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Why Tax Wealth Transfers?: A Philosophical Analysis

Jennifer Bird-Pollan
University of Kentucky College of Law, jbirdpollan@uky.edu

WHY TAX WEALTH TRANSFERS?: A PHILOSOPHICAL ANALYSIS

JENNIFER BIRD-POLLAN*

Abstract: The one-hundredth anniversary of the estate tax provides an ideal moment to reflect on the role of wealth transfer taxation in the larger scheme of the U.S. tax system. Wealth and income inequality are at historically high levels, and the responses to these issues are often reduced to a simplistic political dichotomy of "right" versus "left." The multitude of views of the American people cannot be reduced to such simple generalities without losing important nuances. This Article identifies three general categories of political philosophical viewpoints that are commonly endorsed by both politicians and everyday Americans, and then examines the current estate tax from within the perspective of those positions. The Article concludes that maintaining a wealth transfer tax system, perhaps organized as a tax assessed on the heirs, best matches the political views of twenty-first century Americans.

INTRODUCTION

Should we still, in 2016, upon the one-hundredth anniversary of the estate tax in the United States, ask the question, "Why tax wealth transfers?" Is the answer merely one of political exigency? A leftover set of arguments from the early twentieth century? Or is there new evidence? Are there reasons why, in 2016, scholars and elected officials should consider wealth transfer taxation as an essential part of any coherent tax policy? And further, if this form of taxation is economically or philosophically important, is it also politically feasible? Are there reasons to think that the American public would endorse a healthy estate tax, bringing the purview of the tax back to its pre-2001 levels, and strengthening it against aggressive tax planning strategies that threaten to eviscerate the tax base? And if such endorsement is possible, how best to present the tax? What arguments demonstrate the tax's position in an ideal tax system, designed to enact the most commonly endorsed principles of fairness and justice? A glance at the current state of the U.S. federal wealth transfer tax system might lead one to conclude that,

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even were it desirable, saving the estate tax might be impossible. This Article, however, outlines reasons to believe that a more robust wealth transfer tax system, although not necessarily in the form it currently takes, is an essential component of a comprehensive progressive tax system aimed at increasing economic equality in this country. Further, this Article demonstrates that wealth transfer taxation is consistent with most commonly held philosophical-political views, when those views are examined and their logical consequences identified.

Philosophy as a subject matter is most commonly relegated to the hallowed halls and ivory towers of universities. An individual might dabble in Nietzsche or Plato as an eighteen-year-old, but most people leave philosophy behind when choosing a career, a life plan, or moving on to the post-college "real world." This is unfortunate. Philosophy represents civilization's greatest tradition of thoughtful contemplation about life's most important questions, including, among other things, how best to structure society. One element of the structuring of society is the design of a tax system, and philosophy has, historically, had something to say about tax design.[1]

But beyond specific recommendations regarding best practices in tax design, philosophy can help us think through the consequences of the particular philosophical views that individuals articulate. For instance, if an individual believes that property rights are fundamental and argues for the preeminence of property rights over all other elements of structural design in society, what consequence should that claim have on the tax system? Is such a belief consistent with social life? Should we interpret the claim in a way that makes it consistent with that individual's lived experience? If the individual lives in society, benefitting from the advantages that come from that life, should we understand the claim of priority for property rights differently than we would understand the claim if the individual chose to live

[1] There are numerous examples of philosophers discussing tax system design. These discussions range from mere mentions of the issue, to robust discussions with particular suggestions. Among the many philosophers who have written about tax, Aristotle includes an extensive discussion of taxation in his *Politics*. *See generally* ARISTOTLE, POLITICS (Benjamin Jowett trans., Batoche Books 1999) (350 B.C.) (discussing collection of taxes in the administration of different types of government). Plato's *Republic* also includes a discussion of tax. PLATO, REPUBLIC 71 (Chris Emlyn-Jones & William Preddy eds. & trans., Harvard Univ. Press 2013) (380 B.C.). Immanuel Kant, in his *Metaphysics of Morals*, includes an explanation of his theory of tax. *See generally* KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS (Mary J. Gregor ed., Cambridge Univ. Press 1998) (1785). Thomas Hobbes and John Locke, in their respective works on property, include discussions of taxation in their theories of the state. THOMAS HOBBES, LEVIATHAN 127, 143–44, 153–54 (1651), http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf [https://perma.cc/P2MQ-YP4Y]; JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 16–30 (Thomas P. Peardon ed., Liberal Arts Press 1952) (1689). In more recent years, Robert Nozick and Milton Friedman have both articulated theories of taxation. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 172–76 (2002); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 169–72, 265–68 (1974).

off the grid, rejecting the benefits attributable to social life? In addition to understanding the consequences of particular claims, philosophical analysis allows us to identify what structural components might be endorsed by a variety of belief systems.

This Article begins from this point, applying philosophical analysis to the question of wealth transfer taxation. It demonstrates that, despite the political opposition to the current U.S. federal estate tax, a robust wealth transfer tax system is, in fact, consistent with most philosophical views about property rights, social rights and obligations, social opportunity, and government responsibilities. At the center of this argument is the claim that political expressions of social will, especially to the extent they must be reduced to a preference for "Democrat" or "Republican," do not accurately represent the complex of ideas addressed by the taxation of wealth transfers.

The Article is organized as follows: Part I examines the current state of wealth transfer taxation in the United States, as well as the current political situation.[2] Part II turns to economists and political commentators to explore what makes the current political situation different from earlier scenarios.[3] Part III addresses how wealth transfer taxation in particular can address the problems identified earlier in the Article.[4] Part IV considers a variety of political philosophical perspectives, and how those perspectives approach the question of wealth transfer taxation.[5] Finally, Part V identifies the particular structure of wealth transfer taxation best suited for that task.[6]

I. Current Taxation of Wealth Transfers in the United States

The U.S. federal estate tax was enacted in 1916.[7] Its attendant component parts, the federal gift tax and the federal generation-skipping transfer ("GST") tax, followed closely behind, in 1924 and 1976 respectively.[8] Originally adopted to raise revenues to support the war effort, while incidentally addressing wealth inequality in the United States, the wealth transfer tax

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[2] *See infra* notes 7–30 and accompanying text.
[3] *See infra* notes 31–40 and accompanying text.
[4] *See infra* notes 41–43 and accompanying text.
[5] *See infra* notes 44–91 and accompanying text.
[6] *See infra* notes 92–96 and accompanying text.
[7] Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, 27 STAT. INCOME BULL. 118, 120–22 (2007), https://www.irs.gov/pub/irs-soi/ninetyestate.pdf [https://perma.cc/K68W-TTSG] (discussing the enactment of the Revenue Act of 1916 which created the estate tax); David Joulfaian, The Federal Estate Tax: History, Law, and Economics 1-1 (2013) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract-id=1579829 [https://perma.cc/RSE4-RL9S] (June 2013) (discussing the history of inheritance and estate taxes).
[8] *See* Jacobson et al., *supra* note 7, at 120–22; Joulfaian, *supra* note 7, at 1-1.

system was originally relatively popular politically.[9] In its hundred years of existence, it has evolved dramatically, and its popularity has waned. In particular, in the last fifteen years, largely in response to an anti-tax movement led by Grover Norquist, the founder and President of Americans for Tax Reform who has participated in the efforts to successfully identify the estate tax as the "death tax" in the minds of many Americans, the wealth transfer tax system has experienced declining popular and political support.[10]

The current tax is imposed at what is effectively a flat rate of forty percent on all wealth transfers over a lifetime in excess of the exemption amount—currently $5.45 million per individual (double that for married couples)—which rises annually with cost-of-living adjustments.[11] These wealth transfers are in addition to the $14,000 per individual recipient per year that goes untaxed,[12] and the payment of most educational and medical expenses on behalf of another person, which is also statutorily excluded from tax.[13] The gift tax is integrated into the estate tax, as it is levied at the same rates, and transfers made as inter vivos gifts are counted against the

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[9] Early attempts to repeal the estate tax failed due to bipartisan support for the tax. For a discussion of such a repeal effort led by Andrew Mellon in the 1920s, see JOSEPH J. THORNDIKE, THEIR FAIR SHARE: TAXING THE RICH IN THE AGE OF FDR 21 (2013); *see also* Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 226–38 (1955) (tracing the history and political support of and opposition to an estate tax); Joulfaian, *supra* note 7, at 1-1, 2-2 to 3 (discussing the history of and reasons for implementing the estate tax in 1916 and noting growing opposition to estate taxes in the last decade).

