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ARTICLES  
EQUAL OPPORTUNITY AND INHERITANCE TAXATION

*Anne L. Alstott*

TABLE OF CONTENTS

I. INTRODUCTION.....	470
II. EQUALITY OF OPPORTUNITY AND EQUALITY OF RESOURCES.....	476
III. CONCEPTUALIZING AN EQUAL OPPORTUNITY INHERITANCE TAX.....	485
<i>A. Equal Inheritance and “Leveling Up”.....</i>	<i>489</i>
<i>B. The Economic Consequences of Equal Inheritance.....</i>	<i>496</i>
IV. DESIGNING AN EQUAL OPPORTUNITY INHERITANCE TAX.....	501
<i>A. Relatives and Strangers.....</i>	<i>507</i>
<i>B. No Penalty on Generation-Skipping.....</i>	<i>516</i>
<i>C. Timing.....</i>	<i>521</i>
1. Inheritance and the Life Cycle.....	523
2. Taxing Contingencies and Expectations.....	532
V. CONCLUSION.....	542

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## EQUAL OPPORTUNITY AND INHERITANCE TAXATION

Anne L. Alstott\*

*Equality of opportunity is understood to be one of the bedrock principles supporting the taxation of inheritance. The familiar idea is that inherited wealth offers an unjustified head start for some individuals at the expense of others. In political theory, this principle is closely identified with the branch of liberalism known as resource equality. But the resource equality ideal has not been fully translated into the legal literature. The major legal writings on inheritance taxation use the term “equal opportunity” quite generally and often blend equal opportunity with goals that are distinct, like wealth equalization.*

*This Article revisits the topic of inheritance taxation to see whether a single-minded focus on equality of opportunity, interpreted as resource equality, can shed new light on questions of legal design. I conclude that the present estate tax and major proposals for inheritance taxation only weakly track the equal opportunity principle. A system of inheritance aimed at equality of opportunity would look radically different from current law and from classic proposals for reform. It is an open question whether an inheritance tax structured along these lines could be made politically attractive, and in this Article, I do not attempt that task. Instead, my aim is to show the surprising gap between both current law and major reform proposals, on the one hand, and equal opportunity, rigorously interpreted, on the other.*

*I draw out four implications of equal opportunity for the design of inheritance taxation. First, the equal opportunity principle supports inheritance taxation in combination with a social inheritance, meaning a government expenditure program that would pay a universal, public inheritance. Second, in an equal opportunity regime, gifts and inheritance received from close relatives would be taxed, while those received from peers, spouses, friends, and strangers would be exempt. This counterintuitive rule would reverse the standard result, which is to tax inheritance from parents, children, and other close relatives at rates equal to or lower than those at which inheritance from others is taxed. Third, the equal opportunity view implies no penalty on so-called “generation-skipping transfers,” which occur when a grandparent leaves her wealth to her grandchildren rather than to her children. Fourth and finally, equal opportunity suggests higher rates of taxation on gifts and bequests received by younger individuals than on those received by older individuals.*

### I. INTRODUCTION

Equality of opportunity is widely understood as one of the bedrock principles supporting the taxation of inheritance. The familiar idea is that every individual should begin life with a fair and equal

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\* Jacquin D. Bierman Professor of Taxation, Yale Law School. Thanks to Bruce Ackerman, Lily Batchelder, Michael Graetz, John Langbein, Miranda Perry, Reed Shuldiner, Mark Stein, Larry Zelenak, and participants in the October 13, 2006, Harvard Law School Workshop on Current Research in Taxation and the November 5, 2007, Harvard Law School Faculty Workshop for helpful comments.

share of society's resources and that inherited wealth offers an unjustified advantage for some over others.<sup>1</sup> In political theory, this ideal is closely identified with the branch of liberalism known as resource equality. Resource egalitarians tend to emphasize ex ante equality in the distribution of wealth (and other resources). In contrast, they do not necessarily condemn inequality in wealth (or other resources) arising from individuals' differential earning power or investment skill.<sup>2</sup>

But the resource equality ideal has not been fully translated into the legal literature. The classics of the legal literature use the term "equal opportunity" quite generally and often blend equal opportunity with principles that are distinct. For example, the Meade Committee's 1978 report on tax reform in the United Kingdom adopts three goals: taxing wealth, promoting a more equal distribution of wealth, and distinguishing inherited wealth from earned wealth.<sup>3</sup> The last of the three goals seems to imply some notion of equal opportunity, since inherited wealth is the focus of equalization efforts. But the first two goals stated by the Meade Committee stand in tension with resource equality, which endorses equal starting points and not the equalization of wealth thereafter. The Meade Committee report does not develop any of the three ideals in detail and focuses instead on elaborating legal rules.<sup>4</sup> William Andrews's *Reporter's Study of the Accessions Tax Proposal (Reporter's Study)*, published in 1969 by the American Law Institute (ALI), interprets the tax as a periodic capital levy and as a curb on the accumulation of dynastic wealth by families.<sup>5</sup> We shall see that both goals stand in tension with the ex ante focus and individualism of the resource equality ideal. Michael Graetz's defense of the es-

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<sup>1</sup> See, e.g., BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 201-07 (1980); JOHN RAWLS, *A THEORY OF JUSTICE* 277-78 (1971); PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL* 100-02 (1995).

<sup>2</sup> Some writers in this tradition describe their ideal as "equality of opportunity," though others do not. Compare BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 1-4 (1999) (identifying resource egalitarianism with equal opportunity), with RONALD DWORKIN, *SOVEREIGN VIRTUE* 86-92 (2000) (equating "equality of opportunity" with libertarianism, and rejecting it).

<sup>3</sup> See INSTITUTE FOR FISCAL STUDIES, *THE STRUCTURE AND REFORM OF DIRECT TAXATION* 317-18 (1978) [hereinafter MEADE COMMITTEE REPORT].

<sup>4</sup> See *id.*

<sup>5</sup> See William D. Andrews, *Reporter's Study of the Accessions Tax Proposal* § A2, in AM. LAW INST., *FEDERAL ESTATE AND GIFT TAXATION* 446, 475-76 (1969) (describing an accessions tax as a "periodic capital levy"); *id.* § A61, at 546-47 (explaining that taxing large transfers in trust on an ex ante basis is important to curb dynastic wealth and prevent deferral). Harry Rudick recommends an accessions tax because it would combat the concentration of wealth and promote equal opportunity. See Harry J. Rudick, *What Alternative to the Estate and Gift Taxes?*, 38 CAL. L. REV. 150, 167-68 (1950). His analysis does not specify the nature of equal opportunity beyond terming it "one of the cornerstones of democracy." *Id.* at 158-59. For a largely technical examination of accessions taxation, see Edward C. Halbach, Jr., *An Accessions Tax*, 23 REAL PROP. PROB. & TR. J. 211 (1988).

tate tax rests on the ground that wealth transfer taxation can enhance progressivity in the distribution of the federal tax burden; Graetz's focus, too, is on ex post equalization of income and wealth.<sup>6</sup>

This Article revisits the topic of inheritance taxation to see whether a single-minded focus on equality of opportunity, interpreted as resource equality, can shed new light on questions of legal design. I conclude that an inheritance tax regime grounded in equal opportunity would look radically different from both current law and major proposals for reform in four important respects.

First, in an equal opportunity regime, inheritance taxation would be combined with a social inheritance, meaning a government expenditure program that would pay a universal, public inheritance. Resource egalitarians have debated the proper form for the social inheritance: should it be a lump sum, a lifetime annuity, or a transfer in kind? But whatever the form chosen, the social inheritance constitutes the core of a resource equality regime of inheritance, because taxation standing alone cannot fulfill the promise of ex ante material equality. The rationale for a public inheritance has been established elsewhere, including in my earlier work.<sup>7</sup> Here, I revisit the idea of a public inheritance to show that resource equality requires not only "leveling down" through inheritance taxation to reduce private inheritance but also "leveling up" through a public inheritance that helps give every individual the financial means to start adult life from a position of equality. Conventional discussions of inheritance taxation, by contrast, typically consider only leveling down.<sup>8</sup>

Second, an inheritance tax designed to implement equality of opportunity would tax gifts and inheritance received from close relatives but would exempt those received from peers, spouses, friends, and strangers. This counterintuitive rule reverses the standard result, found in many inheritance tax proposals and in state and foreign inheritance taxes, which tax inheritance from parents and other close relatives at lower rates than inheritance from others. The reversal reflects the distinction, central to resource equality, between choice and

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<sup>6</sup> See Michael J. Graetz, *To Praise the Estate Tax, Not To Bury It*, 93 YALE L.J. 259, 271–73 (1983). For a recent article that examines equal opportunity along with other policy goals, see Joseph M. 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 (2003).

<sup>7</sup> See ACKERMAN & ALSTOTT, *THE STAKEHOLDER SOCIETY*, *supra* note 2, at 4–17. For a discussion of alternative approaches to social inheritance, see the essays in BRUCE ACKERMAN, ANNE ALSTOTT & PHILIPPE VAN PARIJS, *REDESIGNING DISTRIBUTION* (Erik Olin Wright ed., 2006).

<sup>8</sup> For instance, the Meade Committee's report, Andrews's *Reporter's Study*, and Graetz's article discuss inheritance taxation as a means for reducing wealth, dynastic power, or inequality at the top. See MEADE COMMITTEE REPORT, *supra* note 3, at 317; Andrews, *supra* note 5, § A61, at 546–57; Graetz, *supra* note 6, at 271–73. This focus is not a shortcoming but rather a reflection of these authors' normative focus.

chance. An equal opportunity inheritance tax would distinguish between inheritance reflecting arbitrary luck (the wealth of the family into which one is born or by which one is adopted) and one's own choices (the attributes of one's spouse and friends). The choice-chance distinction is rarely clear cut, as we shall see, but it forms a core principle for an equal opportunity approach to inheritance.

Third, the equal opportunity view implies no penalty on so-called "generation-skipping transfers," which occur when a grandparent leaves her wealth to her grandchildren rather than to her children. Equal opportunity implies taxation of all inheritance from relatives at the same rate — whether the money is received from one's grandparents or one's parents. We shall see that there are forceful arguments against generation-skipping transfers, but that those arguments reflect a different aim. The goal driving such arguments is not to achieve equal opportunity for every individual but rather to impose a periodic tax on wealth that remains within a family group.

Fourth, an inheritance tax based on equal opportunity principles would tax gifts and bequests received by younger individuals at higher rates than those received by older individuals. This conclusion, too, is counterintuitive and at odds with the terms of present law and most proposals for reform. The implication follows from the decline of opportunity over an individual's (adult) life cycle: to reflect the impact of inheritance on each individual's opportunity set, the tax ought to be higher on younger recipients (who have greater opportunities to use money to transform their lives) than on older ones (whose life patterns tend to be less malleable).

The aims of this Article are intellectual rather than political. My goal here is simply to draw out the implications of equal opportunity for inheritance taxation.<sup>9</sup> Although some of the innovations discussed here may be politically attractive, others are not. For example, the public inheritance idea has gained some political traction via Britain's Child Trust Fund,<sup>10</sup> a program recently endorsed by some high-

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<sup>9</sup> I have elsewhere attempted to translate resource equality principles into practical political proposals. See ACKERMAN & ALSTOTT, *THE STAKEHOLDER SOCIETY*, *supra* note 2; ANNE L. ALSTOTT, *NO EXIT* (2004).

