DIVIDE AND CONQUER: USING AN ACCESSIONS TAX TO COMBAT DYNASTIC WEALTH TRANSFERS

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Abstract: The current estate tax raises little revenue, yet is ill designed to further the social goals used to justify it. This Article takes one frequently mentioned goal—minimizing dynastic wealth transfers—and explores what insights focusing on that objective yields for the design of the transfer tax system. It starts from the premise that what renders dynastic wealth transfers problematic is that such transfers can bestow upon the recipient unearned political and economic power, which contravenes the democratic ideal that power should be earned, not inherited. Under this view, the tax system should be concerned with neither the build-up of wealth per se nor transfers of wealth that are not large enough to bestow power upon the recipient. Instead, the tax system should be concerned only with transfers of wealth large enough to confer economic and political power on the recipient. The structure that best reflects this concern is a progressive cumulative accessions tax that focuses on the recipient, instead of an estate tax that focuses on the transferor. Each recipient should have an extremely high exemption amount, given that receiving a few hundred thousand or couple million dollars does not give one power. Lastly, there should be no generation-skipping penalty, because what matters is how many individuals have the ability to use the power accompanying the wealth.

INTRODUCTION

The current estate tax is neither fish nor fowl. It raises little revenue, yet is ill designed to further the various social goals most often used to justify it: adding progressivity to the tax system, backstopping the income tax, reducing ex post inequality, increasing ex ante equality of opportunity, and minimizing dynastic wealth transfers.[1] Each of these goals, however, has

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[1] *See generally* Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469 (2007) (discussing ex ante equality of opportunity and the estate tax); Mark L. Ascher,

different implications for the design of a transfer tax system.[2] This Article takes one frequently mentioned goal of the transfer tax system—minimizing dynastic wealth transfers—and explores what insights focusing on that goal yields for the design of the transfer tax system. It argues—perhaps counter-intuitively—that the goal of minimizing dynastic wealth transfers suggests a progressive accessions tax with an extremely large per-recipient exemption and no generation-skipping penalty.

This Article starts from the premise that what renders large transfers of wealth from one individual to another problematic is that such transfers bestow upon the recipient unearned power and influence over others. This premise differs from the usual justifications for minimizing dynastic wealth transfers.[3] One such justification, for example, argues that large wealth concentrations in and of themselves—whether earned or inherited—are harmful to democratic ideals.[4] Under this view, taxing wealth transfers helps prevent the build-up of wealth concentrations in the first instance.[5] The argument

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Curtailing Inherited Wealth, 89 MICH. L. REV. 69 (1990) (same); Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 269–73 (1983) (discussing the progressivity of the estate tax).

[2] Recent scholarship has begun explicitly exploring what some of these goals suggest for the design of a transfer tax system. Anne Alstott, for example, mines the nuances of equality-of-opportunity theories and argues that such principles counsel replacing the estate tax with an accessions tax (which she refers to as an inheritance tax). *See generally* Alstott, *supra* note 1 (proposing such a tax in order to further equality-of-opportunity goals). In the same vein, Lily Batchelder explores welfarist theories and proposes what she terms a "comprehensive inheritance tax" that would include gifts and bequests in the recipient's income, subject to a 15% surtax. *See generally* Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1 (2009) (proposing such a scheme in order to enhance social welfare).

[3] *See, e.g.*, Ascher, *supra* note 1, at 87–99 (exploring various reasons for taxing wealth transfers and suggesting that protecting a democratic form of government is one reason for curtailing large inheritances); Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 235–36 (1955) (describing the Roosevelt Administration's rationale for an estate tax, namely, as a means of preventing transmissions of wealth inconsistent with American ideals); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 828–50 (2002) (discussing several justifications for taxing wealth transfers and arguing that large wealth concentrations are inherently harmful for political and economic reasons).

[4] *See* Repetti, *supra* note 3, at 826–27.

[5] *Id.* The American Law Institute ("ALI") accessions tax proposal, prepared by William Andrews, also seems to be motivated by this concern. *See* William D. Andrews, *Reporter's Study of the Accessions Tax Proposal*, *in* AM. LAW INST., FEDERAL ESTATE AND GIFT TAXATION 446, 460–68, 475 (1969) [hereinafter *ALI Proposal*] (conceptualizing an accessions tax as a periodic wealth tax). Several other past proposals appear to be similarly motivated. *See* Joseph M. Dodge, *Replacing the Estate Tax with a Reimagined Accessions Tax*, 60 HASTINGS L.J. 997, 1003–04 (2009) [hereinafter Dodge, *Replacing*] (arguing for limits on inherited wealth in order to prevent unearned and undeserved wealth concentrations); Harry J. Rudick, *What Alternative to the Estate and Gift Taxes*, 38 CALIF. L. REV. 150, 167–68 (1950) (suggesting an accessions tax as a means of preventing wealth concentration). Although Alstott's focus is on equality-of-opportunity concerns, she too seems to view the anti-dynastic wealth argument as relating to the build-up of wealth with-

that large wealth concentrations are intrinsically harmful and should be taxed as such, however, is contested.[6] This Article sets that debate aside to focus on what it hopes is a less contested argument: the proposition that regardless of what one believes to be the effects of earned power on democracy, there is something antithetical to this country's democratic ideals about being able to transfer power and influence to one's heirs.

This second common justification for minimizing dynastic wealth transfers is to prevent the creation of a hereditary plutocracy or aristocracy.[7] Most often, this is expressed in equality-of-opportunity terms and reflects a notion that it is unfair for parents to pass along financial advantages to their children.[8] These ideals hold that it is unfair for individuals to have differing abilities to develop fully their talents and pursue their definitions of a good life based on the chance circumstances of their birth.[9] Wealth transfer taxation is therefore justified as a means of evening the playing field so that

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in families, instead of relating to any specific harm from the transfer of great wealth apart from the fact such transfers enable wealth accumulation. *See* Alstott, *supra* note 1, at 518–19. Alstott suggests that "if the aim of the tax is to fight the concentration of wealth within family dynasties," then generation-skipping penalties or a periodic wealth tax would be appropriate. *Id*. These suggestions imply a view equating dynastic wealth with wealth concentration itself. In contrast, this Article's view is that the *existence* of wealth concentrations is not problematic, but that their *transfer* is. For an argument that wealth concentrations naturally dissipate over time even without wealth transfer taxes, see Joseph R. Dodge, *Comparing a Reformed Estate Tax with an Accessions Tax and an Income Inclusion System, and Abandoning the Generation-Skipping Tax*, 56 SMU L. REV. 551, 555 (2003) [hereinafter Dodge, *Comparing*] (arguing that only a handful of dynasties might sustain themselves over time).

[6] *See* Dodge, *Replacing*, *supra* note 5, at 1002 ("[P]enalizing accumulations of wealth—an aspect of the American dream—is not particularly popular as a political goal, and it is suspect from the vantage point of liberal theory."). *See generally* Eric Rakowski, *Can Wealth Taxes Be Justified*, 53 TAX L. REV. 263 (2000) (critiquing and refuting justifications for wealth taxes).

[7] *See, e.g.*, Ascher, *supra* note 1, at 82–83 (implying that unlimited inheritance is linked to the existence of aristocracies); Irving Fisher, *Some Impending National Problems*, 24 J. POL. ECON. 694, 711 (discussing aristocracies). Unfortunately, prior literature is often less than clear about what is meant by such terms, and often blends distinct concepts when discussing them. *See* Eisenstein, *supra* note 3, at 258–59 (blending concerns about transferring economic power with equality-of-opportunity concerns). This Article is not the first to note that past scholarship often does not identify as clearly as it could what social goal it believes the transfer taxes should pursue. Alstott, for example, has criticized the tendency of prior scholarship to conflate various goals of the estate tax with each other. Alstott, *supra* note 1, at 471 (arguing that past scholarship often conflates equality-of-opportunity ideals with goals that are distinct from such ideals).

[8] *See, e.g.*, Alstott, *supra* note 1, at 518; Ascher, *supra* note 1, at 74–75; Fisher, *supra* note 7, at 711. As Alstott notes, concerns about dynastic wealth concentrations are distinct from equality-of-opportunity concerns. Alstott, *supra* note 1, at 518. She is therefore careful to clearly ground her argument for an accessions tax on equality-of-opportunity grounds. *See id.*

[9] *See* Alstott, *supra* note 1, at 516 (arguing that the concern of equal opportunity theory is ensuring that each child "can develop the capabilities she will need to make informed choices *about her life as an adult*" (emphasis added)).

one's educational achievement, job prospects, and economic class are not determined by birth.[10]

This Article focuses on a less discussed interpretation of what constitutes a hereditary plutocracy or aristocracy: the ability to pass power and influence on to one's heirs by transferring to them huge sums of wealth. Under this view, the transfer tax system should be unconcerned about wealth transmissions that are not large enough to bestow upon the recipient power and influence over others. At some point, however, transferring large wealth accumulations to one's heirs is tantamount to passing power and influence over others, which contravenes the American ideal that influence should be both earned and open to all.[11] As President Franklin D. Roosevelt argued over eighty years ago, dynastic wealth accumulations "amount to the perpetuation of great and undesirable concentration of control in a relatively few individuals over the employment and welfare of many, many others."[12] Roosevelt believed that inherited economic power of that kind is as inconsistent to American ideals as inherited political power was to the founders of the country.[13]

Although this overlaps somewhat with equality-of-opportunity ideals, it is a distinct concern and has different implications for the design of wealth transfer taxation. Families with wealth of only a few hundred thousand dollars (or less) can confer on their children the type of advantages that theorists believe inhibit equality of opportunity: private schools and tutors, college and graduate education, and perhaps a down payment on a

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[10] To that end, equality-of-opportunity theorists focus on ways in which transfer taxes can be used to equalize starting points. Alstott, for example, supports a progressive inheritance tax based on the amount of gratuitous transfers an individual receives during one's life because such transfers confer a greater ability to pursue one's life projects. Alstott, *supra* note 1, at 502–03. And because such transfers impart more advantages the earlier they are received in life, Alstott would tax transfers received by younger recipients more heavily. *Id.* at 523–24. In contrast, Edward McCaffery has argued that certain aspects of the current structure undermine equality-of-opportunity goals by encouraging parents to transmit wealth to their children earlier than otherwise. Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 294, 314–18 (1994). McCaffery's solution is a progressive consumption tax. *Id.* at 345–58.