[10] The label "death tax" was first applied to the estate tax by Jim Martin, president of a seniors' association. MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 13–14 (2005). Its popularization as a term for the tax, however, has been spearheaded by Norquist's efforts. *Id.* at 29–31; *see also* Stephen Martin, *America's Un-American Resistance to the Estate Tax*, THE ATLANTIC (Feb. 23, 2016), http://www.theatlantic.com/business/archive/2016/02/resistance-estate-tax/470403/ [https://perma.cc/UV6V-D2VA] (comparing the general American preferences for equality of opportunity with general American opposition to the estate tax); Joseph Thorndike, *Face It: Americans Just Don't Like the Estate Tax*, FORBES (Mar. 31, 2016), http://www.forbes.com/sites/taxanalysts/2016/03/31/face-it-americans-just-dont-like-the-estate-tax/#7afaa03f5bf4 [https://perma.cc/XL8V-2V4B] (citing a Gallup poll indicating 54% support for repeal of the estate tax).

[11] The estate tax is imposed by the Internal Revenue Code § 2001. I.R.C. § 2001 (2012). The current rate of 40% is imposed on amounts in excess of the 2016 unified credit exemption equivalent amount of $5,450,000. I.R.C. § 2010(c) (2012); Treas. Reg. § 20.2010-2(5)(ii) (2015) (indicating the 2016 exemption).

[12] *See* I.R.C. § 2503(b) (2012) (implementing a $10,000 exclusion adjusted for inflation). Section 2503(b) allows annual per-recipient transfers of $14,000 to fall outside of the statutory definition of "gift," thereby allowing such transfers to have no impact on the lifetime exemption equivalent amount, and to fall outside of taxation entirely. *See id.*

[13] I.R.C. § 2503(e). Section 2503(e) allows all transfers for direct payment of another's medical or educational expenses to go untaxed. *Id.* In order to qualify for this exemption, the transfer must satisfy certain requirements, and the payments must be paid directly to the provider of the medical or educational services. *Id.* § 2503(e)(2).

lifetime exclusion amount.[14] The GST tax is an additional tax assessed on transfers to heirs related to the transferor who are more than one generation removed from the transferor.[15] This additional tax attempts to prevent large dynastic trusts from paying tax only every other generation by transferring to generations further removed from the transferor.

The current state of the U.S. federal wealth transfer tax system represents a dramatic shift from the beginning of the twenty-first century. In 2001, the lifetime exemption for wealth transfers was $675,000.[16] Amounts transferred by inter vivos gift or post-death above that amount were then subject to tax at fifty-five percent.[17] These higher levels of tax and lower exemption amount meant that the tax was imposed on more people.[18] Although the total dollar amounts were always a relatively small portion of total U.S. tax revenue, the importance of that kind of revenue should not be dismissed. In 2016 dollars, year-2000 levels of wealth transfer tax collections would have covered the costs of, for instance, all student aid funding administered through the federal government.[19]

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[14] *See* I.R.C. § 2501 (2012) (imposing a gift tax). Section 2501 imposes an excise tax on the gratuitous transfer of wealth during the donor's lifetime, if the transfer exceeds the lifetime unified credit exemption equivalent amount of $5,430,000. *See id.*; I.R.C. § 2505 (2012). The gift tax is statutorily linked to the estate tax, so the tax is imposed at the rate of 40% in 2015. I.R.C. § 2502(a) (2012) (computing tax using the rates under § 2001).

[15] I.R.C. § 2601 (2012). Section 2601 imposes a tax (in addition to taxes imposed under § 2001 and § 2501) on direct transfers or distributions from a trust to a "skip person." *Id.*; I.R.C. §§ 2611–2613 (2012). In addition to the unified credit against estate and gift taxes available under § 2010, there is a lifetime credit against the GST tax equivalent to an exemption amount, in 2016, of $5,450,000. I.R.C. § 2631(c) (2012) (setting the GST exemption amount equal to the amount under § 2010). Transfers in excess of the exemption equivalent amount are taxed at 40% in 2016. I.R.C. §§ 2602, 2641 (2012).

[16] I.R.C. § 2010(c) (2000) (listing applicable exclusion amounts). $675,000 was itself an increase in the exemption amount as compared with earlier years, when lifetime transfers were only taxed if they exceeded a lower cap: $650,000 in 1999, $625,000 in 1998, progressing down to a $50,000 exemption amount when the tax was first enacted in 1916. JOINT COMM. ON TAXATION, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 5, 12 (2015), https://www.jct.gov/publications.html?func=startdown&id=4744 [https://perma.cc/YY4A-GZC8].

[17] I.R.C. § 2001(c) (2000).

[18] In the year 2000, 2.16% of estates were subject to the estate tax, as opposed to a projection of only 0.2% of estates in 2015. JOINT COMM. ON TAXATION, *supra* note 16, at 25, 30. In addition, the estate tax system collected more total revenue in 2000 ($29 billion) than in 2015 (when it collected only an estimated $21.5 billion). *Id.* at 28, 30.

[19] Converting 2001 dollars to 2015 dollars, the estate tax collected approximately $38.3 billion in 2001. Calculation of the effects of inflation on historical dollar amounts can be done with the inflation calculator produced by the Bureau of Labor Statistics. *CPI Inflation Calculator*, BUREAU LAB. STAT., http://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/UET2-RY5V]. The cost of all federal student financial aid programs in the 2015 budget is under $31 billion. Alternatively, the revenue raised from imposing the estate tax at 2001 levels could cover the costs of both the special education budget ($12.5 billion) and the funds for school districts with low-income K–12 students ($15.6 billion) and there would still be some left over to cover part of the

This evolution of the taxation of wealth transfers in the United States tracks a political evolution that has created more and more opposition to taxation in general, and to the taxation of wealth transfers (referred to by leaders of this political movement as the "death tax") in particular.[20] As Michael Graetz and Ian Shapiro so insightfully demonstrated in their book on the subject, the estate tax was specifically targeted by anti-tax groups who effectively rallied seemingly disparate political groups to their cause in order to create strong political pressure aimed at having the tax eliminated.[21]

In the lead-up to a presidential election, prominent politicians on both sides of the aisle are asked to articulate a view about taxes. Their views often include a pronouncement about the role wealth transfer taxation should play. The 2016 presidential campaign cycle is no exception. Candidates for the Republican nomination included Jeb Bush, whose tax proposal contained the following claim: "Death should not be taxable event. This reform [proposal] ends the estate and gift tax to protect family businesses and farms from an unfair tax."[22] Republican candidate Donald Trump previously supported a curtailed version of the estate tax.[23] In 2011 Trump was a vocal proponent of lowering taxes, and his 2016 platform included a proposal to eliminate the "death tax." [24] Candidate Ben Carson's tax plan also proposed eliminating the estate tax as part of a massive overhaul of the tax system in order to replace the progressive income tax with a flat tax.[25] Candidates for the 2016 Democratic nomination also articulated their views about tax reform. Unsurprisingly, Democratic candidates tend to support the

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costs of the federal response to natural disasters (estimated at $15.4 billion). *See Interactive Budget*, OFFICE MGMT. & BUDGET, https://www.whitehouse.gov/interactive-budget.