<sup>10</sup> The Child Trust Fund provides government grants of £250 at birth to every British child; poorer children receive an additional £250 for a total of £500. The government adds an additional £250–£500 on the child's seventh birthday, and the money compounds, with investment earnings, until the child is 18, when the money is hers, free and clear. See Key Facts About the Child Trust Fund, <http://www.childtrustfund.gov.uk/templates/Page.aspx?id=11177> (last visited Nov. 10, 2007). For linkage to resource equality ideals (and to *The Stakeholder Society* in particular), see Samuel Brittan, *In Praise of Brown's Trust Fund: The Government's Proposals for Asset-Based Welfare Mark a Useful Step Towards Capitalism with a Human Face*, *FIN. TIMES* (London), May 24, 2001, at 21; and David S. Broder, *Tony Blair's Eye-Catchers*, *WASH. POST*, May 2, 2001, at A21.

ranking politicians in the United States.<sup>11</sup> But spending programs are usually more popular than taxes, even when taxes are redistributive, as inheritance taxes are.<sup>12</sup> And some of the implications of equal opportunity — particularly the high taxation of bequests from relatives and the lower rates on older heirs — will probably strike the ordinary person (and the ordinary politician) as odd. It may be that a concerted campaign of equal opportunity education could alter public perceptions, but real-world legislation is always a hodgepodge of ideals only dimly realized. Even the Child Trust Fund, which was explicitly linked to equal opportunity principles, also contains provisions that serve competing ends, such as tax incentives encouraging private gifts from parents to children.<sup>13</sup>

While bracketing political practicalities, this Article aims to improve understanding of the law and its motivations in two ways. First, the analysis here draws out in some detail the institutional conclusions that follow from the equal opportunity principle. A more precise conception helps illuminate tensions within existing law that arise from competing ideals of equality. For instance, running throughout the analysis is the contrast between *ex ante* equality of resources and *ex post* equality of wealth. We shall see that equality of opportunity and equality of wealth represent quite different goals with different legal implications. Seemingly technical questions related to the form of the tax, exemptions, rates, and timing turn out to be bound up intricately with the normative principles at stake.

Second, this Article advances the larger intellectual project of linking political theory principles with the law. In taxation, utilitarianism by way of law and economics has dominated normative legal analysis in the last generation.<sup>14</sup> The contribution of the utilitarians has been intellectual rigor: they reject legal formalism and *ad hoc* norms and

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<sup>11</sup> See, e.g., Dan Balz, *Democrats' Plan Focuses on Middle Class: Sen. Clinton Presents Domestic Agenda Featuring Tax Breaks and Tuition Help*, WASH. POST, July 25, 2006, at A3 (noting Senator Hillary Clinton's endorsement of the idea of "baby bonds").

<sup>12</sup> See generally MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS* (2005) (detailing the politics of estate tax repeal).

<sup>13</sup> The Child Trust Fund's website invokes equal opportunity in explaining the program's purpose: "These savings will build into an asset that children can use as young adults to help them make the most of the opportunities ahead. All eligible children reaching 18 will have some money behind them at the start of their adult lives." Introduction to Contributing to an Account, <http://www.childtrustfund.gov.uk/templates/Page.aspx?id=1257> (last visited Nov. 10, 2007). At the same time, however, the program permits parents and others to contribute money to a child's account, where the funds will accumulate tax-free. The annual contributions are capped at £1200 (from all sources). See *id.*

<sup>14</sup> See, e.g., Louis Kaplow, *A Framework for Assessing Estate and Gift Taxation*, in *RETHINKING ESTATE AND GIFT TAXATION* 164, 165 (William G. Gale, James R. Hines Jr. & Joel Slemrod eds., 2001) (offering a utilitarian approach to the taxation of wealth transfers).

build instead on first principles to draw out legal implications.<sup>15</sup> But utilitarianism is not and should not be the only source of principle for rigorous legal analysis. In other fields, notably constitutional law,<sup>16</sup> liberal egalitarian political theory has played a major role in motivating legal scholarship. This Article, along with other scholarship,<sup>17</sup> aims to build intellectual bridges and to enrich tax scholarship by illustrating alternative methods for principled legal analysis.

Along the way, the analysis contributes to the literature on resource equality by highlighting, in a new context, the hard questions with which resource egalitarians struggle. Some of the most difficult questions of principle recur in the details of inheritance taxation. For example, a key debate within the resource equality tradition is whether an individual should be entitled to use her talents and aptitudes entirely for her own ends, or whether the products of such private assets should be subject to state redistribution. This issue recurs when the state attempts to tax inheritance. Suppose that Albert's good friend Beatrice leaves him \$1 million due to their lifelong friendship and mutual interest in classical music. An equal opportunity approach to taxation might exempt Albert's inheritance, since it reflects his choices about how to live his life: he chose to befriend Beatrice and to pursue their shared interest in music. But complications quickly arise: Albert's innate musical talent and good sense of humor surely also contributed to the friendship. A person of lesser talent or dour demeanor might not have won Beatrice's heart (and money). In this context, the so-called "talent pooling" debate has legal consequences: the scope of inheritance taxation will be broader if the state conceptualizes talent, personality, and friendship as reflections of chance rather than as the outgrowth of personal choice.<sup>18</sup>

Importantly, the discussion here is descriptive rather than normative. The analysis draws on resource equality to give content to the equal opportunity intuitions that have supported inheritance taxation, but without attempting to persuade readers that resource equality is superior to alternative theories of distributive justice. A large body of

<sup>15</sup> See, e.g., *id.*

<sup>16</sup> See, e.g., Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (considering the implications of Rawlsian principles for constitutional law governing welfare rights).

<sup>17</sup> For examples of other work in taxation in this general vein, see ACKERMAN & ALSTOTT, *THE STAKEHOLDER SOCIETY*, *supra* note 2; ALSTOTT, *NO EXIT*, *supra* note 9; LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* (2002); Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 51 TAX L. REV. 363 (1996); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994); and Eric Rakowski, *Can Wealth Taxes Be Justified?*, 53 TAX L. REV. 263 (2000).

<sup>18</sup> The talent-pooling debate is discussed *infra* at pp. 476–85.

literature in political theory takes on that task, contrasting resource equality with welfarism.<sup>19</sup> Here, I will occasionally contrast the resource equality view with a libertarian or utilitarian view, but only to clarify the differences. In other work, I have argued for the merits of resource egalitarianism,<sup>20</sup> but here I aim only to explore the implications of that view.

Part II provides background for the analysis, describing two core principles of resource equality (neutrality and the choice-chance distinction) and drawing out some points of debate within the resource equality tradition. Readers already familiar with resource equality may wish to begin with Part III, which connects resource equality principles to the question of inheritance and introduces the social inheritance. Part IV addresses the design of inheritance taxation, and Part V concludes.

## II. EQUALITY OF OPPORTUNITY AND EQUALITY OF RESOURCES

Equality of resources reflects the proposition that individual liberty is a paramount value. To make liberty meaningful for all, every human being should have an equal chance to choose the life she wants to live. While one's choices are always constrained by scarcity, the idea of equality of resources is that scarcity should be apportioned so that each person has a pro rata share of the resources available for her generation.

The intuition underlying the ideal is sometimes described by way of a hypothetical. Imagine that a spaceship lands on a remote planet (or a ship lands on a deserted island), and the new inhabitants have to divide fairly the planet's (or island's) resources.<sup>21</sup> The dual proposition is that each person should initially receive an equal, per capita share, because such a division accords equal respect to each individual, *and* that any inequalities thereafter should be accepted as fair, because they result from individuals' choices about how to use their resources. More concretely, Person A and Person B should have equal initial shares because their values are worthy of equal respect; there is no ground for a liberal state to treat A's way of life as superior or inferior. But thereafter, if Person A ends up with a larger share of resources because she works harder, trades more cleverly, or farms more carefully

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<sup>19</sup> For examples, see ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE*, *supra* note 1; DWORKIN, *supra* note 2; RAWLS, *supra* note 1; and VAN PARIJS, *supra* note 1.

<sup>20</sup> See, e.g., ACKERMAN & ALSTOTT, *THE STAKEHOLDER SOCIETY*, *supra* note 2; ALSTOTT, *NO EXIT*, *supra* note 9; Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 *YALE L.J.* 967 (1999).

<sup>21</sup> See, e.g., DWORKIN, *supra* note 2, at 66–71; see also ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE*, *supra* note 1, at 31–34.

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than Person B, B should not be able to claim any of A's gains. After the initial starting point, one's access to resources will depend on the operation of a market system. The implied principle is *equal inheritance* — that initially everyone should have an equal share.

The hypotheticals begin with adults who are ready-formed, and they use an external event — a space voyage or shipwreck — as the starting point for an initial distribution. By contrast, in an ongoing society, the starting point for the distribution of resources will be the maturation of each child. When children are ready to step into adult life, to make meaningful choices about how to live their lives, and to be properly held accountable, they are ready to claim an equal share of society's resources. An important corollary is that equality of resources requires a process for helping every individual make it to the starting gate. An adequate education and sufficient care would equip every child with the intellectual and emotional capability to choose how to use her share of material goods to shape a life.<sup>22</sup>

Implicit in the hypotheticals are two core principles of resource equality. The first principle is neutrality: society should not endorse any particular way of life or underwrite any particular tastes or vision of the good, because each person is a moral agent whose life plan is worthy of equal respect. The neutrality principle suggests strict resource equality: if each individual is entitled to equal respect, then each deserves equal resources to do with as she chooses.

The second core principle, termed the choice-chance principle, is an outgrowth of neutrality, and it holds that distributions of society's resources among individuals ought to reflect individual choices (after the initial distribution) but not "pure" bad luck.<sup>23</sup> If one person chooses a risky career as an actor and another pursues a safe career as a certified public accountant (CPA), the thespian cannot expect a greater share of society's resources if he fails, losing his money along the way. This idea is sometimes called the principle of "ambition sensitivity." The notion is that outcomes ought to reflect one's choices (or ambitions) — that one should take responsibility (in the sense of bearing consequences) for one's choices.

By implication, individual preferences and the criterion of social welfare maximization are irrelevant to the initial distribution of resources and to the ultimate distribution of outcomes. Suppose, for example, that the failed actor is now miserable, and that an additional allotment of \$X would relieve her misery, while the stolid CPA would not feel much worse off even if her taxes rose by \$X. A welfarist ideal

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<sup>22</sup> See ALSTOTT, NO EXIT, *supra* note 9 (explaining the ways in which society should assist families in providing what children need).

<sup>23</sup> See, e.g., DWORKIN, *supra* note 2, at 89 (arguing that equality demands a distribution of resources that is "ambition-sensitive" but not "endowment-sensitive").

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might endorse the redistribution of \$X to the actor from the CPA (setting aside, for the moment, important questions of incentives). But the equality of resources ideal reflects a judgment that the moral equality of each person requires that both individuals take responsibility for the financial outcomes of their career choices.

The complicating factor, of course, is that outcomes reflect luck as well as choice. Here, Ronald Dworkin's distinction between option luck (brought about by one's choices) and brute luck (completely random) is canonical.<sup>24</sup> A farmer in some respects chooses to be at the mercy of wind and weather by his choice of occupation (and by his choice not to insure against crop damage due to severe weather), while someone born blind suffers brute luck unaffected by her choices. In practice, the division between brute and option luck can be difficult to make, but the basic thought is that a society should insure individuals against brute luck but not option luck, giving extra resources to those disadvantaged at the starting gate through no fault of their own.<sup>25</sup>

It might appear that the state's mandate to redress brute luck would demand an exhaustive program of equalization: after all, people vary in many ways due to brute luck, and equalizing life chances across all these variations would require intensive and intrusive legal effort. But one limiting factor is that the option to insure helps convert many instances of brute luck into option luck (for adults). For instance, a person who is injured in a freak accident (say, a meteor falling out of the sky) has suffered bad brute luck. But if she is an adult, and if she had the opportunity to buy accident insurance but did not, the state might justifiably treat her condition as option luck rather than as brute luck. Accidents are in some sense part of daily life. While the chance that any one person will be hit by a falling meteor is infinitesimal, the chances that a person will suffer accidental harm in the course of her lifetime are fairly high and definitely foreseeable. The deciding factor with respect to the state's mandate to redress would be the availability of accident insurance.

The neutrality principle also limits the state's obligation to redress individual bad luck: the state should redistribute to ameliorate brute luck but should not intervene in ways that favor one way of life over another (the starving actor at the expense of the CPA). This mandate motivates many of the most difficult internal debates in the resource equality tradition. Consider two examples.

The first is the problem of expensive tastes. Suppose that one person is happy with a modest home, close friends, and unstructured leisure time. A second person requires fancier trappings to make her

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<sup>24</sup> See DWORKIN, *supra* note 2, at 73-74.

<sup>25</sup> See *id.* at 74-75, 77-79, 81.