[11] *See, e.g.*, THE MEMOIRS OF HERBERT HOOVER: THE GREAT DEPRESSION 1929–1941, at 136 (1952) (noting the American people's traditional opposition to inherited wealth because "several million dollars is economic power"); David G. Duff, *Taxing Inherited Wealth: A Philosophical Argument*, 6 CAN. J.L. & JURIS. 3, 25 (1993) ("[T]he institution of dynastic power is even more opposed to democratic ideals than the political influence of economic power confined to only one generation."); Eisenstein, *supra* note 3, at 258–59 (stating that a large inheritance "becomes hereditary economic power, which is no more tenable than hereditary political power"); Jerome Nathanson, *The Ethics of Inheritance*, *in* 1 SOCIAL MEANING OF LEGAL CONCEPTS 74, 89 (E.N. Cahn ed., 1948) ("[I]t is not easy to justify the possession of power through inheritance. On feudal grounds, it can be done; it seems . . . impossible on democratic grounds.").

[12] President Franklin D. Roosevelt, Speech to Congress on Tax Revision (June 19, 1935), *available at* http://www.presidency.ucsb.edu/ws/?pid=15088 [https://perma.cc/4Y5Z-V9QG].

[13] *See id.*

house.[14] Yet structuring a transfer tax to reach into the upper middle classes has its drawbacks. The exemption would have to be extremely low, which would exacerbate political opposition and avoidance measures that often exacerbate inequality of opportunity.[15] More importantly, such a tax would be largely ineffective, for the transmission of human capital occurs when parents and children are young, not when the children are middle-aged and the parents elderly. It is questionable, moreover, whether discouraging parents who can invest in their children's human capital from doing so is desirable as a policy matter; limiting the extent to which parents may pass along these types of advantages to their children strikes many as contravening our innate desire for our children to have better lives than we do. The most effective way of equalizing opportunities is to engage in greater leveling-up efforts, instead of by using transfer taxes to level down.

More importantly, although giving one's child a few hundred thousand dollars, or even a couple million dollars, enables them to lead a more comfortable life than otherwise, such sums do not really give the child power and influence over others. In contrast, directly passing on wealth accumulations that are large enough to give the holder economic and political power over others raises problems of a much greater magnitude.[16] Unfortunately, this worry has received far less attention in the legal literature than equality-of-opportunity concerns or the harms from concentrated wealth generally.[17]

To that end, this Article explores what a set of transfer taxes designed to minimize the transmission of this type of wealth from generation to generation would look like. Its aim is to add to the theoretical literature on wealth transfer taxation by highlighting the ways in which current law as well as various reform proposals do or do not track this fear of inherited power. Although this Article's goal is therefore theoretical in nature, it does address certain political and administrative difficulties. The Article proceeds as follows. Part I briefly discusses the political and economic concerns raised by transfers of large sums of wealth.[18] Part II explains why an accessions tax is superior to other options for taxing wealth transfers in achieving

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[14] *See* Alstott, *supra* note 1, at 485–89 (discussing the impact of inheritance on equality of opportunity); Ascher, *supra* note 1, at 71, 87–91 (discussing effects of inherited wealth on families and children).

[15] *See generally* McCaffrey, *supra* note 10 (describing political opposition to estate taxes and the increased consumption and early gifting that a stronger estate tax would likely spur).

[16] *See* Rakowski, *supra* note 6, at 292.

[17] *See generally* Alstott, *supra* note 1 (focusing on equality of opportunity); Dodge, *Replacing*, *supra* note 5 (addressing the problem of inherited wealth and wealth concentration); Repetti, *supra* note 3 (describing the harms from concentrated wealth); Rudick, *supra* note 5 (focusing on the problem of wealth concentration).

[18] *See infra* notes 21–38 and accompanying text.

the goal of minimizing dynastic wealth transfers.[19] Part III describes the main structural elements of this Article's accessions tax proposal, including the proposed exemption level, rate structure, and the treatment of transfers in trust.[20]

I. WHY WORRY ABOUT DYNASTIC WEALTH TRANSFERS?

The ideal that political power should not be inheritable is one of our country's fundamental values.[21] Another such value, however, is a strong respect for a set of private property rights that includes wide testamentary freedom.[22] The fact that great wealth generally brings with it economic and political power highlights a tension between these two ideals: in some instances, handing wealth down to one's heirs is tantamount to handing them power over others.

In our country's early days these concerns motivated legislation to overturn English property arrangements such as primogeniture and entail.[23] By virtue of such arrangements, the handing down of property in England also included the handing down of political power.[24] That type of aristocracy is antithetical to America's governing ideals, as many of our founders recognized.[25] In proposing to end entail, for example, Thomas Jefferson argued that inheritable power was incompatible with "a well-ordered republic."[26] The preamble to legislation reforming North Carolina's inheritance laws reflects similar sentiments, suggesting that concentrated inheritances "tend[] only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic."[27]

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[19] *See infra* notes 39–68 and accompanying text.

[20] *See infra* notes 69–155 and accompanying text.

[21] *See* Ascher, *supra* note 1, at 93–94 (noting that Thomas Paine and Thomas Jefferson recognized the danger of inherited power).

[22] Lawrence M. Friedman, *The Law of Succession in Social Perspective, in* 12 DEATH, TAXES AND FAMILY PROPERTY: ESSAYS AND AMERICAN ASSEMBLY REPORT 1, 1 (Edward C. Halbach, Jr. ed., 1977) [hereinafter DEATH, TAXES AND FAMILY PROPERTY].

[23] Ascher, *supra* note 1, at 94–95 (declaring that the purpose of early American inheritance reform "was to prevent the disparities in hereditary wealth that had occurred in Europe and thus to protect elective representative government"); Stanley Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 14 (1977) (noting that the purpose of inheritance reform was "to establish the foundation of a republican polity").

[24] Katz, *supra* note 23, at 14–15.

[25] *See, e.g.*, 1 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 58 (Paul Leicester Ford ed., 1904).

[26] Thomas Jefferson, *Bill for Abolition of Entails*, TEACHINGAMERICANHISTORY.ORG, http://teachingamericanhistory.org/library/document/bill-for-abolition-of-entails [https://perma.cc/Z33K-BUV4] (documenting text of 1776 bill).

[27] *See* Ascher, *supra* note 1, at 95 n.144 (quoting Act of April 1784, ch. 22, 1784 N.C. Session Laws 574, *available at* http://docsouth.unc.edu/csr/index.html/document/csr24-0014 [https://perma.cc/6ZVY-G8HK]).

Noah Webster similarly argued that families should not be able to hand influence down generation to generation, in order to protect the desired balance of power in the many instead of the few.[28]

Although power is not tied to land in modern America the way it was in England pre-World War I, few would dispute that great wealth brings with it power and influence over others. First, as James Repetti has carefully shown, wealth enables one to directly influence the political process in a variety of ways[29]: by influencing the media's news and editorial coverage through the granting or withholding of advertising;[30] by making substantial (yet limited) contributions directly to candidates, parties, and political committees and unlimited contributions to § 501(c)(4) organizations that engage in issue advocacy and campaign intervention; and by making contributions to and receiving increased access to elected officials already in office.[31] Wealth also enables influence in a number of additional ways; for example, elected leaders often consult economic leaders for advice.[32] Other times, elected officials follow the wishes of economic leaders on non-economic matters in order to protect jobs and industry in their areas.[33] Business leaders are often civic leaders who can also shape the goals and priorities of a community from the ground up. [34] Lastly, great wealth makes

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[28] *See id.* at 95 n.145.

[29] *See* Repetti, *supra* note 3, at 841–49; *see also* Gerald R. Jantscher, *The Aims of Death Taxation*, *in* 6 DEATH, TAXES, AND FAMILY PROPERTY, *supra* note 22, at 53 (linking the need for campaign finance laws with the unequal distribution of wealth). *But see* ARTHUR M. OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF 29 (1975) (suggesting that "specific and detailed rules" that prevent the wealthy from "spending money to acquire undue power" are "far more promising" than "the most ambitious program of progressive taxation").

[30] Sometimes this influence comes through control of the media. For example, many view Fox News and the *Wall Street Journal* as having conservative biases and MSNBC and the *New York Times* as having liberal biases.

[31] Repetti, *supra* note 3, at 843–49; *see also* Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 TAX L. REV. 263, 278–79 (2007) (describing the ways wealthy individuals can exert public influence). Recent comments by Republican presidential candidate Donald Trump illustrate the effect of large contributions. *See* Jill Ornitz & Ryan Struyk, *Donald Trump's Surprisingly Honest Lessons About Big Money in Politics*, ABC News (Aug. 11, 2015), http://abcnews.go.com/Politics/donald-trumps-surprisingly-honest-lessons-big-money-politics/story?id=32993736 [https://perma.cc/KM2W-433S]. When asked why he made a number of contributions to Democratic candidates, Trump answered: "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." *Id.*

[32] *See* Fleischer, *supra* note 31, at 279 & n.75.

[33] *See id.* After public outcry from a number of large corporations, for example, Arizona Governor Jan Brewer vetoed a bill that would have protected the right of religious businesses owners to refuse service to same-sex couples. Cindy Carcamo, *Arizona Gov. Jan Brewer Vetoes So-Called Anti-Gay Bill*, L.A. TIMES (Feb. 26, 2014), http://articles.latimes.com/2014/feb/26/nation/la-na-nn-arizona-gay-brewer-20140226 [https://perma.cc/K9NA-FYNY].

[34] Hypothetically, it is not hard to imagine a small town in which the CEO of a company holds influence over the direction of the community.

it easier to run for elected office.[35] For these reasons, transferring great wealth often means transferring political power and influence to one's heirs.

Great wealth can also, depending on the circumstances, yield economic control. Although official company towns are long gone, there are many communities where a few wealthy families dominate economic life.[36] In some towns, for example, residents depend on a small group of employers for jobs. In such communities, decisions made by a small group of people—regarding wages, plant expansions, and plant closings—heavily mold citizens' economic lives. In other communities, residents might depend on a small group of companies for necessities like food and housing. In those instances, decisions made by owners of construction firms or grocery stores also strongly shape residents' economic lives.[37] In some cases, therefore, transferring great wealth means transferring economic power and influence to one's heirs.

Although past scholarship contains occasional brief references to the notion that inherited economic and political power is antithetical to democratic ideas,[38] scholars have not yet fleshed out what this goal suggests for the design of the transfer tax system. Such is the goal of this Article.