[20] *See* GRAETZ & SHAPIRO, *supra* note 10, at 4–5. "Estate tax repeal is one important strand of a looming effort to strip from our nation's tax system the very idea that those who have more should shoulder a larger share of the tax burden." *Id.* at 4.

[21] *Id.* at 12–23.

[22] Jeb Bush, *Reform and Growth Plan*, JEB 2016 (Sept. 9, 2015), https://jeb2016.com/backgrounder-jeb-bushs-tax-reform-plan/ [https://perma.cc/W2R3-AUCS].

[23] DONALD TRUMP, THE AMERICA WE DESERVE 170–74 (2000).

[24] Trump's 2011 book, *Time to Get Tough*, articulates a "five-step plan [that] includes eliminating the estate tax and the corporate income tax, lowering the tax rate on capital gains and dividends, enacting a 20 percent tariff on all imported goods and creating a new, lower income tax rate structure," according to the research institute Citizens for Tax Justice. Richard Phillips, *Donald Trump's Regressive and Retrograde Tax Plan*, TAX JUST. BLOG (June 22, 2015, 01:46 PM), http://www.taxjusticeblog.org/archive/2015/06/donald_trumps_regressive_and_r.php#.VwFqG6QrK [https://perma.cc/EZY4-KU84]. Trump's 2016 campaign webpage includes the statement, "No family will have to pay the death tax. You earned and saved that money for your family, not the government. You paid taxes on it when you earned it." Donald Trump, *Tax Reform That Will Make America Great Again*, TRUMP: MAKE AM. GREAT AGAIN!, https://www.donaldjtrump.com/positions/tax-reform [https://perma.cc/M8GD-VU6R].

[25] *See* Kyle Pomerleau, *Details and Analysis of Dr. Ben Carson's Tax Plan*, TAX FOUND. (Jan. 6, 2016), http://taxfoundation.org/article/details-and-analysis-dr-ben-carson-s-tax-plan [https://perma.cc/7QM7-6VMF].

taxation of wealth transfers, as consistently as their Republican counterparts tend to oppose it. Democratic candidate Hillary Clinton focused her discussion of tax reform primarily on changes in the taxation of capital gains,[26] however, she also endorsed returning estate and gift taxation to 2009 levels.[27] Candidate Bernie Sanders repeatedly expressed the view that taxes on wealthy individuals in the United States must be increased. As a U.S. Senator, Sanders proposed an estate tax reform bill that would have raised the highest rate of wealth transfer tax from 40% to 65%.[28] Candidate Sanders has also proposed increasing the estate tax rate and decreasing the exemption level. [29]

Given the variety of political views espoused by candidates in the 2016 presidential election, it seems likely that taxation in general, and wealth transfer taxation in particular, will remain a topic of debate through November 2016 and beyond. Despite the ongoing interest in the debate surrounding wealth transfer taxation, and the number of vocal opponents willing to fight against its continued existence, at least some commentators believe that the estate tax will never be completely eliminated from the tax code, for reasons of political exigency.[30]

II. IS ECONOMIC INEQUALITY IN THE TWENTY-FIRST CENTURY EXCEPTIONAL?

Thomas Piketty's popular treatise *Capital in the Twenty-First Century* identified a variety of economic trends in the past 150 years that reflect changes in political organization, social will, and social and economic (in)equality.[31] At the heart of Piketty's argument is the claim that the distribution of wealth in contemporary western democracies is more uneven than

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[26] Alan Cole, *The Details of Hillary Clinton's Capital Gains Tax Proposal*, TAX FOUND. (July 28, 2015), http://taxfoundation.org/blog/details-hillary-clinton-s-capital-gains-tax-proposal [https://perma.cc/Q5BE-9GC9].

[27] *See* Kyle Pomerleau & Michael Schuyler, *Details and Analysis of Hilary Clinton's Tax Proposals*, TAX FOUND. (Jan. 26, 2016), http://taxfoundation.org/article/details-and-analysis-hillary-clinton-s-tax-proposals [https://perma.cc/9HTT-VQLJ].

[28] Responsible Estate Tax Act, S. 1677, 114th Cong. (1st Sess. 2015).

[29] *See* Alan Cole & Scott Greenberg, *Details and Analysis of Senator Bernie Sanders's Tax Plan*, TAX FOUND. (Jan. 28, 2016), http://taxfoundation.org/article/details-and-analysis-senator-bernie-sanders-s-tax-plan [https://perma.cc/2QY6-GV9P].

[30] *See generally* Edward J. McCaffery, *The Dirty Little Secret of (Estate) Tax Reform*, 65 STAN. L. REV. ONLINE 21 (2012) (arguing that Congress does not make any fundamental changes to the estate tax in order to allow individual members of Congress continue collecting campaign contributions from special interests).

[31] *See generally* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., 2014) (analyzing rates of return on capital compared to economic growth and proposing a global progressive income tax to combat wealth concentration and income inequality).

at almost any point in the past century.[32] Piketty uses tax return information, as well as references from popular fiction of the early twentieth century, to demonstrate that the levels of wealth inequality in the early years of the twenty-first century are extreme.[33] Piketty goes on to argue that the consequences of this wealth inequality are detrimental to society at large, and are inconsistent with most commonly expressed views about economic and social mobility, and about the importance of equality of opportunity as a foundational principle in most western democracies.[34]

Importantly, part of Piketty's claim is not only that there is a disproportionate amount of wealth in the hands of certain individuals rather than others, but also that the longer the inequality remains, the more problematic it becomes.[35] Piketty's economic claim is that previously accumulated wealth becomes disproportionately important over time.[36] This is because most modern economies experience some period of economic stagnation. While returns to capital remain at least steady and incomes remain low, capital becomes more important. If returns to labor are limited, then the only way to improve one's economic situation is to hold capital. Wage earners and those with little reserved capital cannot participate meaningfully in economic growth. The implication, then, is that inequality of income is a significantly less important factor over time than inequality of wealth—especially inequality of accumulated wealth. And inequalities of wealth that survive

[32] *See id.* at 13–16, 237 (discussing changes in the distribution of wealth and inequality over time). Notably, Piketty is not claiming that things might have been worse before the twentieth century. Indeed, Piketty's intuition seems to be that economic inequality might very well be worse now than it has *ever* been, but without empirical evidence to justify that claim, he limits his arguments to the twentieth century and beyond. *See id.* at 11–16 (noting the lack of evidence available prior to the twentieth century).

[33] *See generally id.* (comparing current and historical data to show changes in wealth inequality).

[34] *See generally id.* (arguing for a global tax on capital in recognition of the numerous and wide-reaching effects of wealth inequality).

[35] Piketty's observations about the exaggerated importance of inherited wealth are especially relevant to stagnating economies:

> When the rate of return on capital significantly exceeds the growth rate of the economy (as it did through much of history until the nineteenth century and as is likely to be the case again in the twenty-first century), then it logically follows that inherited wealth grows faster than output and income. People with inherited wealth need save only a portion of their income from capital to see that capital grow more quickly than the economy as a whole. Under such conditions, it is almost inevitable that inherited wealth will dominate wealth amassed from a lifetime's labor by a wide margin, and the concentration of capital will attain extremely high levels—levels potentially incompatible with the meritocratic values and principles of social justice fundamental to modern democratic societies.