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happy: only a mansion, a yacht, and world travel will do, and she is miserable in simple surroundings. A fixed, equal initial endowment of resources will go a longer way toward satisfying the desires of the first person than those of the second. In this sense, the person with simpler tastes may seem to have more resources than her peer. But the inequality is understood to be appropriate because neutrality forbids any endorsement or disapproval of a given way of life. Since both are equally worthy of respect, a liberal society ought to permit each to pursue her own ends but need not (indeed must not) underwrite the more expensive way of life.

The implicit judgment here is that tastes are a matter of individual choice and thus something for which one is properly held responsible. But theorists debate the point: Should individuals be held responsible for their tastes? Are tastes chosen or innate? What if a person despises her own tastes? The vectors of the debate are clear: if one is inclined to view tastes as innate rather than cultivated, then one is likely to view the distribution of tastes as morally arbitrary and thus to be inclined to subsidize expensive tastes.<sup>26</sup>

A second internal debate surrounds the problem of unequal talents, sometimes called the “talent-pooling problem.” Unequal success may reflect unequal effort, or it may reflect unequal talent. On the resource equality view, unequal effort reflects choice and thus is a matter for individual responsibility (although one might again question whether “effort” is truly chosen or instead part of one’s unchosen endowment), but unequal talent is more problematic. Imagine two people, one with innate musical talent, and the other with a tin ear. If both want to pursue a musical career, the talented person is more likely to succeed. Should we be troubled by the resulting inequality in the two individuals’ ability to pursue their vision of the good?

We can frame the same question a slightly different way: What counts as a “resource” for purposes of equality? Should one’s talents enter the calculus, implying that the less talented person should receive more of something else to balance the scale, or at least render it less lopsided? Here, there is a deep split. Some theorists, notably John Rawls and Dworkin, view talents as resources subject (in principle) to equal distribution by society.<sup>27</sup> Their argument, in essence, is that talents are not chosen by the individual but are distributed according to brute luck, so that the “natural” distribution of talents is morally arbitrary. Although society cannot literally redistribute talent, it can re-

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<sup>26</sup> Dworkin argues that expensive tastes ought not be subsidized, *see id.* at 48–59, and rejects the argument that all tastes are a matter of brute luck, *see id.* at 287–91. Dworkin does admit, however, that some innate “preferences” may be classed as “handicaps” if they are “unwanted disadvantages” that impede a person’s success in other chosen endeavors. *Id.* at 82.

<sup>27</sup> *See id.* at 85–92; RAWLS, *supra* note 1, at 73–75, 100–02.

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spond to inequality of talent in other ways, for example by adjusting the distribution of resources *ex ante* or of income *ex post*.

Extending the model, Dworkin suggests that it is not merely the unequal distribution of talents that is problematic, but also the unequal market price one can earn for one's talents. Dworkin concludes that people with low earning power should be entitled to additional resources to make up for their bad luck in the distribution of high-earning talents.<sup>28</sup> But Dworkin's move has been controversial because it authorizes state compensation for society's tastes. To illustrate the problem, consider Britney Spears. Whether Spears's music is good is a matter of taste, but what cannot be debated is that a large number of people like to buy her recordings and see her perform in concert. Spears has made a fortune, while other musicians — imagine a folk singer who performs for little or no pay in the local coffee house — need a day job to make ends meet.

Can the folk singer legitimately complain that Britney has a larger share of society's resources due to her high earning power? Suppose initially that the folk singer would be happy to sing pop music, Britney-style, but cannot do so. That renders the problem of unequal earning power rather like the unequal talent hypothetical involving musicians: both want to live a certain life, but only one can do so, based on innate characteristics. Now alter the hypothetical to suppose that the folk singer *could* perform in Britney's style but disdains to do so. Perhaps she cannot abide pop music, or perhaps she dislikes the risk associated with a pop career and prefers the lower-profile but steadier work she can get in local folk venues. Still, she wishes she could earn a living doing what she likes to do — playing folk music. Should the state compensate her for the bad luck of coming of age in the Britney era rather than in, say, the heyday of Joan Baez?

Dworkin would answer that the folk singer should be eligible for additional resources in the first case but not the second.<sup>29</sup> If the folk singer would do Britney's work but cannot, she merits compensation. Not everyone can be guaranteed a pop star's income, but Dworkin views it as reasonable to insure individuals against the bad luck of having talents that have very low market value.<sup>30</sup> Dworkin constructs a hypothetical income insurance plan that would cushion those whose talents command low market wages.<sup>31</sup> He argues that people are likely to buy insurance that will pay out a modest income, and he ul-

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<sup>28</sup> See DWORKIN, *supra* note 2, at 92–99.

<sup>29</sup> See *id.* at 83–84.

<sup>30</sup> See *id.* at 104–09.

<sup>31</sup> See *id.* at 92–99.

timately rolls up the insurance device into a system of income-based taxes and transfers.<sup>32</sup>

But the result should be different, Dworkin concludes, when the folk singer could take Britney's path but chooses not to. In this case, it is personal choice (a disdain for pop music or a desire for a quieter life) that is at work. Subsidizing the disdainful folk singer would improperly subsidize individuals with an expensive taste for folk music at the expense of those with a cheaper taste for pop music.<sup>33</sup> In practice, a tax-and-transfer program will tend to subsidize those who voluntarily choose low-earning occupations, because it is difficult to detect one's true abilities,<sup>34</sup> but in principle, Dworkin suggests, individuals should be responsible for such choices.

Opponents of talent-pooling would deny compensation to the folk singer in either case. The talent-pooling view puts great pressure on the distinction between tastes, which are considered chosen, matters of judgment, and intertwined with one's vision of the good (and thus matters for which one is responsible), and talents, which are viewed as innate and involuntary, endowed without regard to one's judgment or vision of the good. But, as Tony Kronman points out (and Dworkin recognizes to some degree<sup>35</sup>), this kind of sharp separation is questionable, even in principle, since one's talents are often intertwined with judgment and one's chosen way of life.<sup>36</sup> Most talents require conscious investment and development. Further, as Phillippe Van Parijs points out, the value of one's talents is contingent on one's tastes: the damage one suffers because of (say) a paralyzed hand depends on whether one is a pianist or a bookworm.<sup>37</sup> Thus, the folk singer likely could not — as well as would not — reproduce Britney's performance due to the confluence of her talents and tastes and her choices about how to cultivate her abilities. Likewise, Britney either dislikes folk music or has decided that the monetary rewards of pop stardom are worth a compromise in her own tastes.<sup>38</sup> Both individuals, on a re-

<sup>32</sup> See *id.* at 98–104.

<sup>33</sup> See *id.* at 89 (noting that “if people of equal talent choose different lives it is unfair to redistribute”).

<sup>34</sup> Dworkin explains that the tax system cannot neatly separate wealth traceable to “differential talents” from wealth traceable to “differential ambitions” because of the “reciprocal influence” talents and ambitions exercise on each other. See *id.* at 91. Instead, the state ought to base redistribution on the insurance ideal: the amount of insurance an average person would buy. For example, the state might want to insure against falling below the thirtieth percentile of the income distribution. See *id.* at 92–99 (discussing “underemployment insurance”).

<sup>35</sup> See *id.* at 91–92.

<sup>36</sup> See Anthony T. Kronman, *Talent Pooling*, in NOMOS XXIII: HUMAN RIGHTS 58, 75–76 (J. Roland Pennock & John W. Chapman eds., 1981).

<sup>37</sup> VAN PARIJS, *supra* note 1, at 69.

<sup>38</sup> Spears made some of these decisions as a teenager; this Article treats her as an adult for purposes of illustration, bypassing the interesting problem of the status of life-defining choices

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source equality view, have chosen a life of equal moral worth, if not equal market worth.

This tension in the talent-pooling view emerges in the gaps in Dworkin's version of the Britney hypothetical. He uses the example of a highly paid film star and argues that someone who would do the same work for the same pay has a legitimate complaint — that fewer resources are devoted to the low-paid person's life than to the film star's.<sup>39</sup> But the comparison cannot turn on the income actually earned by Britney (or a movie star). Instead, the question ought to be whether the envious person would have taken the risks that Britney or the movie star took, *ex ante*. Whatever one's opinion of Britney's talents, she took a gamble on a pop career — a gamble that, *ex ante*, probably had a low expected value. Although the wager paid off for Britney, thousands more (many with equal talent, looks, and ambition) took the same gamble and were disappointed. Looking at the decision *ex ante* rather than *ex post*, would the folk singer really trade her life for one involving inferior music (in her view) and an equally low expected financial return? Once we reframe the choice in *ex ante* terms, it becomes clearer that the folk singer's choices are bound up in choices about how to live a life.

The talent-pooling view also contains a second internal tension. As we have seen, one bedrock principle of resource equality is that market allocations are fair, provided that each person enters the market with equal resources. Resource equality treats other people's tastes as having moral standing: if some ways of life are expensive because many people want them, it is entirely fair to allocate scarce resources based on bidding from equal starting points.<sup>40</sup> But talent-pooling theorists arguably backslide on this point when they posit that Britney earns "too much" and the folk singer "too little": they treat market values as arbitrary rather than as legitimate expressions of individual taste rendered into a price system via aggregation.

Bruce Ackerman (among others<sup>41</sup>) rejects talent-pooling, treating individual talents and ambitions together as part of one's chosen vision of the good. He invokes neutrality as a guiding principle: it forbids (he says) the compensation of differentials in talent because talent

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made by (and for) children nearing adulthood. Spears's first big commercial success occurred when she was 16 years old. See People.com, Britney Spears Biography, [http://www.people.com/people/britney\\_spears/biography](http://www.people.com/people/britney_spears/biography) (last visited Nov. 10, 2007).

<sup>39</sup> See DWORKIN, *supra* note 2, at 104–06.

<sup>40</sup> Van Parijs argues that people "should get resources that are equally valuable in terms of the potential uses by others that have to be forgone as a result of the allocation that has been made." VAN PARIJS, *supra* note 1, at 51. Dworkin embraces a similar principle when discussing the initial market allocation (assuming equal talents), but modifies it later in discussing unequal talents. Compare DWORKIN, *supra* note 2, at 65–71 (the auction), with *id.* at 73–83 (handicaps).

<sup>41</sup> See Kronman, *supra* note 36; see also VAN PARIJS, *supra* note 1, at 72–76.

implies a value judgment.<sup>42</sup> On Ackerman's view, within a very large range, each person is responsible for making choices in light of her own values *and* endowments. Rather than treating tastes and talents as separable, Ackerman treats the whole person as an agglomeration of traits, and he argues that each person should choose a life plan that is informed by her tastes and talents. For example, returning to the first hypothetical, the less talented musician may still choose to pursue a musical career, but she cannot demand that society provide her with extra resources to improve her chances of success. By hypothesis, the would-be musician is not disabled: she has a combination of talents and traits that enable her to live one or more ways of life that others would consider good.

Ackerman's view illustrates why the talent-pooling view skates very close to the proposition that the state should indemnify expensive tastes, with the market setting the price structure. If the musician wannabe chooses to spend her life seeking a music career that she simply cannot achieve, she is indulging an expensive taste — not suffering a lack of talent that society ought to compensate. By the same metric, the folk singer who will not adapt to market tastes is making a value-laden choice that carries predictable financial consequences in this world. She should be entitled to make that choice, but the state should not subsidize it.<sup>43</sup> Van Parijs puts the point this way: market prices do render different ways of life differentially expensive.<sup>44</sup> The person with expensive tastes may feel frustrated; the folk singer born into the Britney era cannot live as well as she might have in another time. Still, resource egalitarianism is about resources and possibilities rather than about desires or frustrations: each person's freedom "to do whatever [she] might want to do" is the same,<sup>45</sup> although her freedom to do different things (be a folk singer or a pop musician) is not.

The debate over talent-pooling closely mirrors the debate over the meaning of "disability." If one accepts the talent-pooling notion, the scope of disability is broad: any personal attribute that impedes one's chosen life plan is potentially compensable. On this view, major disabilities, such as blindness and intellectual deficits, would be grounds for additional resources, but so would deficits in musical talent, beauty, and so on. Dworkin goes to some lengths to craft an insurance plan

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<sup>42</sup> See ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE*, *supra* note 1, at 119–24 (developing the concept of undominated diversity, the idea that liberal citizens may vary in talent, but that variation will not permit domination).