II. WHY AN ACCESSIONS TAX?

Our current, transferee-oriented system focuses on the total amount of wealth transferred by a decedent during life and at death, regardless of the recipient.[39] Other possibilities for treating wealth transfers do, however, exist. An accessions tax imposes a tax on the transferee based on the total

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[35] This is evidenced by Ross Perot, Donald Trump, Michael Bloomberg, etc. *See* Michael Barbaro, *Bloomberg Spent $102 Million to Win 3rd Term*, N.Y. TIMES (Nov. 27, 2009), http://www.nytimes.com/2009/11/28/nyregion/28spending.html [https://perma.cc/X5P5-TRN9] (noting the large amounts of personal wealth spent by Michael Bloomberg during his three mayoral elections); Tina Nguyen, *Donald Trump's $10.8 Million Loan to His Campaign Shows He's Finally Getting Serious*, VANITY FAIR (Feb. 1, 2016, 10:12 AM), http://www.vanityfair.com/news/2016/02/donald-trump-self-funded [https://perma.cc/EW3Q-Q7KH] (describing how Trump has used his personal wealth to make loans to his presidential campaign); Simi Shah, *In the Business of Politics*, HARV. POL. R. (Nov. 27, 2015, 12:00 PM), http://harvardpolitics.com/united-states/business-politics/ [https://perma.cc/6QLP-LCNX] (noting the amount of personal money spent on campaigns by businesspeople such as Ross Perot).

[36] *See* Fleischer, *supra* note 31, at 280–82 (describing company control of communities even in the era after "Pullman towns").

[37] *Id.* at 280–81.

[38] *See, e.g.*, Eisenstein, *supra* note 3, at 258–59.

[39] Subject to certain requirements, however, transfers to spouses and charities are not taxed. I.R.C. §§ 2055–2056 (2012). Transfers that "skip" generations, such as when a grandfather makes a transfer directly to a grandson, incur an additional generation-skipping transfer tax that is meant to mimic the tax burden that would be incurred if wealth were handed from one generation directly to the next-lower generation. *See* I.R.C. § 2601 (2012).

amount of gratuitous receipts during the transferee's lifetime.[40] An inheritance tax also imposes a tax on the transferee, but on an annual instead of lifetime basis.[41] Although these three alternatives are separate from the income tax system, the income tax treatment of gifts and bequests could also be changed. For example, transfers could be treated as deemed realization events for the donor, or the carryover basis rule could be applied to bequests as well as gifts. Lastly, gifts and bequests could be included in the income of the recipient.[42] In theory, nothing precludes imposing both a transfer tax (be it an estate, accessions, or inheritance tax) and changing the income tax treatment of gratuitous transfers. Largely due to political concerns, however, the two are generally viewed as either-or propositions.[43]

Of these alternatives, an accessions tax is the best way to minimize one's ability to pass power-conveying wealth to others. Such an accessions tax would have increasing marginal rates based on a transferee's total cumulative receipts. Moreover, each transferee's exemption level should be higher than most other commentators suggest,[44] to reflect that power over others accompanies extremely large bequests, not bequests of a few million dollars that merely enable one to live a more luxurious life. The proposal explored in this Article attempts to balance two main concerns. First, any given individual's ability to exert control over others rises with the individual's wealth. Second, control that arises from inherited wealth is more pernicious

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[40] Alstott, *supra* note 1, at 502.

[41] *Id.* Inheritance tax rates typically vary based on the relationship between the transferor and transferee; transfers between close relatives are usually taxed less heavily than transfers between remote relatives and unrelated individuals. Under both accessions and inheritance taxes, transfers from spouses are generally untaxed. Unfortunately, the terms "inheritance tax" and "accessions tax" are often used interchangeably. Alstott uses the terms "inheritance tax" and "accessions tax" to refer to an accessions tax and the term "annual inheritance tax" to refer to an inheritance tax levied on one's annual receipt of gratuitous transfers. *Id.*

[42] Batchelder has proposed what she calls a "comprehensive inheritance tax," in which gifts and bequests would be included in one's income once their cumulative total exceeds an exemption amount of $1.9 million. Batchelder, *supra* note 2, at 2, 62. Instead of using a separate rate schedule, Batchelder proposes that such receipts be taxed at the recipient's marginal income tax rate plus 15%. *Id.* at 62.

[43] *See id.* at 87; Joseph M. Dodge, *A Deemed Realization Event Is Superior to Carryover Basis (and Avoids Most of the Problems of the Estate and Gift Tax)*, 54 TAX L. REV. 421, 431 (2001).

[44] *See, e.g.*, Alstott, *supra* note 1, at 506 (discussing a lifetime exemption of $100,000 and arguing that a $2 million exemption is too high); William D. Andrews, *The Accessions Tax Proposal*, 22 TAX L. REV. 589, 592 (1967) (suggesting a lifetime exemption of $24,000, which is the equivalent of roughly $170,000 in 2015 dollars, according to the author's calculation using the Bureau of Labor Statistics Inflation Calculator); Batchelder, *supra* note 2, at 62 (proposing a $1.9 million lifetime exemption); Edward C. Halbach, Jr., *An Accessions Tax*, 23 REAL PROP. PROB. & TR. J. 211–12 (1988) (suggesting a $700,000 exemption, which is about $1.4 million in 2015 dollars, according to the author's calculation using the Bureau of Labor Statistics Inflation Calculator).

than control that arises from earned wealth. Accordingly, section A of this Part demonstrates why a progressive accessions tax is superior to an estate tax at combatting dynastic wealth transfers.[45] Section B argues that a progressive accessions tax is preferable to alternative reform proposals.[46] Finally, section C briefly addresses the assertion that a progressive accessions tax is unfair.[47]

A. A Progressive Accessions Tax Is Superior to an Estate Tax at Combating the Transmission of Dynastic Wealth

Consider the intuition that one's ability to exert economic and political influence depends on how much wealth one has. Receiving $1 million will enable one to live a cushier life than otherwise, but it likely will not increase one's ability to exert influence over others. In contrast, it is conceivable that receiving a larger sum (perhaps $20 million, perhaps $50 million) does enable one to have control over others. A transfer tax with the motivation of minimizing the transmission of power from generation to generation should first and foremost encourage donors to break up their wealth into smaller chunks that bring with them less influence over others.

Aside from the charitable deduction, the current estate tax does not contain any such incentive.[48] By focusing on what the donor transfers out, regardless of the recipient, the treatment is the same whether the donor makes one extremely large bequest or many smaller ones.[49] In contrast, a progressive accessions tax would encourage donors to make more small transfers instead of one large one because the recipients each have their own exemption levels and rate ladders.[50]

To illustrate how an accessions tax works, imagine that *Alice* dies with an estate of $50 million and makes no spousal or charitable transfers. Further assume that she is tax-sensitive.[51] Under an estate tax, all amounts above *Alice*'s exemption level will be taxed regardless of to whom she

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[45] *See infra* notes 48–54 and accompanying text.

[46] *See infra* notes 55–66 and accompanying text.

[47] *See infra* note 67–68 and accompanying text.

[48] To the extent that the marital deduction encourages a decedent to split his or her estate between the decedent's spouse and descendants, this split is generally temporary. Most estate plans provide that assets pass to descendants after the surviving spouse dies.

[49] *See* Dodge, *Replacing*, *supra* note 5, at 1004 (noting that an estate tax is indifferent to how wealth is dispersed).

[50] *See* Alstott, *supra* note 1, at 503 (making this point with respect to the goal of equality of opportunity); Dodge, *Replacing*, *supra* note 5, at 1004 (comparing and contrasting accessions and estate taxes).

[51] Some evidence, albeit limited, suggests that tax incentives influence how donors divide their estates. *See* Batchelder, *supra* note 2, at 74 (discussing evidence that donors make financially motivated bequests).

transfers her assets. If the exemption level is $5 million, $45 million will be taxed no matter how she splits up her estate. Under an accessions tax model, however, *Alice* can minimize overall tax liability by dividing her estate into more, rather than fewer, pieces. Assume that each transferee has a $5 million exemption level. If so, *Alice*'s wealth will avoid tax altogether if she makes ten $5 million transfers instead of a single $50 million transfer. Similar incentives exist even if there are fewer than ten people whom *Alice* wishes to benefit. Perhaps she only desires to help five descendants. If she leaves each of these five individuals $10 million, only $25 million of her wealth will be taxed.

Applying increasing marginal rates to a recipient's cumulative receipts creates a similar incentive for the transferor. To the extent *Alice* is tax sensitive, she will search for individuals who have previously received fewer, rather than more, gratuitous transfers. Even if such individuals have already used up their exemptions, *Alice* can reduce taxes on her wealth by making transfers to individuals who are still at the bottom of their rate ladders.[52] Her wealth will thus take advantage of several trips up the lower rungs of the rate ladders, instead of the single trip to which she would be limited under an estate tax.[53]

Encouraging donors to divide their estates into smaller portions is not the only goal better served by an accessions tax. Such a structure also reflects that the total amount any individual inherits affects that individual's ability to wield power over others. Because the accessions tax would be imposed at increasing rates on the cumulative amount of gratuitous transfers received by a transferee, it better demonstrates this concern than an estate tax that depends on the size of the donor's estate. First, consider *Bob* who inherits $50 million from five different sources. The tax burden on that wealth will likely be heavier under an accessions tax than under an estate tax. Because an accessions tax taxes each individual cumulatively on that individual's receipts, each transferee only gets one exemption and one trip up the rate ladder. Therefore, transferees have only one chance to take advantage of the lower rates that apply to the bottom rungs. In an estate tax, however, the five transferors will each get to use an exemption and take

[52] This assumes that the rate schedule applies increasing marginal rates to amounts actually taxed. This contrasts with the current structure, where the amount shielded from tax by a decedent's applicable credit amount is larger than the break point for the top marginal rate of 40%. This Article does not address whether the per-transferee exemption amount should be structured as a credit (as under current law) or an exclusion or exemption.

[53] Even if an accessions tax does not lead *Alice* to change how she divides up her estate, it would impose a heavier burden on transfers that transmit power-conveying wealth than on other transfers. *See* Rudick, *supra* note 5, at 168.

their own trips up five separate rate ladders, thus taking advantage of the lower rates five times instead of once.

Next, compare *Bob*, who inherits $50 million over the course of his lifetime, to *Chloe*, who only inherits $10 million over the course of hers. *Bob* can wield more power and influence with his bequest than can *Chloe*. Taxing *Bob* and *Chloe* according to what each receives, instead of what their benefactors have relinquished, better reflects the notion that more wealth translates into more power. The current system, which focuses on the transferor, does a poor job of tying the tax burden to the amounts received by a given recipient. For example, one study estimated that 22% of heirs burdened by the estate tax inherited less than $500,000, whereas 21% of individuals inheriting more than $2,500,000 faced no estate tax burden.[54]

B. A Progressive Accessions Tax Is Preferable to Alternative Reform Options for Combatting the Transmission of Dynastic Wealth

In terms of minimizing dynastic wealth transfers, an accessions tax is also superior to other common reform proposals: adopting some type of inheritance tax, including gifts and bequests in income, making death a realization event, or applying carryover basis to bequests.