Id. at 26.

[36] *Id.* at 166.

over long periods of time are the most problematic inequalities. These inequalities are exactly the inequalities addressed by the taxation of wealth transfers.[37]

The evidence of inequality unearthed by Piketty is fundamentally related to a foundational principle of U.S. political identity. One typical response to the claim that wealth transfers should be subject to tax is the argument that keeping such transfers free from tax ensures a free market meritocracy, in which individuals are financially rewarded for talent and hard work. The United States is regularly held up as an example of a true democracy—there are no inherited positions of authority, no dynastic wealth or family lands, and none of the trappings of aristocracy historically evident in European countries. America has historically prided itself on being the land of opportunity, where a mailroom errand boy can become the president of the company, pulling himself up by his bootstraps to achieve success. By tracing income and wealth quintiles over time, however, Piketty demonstrates that the current levels of wealth inequality in the United States and other western democracies are stagnant.[38] That is to say, class mobility in the twenty-first century remains as difficult as it has always been.[39] The concentration of wealth that has grown in the last hundred years has been passed down and further concentrated from one generation to the next.

In addition to the concern that the further exacerbation of wealth inequality makes the American dream of success despite starting from the bottom more unlikely than ever, there is reason to believe that concentrations of wealth make democracy less viable. Commentators have repeatedly ob-

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[37] Much of Piketty's book is dedicated to unpacking this relationship between capital and labor. In particular, see the chapter entitled "The Capital/Income Ratio Over the Long Run." *Id.* at 164–98.

[38] Piketty spends a significant amount of time addressing the consequences of a stagnating economy on social and economic inequality, and lack of social mobility is yet another victim of lack of economic growth. As Piketty writes,

> When growth is zero or very low, the various economic and social functions as well as types of professional activity, are reproduced virtually without change from generation to generation. By contrast, constant growth, even if it is only 0.5 or 1 or 1.5 percent per year, means that new functions are constantly being created and new skills are needed in every generation. Insofar as tastes and capabilities are only partially transmitted from generation to generation (or are transmitted much less automatically and mechanically than capital in land, real estate, or financial assets are transmitted by inheritance), growth can thus increase social mobility for individuals whose parents did not belong to the elite of the previous generation.

Id. at 84–85.

[39] With regard to class mobility in the United States, see generally Raj Chetty et al., *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility* (Nat'l Bureau of Econ. Research, Working Paper No. 19,844, Jan. 2014) (presenting evidence on trends in intergenerational mobility in the United States).

served that great wealth inequality is inconsistent with democratic ideals.[40] If this inverse relationship between inequality and democracy is true, then we must find a way to combat that inequality, in particular as it is transmitted from one generation to the next, growing along the way.

III. CAN WEALTH TRANSFER TAXATION ADDRESS ECONOMIC INEQUALITY?

The form of taxation best situated to address problems of intergenerational wealth inequality is the taxation of wealth transfers. Because wealth transfer taxation intercepts wealth at the moment it would otherwise be transmitted to the next generation, estate and gift (or inheritance) taxation can combat the concentration of wealth over time and the stagnation of opportunity over generations in a democracy. Unlike income and consumption taxes, or even direct wealth taxes (such as a real property tax), wealth transfer taxation is specifically targeted at the transmission of wealth. The problems of inequality identified in the previous Part are primarily problems that arise over time, and income tax and direct taxes on wealth are taxes that are focused on one moment in time. That is, an income or wealth tax is assessed on the current earner of income, or holder of wealth, without regard to the ultimate disposition of that income or wealth, meaning that these forms of taxes are less well-suited to combatting problems of multi-generational wealth inequality. Of course, robust income and wealth taxes can reduce the concentration of wealth in individual taxpayers' hands, and therefore, necessarily, there would be less wealth remaining to be transferred to that taxpayer's heirs, either during lifetime or at death. These taxes, however, at least in their current forms, do nothing to combat the receipt of wealth through inheritance. And an income tax would have to include the imposition of tax at levels last seen in the 1960s to combat the concentration of wealth over time at the very highest income levels.[41]

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[40] Discussing this issue, Robert Reich writes:

> As we've already seen in this Republican primary election, a handful of extraordinarily wealthy people can virtually control the election result—not entirely, but have a huge impact. That's not a democracy. As the great American jurist and Supreme Court associate justice Louis Brandeis once said: "We can have huge wealth in the hands of a relatively few people or we can have a democracy. But we can't have both."

Robert Reich, *What Happened to the Moral Center of American Capitalism?* ROBERTREICH.ORG (Sept. 4, 2015), http://robertreich.org/post/128336881225 [https://perma.cc/585X-GPC3].

[41] In 1960 the highest marginal income tax rate in the United States was 91%. TAX FOUND., FEDERAL INDIVIDUAL INCOME TAX RATES HISTORY (2013), http://taxfoundation.org/sites/taxfoundation.org/files/docs/fed_individual_rate_history_nominal.pdf [https://perma.cc/GH3J-ZJCR]. In 2016 the highest income tax rate is 39.6% and that rate applies to all single taxpayers who earn over $413,200, or married couples with incomes over $464,850. *See* I.R.C. § 1 (West 2015); Rev.

Direct taxation of wealth might help combat the inequalities identified in the previous Part, but this form of tax tends to find opposition along a variety of lines. Defenders of meritocracy claim that a second layer of tax, a wealth tax, imposed on amounts that were already subject to income tax when earned by that same taxpayer, penalizes success in an inexcusable way.[42] Further, the consumption of wealth by high-earning individuals is not, as such, a problem along the lines identified in Part II. It is the concentration of wealth and its exacerbated concentration over time that threatens democracy. Therefore, allowing a taxpayer to earn significant income, invest it, produce additional income from that investment, and then consume it all within a lifetime, while potentially distasteful to some, does not threaten fundamental principles of equality of opportunity and democracy in the United States. In this way, a wealth tax might go too far by collecting tax from those who would otherwise mostly consume their wealth during their lifetimes, rather than attempting to transfer it to their heirs.

While taxation in general suffers a lack of popularity in contemporary political discourse, there is good reason to believe that wealth transfer taxation, as opposed to the taxation of income or consumption, might be most palatable to people holding a wide variety of political and philosophical beliefs. As this author has demonstrated elsewhere through a series of articles on the relationship between philosophy and the taxation of wealth transfers, many different philosophical positions, which find themselves on different ends of the political spectrum, are consistent with, and often even endorse, wealth transfer taxes.[43]

Proc. 2014-61, 2014-47 I.R.B. 860. This means that the *highest* tax rate is 39.6%, and a married couple earning $465,000 finds itself in the same marginal tax bracket as the married couple earning $100 million. This income tax system does nothing to combat high levels of wealth inequality, as it does not distinguish, for tax purposes, between the top 5% of income earners and the top 0.1% of income earners, allowing the very richest American taxpayers to keep a very significant portion of their pre-tax unequal incomes. Of course, high-income taxpayers consume a smaller percentage of their post-tax income than do their lower income counterparts, thereby allowing them to then transfer larger amounts of that income to their children, creating intergenerational wealth.

[42] STEPHEN J. MCNAMEE & ROBERT K. MILLER, JR., THE MERITOCRACY MYTH 223–24 (3d ed. 2014) ("[E]state taxes and gift taxes . . . are aimed at nonmerit forms of wealth accumulation . . . . Those who oppose such [wealth] taxes often label them 'confiscatory' and argue that they discourage work, savings, and investment.").