<sup>43</sup> Cf. VAN PARIJS, *supra* note 1, at 70 (noting that Dworkin's insurance ideal would treat differently two untalented oboists — compensating the one who doggedly pursues a (predictably) unsuccessful career, while not compensating the one who sensibly turns to a more lucrative career).

<sup>44</sup> See *id.* at 48–49.

<sup>45</sup> *Id.* at 49 (emphasis removed).

that limits compensation for deficits in talents: he worries that excessive compensation would enslave the talented and require impossible judgments when success is due both to talent and effort.<sup>46</sup> Still, those lacking talents (as judged by their own ambitions) would receive some compensation in Dworkin's scheme.

By contrast, the problem for opponents of talent-pooling is to admit any disability at all, since nearly any attribute has only contingent value dependent on one's vision of the good. In principle, an opponent of talent-pooling would admit as a disability only an incapacity that compromises one's life options across the board, regardless of one's conception of the good. Ackerman takes the view (which Van Parijs endorses<sup>47</sup>) that the solution to this problem is to view every individual as a whole person and to judge her talents accordingly.<sup>48</sup> Instead of looking at deficits in a piecemeal fashion (can you sing? add columns of numbers? easily comprehend another's state of mind?), the state ought to evaluate individuals' prospects as a whole. Suppose that one person is a math whiz but musically inept, while another has little aptitude for math but great social intelligence. Neither would be considered disabled, since both have ample life options open to them — options that other people legitimately consider to be good ones. It is irrelevant whether the math whiz longs to sing at Covent Garden, or the socially intuitive person is dying to learn particle physics. Those are tastes, and if they are expensive ones, whether to indulge them or not is a matter for individual judgment.

For later discussions, it is critical to bear in mind that even when resource equality theorists take notice of inequalities in outcomes, their rationale for doing so harks back to some initial, *ex ante* inequality (such as unequal talents) that affects life chances, not some objection to *ex post* inequality that reflects individual choices. Although it is true that inequalities in starting points (early nurture, social class, and talents) will affect outcomes, resource equality does not thereby collapse into an effort to equalize outcomes (income, wealth, happiness, or some other metric of "success"). Instead, the effort is to correct inequalities of resources *ex ante*, if possible, and if not, to alter outcomes selectively, in accordance with the principle of ambition sensitivity, so that outcomes reflecting choice are preserved (again, if possible).

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<sup>46</sup> See DWORKIN, *supra* note 2, at 97–99.

<sup>47</sup> See VAN PARIJS, *supra* note 1, at 72–76.

<sup>48</sup> See ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE, *supra* note 1, at 119–24. James Fishkin, in his book on equal opportunity and the family, adopts a version of resource equality without talent-pooling. See JAMES FISHKIN, JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY 34–35 (1983). But he suggests, rightly, that incorporating talent-pooling would make the task of equalization even more strenuous. See *id.* at 35.

Dworkin, for example, endorses a system of (state) insurance that would tax those with high incomes and redistribute to those with low incomes, but his rationale is *not* that society ought to equalize incomes as a matter of justice. Rather, the rationale is talent-pooling: low earnings capacity is a disability of sorts.<sup>49</sup> Dworkin views it as a drawback (albeit an inevitable one) that any system of income taxation cannot distinguish between success due to effort and ambition, on the one hand, and success due to one's endowment of talents, on the other.<sup>50</sup> Rawls comes perhaps closer to redistribution based on outcome: some interpret his second principle of justice (which directs that inequalities should work to the advantage of the least advantaged) in that light.<sup>51</sup> But that principle is ambiguous in many respects. The "least advantaged," for example, are not necessarily those who fare badly *ex post*. They might instead be those who are disadvantaged *ex ante* by inequalities of resources that are difficult to correct as a practical matter.

The questions of expensive tastes, talent-pooling, and disability reveal the central role within resource equality of the distinction between attributes of the person that are *chosen* (one's values and vision of the good) and those that reflect *endowment* based on brute luck (one's gender, race, and parents, for example). The controversies over innate tastes and talent-pooling may not initially seem significant for an article on material inheritance, but we shall see the same problems recur in the design of an inheritance tax.

### III. CONCEPTUALIZING AN EQUAL OPPORTUNITY INHERITANCE TAX

"Equal opportunity" is a familiar<sup>52</sup> but underspecified term. Equality of opportunity contrasts with "equality of result," but beyond that, the sound bite does not specify what kind of opportunities people should have or how to measure equality in distribution. Here, I use the resource equality ideal to give content to equal opportunity. Resource equality is not the only possible interpretation, but it does represent one accepted view of "equal opportunity" in political theory cir-

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<sup>49</sup> See DWORKIN, *supra* note 2, at 92.

<sup>50</sup> See *id.* at 91–92.

<sup>51</sup> See, e.g., Lawrence Zelenak & Kemper Moreland, *Can the Graduated Income Tax Survive Optimal Tax Analysis?*, 53 TAX L. REV. 51, 53–54 (1999) (noting the identification of Rawls, in the optimal taxation literature, with a social welfare function that maximizes the utility of the worst off).

<sup>52</sup> A Google search for "equal opportunity" conducted on November 6, 2007 returned about 10.6 million hits.

cles, and it offers a well-specified ideal that has been explored in a thoughtful literature over several decades.<sup>53</sup>

Taking this approach, equality of opportunity requires that every individual begin with an equal share of society's resources and with the capacities she needs to choose a way of life. Since we do not in fact disembark from a spaceship or a sailing vessel, the starting point for each individual is the threshold of adulthood — the point at which she can make choices and should be held responsible for their consequences. Childhood is taken to be a time for nurture and education — for the development of the capacities one needs to make choices about one's vision of the good — and the equality of resources ideal suggests that every child should receive an equal investment. At adulthood, the process of development is taken to be finished, and each individual accedes to her equal share of material resources.

This ideal of equal opportunity is more demanding of legal institutions than is the merit principle, sometimes called "careers open to talents," which requires only that people be permitted equal access to jobs for which they are qualified.<sup>54</sup> The merit principle is an important principle of justice, and it takes a central role in (inter alia) anti-discrimination law: every job should go to the most qualified person, regardless of morally irrelevant attributes like race, gender, and so on. The concept of "careers open to talents" certainly reflects an *ex ante* notion of equality: each person has an equal chance to compete and to be judged on her merits. But the merit principle standing alone would leave uncorrected the brute luck that affects early development and the resources to which one has access. For example, a child born to neglectful parents may fail to develop the emotional stability required for intellectual success; a child born to a poor family may lack the money to obtain higher education. Both of these children find themselves unable to qualify for careers that they could otherwise achieve; the merit principle standing alone would not guarantee children adequate developmental conditions.

What does equal opportunity imply about inheritance? Inheritance in the broadest sense encompasses the capabilities and resources that individuals possess at birth and gain later on. Everyone comes into the world with a genetic blueprint and biological parents, and each

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<sup>53</sup> Within the school of resource equality, some embrace the "equal opportunity" synonym, whereas others reject it. Compare ACKERMAN & ALSTOTT, *THE STAKEHOLDER SOCIETY*, *supra* note 2, at 24 ("equal opportunity"), FISHKIN, *supra* note 48, at 20 ("strong doctrine of equal opportunity"), and RAWLS, *supra* note 1, at 83 ("fair equality of opportunity"), with DWORKIN, *supra* note 2, at 286 (rejecting the label).

<sup>54</sup> See RAWLS, *supra* note 1, at 65–75 (contrasting careers open to talents with fair equality of opportunity); see also FISHKIN, *supra* note 48, at 19–30 (describing the principle of merit, which corresponds to this "thinner" ideal of equal opportunity).

person experiences the physical environment. In addition, most children inherit some kind of nurturance and some kind of culture and community, and some will inherit additional material resources from their family and community, either in childhood or later on.

Which of these aspects of inheritance are proper subjects for redistribution according to a resource equality ideal? Should we attempt to alter genetic inheritance? Should we (could we?) attempt to alter the nurturing practices of a family? And so on. In this Article, I bracket these issues in order to isolate one question: what is a fair inheritance of *privately controlled material resources*? (I term this phrase, somewhat less precisely, “material inheritance.”) The restriction to privately controlled resources implies that the heir properly exercises (exclusive) control over the resources she inherits — she may use them as she sees fit in shaping her life. I intend to exclude the inheritance of public goods shared in an undifferentiated way with others (for example, the environment) as well as resources available to individuals but restricted to some use dictated by others (for example, access to a public hospital or a public university system).

Thus, the analysis in this Article assumes that the rules for material inheritance will operate alongside programs to ensure the fair distribution of other resources such as genes, nurture, environment, and culture. This assumption is standard in discussions of inheritance taxation, but it is worth making explicit, because it may be untenable in the end.<sup>55</sup> At a minimum, the overall *level* of material inheritance will be influenced by the quantum of resources that must be devoted to equalizing inheritance in other spheres. If, for example, a society has one hundred units of resources to pass on to the next generation, it will matter whether five, twenty, or sixty of those must be devoted to equalizing developmental conditions in childhood before the generation steps up to claim its material inheritance. But it may also be that the *distribution* of material inheritance among adults should vary as well if (for example) it turns out that some early deprivation or disadvantage can best be mitigated by a later infusion of material resources.

The analysis here also assumes that adjustments for talent-pooling and disability are taken care of elsewhere in the law. The hypothesis is that the rules for material inheritance govern those without disability and with reasonable earning power. There is nothing necessary about this assumption, but it makes it possible to generalize about material inheritance for a large group of people without having to delve into the design of income-support and disability-accommodation regimes.

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<sup>55</sup> See, e.g., Kaplow, *supra* note 14, at 183–84 (arguing that a comprehensive approach to taxation should adopt a social welfare function that takes account of all sources of inequality simultaneously, rather than isolating financial inheritance).

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Although these are significant assumptions, they are standard in tax analysis and, indeed, in legal analysis generally. In analyzing one legal rule, or one market, we generally make assumptions about the rest of the world. For example, analyses of taxation may assume that markets are competitive or that a tax affects only one market, ignoring spillover and macro effects.<sup>56</sup> The important point is that we should be careful not to conflate the academic assumption, adopted for analytic purposes, with a political agenda that puts equality of material inheritance ahead of other facets of equal opportunity.

Equality of opportunity suggests that material inheritance ought to be equalized to the extent it reflects brute luck rather than individual choice. Being born to rich (or poor) parents is a matter of brute luck, and so the conventional equal opportunity prescription is to tax material inheritance heavily, perhaps even to confiscate it.<sup>57</sup> The key distinction is that it is not wealth per se but rather the source of one's wealth that matters. Individuals have no moral claim to wealth inherited by reason of their position at birth; in contrast, they do have a moral claim to wealth that proceeds in some way from their own choices about work, savings, and relationships.

Initially, it may seem that equalizing material inheritance conflicts with the neutrality principle, because parents may consider leaving money to their children to be part of their life plan.<sup>58</sup> Why should parents who work and save in order to better their children's lives be denied the chance to do so? Isn't it a violation of neutrality for the state to deny those individuals the chance to achieve their objective, while permitting others (book collectors, musicians, hedonists) to pursue theirs without state interference? Parents may feel this conflict acutely in today's libertarian society, in which their children's well-being may indeed depend on family support rather than state measures that ensure equal opportunity.

But in an equal opportunity state, the conflict is resolved by applying the neutrality principle only *to life plans that do not compromise equality of opportunity*. Here, the individualism of the liberal view is foundational: each individual is a separate moral being, whose vision of the good life is entitled to equal respect. For opportunity to be equal for everyone — and not just for the first generation — the state must not permit individuals to act in ways that compromise equality.

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<sup>56</sup> See, e.g., John Laitner, *Inequality and Wealth Accumulation: Eliminating the Federal Gift and Estate Tax*, in *RETHINKING ESTATE AND GIFT TAXATION*, *supra* note 14, at 258, 259, 265 (assuming, inter alia, that household preference orderings are invariant to tax changes and that markets are perfectly competitive).