First consider the annual inheritance tax, which taxes individuals on the total amount of gratuitous transfers received in a given year.[55] By focusing on what an individual receives annually instead of over a lifetime, an annual inheritance tax does not reflect as accurately the notion that increased wealth provides more opportunities to exert control over others. *Dennis*, who receives $50 million all in one year, will be taxed more heavily under an inheritance tax than *Emma*, who receives $10 million per year for five years, even though both receive the same amount of power-conveying wealth. This is because *Emma* receives the benefit of five exemptions, one per year, and the ability to use the lowest rates five times during five separate trips up the rate ladder. In contrast, *Dennis* only benefits from one exemption and one trip up the rate schedule. A progressive accessions tax, however, would treat *Dennis* and *Emma* the same; during their lifetimes, each would receive one exemption and one trip up the rate ladder regardless of the timing of their receipts.

Moreover, under an annual inheritance tax, donors who divide their transfers to the same recipient temporally obtain the same advantage as

[54] Batchelder, *supra* note 2, at 3 & n.8 (citing Lily L. Batchelder & Surachai Khitatrakun, *Dead or Alive: An Investigation of the Incidence of Estate and Inheritance Taxes* 41 tbl.A14 (Third Annual Conference on Empirical Legal Studies Papers, Working Draft, Oct. 28, 2008)). Even though the estate tax is technically imposed on the decedent’s estate, it is effectively paid by heirs, who receive less than they would in the absence of tax. *Id.* at 7, 53–54.

[55] Alstott, *supra* note 1, at 502.

those who divide their transfers among multiple recipients. *Dennis*'s father *Frank*, for example, could obtain better tax results simply by staggering his gifts to *Dennis*. Yet temporally dividing transfers to one recipient does not serve the goal of minimizing dynastic wealth transfers as much as dividing one's estate among a greater number of recipients.

Another type of inheritance tax is imposed by several states.[56] Despite the name, this tax is actually a hybrid between an estate tax and an inheritance tax; it taxes the decedent at rates that vary depending on to whom the property passes.[57] Transfers to immediate relatives such as children and parents are typically either totally exempt from tax or taxed at an extremely low rate with a large per-beneficiary exemption.[58] Transfers to other relatives are taxed at a somewhat higher rate and have a medium-sized exemption.[59] Finally, transfers to strangers and very distant relatives are taxed at the highest rates and have the smallest exemption.[60] To the extent these taxes have a per-beneficiary exemption, they might—like an accessions tax—encourage transferors to divide their estates more widely.[61] On the other hand, the fact that transfers to immediate relatives are either untaxed or taxed less heavily than bequests to more distant relatives and strangers could encourage decedents to scatter their wealth less widely. Lastly, this type of inheritance tax—in contrast to an accessions tax—does not reflect the intuition that recipients of greater total amounts of wealth should bear more tax than recipients of lower total amounts of wealth. This is so because each transfer is taxed in a vacuum, without regard to transfers received from other individuals.[62]

In addition to its superiority over various forms of inheritance taxes, an accessions tax is also superior to changing the income tax treatment of gifts and bequests if the goal is curbing the transmission of dynastic wealth. Consider requiring inclusion of gifts and bequests in income. Like an annu-

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[56] *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/LW3D-BV3R]. Currently Nebraska, Iowa, Kentucky, Pennsylvania, New Jersey, and Maryland impose state inheritance taxes. *Id.*

[57] *See id.*

[58] *See, e.g.*, IOWA CODE ANN. §§ 450.2, 450.9 to 450.10 (West 2006); KY. REV. STAT. §§ 140.010, 140.070 to 140.080 (West 2010); NEB. REV. STAT §§ 77-2001, -2004 to -2006 (2009). In discussing the exemption levels, "large," "medium," and "small" refer to the size of the exemption levels relative to each other, not some absolute conception of size.

[59] *See supra* note 58 and accompanying text.

[60] *See supra* note 58 and accompanying text.

[61] Kentucky and Nebraska have such structures. *See* KY. REV. STAT. §§ 104.070, 140.080 (assigning a per-beneficiary exemption); NEB. REV. STAT. § 77-2004 (also granting a per-beneficiary exemption).

[62] Many of the states using this model do not have a separate gift tax, which compounds the effects of looking at these bequests in a vacuum. *See* Wendy C. Gerzog, *What's Wrong with a Federal Inheritance Tax*?, 49 REAL PROP. TR. & EST. L.J. 163, 175 (2014).

al inheritance tax, this option fails to reflect the fact that amounts received over one's entire lifetime—not just during one calendar year—affect one's ability to exert influence and power. Moreover, the highest marginal income tax rate currently kicks in at $415,050,[63] which is much lower than an exemption intended to exclude from taxation transfers too small to convey power and influence. The low exemption would render the tax a flat rate tax, which less accurately reflects the notion that increasing amounts of wealth bring with them the increased ability to exert power and influence over others.[64]

Nor does making death a realization event or instituting carryover basis for bequests satisfactorily serve the goal of minimizing the transfer of dynastic wealth. Proponents accurately assert that such reforms would tax unrealized appreciation, large amounts of which currently escape tax due to the current exemption level and carryover basis.[65] If one's goal for implementing a transfer tax structure is to raise revenue, increase progressivity generally, or backstop the income tax system, then these reforms serve those goals.[66] But these reforms track the goal of combatting the transmission of dynastic wealth less effectively. Most importantly, these reforms tax individuals the same regardless of how they divide their wealth, thus falling prey to the main drawback of an estate tax.

Second, both latter reforms miss the mark by focusing on unrealized appreciation. Although it is true that appreciated assets comprise the majority of extremely large estates, appreciated assets are not the sole component of such estates. Cash and high-basis assets also have the potential to yield power over others. Taxing unrealized appreciation while allowing cash and high-basis assets to pass free of tax does not accurately measure the potential for power over others that is conveyed.

A last reason why implementing carryover basis for bequests does a poor job addressing the concern that large amounts of wealth can equate to power over others is the fact that tax on any unrealized appreciation is triggered only if a transferee sells the inherited assets. But someone who receives a substantial amount of appreciated assets need not sell to exert polit-

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[63] This is the point at which the top rate of 39.6% begins in 2016. *See* Rev. Proc. 2015-53, 2015-14 I.R.B 7.

[64] Batchelder's solution in the comprehensive income tax proposal—taxing gifts and bequests at a rate equal to the recipient's top rate plus 15%—does not remedy this problem. *See* Batchelder, *supra* note 2, at 4. In that proposal, the tax burden turns on other characteristics of the recipient—her income—instead of her cumulative amount of gratuitous receipts. *See id.* at 4, 17–22.

[65] *See* Dodge, *supra* note 43, at 430–34; Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361, 364, 367 (1993).

[66] As Joseph Dodge has recognized, the income tax is better suited to the goal of preventing the accumulation of wealth by the earner in the first instance than a transfer tax. Dodge, *Replacing*, *supra* note 5, at 1002.

ical and economic power. To exert political power in the form of political and issue advocacy spending, the individual can borrow against those assets. Moreover, economic power—if it is in the form of stock in a privately-held company or a control or swing vote bloc of a public company—is better maintained if the recipient does not sell the property at issue. By perpetuating lock-in, applying carryover basis to such bequests exacerbates the economic control issue.

C. Fairness Issues

Some might argue that an accessions tax, as opposed to an estate tax, is unfair to families with fewer descendants. This argument stems from the fact that an accessions tax will tax a $50 million family fortune split between two children more heavily than a $50 million fortune split among five children, whereas an estate tax does not differentiate between the two families. Put another way, the former family will have to look further afield to find distant relatives or unrelated individuals to whom it could make bequests in order to obtain the same tax consequences as the latter family.

This objection, however, misses the mark. The point of this and other accessions tax proposals is to encourage the dispersion of wealth.[67] In larger families with more children the dispersion is more likely to occur naturally. In contrast, smaller families with fewer children are less likely to have the natural dispersion that occurs in larger families. Moreover, this objection focuses on the transferor, not the transferee.[68] But the transferor and the transferor's wealth is not the proper point of comparison if one's concern is the transfer of power-conveying wealth. The proper focus is on whether or not a transferee gratuitously receives such wealth. From a transferee's perspective, an accessions tax treats all individuals who inherit a given sum of money the same, regardless of the number of transferors from whom they inherit.

III. DESIGN ISSUES

Although a fully worked-out accessions tax proposal is impossible to sketch in this short Article, this Part touches on the most important design issues that arise. Section A of this Part focuses on exemption levels.[69] Section B addresses the rate structure.[70] Section C looks at generation-skipping

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[67] *See, e.g.*, Alstott, *supra* note 1, at 503; Andrews, *supra* note 44, at 617; Dodge, *Replacing*, *supra* note 5, at 1004; Rudick, *supra* note 5, at 168.

[68] Batchelder, *supra* note 2, at 77–78.

[69] *See infra* notes 77–80 and accompanying text.

[70] *See infra* notes 81–88 and accompanying text.

transfers.[71] Section D analyzes transfers in trust.[72] Section E analyzes charitable transfers.[73] Section F focuses on liquidity provisions for family businesses.[74] Section G analyzes attribution and amalgamation.[75] Finally, section H deals with administrative concerns.[76]

A. The Exemption Level and an Annual Exclusion

This Article suggests a per-recipient exemption level that is much higher than under current law, something along the lines of $10 million or $20 million. Although these sums will strike many readers as extraordinarily high, one should keep in mind the goal of this proposal. This proposal is only concerned with the transfer of sums of wealth large enough to convey power and influence upon the recipient, and not with traditional equality-of-opportunity principles. A gratuitous transfer of $5 million undoubtedly allows the transferee to enjoy an extremely luxurious lifestyle and to pass that lifestyle on to future generations. It also provides a variety of advantages in developing one's talents, from private schools, lessons and camps; to college and graduate school; to seed money for a small business.

A transfer of that size, however, does not convey power and influence over others. Although it may allow the recipient to make more political and § 501(c)(4) contributions than otherwise, it does not allow the recipient to make substantial, sustained contributions from income alone. It therefore does not transmit such political power down from generation to generation.

With respect to economic power, any business valued under $5 million will be relatively small. Imagine a mechanic shop that employs five people. When the owner dies and leaves it to his son, the son now runs the shop. It might seem that the parent has transmitted power over those employees to his son. But given the small scale of the operation, the shop owner does not have power over the employees in the monopolistic sense with which this Article is concerned. Presumably there are competing auto shops in the area, and employees and customers could go elsewhere if the son—the new owner—did not treat them well. But the calculus changes when we are talking about a tire factory that employs five thousand people in a town of six thousand adults. Now whoever owns the tire factory has much more influence over the lives of the town.