[43] *See generally* Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 ME. L. REV. 1 (2013) [hereinafter Bird-Pollan, *Death, Taxes, and Property*] (examining estate taxes through the lens of libertarianism); Jennifer Bird-Pollan, *Unseating Privilege: Rawls, Equality of Opportunity, and Wealth Transfer Taxation*, 59 WAYNE L. REV. 713 (2013) [hereinafter Bird-Pollan, *Unseating Privilege*] (arguing that wealth taxes are consistent with Rawlsian equality of opportunity).

IV. DO CURRENT PHILOSOPHICAL BELIEFS COMPORT WITH WEALTH TRANSFER TAXATION?

Identifying coherent philosophical viewpoints in the miasma of the current political debate in the United States can seem like a daunting task. Approaching the problem from within the perspective of the philosophical tradition, however, gives structure to what might otherwise be a hopeless endeavor. One of the fundamental premises of tax design in a democracy is that the tax system should comply with a majority of the citizens' ideas of fairness. Although this is an easily identifiable goal in theory, what that actually means in practice is incredibly complex. Economists, tax lawyers, drafters of legislation, and politicians are responsible for taking this political will and applying it in the thousands of particular ways necessary to draft the tax law. Unfortunately, spending so much time in the proverbial weeds of tax policy often means leaving behind the bigger picture. At the same time, the loudest political voices often focus on one particular element of the tax law, most often seeking a particular outcome rather than considering that element in the context of a larger discussion of fairness overall.[44] To that end, opposition to the current estate tax, while following the lines of the "death tax" campaign discussed above,[45] often focuses on the tax as an "unfair double tax," "punishing death," or "punishing savings"—rather than thinking of the estate tax as part of a larger cohesive system aimed at achieving a particular democratically endorsed goal. This Part takes the responsibility of looking at the estate tax holistically and seriously, and considers the major philosophical systems most commonly endorsed in contemporary society.[46]

Philosophy does not have a unified response to taxation generally or wealth transfer taxation specifically. What philosophical inquiry can add to the discussion is an analysis of goals and strategies that help to determine which tax law best reflects the needs and beliefs of the society to which it applies. As a discipline with more than two thousand years of recorded history, there are obviously more philosophical perspectives than can fit into this Article. Contemporary political philosophy, however, arguably represents, at least generally, the philosophical beliefs and needs of most western societies. Therefore, this Part focuses on three of the most prevalent theories in contemporary political philosophy: liberalism, libertarianism, and

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[44] This focus on a particular outcome is probably chosen as a political strategy because focusing on a particular outcome makes for a more convincing political sound bite.

[45] *See supra* notes 10, 20–21 and accompanying text.

[46] These issues are considered in more detail in the author's other works. *See, e.g.*, Jennifer Bird-Pollan, *Philosophical Foundations of Wealth Transfer Taxation*, *in* PHILOSOPHICAL FOUNDATIONS OF TAX LAW (forthcoming 2016); Bird-Pollan, *Death, Taxes, and Property*, *supra* note 43; Bird-Pollan, *Unseating Privilege*, *supra* note 43.

utilitarianism.[47] As this Part demonstrates, examining wealth transfer taxation from the perspective of each of these theories results in the same central conclusion: the taxation of wealth transfers is justified and is an essential element of any robust contemporary tax system.[48]

A. Liberalism

Political liberalism is perhaps the most prevalent theory in contemporary political philosophy. Most completely articulated by John Rawls, liberalism generally endorses political systems that guarantee equality of opportunity, while not necessarily seeking equality of outcome.[49] Commentators generally agree that Rawlsian liberalism is compatible with heavy redistribution.[50] In spite of this, much of the work using Rawls to analyze or justify tax policy has focused on the income tax.[51] Although this work is useful in making arguments about the fundamental nature of philosophical arguments in justifying tax policy, the income tax alone is not capable of satisfying the goals of a Rawlsian equality of opportunity.[52] Because of the vast opportunities afforded to recipients of transferred wealth, the estate tax is the appropriate tool to use in order to achieve true equality of opportunity.[53]

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[47] Each of these theories is, in fact, composed of many different threads, representing a variety of interpretations of the central claims. Each section focuses primarily on one foundational articulation of the view: Rawlsian liberalism, Nozickian libertarianism, and Millian utilitarianism.

[48] The analyses demonstrate the differences in the form of wealth transfer taxation most strongly endorsed by the particular philosophical theory in question. Although we clearly cannot conclude that one particular form of wealth transfer taxation is unanimously endorsed by all philosophical views, this Article claims that most major philosophical political theories endorse wealth transfer taxation as such. This at least advances the conversation. If we debate what form the tax should take, rather than whether or not we should have such a tax at all, we have already made progress.

[49] *See* JOHN RAWLS, A THEORY OF JUSTICE (1971).

[50] Most, if not all, tax law articles that make reference to Rawls do so in support of the proposition that Rawls endorsed a redistributive liberal position. *See, e.g.*, Anne Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 479, 485 (2007); Charles R.T. O'Kelley, *Rawls, Justice, and the Income Tax*, 16 GA. L. REV. 1, 21–23 (1981); Eric Rakowski, *Taxing Wealth Liberally*, 51 TAX L. REV. 419, 446 (1996); Kerry Ryan, *Human Capital and Transfer Taxation*, 62 OKLA. L. REV. 223, 252–56 (2010).

[51] *See, e.g.*, Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 CHAP. L. REV. 157 (1999); O'Kelley, *supra* note 50; Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 FORDHAM L. REV. 1991 (2004). Notable exceptions include Alstott, *supra* note 50, and Ryan, *supra* note 50.

[52] Linda Sugin argued that "[Rawls's] analysis of philosophical principles does not require commitment to any particular tax system at all. Numerous tax systems could conceivably satisfy Rawls's principles of justice." Sugin, *supra* note 51, at 1998. Although this may be true with regard to the particular mechanics of the tax system imposed, this Article argues that some kind of wealth transfer taxation is, in fact, required by Rawlsian principles of equality of opportunity.

[53] In her article *Equal Opportunity and Inheritance Taxation*, Anne Alstott notes the way in which wealth transfer taxes are especially well suited to achieve equality-of-opportunity goals

One of Rawls's central arguments was the principle that, in contrast to the arguments of utilitarianism, there are central human liberties that cannot be violated in a just society, regardless of the overall good of society that might be attained by such a violation.[54] The extension of Rawls's thought in the form of so-called "luck egalitarianism" held that equality of opportunity within society must account not only for economic inequalities but also for the many individual characteristics (beauty, intelligence, family connections) that make up opportunities in contemporary society.[55] Rawls's primary concern was to explain how a society could be understood to be just and how its citizens could be seen to be equal.[56]

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more broadly. Alstott, *supra* note 50, at 542 ("[E]qual opportunity . . . is widely understood to be the bedrock principle for wealth transfer taxation . . . .").

[54] Bird-Pollan, *Unseating Privilege*, *supra* note 43, at 722.

> The basic shortcoming of utilitarianism—in whatever form—is that basic rights of individuals can be sacrificed for a collective societal goal such as maximizing social welfare. It allows an unacceptable trade-off among persons: utilitarianism formulates a principle which may require lesser life prospects for some, simply for the sake of a greater sum of advantages enjoyed by others. Utilitarianism does not recognize that everyone has equal moral worth (which, as we will see, for Rawls does not entail that distributive shares have to be equal), and therefore recognizes neither the way persons are equal to each other, nor the way they differ from each other.

Id. at 722 n.42 (quoting PERCY B. LEHNING, JOHN RAWLS: AN INTRODUCTION 17–18 (2009)).

[55] Bird-Pollan, *Unseating Privilege*, *supra* note 43, at 722–23.