<sup>57</sup> See, e.g., Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990).

<sup>58</sup> For a discussion of a related objection, and a slightly different reply, see David G. Duff, *Taxing Inherited Wealth: A Philosophical Argument*, 6 CAN. J.L. & JURIS. 3, 40–45 (1993).

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For example, the law should deny people the freedom to pursue a “good life” that involves murdering others for fun or profit. In the same way, the law should also prevent individuals from taking actions that are destructive of equal opportunity, such as a parent’s leaving significant money to her children. Bequests are hardly the moral equivalent of murder, but they do injure the fabric of an equal opportunity society.

This absolutist position may seem harsh. Well-meaning parents act out of love and a desire to leave their children a little money to help survive life’s blows. They do not set out to damage the life chances of other people’s children. But the law (properly) prohibits well-meaning actions all the time when the actions — however unintentionally — undermine social justice. The state bans pollution, even by well-intentioned owners of factories that produce (say) clothing for the needy. We ban discrimination, even when the individuals practicing it believe that they are acting for society’s good.

Put in more abstract terms, the freedom that neutrality guarantees operates only within the confines of laws that guarantee initial equality of opportunity. This move demarcates the liberal egalitarian from the libertarian: the libertarian denies that the supporting structure of state action to guarantee equality is a necessary precursor to liberty. What we might call the preconditions for freedom also separate the liberal from the utilitarian view: the utilitarian would likely reject a flat prohibition on inheritance and would instead seek to weigh the happiness of rich parents permitted to leave large bequests against the loss in happiness of poorer individuals who find themselves left behind at the starting gate.

But stating the goal as equality of material inheritance leaves open two critical questions. First, should the state equalize at zero, so that each person receives no material inheritance, or should the state aim instead to provide each person with some positive inheritance? Second, would equalizing material inheritance produce economic side effects that could undermine equal opportunity? The remainder of this Part addresses these two questions.

#### A. *Equal Inheritance and “Leveling Up”*

Equality of resources requires that children receive adequate resources devoted to early nurture, education, health care, and support. Some of these resources come from parents and some (typically) from the state. The question of material inheritance presses the matter one step further. Should the law also guarantee to each individual a material inheritance to be used for her private ends, above and beyond the resources devoted to childhood development?

Resource egalitarians tend to answer in the affirmative: the idea is that privately controlled material resources are an important determi-

nant of freedom in a modern market society. Van Parijs, Ackerman, and I (among others) have argued that material wealth importantly fosters opportunities.

Van Parijs emphasizes that real freedom (as opposed to formal freedom) requires that individuals have material resources that can be used to support different ways of life.<sup>59</sup> Without such resources, individuals are so constrained in their life options that their choices are nominal: whether to take a low-paid job or to starve, for instance, is hardly the kind of choice that makes for a meaningful life.<sup>60</sup>

Ackerman argues that an equal division of material resources among individuals follows from the principle of individual equality. While some social resources are best used collectively (to facilitate communication, for example, and to rear children), there is a considerable residue of resources that should be divided equally among adults, so that each person has the chance to shape a life of her own choosing. Ackerman's theory suggests that neutrality requires equal distribution to each person; no one can claim more on the ground of superior values or greater efficiency.<sup>61</sup> The equality rationale, he concludes, also requires that each person in each future generation receive no less than her forebears.<sup>62</sup>

Dworkin also endorses an equal initial distribution of resources. His theory does not extend the model to future generations but concentrates, instead, on the importance of equal initial endowments to fairness in market allocations. He argues that when each person steps into the marketplace with equal resources, the resulting price structure is fair, in the sense that prices for particular resources will reflect their opportunity cost to other citizens.<sup>63</sup>

Within the resource equality tradition, there is vigorous debate about the form that a public inheritance or social inheritance ought to take. The neutrality principle suggests that resources should be generic enough to be translated into different ways of life. Cash fits the bill, but some worry that cash inheritance can be abused — that the young may fritter their money on short-term pleasures (or vices) without serious attention to their long-term life plans.<sup>64</sup> This objection is debatable, since dismissing some uses as “abuses” or even “short-term

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<sup>59</sup> VAN PARIJS, *supra* note 1, at 21–24.

<sup>60</sup> *Id.* at 22.

<sup>61</sup> ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE, *supra* note 1, at 53–59.

<sup>62</sup> *Id.* at 201–07.

<sup>63</sup> DWORKIN, *supra* note 2, at 65–73.

<sup>64</sup> See ACKERMAN & ALSTOTT, THE STAKEHOLDER SOCIETY, *supra* note 2, at 39–43 (considering this objection); Bruce Ackerman & Anne Alstott, *Why Stakeholding?*, in ACKERMAN ET AL., REDESIGNING DISTRIBUTION, *supra* note 7, at 43, 51–52 (same).

thinking” strikes some as paternalism.<sup>65</sup> But even Ackerman and I, who propose a lump sum, advocate measures to encourage reflection, suggesting programs of education and the transfer of a securities portfolio rather than bags of dollar bills.<sup>66</sup> At the other end of the spectrum, some argue that “material resources” in the modern world might take the form of vouchers for education, home ownership, entrepreneurship, and other traditional means of achieving stability and security in adult life — the kinds of things of which many parents would approve.<sup>67</sup> The constraint here is the neutrality principle: not everyone wants to (or should) go to college, own a home, or start a business, and the more limited the terms of the voucher, the more likely it is to infringe on the autonomy of individuals who have a different vision. Basic income represents a third way — a lifelong annuity, paid in cash, but not alienable to creditors.<sup>68</sup>

But whatever the form of the public inheritance, the normative claim is that the state should provide each individual with additional material resources as an adult. How large should the public inheritance be? The size of the public inheritance will depend on a society’s wealth and stage of development, and on the resources needed for childhood development and other institutions needed for a fair society, but ideally it would be sufficiently large to make a difference in an individual’s lifetime opportunities. In principle, the public inheritance should be an equal per-adult share of society’s wealth (over and above that needed for these other institutions), and the per-person amount should not shrink over time because each member of each generation is thought equally worthy.

The prospect of a public inheritance raises design issues which differ from those on the taxation side. For example, at what age should individuals receive their public inheritance? Should noncitizens qualify? Illegal aliens? Should there be educational requirements (for example, a high school diploma)? What about people with a criminal record? Should participation in a public-service program be required? And so on. These questions have been discussed in several books,<sup>69</sup>

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<sup>65</sup> ACKERMAN & ALSTOTT, *THE STAKEHOLDER SOCIETY*, *supra* note 2, at 41; Ackerman & Alstott, *Why Stakeholding?*, *supra* note 64, at 48–49.

<sup>66</sup> See ACKERMAN & ALSTOTT, *THE STAKEHOLDER SOCIETY*, *supra* note 2, at 37–39.

<sup>67</sup> See, e.g., Stuart White, *The Citizen’s Stake and Paternalism*, in ACKERMAN ET AL., *REDESIGNING DISTRIBUTION*, *supra* note 7, at 69, 78–79 (discussing proposals to require recipients of capital grants to use them for approved activities).

<sup>68</sup> See VAN PARIJS, *supra* note 1, at 47; Philippe Van Parijs, *Basic Income: A Simple and Powerful Idea for the Twenty-First Century*, in ACKERMAN ET AL., *REDESIGNING DISTRIBUTION*, *supra* note 7, at 3, 4–5.

<sup>69</sup> See ACKERMAN & ALSTOTT, *THE STAKEHOLDER SOCIETY*, *supra* note 2, at 45–64; Julian Le Grand, *Implementing Stakeholder Grants: The British Case*, in ACKERMAN ET AL., *REDESIGNING DISTRIBUTION*, *supra* note 7, at 120, 120–29; White, *supra* note 67, at 69–85.

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and for resource egalitarians, they are as critical to a regime of equal inheritance as are questions of tax design. My point here is simply to highlight the centrality of the public inheritance to the equal opportunity ideal. The universal and equal distribution of private wealth *ex ante* is critical to the justice of market outcomes and market inequalities.

The public inheritance also adds a new consideration to discussions about the structure of the inheritance tax itself. Conventionally, inheritance taxation is taken to be a leveling-down strategy. Put another way, if society were to pursue the ideal of resource equality using only the tool of inheritance taxation, the logical directive would be to equalize inheritance at zero. Confiscatory taxation of gifts and bequests would ensure that everyone received the same amount: nothing. In that case, a 100% inheritance tax would in effect be an abolitionist tax, designed to wipe out private inheritance. Any revenue would be a windfall to the government and could be used to fund other institutions. If the tax produced no revenue at all — because donors aware of the 100% inheritance tax decided to consume their wealth themselves or give it to charity — there would be no reason for concern, since the tax would still have achieved its abolitionist goal. To be sure, practical and political considerations might drive a real-world inheritance tax below 100%, but the leveling-down principle points in the direction of confiscation.

By contrast, a public inheritance commits the state to a leveling-up objective that renders problematic the impulse toward confiscatory inheritance taxation. Put more generally, a tension arises because resource equality dictates leveling up as well as leveling down. Funding a (nonzero) public inheritance requires revenue, and that requirement forces the inheritance tax into an uneasy dual role. Its goal is at once to curb private inheritance (either via transfer from private hands to the government or by inducing changes in behavior by would-be donors, such as consumption or charitable giving) *and* to raise revenue for the public inheritance. These two goals conflict to the extent that higher rates of taxation compromise revenues.

The ideal would be a confiscatory inheritance tax that (somehow) raised maximum revenue for the public inheritance, leaving each individual with a large public inheritance and no private inheritance at all. But the ideal may not be attainable, if confiscatory rates of tax reduce revenues, so that a cut in marginal rates would produce higher revenues via changes in donor behavior. For example, imagine that a 100% rate of tax would raise no revenue at all, while an 80% rate of tax would raise \$1 trillion in revenue and a 50% rate of tax would raise \$3 trillion.

To summarize, this section has so far distilled three principles to express the equal opportunity ideal for material inheritance:

(1) *A universal, public inheritance ("leveling up")*: The state should provide a substantial material inheritance to every person.

(2) *Taxation to reduce private gifts and inheritance ("leveling down")*: The state should use inheritance taxation to reduce private gifts and inheritance through two pathways. The first is taxation itself: the money is transferred to the government from private hands. The second pathway is the redirection of money that would have been used for gifts or bequests, either to donors' higher consumption or to charitable giving.

(3) *Taxation to raise revenue for the public inheritance*: The state should use inheritance taxation to raise revenue for the universal, public inheritance. The goal of raising revenue implies some tolerance (though not unlimited tolerance) for inequality of private inheritance based on common consent.

The tradeoff arises because principles (2) and (3) offer different rationales for inheritance taxation: the purpose of reducing private inheritance may conflict with the aim of raising revenue for the public inheritance.

How can an equal opportunity state resolve such a tradeoff? One familiar device, used in varying forms by different theorists, is to inquire whether citizens debating the issue in some (more-or-less) ideal setting might consent to inequality. Even without entering into the debates over just how thick the veil of ignorance ought to be, it seems plausible that citizens might choose, in their own interest, a public inheritance for all at the cost of tolerating a degree of private inheritance for some. It is impossible to say just what the level of inequality chosen by common consent would be. The empirical effects of taxation on revenue would be one key factor, but so would the degree of social mobility or immobility, which would depend both on the level of inequality remaining and on the level of the public inheritance. Without trying to set a precise number, one can imagine a plausible range of solutions, all involving significant (but not confiscatory) taxation of inheritance and gifts combined with a significant public inheritance.

It is tempting, but probably too simple, to suppose that common consent would authorize maximizing inheritance tax revenue, that is, picking the precise point on the Laffer curve at which the marginal tax rate produces the highest possible dollars of revenue. Maximum revenues would maximize the public inheritance, but the resulting level of inequality might be too high, if the remaining private inheritance produced social and economic immobility that significantly compromised life chances for others.