For these reasons, the exemption level in an accessions tax geared to combat the transmission of power would be higher than in an accessions tax

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71 *See infra* notes 89–94 and accompanying text.
72 *See infra* notes 95–132 and accompanying text.
73 *See infra* notes 133–142 and accompanying text.
74 *See infra* notes 143–146 and accompanying text.
75 *See infra* notes 147–148 and accompanying text.
76 *See infra* notes 149–155 and accompanying text.

designed to reflect traditional equality-of-opportunity principles.[77] Although the choice of exemption level will be somewhat arbitrary, an exemption of something like $10 million or even $20 million per recipient seems appropriate.

In addition to the lifetime exemption amount, this Article also proposes that each transferee have an annual exclusion of $14,000 for gifts received and an annual exclusion of $100,000 for bequests received.[78] Transferees with gratuitous receipts for a given year under this threshold would not be required to file an accessions tax return or keep track of such receipts. Further, these receipts would not count toward a recipient's $10 million or $20 million exemption. The main purpose of this proposal mirrors that of the annual exclusion under current law, which is to render keeping track of every day gifts such as those for birthdays, holidays, weddings, graduations, and so on, unnecessary.[79] It also means that a large portion of those receiving bequests would not be required to file an accessions tax return, thus reducing administrability concerns.[80]

B. The Rate Structure

The accessions tax should impose increasing marginal rates based on the cumulative amount of gratuitous receipts the transferee has received during his or her or her life.[81] So doing reflects the notion that the more wealth one has, the more power and influence that wealth likely generates. Someone who has received $50 million over the course of his or her lifetime, for example, likely has more power than someone who has received the smaller sum of $10 million.

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[77] *See* Rakowski, *supra* note 6, at 292 (explaining that preventing transmission of power would require a tax on only a small segment of the most wealthy Americans).

[78] *Cf.* Batchelder, *supra* note 2, at 64 (suggesting an annual per-recipient exclusion of $13,000 for gifts and $65,000 for bequests). Both figures should be adjusted for inflation each year, as the current annual exclusion is under current law.

[79] Most past accessions tax proposals also contain some type of annual exclusion. *See, e.g.*, Batchelder, *supra* note 2, at 64; Dodge, *Replacing*, *supra* note 5, at 1026–27; Harry J. Rudick, *A Proposal for an Accessions Tax*, 1 TAX L. REV 25, 41–42 (1945). Accessions structured as periodic payments instead of lump sums (such as annuities and income interests in trusts) would be allowed only one annual exclusion, to discourage donors from restructuring gifts to take advantage of multi-year exclusions. *See* Halbach, *supra* note 44, at 212, 235–361; *Rudick*, *supra*, at 42.

[80] See Batchelder, *supra* note 2, at 64 (suggesting that a $65,000 annual exclusion for bequests would eliminate reporting requirements for more than two-thirds of heirs).

[81] Most past accessions tax proposals also suggest increasing marginal rates. *See ALI Proposal*, *supra* note 5, at 460–62; Alstott, *supra* note 1, at 504–05; Dodge, *Replacing*, *supra* note 5, at 999, 1009. *But see* Batchelder, supra note 2, at 4 (suggesting that gratuitous receipts be taxed at a rate equal to the recipient's top marginal income tax rate plus 15%); Halbach, *supra* note 44, at 231 (suggesting a flat rate accessions tax).

A second key feature of an accessions tax designed to minimize transfers of power-conveying wealth is that it would tax receipts from close relatives more heavily than other gratuitous transfers.[82] This contrasts with most existing accessions and inheritance taxes, which tax such transfers less heavily than those from more distant relatives and unrelated individuals.[83] Giving more favorable treatment to transfers to close relatives, however, simply provides additional encouragement for transferors to do what custom and instinct likely lead them to do anyway. In contrast, taxing receipts from close relatives more heavily is meant to encourage donors to spread their wealth more widely than they otherwise might by making transfers not only to lineal descendants, but also to more distant relatives and friends.[84]

How would this be implemented? First, this proposal would consider lineal ascendants, lineal descendants, siblings, and spouses of the foregoing of both the transferor and the transferor's spouse as immediate relatives to be taxed at the higher rate. Second, it would tax transfers to other individuals, such as cousins, nieces and nephews, and friends, at half the rate.[85] As a technical matter, this would be done using one rate schedule and giving each transferee a fifty percent deduction for receipts from that latter set of relatives.[86] Implementing a system of dual rates using a deduction mirrors the treatment of marital transfers between 1948 and 1981 as well as the proposal outlined by the American Law Institute ("ALI") in 1969.[87] Transfers between spouses, however, would continue to be exempt from taxation as they are under current law.[88]

C. Generation-Skipping Transfers

Because this Article's proposal is concerned with the *transfer* of large wealth concentrations, and not their existence per se, it would impose no additional penalty on generation-skipping transfers—in contrast to most past accessions tax proposals. The ALI proposal, for example, suggests tax-

[82] This Article's proposal would not, however, differentiate among transferees based upon their age. This contrasts with Alstott's equality-of-opportunity-focused accessions tax. *See* Alstott, *supra* note 1, at 525–27 (differentiating transferees based on their age).

[83] *See, e.g.*, *ALI Proposal*, *supra* note 5, at 446, 460–68; *supra* notes 56–62 and accompanying text (discussing inheritance taxes in several states).

[84] Because she believes it better reflects the choice-versus-chance distinction, Alstott also proposes taxing receipts from close relatives more heavily than those from distant relatives and friends. *See* Alstott, *supra* note 1, at 507–11.

[85] Setting the lower rate at 50% may be arbitrary, but it has precedence in the old marital deduction provisions.

[86] The rate schedule would reflect the rate chosen for transfers to immediate relatives.

[87] *ALI Proposal*, *supra* note 5, at 460–68.

[88] Almost all past proposals exempt spousal transfers. *See, e.g.*, Dodge, *Replacing*, *supra* note 5, at 1028; Rudick, *supra* note 79, at 41.

ing transfers to children less heavily than transfers to grandchildren in order to discourage the latter.[89] That suggestion's motivation appears to be the goal of preventing wealth concentrations by taxing wealth as such. As the author William Andrews argues, "an accessions tax—or any other transfer tax—operates as a periodic capital levy, the periodicity being determined by the frequency with which the property is transferred."[90] Andrews further reasons that keying a tax off the triggering act of transferring property is a convenient moment for imposing tax, but that the aggregate tax burden itself should not depend on how many times the property has been transferred.[91]

On one hand, Andrews is correct. If the goal of taxing wealth transfers is actually to tax wealth as such, either to raise revenue or to minimize how much wealth remains in private hands, then the number of times it is transferred should not matter. Instead, taxes should be imposed at regular intervals to slow the accumulation of further wealth, much the same way that smaller snowballs grow more slowly than larger snowballs when rolled in the snow. On this view, a tax on generation-skipping transfers is appropriate.[92]

In contrast, if the goal behind the tax has something to do with how many people enjoy the wealth in question, then the number of transfers does matter. Alstott recognizes this in her discussion of generation-skipping and equality of opportunity.[93] As she notes, if the tax's goal is to minimize the advantages recipients of wealth have in achieving their plans for the good life, then what matters is how many different people receive that advantage from the wealth.[94] Along those lines, if the goal of the tax is minimizing the *transfer* of dynastic wealth (due to the troubling implication of allowing power and influence to pass to one's heirs), then the number of transfers should matter. If a grandfather gives $50 million to his grandson but skips over his son, then he has made only one transfer of influence-yielding wealth. If the grandfather first gives $50 million to his son, who in turn leaves it to the grandson, then two people enjoy the influence that comes

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[89] *ALI Proposal*, *supra* note 5, at 460–68. Most, but not all, other accessions or inheritance tax proposals contain a generation-skipping penalty. *Compare* Batchelder, *supra* note 2, at 79–81 (suggesting generation-skipping penalties), *and* Halbach, *supra* note 44, at 214–15 (same), *with* Alstott, *supra* note 1, at 516–21 (rejecting a generation-skipping penalty), *and* Dodge, *Replacing*, *supra* note 5, at 1011, 1045–46 (same).

[90] *ALI Proposal*, *supra* note 5, at 475.

[91] *Id.*

[92] Edward Halbach's proposal contains a generation-skipping tax for similar reasons. Halbach, *supra* note 44, at 215 ("The goal [of a transfer tax] . . . is . . . to impose a like tax burden on a family whether it uses skips or passes property outright from generation to generation.").

[93] Alstott, *supra* note 1, at 517–19.

[94] *Id.*

with that accumulation of wealth and two people should be taxed. To that end, this Article's proposals eschew additional taxes on generation-skipping penalties.

D. Transfers in Trust

In addition to the generation-skipping issue, transfers in trust raise two additional considerations. Both concerns proceed from the decision by most accessions tax proposals to consider trust distributions—instead of an earlier event, like the creation or vesting of trust interests—as the accession that triggers tax.[95] The driving forces behind this decision are the administrative concerns of valuation and liquidity.[96] Although some trust interests can be sold or borrowed against, many cannot, which would make paying the tax difficult if assessed before distribution. Valuation difficulties abound beyond those normally associated with the actuarial tables. Even if a remainder is vested, valuation may be contingent if additional beneficiaries may enter the class, as they may by birth. Additionally, many interests are subject to trustee discretion (such as a remainder "to my children as the trustee determines is in their best interests"), rendering valuation essentially impossible.

The first consideration explored in subsection 1 is whether creation, vesting, or distribution is the conceptually proper moment of accession (apart from administrative concerns).[97] If creation or vesting should theoretically be deemed an accession, then treating distributions as accessions constitutes a deferral of taxation that some commentators argue have potentially troubling implications. As explored below, treating distribution as the accession is, as a theoretical matter, frequently too late. In many instances, a trust interest allows a beneficiary to wield power and influence before distribution. The second consideration, addressed in subsection 2, is the potentially higher tax burden on the beneficiary when distribution instead of some earlier point in time is treated as the accession.[98]

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[95] *See, e.g.*, *ALI Proposal*, *supra* note 5, at 509; Batchelder, *supra* note 2, at 65; Halbach, *supra* note 44, at 236; Rudick, *supra* note 5, at 169.

[96] *See ALI Proposal*, *supra* note 5, at 522–25 (discussing the difficulties created by valuation and liquidity). An additional benefit of treating distribution as the taxable accession is that provisions such as I.R.C. §§ 2036–2038 (2012) would largely be unnecessary. *See* Rudick, *supra* note 79, at 34.

[97] *See infra* notes 99–129 and accompanying text.

[98] *See infra* notes 130–132 and accompanying text.