> Freedom of fair choice, fair equality of opportunity, and relative priority for the position of the least advantaged, are not only core elements of a (political) conception of justice, they are also characteristics of modern welfare states. Pointing to the importance of freedom of choice means that, in actual social economic policies in welfare states, more than has been the case in the past, a distinction is being made between the positions that people are in, and for which they themselves bear responsibility, and the positions that they are in for which they are not to blame, positions that are a consequence of the "Rawlsian" "contingencies of social life," so to speak. Freedom of choice, in this line of reasoning, goes together with stressing personal responsibility, provided that conditions are fulfilled such that people can actually take responsibility for their choices.

Id. at 722 n.43 (quoting LEHNING, *supra* note 54, at 220–21).

[56] Grappling with this issue Rawls stated:

> One can try to deal with this question [of freedom] by viewing political society in a certain way, namely, as a fair system of cooperation over time from one generation to the next, where those engaged in cooperation are viewed as free and equal citizens and normal cooperating members of society over a complete life. We then try to formulate principles of political justice such that if the basic structure of society—the main political and social institutions and the way they fit together as one scheme of cooperation—satisfies those principles, then we can say without pretense and fakery that citizens are indeed free and equal.

JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 4 (2001).

Contemporary American society has significant economic inequality.[57] This in itself is not a violation of Rawls' theory of equal opportunity because Rawls endorsed equality of opportunity rather than equality of position or egalitarianism.[58] If the inequalities present in society had been arrived at only through differences in effort, then it is entirely possible that Rawls would accept the current distribution of wealth as just.[59] Because equality-of-opportunity theorists accept that even with true equality of opportunity present, equality of condition does not necessarily result, Rawls need not critique current society as necessarily unjust.[60] It is possible that with the same original opportunities, different members of society end up in different positions with regard to social and economic status. Equality of opportunity does not necessarily view as unjust the uneven distribution of talents or ability to exert effort.[61] If that uneven distribution of talents and effort results in additional opportunities being made available to the children of the talented, then that would violate the principles of Rawlsian equality of opportunity. It is not difficult to see that if wealth is allowed to pass unchecked down to future generations, the inequality present in the original, equal-opportunity state could grow exponentially.

B. Libertarianism

Another common strand in political philosophy is libertarianism. Libertarianism generally embraces freedom and liberty above other political goals, and evaluates political systems by their tendency towards the protection or infringement of individual freedoms.[62] Early proponents of libertarianism include Milton Friedman and Robert Nozick, both of whom argued for limited taxation.[63] In general, libertarian analyses of taxation endorse only taxation as payment for services—a version of the benefit principle of

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[57] For evidence on social and economic mobility within the United States, see generally Daniel Aaronson & Bhashkar Mazumder, *Intergenerational Economic Mobility in the U.S., 1940 to 2000* (Fed. Reserve Bank of Chi., Working Paper No. 2005-12, 2007) (demonstrating that social and economic mobility in the United States has decreased since 1980 after rising sharply between 1940 and 1980).

[58] *See* Bird-Pollan, *Unseating Privilege*, *supra* note 43, at 722–31 (discussing equality of opportunity versus equality of outcome).

[59] *Id.* at 724. Rawls did not actually believe that a society following his two principles of justice would have great social and economic inequality. *See id.* at 729 & n.71 (discussing Rawls's difference principle).

[60] *See id.* at 730.

[61] Proponents of equality of opportunity, however, might actually view the uneven distribution of talents as unfair.

[62] *See* Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345, 1359–61 (2015) (providing an introduction to libertarian political theory).

[63] *See* FRIEDMAN, *supra* note 1, at 172–75; NOZICK, *supra* note 1, at 169.

taxation.[64] The central tenet of libertarianism is that the government cannot coerce action by its citizens.[65] Only free consent to the law can result in just governance.[66]

Strong property rights are another critical feature of libertarian thinking. Libertarians generally believe property rights are naturally held, rather than existing as a result of governmental grace.[67] Because property rights pre-date social membership, the government cannot curtail or eliminate property rights, again with the exception of consent by the property holder. As a result, unsurprisingly, most taxation is seen as an unjust violation of property rights by the government. Wealth transfer taxation would be subject to the same libertarian criticisms as all other forms of taxation, namely that the tax is immoral unless it is explicitly consented to by the property holder. As this author has argued elsewhere, however, the estate tax provides a unique possibility for just taxation under the libertarian framework.[68] Because the entity subject to taxation (the estate) is not a person with natural rights, the normal libertarian arguments regarding unassailable property rights and the requirements of consent do not apply.

Even those who hold a pure libertarian view of property rights, those who endorse an inviolable set of rights that cannot be breached without consent, concede that their view of property rights is consistent with limited taxation.[69] Libertarians have disagreed about the level of consent required in order to legitimately tax property owners, ranging from Nozick, who seems to require explicit consent from every individual subject to the tax, to more pragmatic views, with proponents arguing that remaining within the society or accepting government-provided benefits are sufficient forms of

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[64] The benefit theory of taxation has a long history, but depends on a number of assumptions related to the calculation of benefits and the imposition of tax. "If you think markets are inherently fairer or otherwise morally preferable to charity or government transfers that do not imitate market exchanges, it may occur to you that taxes should be designed to match tax burdens with the benefit of the social and merit goods provided by government." STEPHEN G. UTZ, TAX POLICY: AN INTRODUCTION AND SURVEY OF THE PRINCIPAL DEBATES 28 (1993).

[65] FRIEDMAN, *supra* note 1, at 15 ("Political freedom means the absence of coercion . . . .").

[66] *See id.*

[67] *See* David G. Duff, *Private Property and Tax Policy in a Libertarian World: A Critical Review*, 18 CAN. J.L. & JURIS. 23, 24 (2005) (arguing against libertarian objections to taxation, after laying out the libertarian position). David Duff begins his article by identifying the Lockean background to the libertarian view of private property, and then goes on to say, "Although libertarian theories begin with the state of nature, they also recognize that the liberty and property rights that exist in this state are insecure and best protected through some form of civil or political society." *Id.* at 24–29. In other words, while property rights are not created by government, they are protected by government.

[68] *See* Bird-Pollan, *Death, Taxes, and Property*, *supra* note 43.

[69] *See id.*; Fleischer, *supra* note 62.

implicit consent to legitimate the tax.[70] Regardless of these differences regarding the necessary form of consent, libertarians have generally agreed that taxation as payment for services received is a legitimate form of taxation by the government.[71] This kind of tax, justified by the so-called benefit principle of taxation, views the government as a provider of services, collecting payment for those services (in the form of taxes) as part of a market transaction.[72] On this argument, citizens might argue that the government should limit the kinds of services it provides to those that *only* the government could provide, or to services where there is a significant increase in the efficacy of the service or a lowering of its cost when provided by the government. The kinds of services for which the government could assess fees via the collection of taxes might include the maintenance of roads and sewers or the provision of security (both local and national).[73] In a more expansive state, services might include public education, the regulation of markets, or the provision of public healthcare. While a classic libertarian might balk at the second set of services, the libertarian position merely requires that the citizens receiving—and paying for, through taxes—the services in question *consent* to have the government provide the services.[74]

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[70] Nozick makes clear his views of implicit consent when he writes that, "[E]veryone else realizes that tacit consent isn't worth the paper it's not written on . . . ." NOZICK, *supra* note 1, at 287. Earlier in the book he claims to have demonstrated that the reason a minimal state is not redistributive, when the amounts paid by some are used to pay for the protection of others, stems from the fact that those who are receiving protection without paying are getting that protection for free in compensation for the rights they may have given up. *Id.* at 114. Barbara Fried demonstrates, however, that Nozick's lack of a coherent theory of property rights and consent leads to the result that, in certain circumstances (such as the move from a minimal state to a slightly more than minimal state), consent to limit the rights of citizens does not have to be explicitly attained. Barbara Fried, *Does Nozick Have a Theory of Property Rights*, *in* THE CAMBRIDGE COMPANION TO NOZICK'S *ANARCHY, STATE, AND UTOPIA* 235 (Ralph M. Bader & John Meadowcroft eds., 2011). Fried claims that "in place of actual or implied consent, Nozick does away with consent entirely." *Id.*

[71] In Nozick's explanation of the shift from anarchy to a minimal state he demonstrates the situation in which an individual could be compelled to pay for protection, because the individual is benefitting from the provision of that protection. NOZICK, *supra* note 1, at 110–18.