The common-consent solution is a complex move, and it arises from a liberal ideal of dialogue that has not yet been emphasized in my thumbnail sketch.<sup>70</sup> The liberal project, which stretches across resource equality theories and beyond, emphasizes the values of freedom and mutual respect: the ideal is that people coming to the table with very different visions of the good could agree on rules and institutions that would treat everyone fairly. In resource equality theories, the idea of common consent is a powerful one. Starting from conditions of equality, if *everyone* could then agree to make a change, either despite their divergent views and prejudices and self-interest (this is Ackerman's device<sup>71</sup>) or from a position in which they cannot know their station (this is Rawls's original position<sup>72</sup>), then the substance of their agreement would be worthy of respect.

Common consent is not, however, infinitely flexible, and implicit is the idea that people cannot consent to social changes that would deprive them (or other people, including future generations) of the preconditions for equality. "Consent" implies that the individuals involved have been reared under conditions of sufficient equality to render them capable of free choice.<sup>73</sup> Consent would not be valid, on this view, if starting points were unequal. To give an extreme example, the Pareto criterion might be satisfied if a slave society were to reduce its income tax rates on the rich, producing extra tax revenue to be used for extra food for the slaves. That change would likely make everyone happier. But such a situation could not garner common consent in a liberal theory. Common consent requires not just choice but fair preconditions for choice and freedom, in this case adequate attention to the development of each individual's capabilities — something presumably lacking for the slaves in the slave society.

Thus, common consent might justify adjustment of the inheritance tax to less-than-confiscatory levels in order to increase the level of the public inheritance. But common consent would not authorize abandonment of the equal inheritance ideal entirely, since material inheritance is part of — and not merely adjunct to — the preconditions for freedom for each individual.

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<sup>70</sup> See ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE*, *supra* note 1, at 257–61 (discussing arguments from general advantage, which justify special privileges to a few in order to improve the benefits to all in certain circumstances, provided those advantaged can continue to justify their privileges through a dialogue with the rest of society).

<sup>71</sup> See *id.* at 8–12.

<sup>72</sup> See RAWLS, *supra* note 1, at 11–17.

<sup>73</sup> Cf. ALSTOTT, *NO EXIT*, *supra* note 9, at 35–41 (arguing that individuals may not waive their right to adequate nurture as children in exchange for greater material resources in adult life on the ground that children require certain aspects of nurture in order to participate meaningfully and exercise their rights as adults).

Thus far, the discussion has assumed that the revenue for the public inheritance should come from inheritance taxation, but that assumption merits a harder look. As we have seen, there is a strong conceptual linkage between the transfer program and the tax side: the aim is to level up and level down at the same time. But there is no particular reason to link the two for purposes of government budgeting. In principle, the level of public inheritance that best serves the agenda of equal opportunity might cost less than or more than the revenue generated by inheritance taxation. This raises the tantalizing possibility that the state could achieve the ideal of zero private inheritance via confiscatory inheritance taxation along with a robust public inheritance program. Any shortfall in revenues from the inheritance tax would simply be made up by raising other taxes.

Whether this solution is the right one depends on the justice and injustice of the alternative revenue sources. Lowering inheritance tax rates below 100% means tolerating private inheritance, which is unjust. But raising other taxes — say, income taxes — may also work an injustice. For example, the income tax tends to penalize market work relative to leisure and nonmarket work (as does a consumption tax). An income tax also penalizes savers relative to spenders (which a consumption tax arguably does not). Thus, raising income taxes may require weighing an affront to equal opportunity (unequal inheritance) against an affront to neutrality (penalizing certain ways of life).

There is much debate about the justice or injustice of income, consumption, and wealth taxes as sources of revenue for a public inheritance,<sup>74</sup> but it is notable that recent proposals have looked beyond the taxation of inheritance. Van Parijs justifies income taxation on the rationale that if jobs are scarce, those who are employed are appropriating to themselves rents that belong to the larger society.<sup>75</sup> Ackerman and I recommend a wealth tax as a backstop to estate taxation, justifying the choice largely on the second-best ground that current wealth has been earned under conditions of unequal opportunity.<sup>76</sup>

Once we decouple inheritance tax revenue from the public inheritance, the implications are uncertain. A confiscatory estate tax plus revenue from other sources is one possible outcome. But another possibility is that the state ought to reduce inheritance tax rates even more

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<sup>74</sup> For a sampling of the recent legal literature in the liberal egalitarian vein, see ACKERMAN & ALSTOTT, *THE STAKEHOLDER SOCIETY*, *supra* note 2, at 94–112 (proposing wealth taxation); McCaffery, *supra* note 17, at 345–50 (arguing for a consumption-without-estate tax as the tax system most in line with liberal egalitarianism). For critiques, see, for example, Alstott, *supra* note 17 (criticizing McCaffery's arguments for a consumption tax); Rakowski, *supra* note 17 (arguing that the reasons asserted by Ackerman, Alstott, and others cannot justify a wealth tax).

<sup>75</sup> VAN PARIJS, *supra* note 1, at 89–132.

<sup>76</sup> ACKERMAN & ALSTOTT, *THE STAKEHOLDER SOCIETY*, *supra* note 2, at 96–101.

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than necessary to fund the public inheritance, in order to raise extra revenue for other purposes and thereby reduce other taxes. Since these matters require both empirical information about the revenue capacity of a hypothetical inheritance tax at different rates and normative judgments about the relative importance of the injustices created by alternative taxes, this Article will not delve further into the debate over alternative revenue sources. As a corollary, it also will not assume any particular rate schedule for the inheritance tax. Instead, the discussion will shortly turn to elements of inheritance tax design that are largely independent of the rate structure: for example, the tax base, the treatment of relationships, and the timing of taxation.

Before turning to these matters, however, one additional matter of principle merits attention: how would a resource egalitarian analyze the behavioral effects of inheritance taxation?

*B. The Economic Consequences of Equal Inheritance*

One major issue involves the effect of inheritance taxation on work and savings. The intuitive story is straightforward: by taxing wealth at death, society would reduce the economic payoff to saving, which could discourage donors from saving. In addition, inheritance taxation could reduce work motivations (to the extent people work in order to leave money to their heirs). For instance, suppose that a parent would like to leave \$100,000 to her child in a world without inheritance taxation. The introduction of a 50% inheritance tax would cut the child's net inheritance by half, to \$50,000, potentially discouraging the parent from working and saving, since the "payoff" (in terms of her ability to leave a bequest) has been cut by half.

But it turns out that the simple intuition is incomplete both theoretically and empirically. Theory introduces two complicating factors. First, the simple analysis implicitly assumes that decedents are rational actors who have perfect information about the timing of their death and the tax burden. In fact, time of death is often unpredictable. When people die earlier than they predict (or hope), bequests become what economists term "accidental," and the incentive story no longer holds. For example, suppose Alice thinks she will live to age 90, perhaps because her parents were long-lived. She has no intention of leaving any bequest to her relatives, but she prudently socks away \$1 million by age 60 to ensure she has enough money to support herself to age 90. If she then dies unexpectedly at age 61, she will inadvertently leave a bequest of \$1 million to her heirs — a bequest unaffected by the level of inheritance taxation, since Alice did not plan to leave any bequest at all.

Second, economic theory clarifies that the simple intuition (inheritance taxation reduces work and savings) reflects the "substitution effect" (change in relative prices) but overlooks the "income effect." The

income effect in economics arises when individuals react to the effect of taxation on their income (or wealth) level by working more in order to earn the same amount. Return to the example of the parent who wishes to leave her child \$100,000. The parent could respond to the imposition of a 50% inheritance tax by working harder and saving more (\$200,000 pre-tax) in order to meet her \$100,000 bequest target. Economic theory cannot predict whether the income effect or the substitution effect will dominate: that is an empirical question.

The empirical evidence, as so often in social science, is less definitive than one might wish. Empirical studies have established that the effect of the estate tax on work and savings is “not large,”<sup>77</sup> but this evidence, while relevant, is not conclusive. Some studies find that the existing estate tax has a negative impact on work and savings, but these findings tend to depend on the specifications of the model being used.<sup>78</sup> Even this tentative evidence finds a smallish impact; a major study estimates that a 50% estate tax would reduce the reported net worth among the richest 0.5% of the population by 10.5%.<sup>79</sup> But this study, like others, cannot detect whether the fall in *reported* estate size reflects tax avoidance (including tax planning) or reductions in donors’ work and savings.<sup>80</sup>

Overall, existing empirical studies, limited as they are, suggest that inheritance taxation would have modest negative effects on work, savings, and capital accumulation, but there is still significant uncertainty. The bigger question requires us to place these economic predictions in normative context. Should we care if the inheritance tax reduces work and savings?

The resource equality tradition tends to give priority to equality of opportunity over the size of the economy.<sup>81</sup> Although having a larger economy would give society in the aggregate more resources to deploy,

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<sup>77</sup> Wojciech Kopczuk & Joel Slemrod, *The Impact of the Estate Tax on Wealth Accumulation and Avoidance Behavior*, in RETHINKING ESTATE AND GIFT TAXATION, *supra* note 14, at 299, 310.

<sup>78</sup> See Douglas Holtz-Eakin & Donald Marples, *Distortion Costs of Taxing Wealth Accumulation: Income Versus Estate Taxes* 24 (Nat’l Bureau of Econ. Research, Working Paper No. 8261, 2001) (finding a negative effect of estate taxation on bequests but noting that this result is significantly reduced when state variation is taken into account). For a summary of the empirical evidence, see William G. Gale & Joel Slemrod, *Rhetoric and Economics in the Estate Tax Debate*, 54 NAT’L TAX J. 613, 617–18 (2001) (characterizing the Holtz-Eakin and Marples results as “fragile”).

<sup>79</sup> See Kopczuk & Slemrod, *supra* note 77, at 338–39.

<sup>80</sup> See *id.*; see also David Joulfaian, *The Behavioral Response of Wealth Accumulation to Estate Taxation: Time Series Evidence*, 59 NAT’L TAX J. 253, 266 (2006) (finding that the estate tax reduces taxable estates by about 10% but being unable to distinguish reductions due to avoidance from those due to behavioral changes that affect capital accumulation).

<sup>81</sup> See, e.g., ACKERMAN & ALSTOTT, THE STAKEHOLDER SOCIETY, *supra* note 2, at 113–21.

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the resource equality view puts emphasis on the equal distribution of resources among individuals. Each person is entitled to a fair and equal share of society's wealth, even if the cost of egalitarian institutions is a smaller economic pie overall.

Still, one can imagine extreme tradeoffs between equality and the size of the economy that would raise harder issues. For example, suppose it were the case that inheritance taxation would so burden the economy that it would return to an agrarian state, with people living as subsistence farmers with few options, barely eking out a meager living. Here, there would be equality of a kind, but very little opportunity, because such a society could not (by hypothesis) fund education and other institutions that would foster autonomy and meaningful choice for individuals. In such a case, resource egalitarians would confront a conflict between different values: equalizing material inheritance and fostering autonomy.

By contrast, in a utilitarian analysis, tradeoffs are everywhere — even in the situation we probably face now, in which estate or inheritance taxes modestly affect individual behavior. For the utilitarian, *any* change (“distortion”) in individual choices about work and savings, however small, would be potentially troubling, so that even if the income effect dampened the substitution effect, welfare losses would arise. The utilitarian approach would not necessarily privilege equality *or* the size of the economy; rather, there would be a comparison of aggregate welfare under different states of the world. The optimal tax system, on this view, would maximize utility gains due to egalitarian redistribution while minimizing utility losses due to distortionary taxation.

In addition to work and savings disincentives, one might worry that inheritance taxes could produce perverse effects on the distribution of resources. For instance, it is possible that equalizing inheritance could produce greater *ex post* inequality in wealth or other outcomes, if taxing inheritance reduces the level of private altruism. Private wealth transfers (for instance, from parents to children) tend to be equalizing, since donors are on average richer than donees.<sup>82</sup> To the extent that taxing inheritance leads rich donors to keep their funds for themselves, the pre-tax distribution of wealth may become less equal than it would otherwise be. Rich donors who keep their funds instead of sharing them with less-well-off children may increase their savings, adding to their social and economic preeminence. They may spend the extra funds on conspicuous consumption or even political influence.