1. Is Creation, Vesting, or Distribution the Conceptually Ideal Accession?

As a theoretical matter, whether creation, vesting, or distribution is the point at which an accession should be deemed to occur depends on the goal of the accessions tax. One could argue that if the goal of an accessions tax is to mimic a periodic wealth tax, then the theoretically natural time of taxation is upon vesting for two reasons. First, in many instances, the beneficiary does receive a valuable property right upon the vesting of a trust interest. This enhances the transferee's wealth, even if its valuation is imprecise. Second, treating vesting as the taxable event prevents the possibility that taxation of trust assets could be deferred for great lengths of time, as would be the case if distribution was treated as the taxable event. This delay, which could last generations, would undercut the point of the tax. Given the valuation and liquidity difficulties of taxing trust interests at creation, however, it seems reasonable to defer taxation until distribution (as most accessions proposals suggest).[99] To compensate the government for the loss associated with deferral due to the time value of money, many such proposals suggest imposing a special tax on large trusts upon creation.[100] The tax basically works as pre-payment; credits are allowed against later distributions from the trust.[101]

In contrast, an accessions tax designed to further equality-of-opportunity principles by reflecting the choice-versus-chance distinction would not necessarily treat the creation of trust interests as the theoretical point of accession.[102] Here, one might initially think that trust beneficiaries should be taxed when trust interests enable them to alter their life plans. Alstott, however, argues that a blanket rule treating trust creation as the time of accession inaccurately reflects the choice-versus-chance distinction.[103] In her view, if the beneficiary lacks control over the disposition or investment of assets, then the ultimate amount distributed to the beneficiary is as much a matter of luck (from the transferee's perspective) as the amount funded at creation. It would therefore be better to theoretically tax such interests at distribution, but tax other interests at the point when the beneficiary "has the capacity to make a choice about the disposition or investment of her

[99] *See ALI Proposal*, *supra* note 5, at 522–25.

[100] These proposals do not view this deferral as problematic in the case of small trusts, since the deferral is offset by the bracket creep discussed *infra* notes 130–132. On the whole, these theorists argue, the government ends up in roughly the same position either way. *See ALI Proposal*, *supra* note 5, at 512–13. Deferral benefits the government if the corpus outperforms the prevailing interest rate at creation or if the life beneficiary dies earlier than the tables predict; it hurts the government if the life beneficiary lives longer than predicted or if the trust assets underperform. *See id.*

[101] *ALI Proposal*, *supra* note 5, at 545.

[102] *See* Alstott, *supra* note 1, at 533–36.

[103] *Id.* at 535–36.

deferred interest."[104] This reflects the notion that what the beneficiary initially receives is a matter of luck, but that the later performance of the trust assets stems from the beneficiary's choices with respect to those assets.[105]

When should a trust interest be considered an accession in an accessions tax whose concern is the transfer of large wealth concentrations and their accompanying influence and power? In theory, an accessions tax so designed would treat the point at which the trust interest enhances the holder's influence and power as the appropriate time for taxation. In some cases, this is when the beneficiary obtains ownership of the interest. In other cases, the beneficiary may have something that is not yet tantamount to ownership but nevertheless gives him or her power and influence. This, of course, will turn on the terms of the trust. Various alternatives are discussed below.

a. Vested Income Interests

Practicalities aside, in most instances, the creation of a trust interest should be considered the accession that enhances the transferee's power and influence. Consider *Iris*, who is the income beneficiary for life of a $10 million trust.[106] Although *Iris* does not receive $10 million outright, she does receive a steady, annual income stream. Assuming a five percent interest rate, each year *Iris* can expect $500,000. Politicians, charities, businesses seeking funding, and others would quite likely begin courting her at the trust's creation, hoping to obtain some of her largesse as she receives distributions. Because the courting would likely begin immediately, as a theoretical matter, the vesting of her income interest should be considered the time of accession.

That said, taxing the value of *Iris*'s income interest at vesting presents potential liquidity concerns.[107] To that end, it seems reasonable to offer *Iris* a choice: she can pay tax now, or treat each distribution as an accession, with interest added to reflect the deferral.[108] If *Iris* defers, she faces another choice. Due to the progressive rate tables, a higher rate of tax may be imposed on later distributions solely because of their growth from the time value of money. The ALI proposal suggested that income beneficiaries be

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[104] *Id.*

[105] *See id*.

[106] This analysis applies whether *Iris* receives all the income, or income from an ascertainable standard such as her health, education, maintenance, and support.

[107] Valuation concerns—in the case of non-discretionary interests such as *Iris*'s—can be overcome by the use of the valuation tables.

[108] If a beneficiary who chooses deferral sells his or her interest, the sale should be treated as a taxable accession. *See ALI Proposal*, *supra* note 5, at 529; Halbach, *supra* note 44, at 236; Rudick, *supra* note 79, at 39. In contrast, if a beneficiary disclaims or assigns her interest before receiving a distribution, he or she should not be treated as having had an accession. *See* Halbach, *supra* note 44, at 236.

allowed to elect a single rate of tax, based on the actuarial value of their interest, at the time of vesting that would apply throughout the trust.[109] That option seems reasonable here.

b. Vested Remainder Interests

Vested remainder interests are somewhat similar, in that *Iris* is likely going to be courted by those seeking her favor long before she actually receives the trust corpus. In theory, the point at which such courting begins should be considered the taxable event, for that is when she can start to exert her power and influence. One cannot know, of course, how long before distribution of the corpus that courting will begin. If the lead interest is a life estate, and the measuring life is still fairly young, it could be decades before *Iris* receives anything. It seems unlikely a charity or politician would court her now in the hopes of receiving donations from her twenty or thirty years hence. But those seeking handouts from *Iris* will likely begin vying for her attention a few years before she expects to receive the trust assets; wooing large donors takes time.

This presents a dilemma. It seems premature to treat trust creation as the time of accession for remainder interests when the courting likely will not start until a few years before distribution. On the other hand, waiting until distributions seems too late. Perhaps one approach would be to pick a date a few years before distribution—perhaps three, perhaps five—and peg that as the time of accession. Tax due could be calculated but deferred, with interest, until distribution due to liquidity concerns.[110]

This default rule should not apply, however, if a beneficiary monetizes a vested yet undistributed interest. Although unlikely, imagine that *Iris* can borrow against or sell her vested remainder interest that pays out in ten years. If she does so, she can now use those assets to exercise power and influence. To that end, monetization of an interest should also be deemed a distribution.[111]

The fungibility of money should also be briefly considered. Knowing that one will receive regular future trust distributions might free one up to make more political expenditures in a given year than otherwise. Continue to assume that *Iris* holds a remainder interest due in Year Ten. Might she decide to make more political contributions in Years One or Two in anticipation of that remainder? Possibly. That said, she must still finance both her

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[109] *ALI Proposal*, *supra* note 5, at 494–501.
[110] Of course, *Iris* could always elect to pay tax at the imputed vesting date.
[111] *See ALI Proposal*, *supra* note 5, at 529.

political expenditures and her daily expenses out of her current assets.[112] Unless she can somehow monetize the trust remainder in the present, the remainder is not freeing up current funds for political expenditures.[113]

c. Discretionary Interests

Determining the proper treatment when *Iris* is simply one of a number of discretionary beneficiaries is more difficult.[114] Imagine that *Iris*'s grandfather creates a trust with income to be distributed among *Iris*'s father and his children as the trustee determines. The remainder is then to be paid to *Iris* and her siblings at her father's death as the trustee directs. On one hand, this expectancy likely gives *Iris* some influence. One can imagine, for example, *Iris* holding court with those hoping to obtain contributions from her if and when she does receive trust distributions. On the other hand, this influence is much more indirect than when *Iris* is guaranteed trust distributions. Further, the value of a discretionary trust interest is impossible to calculate.

For these reasons, *Iris* should not be taxed until she actually receives a distribution. This is not a theoretically perfect rule. Assume, for example, that the trustee splits the income up equally between the trust beneficiaries each year. In that case, *Iris* likely has more clout than if the trustee only distributes income to her sporadically. But crafting a rule that attempts to pinpoint when past practice becomes more than an expectancy on *Iris*'s part is essentially impossible. Moreover, given the liquidity relief suggested for those who receive vested income interests, the timing of tax with respect to discretionary interests will be somewhat close to that imposed upon vested interests.

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[112] This assumes, of course, that she either cannot borrow against her vested remainder interest or can borrow only small amounts. If a beneficiary does somehow monetize a trust interest, for example by selling it or borrowing against it, the act of monetization should be deemed an accession.

[113] It is possible that *Iris* might decide to save less for the future knowing that she will come into the remainder. Given the riskiness of this decision (due to the multitude of variables that will affect the remainder's value at payout), it is unclear how many people will make extremely large changes in their spending habits. Perhaps *Iris* would make only minimal political expenditures in the absence of a trust. How realistic is it to think that upon learning she is the remainder beneficiary of a trust *Iris* suddenly makes enormous political expenditures of the type usually made only by the very wealthy?

[114] This analysis assumes that *Iris* is neither trustee nor has another means of directing distributions to herself, such as a power of appointment. This Article proposes retaining the existing rules governing when trustee powers should be imputed to others. *See, e.g.*, Treas. Reg. § 20.2036-1 (2015) (including in a decedent's estate transfers in which the decedent has retained either an income interest or the ability to determine who shall enjoy the income from the transferred property); *id.* § 20.2038-1 (2015) (similarly including revocable transfers); *id.* § 20.2041-1 (2015) (addressing the inclusion of powers of appointment); *id.* § 20.2041-3 (2015) (same).

d. Beneficiaries Are Trustees

The foregoing has assumed that beneficiaries are not trustees. If a beneficiary is also trustee, does that change the analysis? It does not, if the trustee's discretion is limited to basic administrative powers. Imagine, for example, that a trust provides that income be distributed to *Jack* for ten years, with remainder being paid to *Iris*. If *Iris* is trustee, she is largely just carrying out the trustor's wishes. True, she could somewhat influence how much each beneficiary receives by investing in assets that produce either more or less income, but even that ability is limited by fiduciary duties. She may also wield some influence in the business world by deciding where to invest,[115] but again, fiduciary duties limit that ability.[116] These types of trustee powers have never been considered enough to impute ownership; a grantor's retention of such powers is not enough to run afoul of the string provisions, for example.[117] Nor do such administrative powers, standing alone, constitute a general power of appointment.[118] The power and influence *Iris* has with respect to the trust stems largely from the fact that she will receive the remainder, not from her ability to manage the assets.

Moving on from basic administrative powers, next consider a situation in which *Iris* has more discretion, but still cannot directly exercise that discretion to benefit herself. Assume that the trust provides that all income be paid to *Jack* or *Katherine* in such proportions as the trustee determines, with the remainder being paid to *Iris*. *Iris* remains trustee. Here, *Iris* now has some control over *Jack* and *Katherine*, who may be inclined to do her bidding in order to receive a larger income distribution. Even so, this should not be enough to constitute an accession by *Iris* for two reasons. First, she has not acceded to a beneficial interest in the income; her beneficial interest is in the remainder. Second, her power to choose between *Jack* and *Katherine* only gives her internal power—not external power in the sense of influence over economic and political affairs. It is the latter with which this Article is concerned.[119]

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[115] Perhaps, for example, by deciding whether to invest in *Startup A* or *Startup B*.