[72] The benefit principle of taxation, authorizing taxation only to the extent that it compensates the government for services it provides to its taxpaying citizens, is not a view held only by libertarians. For a discussion of the benefit principle of taxation, and an explanation of its ongoing role in tax policy debates, see JOEL SLEMROD & JON BAKIJA, TAXING OURSELVES 86 (4th ed. 2008).

[73] Even Milton Friedman himself, in many ways the father of libertarianism, imagined that a government should provide certain services, and could therefore assess tax on its citizens in order to receive payment for those services. FRIEDMAN, *supra* note 1, at 27–32.

[74] There is a tradition known as left libertarianism, in which a more expansive state, such as one that might provide the second set of services listed above, is more likely to be endorsed. What left libertarianism shares with the tradition of right libertarianism is the insistence on the importance of consent in providing moral legitimacy to the government and its curtailing of property rights. For examples of left libertarianism, see MICHAEL OTSUKA, LIBERTARIANISM WITHOUT INEQUALITY (2003); THE ORIGINS OF LEFT-LIBERTARIANISM: AN ANTHOLOGY OF HISTORICAL WRITINGS (Peter Vallentyne & Hillel Steiner eds., 2000).

A payment-for-services benefit principle model of taxation seems to fit most naturally with an income tax, rather than an estate tax or other transfer tax. Because the services in question (such as maintenance of roads, national security, and garbage collection, for example) would be provided regularly, an annual accounting of the cost of the services, and the amount of that cost allocable to any particular taxpayer, would be easier to administer than a lifetime calculation done via the estate tax. In addition to the ease of administration, the income tax seems to fit the payment-for-services model better than the estate tax would because it charges the taxpayer for the services in the general time period in which the services were received, rather than waiting until the end of the taxpayer's life to calculate the amount due.[75] A society could, however, elect to administer a payment-for-services type of tax as an estate tax. That structure would use the end of life as a time to calculate the benefits enjoyed over a lifetime, and would assess tax to compensate the government for the benefits it had provided to the deceased. There are several reasons that this does not seem to be the ideal scenario, not least because if the taxpayer had no estate remaining at death there would be no way to recover payment for the services the government had provided.[76]

For the reasons explained above, libertarians might approve of an income tax if it were designed to satisfy the libertarian benefit principle requirements. Unsurprisingly, however, a wealth transfer tax that was justified as a method of redistributing wealth from the richest taxpayers to the rest of society is anathema to the libertarian moral view.[77] Because it would likely violate the principle of taking from the taxpayer only with (implicit or explicit) consent, government-facilitated redistribution through the tax code is immoral on the libertarian view.[78] As such, there is not necessarily a fun-

[75] In most payment-for-services scenarios, payment is made in the general timeframe in which the services are provided. Providing a lifetime of services and waiting for payment until the end of that lifetime seems to leave significant room for error.

[76] Under the current system, individuals receive the benefits of government services, and then must pay an annual income tax. If an individual does not have sufficient funds available to pay the income tax that the government assesses against them, then the government has a variety of methods available to help it decide whether to forgive some amount of the assessed taxes, or collect from the individual in future years. For a discussion of the way the government makes these decisions, see generally Shu-Yi Oei, *Who Wins When Uncle Sam Loses? Social Insurance and the Forgiveness of Tax Debts*, 46 U.C. DAVIS L. REV. 421 (2012). If, however, a government held its collection of taxes until the end of an individual's life, it seems significantly more likely that there would be no money left to pay the bills accumulated over that lifetime.

[77] G.A. COHEN, SELF-OWNERSHIP, FREEDOM AND EQUALITY 68 (1995).

[78] Of course, redistribution *could* be consistent with a libertarian model, as long as the redistribution was explicitly consented to by the taxpayers involved. Here one might imagine Warren Buffett, Bill Gates, and others insisting that they should be taxed more heavily in order for the government to have more funds available to support social welfare programs. *'Patriotic Million-*

damental libertarian objection to the estate tax. As a logistical matter, libertarian-sanctioned benefit principle taxation is likely easiest to administer through the income tax. An estate tax is permissible on libertarian grounds as long as the justification for the tax is limited to benefit principle grounds. The Nozickian view of absolute property rights objects to taxation intended to redistribute when that redistribution has not been explicitly consented to. The form of the taxation (whether the tax is assessed as an income tax or as an estate tax) does not affect the analysis.

C. Utilitarianism

Stemming from the nineteenth-century writings of John Stuart Mill, utilitarianism evaluates the morality of actions on the basis of the utility produced by those actions.[79] The ethically correct action is that which maximizes utility the most overall, including in the utility calculus both the production of utility and the off-setting production of disutility.[80] Utilitarianism has generally evolved into contemporary theories of welfare economics. In this model, the utilitarian calculus is done by determining the utility of particular outcomes based on the social preferences of the relevant society. Actions are not a priori moral or immoral. On the contrary, the rightness or wrongness of an action can only be determined by examining its consequences. In this sense, utilitarianism is deeply contextual, and utilitarian analyses would likely result in different moral outcomes in different social scenarios. In evaluating tax policies from a utilitarian theoretical perspective, one must determine what outcomes each policy will likely have. Here empirical economic research plays an important role, making predictions about the likely economic consequences of various tax policy actions. Classical utilitarianism, however, as articulated by Mill, included objective utility values.[81]

At the center of Mill's theory of utilitarianism, and the element that makes utilitarianism more than merely an ethics of self-interest, is that, when one calculates how any particular action will maximize happiness, one must not privilege one's own happiness over that of any other person.[82] All human beings have equal value when calculating how much happiness

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aires' Lobby Congress for Higher Taxes on Rich, PBS NEWSHOUR (Nov. 16, 2011), http://www.pbs.org/newshour/bb/politics-july-dec11-millionaires_11-16/ [https://perma.cc/BE7V-JB3B].

[79] *See generally* JOHN STUART MILL, UTILITARIANISM (Roger Crisp ed., 1998).

[80] *See id.* at 54–72 (explaining the meaning of utilitarianism).