But according to the resource equality view, none of these effects is cause for concern, provided that the distribution of wealth reflects a

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<sup>82</sup> See Kaplow, *supra* note 14, at 182–83 (discussing this possible consequence).

fair ex ante distribution of resources. Suppose that the adoption of equal inheritance is the capstone of a legal regime that perfectly implements equality of resources. In that case, rich donors are rich because of their own choices rather than by virtue of brute luck or injustice, and there is nothing unfair about their saving or spending their wealth. Resource equality does not require equality in outcomes — indeed, the criterion of ambition sensitivity would forbid measures to equalize outcomes except insofar as such measures correct for some ex ante inequality. Further, if the society has fair political institutions, private wealth should not translate into disproportionate political power.

By contrast, greater ex post wealth inequality might be troubling for ideals other than equal opportunity. The wealth-equalizing impulse might reflect a utilitarian or welfarist point of view, which aims to transfer wealth from richer to poorer individuals. Wealth equalization might, alternatively, reflect a communitarian view, which condemns wealth inequality for its pernicious effects on collective life. But, at least in ideal theory, the wealth-equalizing impulse would not follow from the resource equality ideal.

The distinction between equal opportunity and wealth-equalization is a critical one — and we shall see that the contrast between the two perspectives recurs in competing designs for inheritance taxation. More specifically, we shall see that the wealth-equalizing impulse tends to support wealth or income taxation rather than true taxation of inheritance by individuals.<sup>83</sup> As Louis Kaplow has pointed out, “there is no simple, direct connection between the desire to redistribute income and the optimality of imposing taxes on gifts” in a utilitarian framework.<sup>84</sup> Liam Murphy and Thomas Nagel, who adopt a more individualistic normative theory, similarly conclude that wealth transfer taxation is not an especially attractive institution for addressing differential outcomes.<sup>85</sup>

To illustrate the difference between equal opportunity and wealth equalization, consider Bill Gates and Alice Walton, who rank first and fifteenth respectively in *Forbes*'s 2007 rankings of America's richest individuals, with net worths of \$59 billion and \$16.1 billion.<sup>86</sup> Although Alice is a bit poorer than Bill, both have just about everything

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<sup>83</sup> See *infra* pp. 502–03.

<sup>84</sup> Kaplow, *supra* note 14, at 185.

<sup>85</sup> MURPHY & NAGEL, *supra* note 17, at 154–61. They support the estate tax under the “non-ideal” situation of present law but consider the case for a separate transfer tax (in addition to including inheritance in donees' income under the income tax) to be weak in principle. See *id.*

<sup>86</sup> Matthew Miller, ed., *The Forbes 400*, FORBES, Oct. 8, 2007, at 72, 75, 208. In the rankings, Alice Walton is clustered in a group with her mother, brothers, and sister-in-law. See *id.* at 208.

money can buy. The objective of increasing aggregate welfare (or equalizing individual welfare) would support taxing both to redistribute wealth to the less well-off.

But for the resource egalitarian, the source of one's wealth matters: the key fact is that Bill Gates is a self-made billionaire, while Alice Walton inherited her wealth.<sup>87</sup> The principle of ambition sensitivity requires that we tax inherited wealth (attributable to brute luck) but not earned wealth (attributable to choice). Bill Gates earned his fortune based on ambition and a great deal of option luck; Alice Walton gained hers by being born to the right parents. Given the aim of equalizing inheritance, a wealth transfer tax is more suitable than a wealth or income tax, precisely because the aim is to tax wealth differentially based on its source.<sup>88</sup>

Now for an important caveat. The preceding analysis assumes that all the institutions necessary to achieve equality of resources are in place. But what should the resource egalitarian do in the real world, where equality of opportunity is lacking in many dimensions? If we operate in a second-best world, perhaps equality of resources should merge into wealth equality in order to attack the injustice of wealth that reflects brute luck and that would not be earned in a regime of equal resources.

The difficulty with this suggestion is that it is impossible to say how much of an individual's wealth reflects advantages that would be erased in a fair society, and how much reflects choice and effort. Compounding the problem, we cannot sort out what kinds of choices these individuals would make in a fair society — or how a hypothetical fair market (reflecting resource equality) would price the various choices they would make.

In a second-best setting, the task is to move toward equality of resources by the quickest route, consistent with minimum compromise in ex ante equalities already achieved. No theory can prescribe the best route; rather, there are complex questions of strategy and practicalities. Ex post wealth equalization might be one strategy: perhaps the state could raise significant revenue by taxing income or wealth, tolerating the injustice that results from taxing choice in order to move forward on educational reform, children's health care, and programs to im-

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<sup>87</sup> See Carol Cogel, *A Determined Heiress Plots an Art Collection*, N.Y. TIMES, May 14, 2005, at B7 (noting that Walton inherited her wealth from her father, Sam Walton, the founder of Wal-Mart).

<sup>88</sup> Kaplow concludes that a concern for "equality of opportunity" can be addressed at the least social cost by income or wealth taxation. See Kaplow, *supra* note 14, at 184–86. However, he does not identify equal opportunity with resource equality, and his account of "equal starting points" seems to incorporate talent-pooling and other controversial premises, with the result that "equal opportunity" becomes a general concern for inequality of outcomes arising from a variety of sources. See *id.*

prove early nurture. Similarly, the state might forgo the equalization of inheritance, if doing so were an effective strategy for improving resource equality in other dimensions. But these instrumental questions rest on complex matters of politics and empirics. How much revenue might be raised by different forms of taxation? Would the political system use the revenue to equalize resources rather than for other ends? Can we specify conditions under which we might phase out wealth equalization as we move closer to equality of resources? The danger is that wealth equalization (or some other second-best strategy) will eclipse the ideal in whose service it is adopted.

#### IV. DESIGNING AN EQUAL OPPORTUNITY INHERITANCE TAX

Now to the institutional question: what would an equal opportunity inheritance tax look like? At first glance, the directive to equalize inheritance gives only limited guidance for the design of a wealth transfer tax. Should we tax estates or inheritance? What kinds of transfers should be exempt, if any? Should transfers to spouses and children receive preferred treatment? And what about timing — when should taxation take place, and when should the system take measures to counter tax deferral?

A closer look suggests that the principles of resource equality do offer direction on matters of tax design. The remainder of this Article illustrates the implications of equal opportunity for four major design issues: the form of the tax, the treatment of relationships, the question of generation-skipping, and the timing of taxation. In each case, I demonstrate how the core ideas of resource equality suggest a resolution of the specific design elements, and I pursue a few practical issues that could arise in implementing the principles. But, consistent with the exploratory spirit of this Article, the discussion does not attempt to reduce principles to readily administrable rules, nor does it try to address every issue involved in designing an inheritance tax.<sup>89</sup>

A quick word on terminology. Throughout the discussion, I refer to gifts and inheritance interchangeably: unless otherwise specified, the tax treatment of gratuitous transfers received by an individual should be the same whether the transfer is *inter vivos* or at death. Thus, the terms gift and inheritance, donor and decedent, donee and heir, will be used as synonyms rather than in their precise legal senses. Similarly, I use the term “wealth transfer” to encompass both *inter vivos* and deathtime transfers.

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<sup>89</sup> For example, this Article does not tackle the constitutionality of accessions taxation, practical problems of valuation, or the taxation of foreign-source accessions or accessions received by foreigners. Nor does it consider coordination of an inheritance tax with the federal income tax or with state wealth transfer taxes.

To this point, I have referred to “inheritance taxation” rather generically. But to implement the tax, we need a tighter specification of the tax base. An estate tax and an inheritance tax are both variants of wealth transfer taxation: that is, the precipitating event is the (non-market) transfer of wealth from one individual to another. Which form of the tax would resource egalitarians endorse?

The major variants of wealth transfer taxation appear in summary form in Table 1. An estate tax collects tax at graduated rates based on lifetime bequests by individuals, while an inheritance tax collects tax at graduated rates based on inheritance by individuals. When an inheritance tax incorporates a lifetime perspective, it is termed an “accessions tax.” (I will use the terms “accessions tax” and “inheritance tax” to refer to the accessions tax idea; I will use the term “annual inheritance tax” to describe a tax on inheritance based on receipts in a single year.)

The critical attributes of the accessions tax are, first, that it treats the receipt of wealth transfers by individuals as the focal point for taxation; second, that it taxes wealth transfers using rates and exemptions based on a lifetime perspective rather than an annual perspective; and third, that it taxes wealth transfers without regard to the taxpayer’s income or wealth from other sources. As Table 1 suggests, alternative forms of taxation mix and match these attributes in different ways.

TABLE 1. A COMPARISON OF ALTERNATIVE WEALTH TRANSFER TAXES

	Tax Base	Rates	Annual or Lifetime
Estate Tax	Bequests + gifts given	Graduated above an exemption per donor	Lifetime
Accessions Tax	Inheritance + gifts received	Graduated above an exemption per recipient	Lifetime
Annual Inheritance Tax	Inheritance + gifts received	Graduated above an exemption per recipient	Annual
Income Tax Inclusion of Inheritance and Gifts	Income from all sources + inheritance + gifts received	Graduated rates and exemption levels applied to all income	Annual

The familiar — and correct — point is that equality of opportunity tends to support a lifetime tax on inheritance, that is, an accessions

tax.<sup>90</sup> The accessions tax form maps best onto the objective of equalizing the material inheritance received by each individual over her lifetime. By contrast, an estate tax focuses on the wrong individual (the decedent) and imposes the same burden on disparate patterns of inheritance. From an equal opportunity point of view, an estate of \$500,000 divided among ten heirs is less objectionable than the same estate left to one heir, but an estate tax treats the two scenarios the same.

The lifetime perspective also maps onto the liberal view of individual life-planning: each person is entitled to a single, equal inheritance per lifetime. In contrast to the objective of equalizing ex post wealth, which might provide subsidies and taxes on an annual basis to equalize outcomes, the resource equality view treats each person as author of her own life. On the taxation side, this implies that inheritance should be measured on a lifetime basis as well: a person who inherits \$50,000 a year for ten years has a significant head start in life, much like (though not precisely the same as) a person who inherits \$385,000 in one lump sum (\$385,000 is the present value of the stream of payments at 5%). (The section on timing, below, considers issues of comparability in more detail.)

As a technical matter, with a pure flat-rate tax, the differences among the types of taxes would not be significant in terms of the amount of tax collected and the impact of the tax on individuals. The government would collect the same revenue, and heirs would receive the same net amount, whether the tax was assessed on a \$500,000 estate or on ten \$50,000 inheritances.<sup>91</sup> Although the estate tax would be nominally imposed upon a different taxpayer than the inheritance tax would, the incidence (that is, the distributional effects) of the tax is likely to be the same, assuming rational actors, perfect information, and flat rates.<sup>92</sup> A flat rate would make a cumulative lifetime calculation irrelevant as well, since the bunching or spreading of gifts or inheritances would not affect the total tax paid. If we assume a constant

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<sup>90</sup> See Duff, *supra* note 58, at 45–62; Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX L. REV. 419, 431 (1996).

<sup>91</sup> Whether the tax is *collected* from the estate or from heirs is a separate question, and largely one of enforcement. Estates should probably be required to file information returns to help the IRS track individual accessions. The further step of collecting tax from the estate might have administrative advantages as well. Taxing the wealth when it is all in one place and under the control of one person (the executor or probate judge) may aid in enforcement. By analogy to the income tax, the familiar device would be for the estate to collect a preliminary “withholding” tax to be reconciled and refunded upon later filing of an accessions tax return by each heir. For a discussion of possibilities, see Andrews, *supra* note 5, §§ A9–A10, at 506–07.

<sup>92</sup> Reed Shuldiner demonstrated to me that graduated rates could change patterns of bequests, due to the tax incentive to spread bequests among more heirs — an incentive found in the inheritance tax but not in the estate tax. Thus, the incidence of the tax could change, leaving some heirs with less and others with more.

5% rate of return that is identical for the government and for taxpayers, then a tax of rate  $t$  on a base of \$385,000 in Year 1 or on ten annual payments of \$50,000 would amount to the same thing in present-value terms.