[116] See *infra* notes 122–129 and accompanying text for a discussion of the unique circumstances in which investment power does generate enough economic power to count as an accession.

[117] Of course, if a grantor retains an income interest in a trust, he or she runs afoul of § 2036. *See* I.R.C. § 2036 (2012) (including in a decedent's gross estate the full value of trusts in which the decedent has retained an income interest). But in that case, it is the income interest and not the trustee powers that trigger taxation. *See id.*

[118] *See* Treas. Reg. § 20.2041-1 (stating that mere power of management or investment, constrained by standard fiduciary duties, is generally not a power of appointment).

[119] When *Jack* and *Katherine* receive the assets, however, that should be considered accessions to them from the creator of the power.

e. Powers of Appointment

Consider what happens if *Iris* has a power of appointment over the trust assets. First assume that *Iris* can invade the trust for her health, education, maintenance, and support ("HEMS"). Given *Iris*'s enforceable interest, this should theoretically be treated the same as when *Iris* has a vested income interest in the trust. The distinguishing factor, however, is valuation. Valuing what portion of the trust is needed for her HEMS, especially at the trust's outset, is extremely imprecise—much more so than the estimates generated by the valuation tables for mandatory income and remainder interests. Distributions for HEMS will have a much wider variance from initial estimates than mandatory, non-discretionary trust distributions. It seems unfair to tax *Iris* on an amount that could be so much more than what she may ultimately receive.[120] Thus, for valuation reasons, HEMS interests should be taxed at distribution.

Alternatively, assume *Iris* has a general power of appointment, meaning that *Iris* has the discretionary ability to invade the trust assets for herself. In this situation, what *Iris* has is tantamount to ownership over the assets and she can immediately use them for whatever purpose she wishes. Her immediate access gives *Iris* power and influence outside the trust. To that end, this proposal follows most others in treating receipt of a general power of appointment as an accession.[121]

A trickier case is when a beneficiary has a non-general power of appointment that is not limited in scope. Imagine that *Iris* has the ability to invade the corpus for the benefit of anyone other than herself, her estate, her creditors, or the creditors of her estate. Here, *Iris* cannot technically use the assets for her own benefit. Nevertheless, her ability to decide who else will benefit from the assets likely gives her substantial power and influence; imagine entrepreneurs seeking funds for their start-ups or fundraisers seeking donations for § 501(c)(4) organizations. An argument could therefore be made that these types of non-general powers should be considered accessions if used to direct assets outside the immediate family unit.

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[120] To be sure, the actuarial tables used for valuing non-discretionary income and remainder interests are estimates. The amount actually paid out to a beneficiary will never precisely match the estimated value of an income interest at accession, due to investment risk, market conditions, and changing rates of return.

[121] *See, e.g.*, *ALI Proposal*, *supra* note 5, at 534; Halbach, *supra* note 44, at 237; Rudick, *supra* note 79, at 39 (noting that if a donee is given the "unrestricted power to invade principal . . . [t]he statute could and should provide that such a transfer be treated the same as an outright transfer"). *But see* Dodge, *Replacing*, *supra* note 5, at 1043 (arguing that receipt of a power of appointment should not count as an accession). Harry Rudick limits this to income beneficiaries who can invade corpus for themselves. *See* Rudick, *supra* note 79, at 42. This author does not see why this rule should apply only when income beneficiaries have this ability.

f. Extraordinary Control and the Special Estate Tax

As discussed above, the proper time to impute an accession varies according to the terms of the trust. When creation is the theoretical point of accession, as is the case for a vested income interest, the amount of control a beneficiary has over the trust assets is irrelevant. The beneficial interest itself is enough to trigger an accession. But if the beneficial interest, standing alone, suggests that a later point is the proper time at which to impose a tax, then it matters whether a beneficiary has additional control over the trust assets. This is so because some types of additional control bestow power and influence upon the trust beneficiary, suggesting that the time when an accession theoretically occurs is earlier than that triggered solely by the beneficial interest.

In those situations, this Article suggests that a special estate tax could be imposed whenever assets are transferred to a trust and the trust beneficiaries are somehow able to exercise substantial influence over those assets. The special tax would apply even if the rules discussed above would not impute an accession until a later point.[122] This tax would later be credited against tax due upon an accession determined by the above rules.[123]

A beneficiary can accede to this type of control over trust assets in two situations. The first occurs when a beneficiary is a trustee and by reason of that position can vote more than 10% of the stock of any given corporation.[124] Both stock owned by the trust and by the beneficiary in his or her individual capacity would count toward the 10% limit. Imagine that *Iris* is trustee of a trust that owns 20% of *X Corp.*; *Iris* owns an additional 5% in her individual capacity. *Iris* now controls a block of *X Corp.* that most scholars believe is large enough for her to influence its affairs.[125] Given that

[122] This Article borrows the idea of a special estate tax from the 1969 ALI proposal, which suggested a special estate tax for very large trusts, in order to combat what it viewed as problematic deferral. *ALI Proposal*, *supra* note 5, at 544–45 (proposing a special tax for trusts larger than $100,000); *see also* Halbach, *supra* note 44, at 217 (proposing a special tax on large estates similar to that of the ALI proposal).

[123] Fleshing out the details of this special estate tax is beyond the scope of this short Article. For a detailed overview of another proposal for a special estate tax on certain transfers to trust, see *ALI Proposal*, *supra* note 5, at 544–57. For administrative critiques of the ALI's proposed special tax, see Dodge, *Replacing*, *supra* note 5, at 1041–42.

[124] Ten percent is chosen as the triggering proportion based on the 1940 Act regulating mutual funds. *See generally* Investment Companies Act of 1940, Pub. L. No. 76-768, 54 Stat. 789 (codified at 15 U.S.C. §§ 80a-1 to 80-64 (2012)) (creating definitions for what constitutes an investment company).

[125] It is commonly accepted corporate law wisdom that a block of over 25% can control a large publicly-held company due to the dispersion of the other shareholders. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 80–84 (1932); AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS 14–15 (1994).

combination of control and beneficial interest, the special estate tax should be imposed whenever a beneficiary who is also a trustee can vote more than 10% of the shares of any company. This rule should apply whether or not the beneficiary is an employee of the company in question, and whether or not the corporate assets in question are privately or publicly held.

The second situation occurs when the trust beneficiary has some control over trust assets due to reasons external to the trust itself. Business entities illustrate one instance in which this arises. Consider *Lola*, who owns 100% of *L Corp*. Before her death *Lola* serves as *L Corp.*'s CEO; her two children, *Max* and *Nina*, also work there. If *Lola* leaves *L Corp.* to her children outright, then *Max* and *Nina* will have taxable accessions upon receipt of their stock shares. Imagine that *Lola* instead establishes a trust, names *Max* and *Nina* the beneficiaries, and transfers her shares of *L Corp.* stock to the trust. Under the general rule outlined above, whether *Max* and *Nina* have a taxable accession upon creation would normally depend on the terms of the trust. But in this instance, regardless of the terms of the trust, *Max* and *Nina* do have some control over the assets even though they are held in trust. This control comes from their employment in the company. Again, it seems that some tax is appropriate upon creation because *Lola* has transferred assets to her children that they can control, even if the transfer to the children was of trust interests.

Thus, the special estate tax should be triggered whenever a trust beneficiary is a disqualified person with respect to trust assets, borrowing from the § 4958 rules.[126] Those rules define disqualified persons as those who are in a position to exercise substantial influence over the affairs of an organization, such as directors, executives, and other individuals who have authority over large portions of an organization's budget.[127] Imagine that *Max* is the CFO of *L Corp*. and also a beneficiary of a trust holding *L. Corp*. stock. In that instance, *Max* benefits from the stock, due to his interest in the trust, and also has some control over that stock, due to his position in *L. Corp*. The creation of the trust, therefore, is the point in time at which *Max* accedes to both a beneficial interest in and control over the *L. Corp.* stock. This rule should apply whether or not the beneficiary in question is a trustee of the trust, because the control in this instance proceeds from *Max*'s direct

[126] *See* I.R.C. § 4958 (2012) (applying a special tax to excess benefit transactions).

[127] *See id.* § 4958(f)(1)(A); Treas. Reg. § 53.4958-3(c) (2015). In contrast to the § 4958 rules, however, this Article's proposal would not deem someone to be a disqualified person simply due to their familial relationship to a disqualified person. *See* I.R.C. § 4958(f)(1)(B); Treas. Reg. § 53.4958-3(b).

relationship to *L. Corp*. and not from any direct control over the trust itself.[128]

Of course, many arrangements that may trigger the special estate tax will likely involve family farms and businesses. Special provisions to alleviate potential liquidity issues for family farms and businesses—whether caused by the special estate tax or the regular application of the accessions tax—are addressed below in section F.[129]

2. Bracket Creep

The choice at times to treat a point other than creation as the time of accession presents a further issue, one that involves the interaction of the passage of time, the time value of money, and graduated rate schedules. Imagine that in Year 1, *Olive* receives a ten-year vested remainder interest in a trust with a corpus of $613,913 that accumulates income instead of paying it out. Assuming a 5% growth rate, *Olive* will receive $1 million in Year 10. Applying a constant 50% tax rate, *Olive* should be indifferent between paying tax of $306,956.50 in Year 1 or $500,000 in Year 10. But given the fact of increasing marginal rates, *Olive* is not indifferent. If accessions over $750,000 are taxed at 60%, then *Olive* pays $525,000 upon distribution, an increase of $25,000 simply due to bracket creep.[130]

To mitigate this effect, most accessions tax proposals allow certain trust beneficiaries to treat creation of their interest as a taxable accession. The ALI proposal, for example, would allow income beneficiaries to determine the tax due on the present value of the interest received, determine what rate of tax that represents, and then apply that flat rate to all future trust distributions.[131] Moreover, for purposes of determining the rate applicable to later accessions from other sources, the present value of the income interest upon receipt would be treated as the amount of the accession. The ALI proposal also suggests as an alternative allowing income beneficiaries

[128] Although this illustration uses a privately held company, this rule should apply in the case of publicly held companies as well.

[129] *See infra* notes 143–146 and accompanying text.

[130] For further explication of this problem, see *ALI Proposal*, *supra* note 5, at 494–500; Halbach, *supra* note 44, at 250–52.