[81] *See id.*

[82] *Id.* at 105 ("[Impartiality] is involved in the very meaning of Utility, or the Greatest-Happiness Principle. That principles is a mere form of words without rational signification, unless one person's happiness, supposed equal in degree (with the proper allowance made for kind), is counted for exactly as much as another's.").

there is in the world.[83] Therefore, even an action that threatens to impose pain on one individual or on a group of individuals might still be held to be ethical on a utilitarian calculus, as long as the totality of pleasure created by the action exceeds that pain.[84] It is this universal nature of the utilitarian calculus that makes taxation ethically possible, because the "pain" imposed by the government collecting the tax will be offset by the pleasure created by the services the government provides with the revenue.[85]

Mill's emphasis that there are higher and lower pleasures, and that the higher pleasures are more ethically valuable than the lower ones, serves as the basis for thinking that Mill is concerned with more than just self-interest.[86] Mill goes on to explain that, for example, "justice" is nothing more than a higher pleasure that must be included in the utilitarian calculus.[87] Justice is a term used regularly in most discussions of ethics. But Mill argues that justice has no meaning outside of the utilitarian calculus.[88] Valuing "justice," even giving it absolute dominance over all other values, only demonstrates that what we call "justice" must be given great worth in the utilitarian calculus. Justice is nothing but a surfeit of pleasure produced by certain actions. Part of what often gets left out of discussions of the utilitarian calculus is Mill's belief that if people are, in fact, highly moral, then they will get pleasure from helping others.[89] A world that is just, by utilitarian measures, will tend towards equality, as those with means will experience happiness by sharing what they have with those who have less.[90]

Mill ultimately holds that there are meaningful differences between the higher and lower pleasures, and that the higher pleasures are those that tend

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[83] *Id.* at 64 ("[T]he happiness which forms the utilitarian standard of what is right in conduct, is not the agent's own happiness, but that of all concerned. As between his own happiness and that of others, utilitarianism requires him to be as strictly impartial as a disinterested and benevolent spectator.").

[84] *See id.*

[85] Mill discusses taxation towards the end of *Utilitarianism*, primarily by criticizing non-consequentialist analyses of the justice of taxation. *See id.* at 102. Mill claims that the only way out of the debate about the appropriate way to tax is to apply utilitarian principles. *Id.* Having pointed out that some theories of justice will demand equal taxation from all, and others will require graduated tax, Mill states: "From these confusions there is no other mode of extrication than the utilitarian." *Id.*

[86] *See id.* at 78–79, 102–104 (discussing equality and impartiality).

[87] *See id.* at 87–95 (describing what is just and unjust).

[88] *See id.*

[89] *See id.* at 5 ("[I]n a properly constituted world, the individual's happiness will be found in doing what is morally right.").

[90] *See id.* at 63–64 ("The utilitarian morality does recognize in human beings the power of sacrificing their own greatest good for the good of others. It only refuses to admit that the sacrifice itself is a good. A sacrifice which does not increase, or tend to increase, the sum total of happiness, it considers wasted.").

toward equality and justice.[91] And because motives are irrelevant, from an ethical perspective, laws can and should create ethical behavior by mandating happiness-producing actions.

V. How Should a System of Wealth Transfer Taxation Be Designed?

If the goal of wealth transfer taxation is the dilution of concentrations of wealth and the minimization of dynastic wealth, then our current system is not necessarily the best approach. The U.S. federal gift and estate tax system imposes a tax on the wealth held by the taxpayer at death, or transferred by the taxpayer during his or her lifetime.[92] That wealth is taxed in the same way, regardless of the identity of the recipient of the transfer,[93] and regardless of the amount transferred to any one particular recipient.[94] Another model of tax system design focuses on the recipient of the transfer, taxing at the site of receipt, rather than the site of distribution. Many states in the United States have an inheritance tax designed like this, most of which also exempt transfers made to surviving spouses or direct descendants of the transferor, although such an exemption is not an essential part of the tax.[95] Focusing on the economic status of the recipient of the transfer, rather than on the status of the transferor, allows this form of wealth transfer taxation, often referred to as an inheritance tax,[96] to more directly combat the inequalities that most vex proponents of wealth transfer taxation.

If the primary concern of the problem of inequality is increasing concentration of wealth in the hands of some at the expense of the well-being of other members of society, an inheritance tax that specifically targets the transfer of large amounts of wealth to one particular individual would best address that problem. The proper focus of the tax should be the recipient, rather than the transferor. An inheritance tax, focused on the recipient of

[91] *See id.* at 87–105 (explaining the connection between utility and justice).

[92] *See supra* notes 11–15 and accompanying text.

[93] The exception to this rule is transfers to surviving spouses, which are entirely exempt from tax. *See* I.R.C. § 2056 (2012).

[94] This excepts the annual exclusion amount described earlier. *See supra* notes 12–13 and accompanying text (explaining the exclusions under I.R.C. § 2503 (2012)).

[95] *See* Scott Drenkard & Richard Borean, *Does Your State Have an Estate or Inheritance Tax?*, TAX FOUND. (May 5, 2015), http://taxfoundation.org/blog/does-your-state-have-estate-or-inheritance-tax [https://perma.cc/42V5-3WEB]. For example, Kentucky has an inheritance tax but grants a total exemption to surviving spouses. KY. REV. STAT. ANN. § 140.080(a) (West 2010).

[96] This Article uses the term "inheritance tax" throughout to refer to a tax that is imposed on the recipient of the transfer, rather than on the transferor, as an estate tax is structured. This is not the universal vocabulary, however, because the United Kingdom's wealth transfer tax is referred to as an "inheritance tax," although the structure of the tax is quite similar to what we call the "estate tax" within the U.S. wealth transfer tax system. *See Inheritance Tax*, GOV.UK, https://www.gov.uk/inheritance-tax [https://perma.cc/PP3Z-FWTV].

gifts or bequests at death, could offer a per-recipient exemption amount, taxing all transfers over a lifetime that exceeded that basic amount. By focusing on the recipient of a transfer, rather than the transferor, an inheritance tax would encourage the breaking up of concentrations of wealth. Rather than facing the same tax bill, regardless of whether the transferor transfers the entirety of his or her estate to a single heir or multiple heirs, this inheritance tax could allow the potential transferor to significantly reduce the overall tax bill. Distributing the wealth more broadly would allow the transferor to gift more of his or her estate to intended recipients, rather than having that amount collected by the government in the form of a tax. Of course, many transferors' decisions will be unaffected by the structure of the wealth transfer tax as either an estate tax or an inheritance tax. For these taxpayers, there may be only one or two potential heirs to receive the wealth, and it may be the desire of the transferor to pass the wealth to those heirs, regardless of the size of the tax bill. Even in those cases, however, an inheritance tax may bring the economic situation more in line with the goals of wealth transfer tax proponents. Because the tax would be levied more heavily on transfers made entirely to one heir, there would be less wealth remaining after the tax to be transferred to the hands of that heir. In that sense, the concentration of wealth would be broken up, at least in part.

Whether this form of the tax would be more effective at breaking up the concentrations of wealth for transfers to a sole heir, despite the higher tax than would be assessed on a transfer to several heirs, would depend on the rates imposed. If the rates were high enough (for instance a tax of one hundred percent on all transfers over a fixed exemption amount), then it is likely the potential transferors would find additional heirs to whom they would transfer at least some of their wealth. Alternatively, if charitable contributions remained deductible, as they are currently, then a large portion of the transferred wealth would likely be donated to charity.

CONCLUSION

The estate and gift tax system in the United States is a battered soldier, having withstood one hundred years of attacks and amendments. Constantly threatened with extinction, our wealth transfer taxes still play a critically important role in the preservation of progressivity in our nation's tax system. Indeed, as more and more empirical research and economic theory demonstrates, economic inequality in the United States is at historic levels. A robust system of wealth transfer taxation is best suited to combat that inequality in the twenty-first century. Further, as this Article demonstrates, wealth transfer taxation is consistent with most philosophical belief systems. Alternate forms of wealth transfer taxation, in particular a system focused primarily on the recipients of wealth, rather than its transferors, may better comport with most common philosophical beliefs. In order to see the way that wealth transfer taxation fits within these philosophical frameworks, though, it is often necessary to consider them in a larger context, as part of a system that tends toward desirable philosophical aims, rather than as individual elements of the law. This Article attempts to contribute to that project, thereby shoring up the U.S. wealth transfer tax system for its next hundred years.