[131] *ALI Proposal*, supra note 5, 494–500; *see also* Halbach, *supra* note 79, at 253 (proposing to allow beneficiaries to make an election to pay tax upon creation of a trust interest). *But see* Rudick, *supra* note 79, at 37–38 (proposing to apportion tax over the expected years of an income beneficiary's life). Interestingly, Rudick later suggested that income beneficiaries be taxed at the rate that would have been applicable had they been left the full trust corpus outright. *See* Rudick, *supra* note 5, at 169. This results in a higher tax burden on the income beneficiary than under the first alternative. *Id*. at 172–73.

to elect to prepay the tax at any time.[132] This seems sensible, and this Article proposes the same elections.

E. Transfers to Charity

In keeping with the motivation behind this Article's proposal—the transfer of power and influence—this accessions tax proposal does not automatically exempt transfers to charity from taxation.[133] This contrasts with most past accessions tax proposals, which either do not discuss charitable transfers or do so only to note that transfers from charities to individuals should not be treated as accessions.[134] Instead, this Article argues that a tax similar to the special estate tax discussed above should be levied on transfers to charities controlled by a member of the transferor's family, regardless of whether those charities are public charities or private foundations.[135]

Such a tax is appropriate because—as has been more fully explored elsewhere—control of a charity enables one to exert both political and economic influence.[136] First, transfers to family controlled charities can give the family power over the fates of others through the family's charitable work. Consider a family foundation. Decisions by a foundation about which grants to fund affect the operations of grant applicants, which in turn affect those individuals served by grant applicants. A decision to fund research on AIDS instead of diabetes, for example, may affect the health of those suffering from diabetes. Funding decisions about early childhood education, job training, and basic needs services like soup kitchens and homeless shelters directly impact the individuals served by charities requesting grants. Similar effects are felt when public charities make decisions about the level and quality of services to provide.[137] In addition, transfers to family-controlled

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[132] *ALI Proposal*, *supra* note 5, at 500. In both cases, the actuarial value of the income interest used to determine tax due would be treated as the amount of the accession for purposes of determining tax due on any later, separate accessions. *Id.* at 494.

[133] For discussions of the charitable tax subsidies generally, see Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345 (2015); Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010).

[134] *See, e.g.*, Halbach, *supra* note 44, at 235 ("Receipts *by* charities would not be subject to the tax; and receipts by individuals *from* charities pursuant to their charitable purposes are also not accessions.").

[135] Rudick considered this possibility, suggesting that charitable transfers should remain untaxed, "except possibly in the case of transfers to private foundations." *See* Rudick, *supra* note 79, at 41. This Article proposes that family-controlled charities have their own exemptions, just as individual family members do. *See supra* notes 77–80 and accompanying text (discussing individual exemptions).

[136] *See* Fleischer, *supra* note 31, 284–91.

[137] Although rare, it is possible for a public charity to be effectively controlled by one family. *See id*. at 284–85 & n.92.

charities also give family members power over the assets held by the charity. As was discussed in the context of private trusts, this investment power can also translate into real economic power.[138] In all these scenarios family members are still making decisions that have economic repercussions outside the family due to the transferred assets.

Second, control of a charity can often yield political influence. Sometimes this influence is direct. Public charities, for example, are allowed to engage in limited amounts of lobbying. In addition, both public charities and private foundations can influence public discourse. For instance, they can engage in voter education activities and issue advocacy by conducting research studies and writing policy papers. Other times this influence is indirect. First, control of a charity can bring community prominence, which often translates into power.[139] In the past, for example, control of a charity was one of the few avenues through which women could attain power and prominence in the community.[140] Further, control of a charity also often serves as a stepping-stone to or from political office itself.[141]

For these reasons, transfers to charities controlled by a member of the transferor's family[142] should not be completely free of tax. At the same time, however, this proposal acknowledges that control of charitable assets is not quite the same as having control over assets one owns outright. To that end, this proposal suggests that the rate for the special tax should be less than the special estate tax imposed on certain transfers in trust, and charitable recipients subject to the tax should be eligible for the liquidity provisions discussed below.

F. Liquidity and Family Enterprises

Concerns about family farms and small businesses will likely continue to play a large role in any political debate over wealth transfer taxation, especially if the special estate tax is perceived to be imposed on trusts holding such entities more frequently than on other trusts. Although the large per-recipient exemption would likely completely shield from taxation enterpris-

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[138] *See supra* notes 95–129 and accompanying text.

[139] *See* Gerald E. Auten et al., *Taxes and Philanthropy Among the Wealthy, in* DOES ATLAS SHRUG? THE ECONOMIC CONSEQUENCES OF TAXING THE RICH 392–402 (Joel B. Slemrod ed., 2000) (describing the prestigious social networks that come with extensive charitable activity).

[140] TERESA JEAN ODENDAHL, CHARITY BEGINS AT HOME 100–02 (1990).

[141] Witness the Clinton Foundation. Another example is Elizabeth Dole, who headed the Red Cross after working in the Cabinet and before becoming a U.S. Senator. James A. Johnson, *Interview with Elizabeth Dole, President, American Red Cross*, 43 J. HEALTHCARE MGMT. 211, 211 (1998).

[142] This Article suggests using rules such as those found in § 4958 to determine when a charity is controlled by a member of the transferor's family. *See generally* I.R.C. § 4958 (taxing excess benefit transactions).

es that most people consider "small," the public's fear that a family business would have to be sold to pay tax would likely remain.[143] To that end, this Article borrows from Lily Batchelder's comprehensive inheritance tax plan in proposing relief for transferees whose tax liability exceeds liquid assets received plus some cushion.[144] Such recipients would be required to pay tax up to the amount of liquid assets received (plus a cushion), but could defer the remainder of tax until liquidity issues eased through sale or receipt of distributions from the business.[145] This relief should be available both to individuals facing the regular accessions tax and to trusts facing the special estate tax. Such a provision would address the specter of forced sales without favoring illiquid over liquid assets.[146]

G. Attribution and Amalgamation

Thinking about family businesses raises another question: should family members' holdings be amalgamated to determine whether the exemption level has been reached? Consider *Penelope*, who inherits $5 million. Standing alone, $5 million is not enough to really give her political power and is below any likely exemption amount. But what if *Penelope* acts in concert with her four siblings, who each also inherit $5 million? Together, their $25 million could bring with it political power. Although many siblings have divergent political and economic interests, in some cases, money is enough to encourage them to work together.[147]

The problem, however, is that without more, the specter of familial cooperation is quite speculative. For every family that decides to work together to wield political influence, there is another family where members have divergent interests. To that end, a blanket rule amalgamating family members' holdings seems ill advised.

That said, amalgamation or attribution seems warranted in the case of valuing jointly owned assets, such as active family businesses. In that scenario, the business provides an additional incentive for familial cooperation. It is plausibly more likely that *Penelope* and her siblings will act in concert when each of their $5 million bequests comprises a share of a family business than when it consists of separate assets. Moreover, such attribution

[143] A per-recipient exemption of $20 million, for example, means that the smallest-sized business that could potentially trigger tax upon its transfer is one worth $20 million—hardly the food trucks and Christmas tree farms of political yore.

[144] *See* Batchelder, *supra* note 2, at 90–93.

[145] *See id.*

[146] *Id.*

[147] Thank you to Bridget Crawford and Lee-ford Tritt for bringing this point to the author's attention.

rules would minimize the ability of taxpayers to take advantage of valuation discounts.[148]

H. Administrative Concerns

Perhaps the most common criticism of accessions tax proposals is that they will increase filing burdens compared to an estate tax.[149] This is so because an estate tax requires only one return, which is filed by the executor on behalf of the transferor. In contrast, an accessions tax requires transferees to file returns, which—assuming decedents leave their estates to more than one heir—will increase the number of people required to file some type of return. Although it is true that accessions tax proposals will require more individuals to file returns, this hurdle does not render such proposals unworkable.[150]

As an initial matter, an accessions tax return could simply accompany the income tax return.[151] This would link filing of the accessions tax return to a familiar ritual during which individuals are already accounting for the year's inflows. Although individuals would have to account for accessions received in prior years that exceeded the annual exclusion, this is not such a burden as to render an accessions tax unworkable. Most individuals receiving gifts and bequests that exceed the exclusion amount are likely already keeping careful financial records, such as their prior years' income tax returns. Computer programs such as TurboTax could easily be adapted to record such information, and there is no reason the IRS cannot also track such data and share it with taxpayers, much like the Social Security Administration mails statements to individuals who have not yet retired showing what benefits have accrued.[152] Requiring transferors and third parties—who are already used to filing transfer tax forms and sending informational schedules to taxpayers—could further enhance compliance and reduce errors.[153]

Despite the increased reporting requirements, other features of an accessions tax are less complex than the estate tax. Namely, an accessions tax reduces the advantage many transferors currently gain from engaging in a number of tax-planning techniques, including splitting married clients' es-

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[148] *See* Paul L. Caron & James R. Repetti, *Revitalizing the Estate Tax: 5 Easy Pieces*, 142 TAX NOTES 1231, 1232–35 (2014) (addressing the problem of minority discounts involving control of an entity or asset by family members).

[149] *See* Gerzog, *supra* note 62, at 174 (critiquing the comprehensive income tax proposal on administrative grounds that would also apply to an accessions tax).

[150] The experiences of other jurisdictions with accessions taxes further demonstrate its administrability.

[151] *See* Rudick, *supra* note 79, at 34, 42.

[152] *See* Dodge, *Replacing*, *supra* note 5, at 1010.

[153] *See* Batchelder, *supra* note 2, at 64–65; Dodge, *Replacing*, *supra* note 5, at 1010; Halbach, *supra* note 44, at 270; Rudick, *supra* note 79, at 42–43.

tates into marital and bypass portions[154] and using charitable trusts and grantor retained annuity trusts to engage in valuation games.[155] Valuation concerns are reduced greatly, as are the importance of provisions such as §§ 2036–2038 of the Internal Revenue Code.[156]

CONCLUSION

Theorists and policymakers frequently invoke the goal of minimizing dynastic wealth transfers when justifying the estate and gift taxes. This Article interprets that aim as an objection to hereditable economic and political power, and mines that concern for insights into the ideal transfer tax system. This analysis shows that a transfer tax system designed to fight the transfer of wealth great enough to bestow political and economic power upon the recipient has little in common with the current structure for taxing wealth taxes. Instead of our current, transferor-focused estate tax, the former would be a progressive, transferee-focused accessions tax with an extremely large per-recipient exemption. It would not penalize generation-skipping transfers, but would tax, at a lower rate, transfers to family foundations and other charitable organizations controlled by the donor's family.

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[154] Despite portability, many wealthy couples still engage in traditional marital planning because the generation-skipping transfer tax exemption is not portable.

[155] *See* Batchelder, *supra* note 2, at 74–76; Halbach, *supra* note 44, at 221–22.

[156] *See* I.R.C. §§ 2036–2038 (2012) (creating rules related to transfers with retained life estates, transfers taking effect at death, and revocable transfers).