Thus, it is the introduction of exemptions or graduated rates, or both, that renders meaningful the distinctions between estate and inheritance taxation and between lifetime and annual assessment. An exemption acts as a zero bracket — a zero tax rate on some dollar amount — so that even if the tax rate is flat above the exemption, there are in effect two brackets with progressive marginal rates.

What should the rates of inheritance tax be, and what exemptions should be permitted? While the level of tax rates is a question that should be resolved largely by revenue concerns and the tradeoffs considered above, the structure of rates is a separate question. In effect, the question is how much money an individual ought to be allowed to receive in addition to her public inheritance.<sup>93</sup> At first glance, equal opportunity would seem to require progressive marginal tax rates. On a leveling-down rationale, progressive marginal rates take an increasing share of larger inheritances, which presumably do more damage to equality of starting points. Progressive marginal rates are the traditional and familiar structure: the present estate tax<sup>94</sup> and Andrews's ALI proposal,<sup>95</sup> for example, incorporate them.

In addition, compared to a progressive estate tax, a progressive inheritance tax creates an incentive for donors to spread wealth among a larger number of recipients. An estate tax is, by definition, a function of the total wealth given away, and so the number of donees does not affect the tax burden. By contrast, inheritance taxation can be mini-

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<sup>93</sup> An equal opportunity accessions tax would require some mechanism to integrate the inheritance tax with the public inheritance. For the reasons given above, the rate of inheritance tax is likely to be less than 100%, although how much less is an open question. Whatever the rate may be, some method is needed for offsetting private inheritance against the public inheritance. Mechanically, there are two equivalent methods. First, the public inheritance might be paid universally, tax-free, and the inheritance tax would apply to private inheritance alone. Thus, if the public inheritance were \$100,000 per person, and Hannah also received a \$40,000 taxable bequest, Hannah would keep all \$100,000 of her public inheritance plus  $(1-t)$  of her private inheritance in excess of any exemption. At a tax rate of 80%, Hannah would keep a total of \$108,000. Second, the public inheritance might be "inheritance-tested," analogous to the more familiar income-testing found in public welfare programs. Those receiving a private inheritance below the amount of the public inheritance would be "topped up," either dollar for dollar or according to some ratio. For example, Hannah might be permitted to keep her \$40,000 private inheritance and receive a \$60,000 top-up from the state. This is implicitly, however, a confiscatory tax rate on the private inheritance: Hannah and her parents will quickly figure out that a dollar kept by the parents means a dollar paid by the state. The government could reduce the "tax" implicit here, with the consequence that Hannah could end up with more than the \$100,000 public inheritance in total.

<sup>94</sup> I.R.C. § 2001 (2000 & Supp. IV 2004).

<sup>95</sup> See Andrews, *supra* note 5, § A2, at 461.

mized (given progressive rates) by spreading the wealth among a greater number of donees, each of whom can take advantage of low brackets.

Traditionally, this spreading incentive is viewed as salutary,<sup>96</sup> since it is better for society if ten heirs each receive \$50,000 than if one receives \$500,000. This point seems sound if the goal of the tax is to reduce the concentration of wealth; by definition, dispersion is superior to concentration. But the equal opportunity view raises a question: is it really true that larger inheritances for fewer individuals do more damage to equal opportunity than smaller ones for more individuals?<sup>97</sup> In the example of \$50,000 inheritances, the point may be true. But above a certain threshold, one might argue that the damage to individual opportunity is largely done. In that case, lower rates might generate more revenue for the public inheritance without any additional cost in equal opportunity terms. For example, suppose that an inheritance of \$10 million opens up most options for most people, and that additional amounts — \$20, \$50, or \$100 million more — make little marginal difference in the life heirs might lead. Certainly, \$10 million is merely rich, while \$100 million is mega-rich, but in terms of educational options, financial security, and social cachet, the additional money probably would not transform the ordinary person's life. If this observation is correct, the best rate structure might operate with progressive rates up to the point that the individual keeps \$10 million and then decline somewhat after that.

The question of rates illustrates the tension between the equal opportunity perspective and the goal of reducing wealth concentration. Declining marginal tax rates on mega-fortunes would arguably serve equal opportunity but at the cost of permitting the super-rich to keep more wealth within the family across generations.

The goal of combating dynastic wealth — that is, wealth concentrated within families — actually suggests a third perspective. Equal opportunity and the anti-wealth concentration norm take an individualistic perspective: they measure opportunity and concentration individual by individual. But if, instead, we interpret families as a unit, the accessions tax may be an inferior form of social intervention. Return to the example of a donor who has \$500,000 to bequeath. If she leaves it all to one heir, he will pay quite a bit in accessions tax, while if she leaves it to ten heirs, they will pay little or nothing. While this is a happy example if one seeks equal opportunity or wealth dispersion,

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<sup>96</sup> See, e.g., MEADE COMMITTEE REPORT, *supra* note 3, at 318 (discussing the argument that tax incentives designed to encourage dispersion of gifts and bequests can serve the agenda of equalizing the distribution of wealth).

<sup>97</sup> Thanks to Louis Kaplow for raising this fascinating question at the October 13, 2006, Harvard Law School Workshop on Current Research in Taxation.

it could be a bitter example for the anti-dynastic crowd if it turns out that all ten heirs are family members — say, children and grandchildren. From this point of view, the accessions tax reaches a backwards result, offering an unjustified advantage for large dynasties over smaller ones.<sup>98</sup>

The logic of equal opportunity also has implications for exemption levels. De minimis inequalities in inheritance should be permissible, on the principle that inequalities that would not significantly change one's ability to pursue a life plan should not matter. This criterion might support a small annual exemption, sufficient to cover token holiday and birthday gifts, but the current \$12,000 annual exemption (per donor per donee) provided by federal law<sup>99</sup> is too large for all but Rockefeller-esque birthday gifts.<sup>100</sup> A smaller exemption, perhaps on the order of \$1000 or less, would permit generous gifts between adult relatives without opening the door to covert wealth transfers that can cumulate over time.

The de minimis principle would also permit an additional lifetime exemption per heir. While reasonable people might differ on what dollar amount meaningfully changes an individual's life chances, it is still relatively small: even \$100,000, for example, can make a significant difference. With \$100,000, one could buy a four-year college education at many colleges without going into debt, or buy a home in many areas of the country. Net worth of \$100,000 would put an individual above the fiftieth percentile of the national wealth distribution.<sup>101</sup> Thus, the lifetime exemption should be set lower in order to permit people to inherit items with sentimental value but not a market value high enough to change their opportunity set. By contrast, the current lifetime exemption of \$2 million per decedent<sup>102</sup> vastly exceeds the level of wealth that makes a real difference in one's life opportunities. Enforceability concerns might drive the annual and lifetime exemptions upward somewhat, but they still should fall well below current thresholds.

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<sup>98</sup> See Rudick, *supra* note 5, at 168 (pointing out that if one views the family as a unit, the accessions tax benefits larger families over smaller ones).

<sup>99</sup> I.R.C. § 2503(b) (2000).

<sup>100</sup> Under present law, a well-known estate-planning device is for each parent to give each child \$12,000 each year, a practice that can permit the transfer of very large sums in total. If both parents give each of two children the maximum gift of \$12,000 every year for twenty-five years, the total transfer (at a 5% discount rate) has a present value of \$677,000.

<sup>101</sup> See Brian K. Bucks, Arthur B. Kennickell & Kevin B. Moore, *Recent Changes in U.S. Family Finances: Evidence from the 2001 and 2004 Survey of Consumer Finances*, 92 FED. RES. BULL. A1, A8 tbl.3 (2006), available at <http://www.federalreserve.gov/pubs/oss/oss2/2004/bullo206.pdf> (noting that median family net worth in 2004 was \$93,100).

<sup>102</sup> I.R.C. § 2010 (2000 & Supp. IV 2004).

*A. Relatives and Strangers*

Initially, it seems that the aim of equalizing material inheritance implies equal taxation of all inherited wealth, without regard to the relationship between the donor and donee. The equal opportunity principle focuses on the recipient's opportunities, not on the donor's intentions, and so it seems that inheritance from any source should be equally disfavored. The neutrality principle would seem to bolster that conclusion: neutrality forbids any state judgment favoring certain relationships over others.

By contrast, the present estate tax does vary the rate of taxation, depending on the relationship between donor and donee. Gifts and bequests to spouses are exempt via the unlimited marital deduction.<sup>103</sup> Gifts and bequests to children are taxable (to the extent total gifts and bequests exceed the lifetime credit), while those made to grandchildren may be subject to an extra generation-skipping tax<sup>104</sup> (GST). Similarly, some European inheritance taxes explicitly adopt lower rates for close and lineal relationships and higher rates for more distant ones.<sup>105</sup>

But a closer look at equal opportunity, interpreted as equality of resources, suggests two insights. First, the principle of ambition sensitivity suggests that the inheritance to be equalized is inheritance that reflects endowment (brute luck), such as being born to wealthy parents, wealthy grandparents, or to an extended family willing to share its wealth with relatives. By contrast, inheritance that reflects choice should not be equalized any more than earnings or wealth reflecting choice should be equalized. If William devotes his time to paid work, while Linda spends her time developing and maintaining a network of relationships, each should bear the consequences: whether inheritance is part of Linda's plan, or simply a windfall, she ought to keep the inheritance that her friends and partners leave to her.

Second, the neutrality principle suggests that, within the categories of choice and endowment, the state should not favor any particular relationship over any other. The state should not privilege marriage, let alone heterosexual marriage; nor should the parent-child relationship be privileged over more distant relationships.

Implementing these principles is a thorny task, for conceptual as well as practical reasons. The principle of ambition sensitivity implies that the kind of material inheritance that ought to be equalized proceeds from endowment rather than choice. In a narrow, legal sense,

<sup>103</sup> I.R.C. § 2056 (2000) (bequests); I.R.C. § 2523 (2000) (gifts).

<sup>104</sup> I.R.C. §§ 2601–2604 (2000 & Supp. IV 2004).

<sup>105</sup> See Helmuth Cremer & Pierre Pestieau, *Wealth Transfer Taxation: A Survey* 7 tbl.2 (CESifo, Working Paper No. 1061, 2003), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=462441](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=462441) (showing rate differentials for nonrelated heirs).

gifts and inheritances are by definition unearned; there is no legal obligation to make them. But the absence of legal consideration is not sufficient to answer the moral question: does the inheritance reflect a relationship that is an accident of birth, or does it instead reflect a relationship of choice? The difficulty, of course, is that many relationships reflect a mix of endowment and choice.

Consider a simple hypothetical. Suppose that Dylan dies and leaves his heir, Hayden, a fortune of \$1 million. From an equal opportunity perspective, it matters whether Hayden is Dylan's child or his friend or partner. If Dylan left Hayden the \$1 million because of their parent-child relationship, the inheritance represents endowment — the brute luck that Hayden was born to a wealthy parent. But if Dylan left Hayden the \$1 million because they were friends or partners, then the money reflects the outcome of choice: Hayden chose to spend time with Dylan, perhaps foregoing some other friendships or taking on new ones for Dylan's sake. Hayden and Dylan may have made career decisions together, or may have pooled their resources. Or perhaps they were casual friends, and Dylan left the money on a whim. In any case, it is the fact that their relationship was *chosen* rather than any judgment about the nature of their relationship (for example, whether it was a marital one or close to it) that is significant.

But how is the tax system to sort out mixed motivations? Perhaps Dylan, at 65, and Hayden, at 35, have become fast friends by choice, as well as being father and child. Perhaps Hayden has even made sacrifices for Dad, moving closer as he ages, giving up other relationships to spend time with him. In that case, the endowed relationship has also become a relationship of choice. On the flip side, we can also imagine a friendship that proceeds from endowment as well as choice. Perhaps Dylan is a longtime friend of Hayden's own father. Dylan has spent little or no time with Hayden, but Dylan has no children of his own and leaves Hayden the money out of a sense of obligation to his old friend, Hayden's father, who has fallen on hard times. In that case, the bequest arguably reflects Hayden's endowment — his brute luck in being born to parents with wealthy friends. Dylan's relationship with the older generation reflects Dylan's choices, but in this case, Hayden has not chosen a relationship with Dylan — it was something he was born into.

It is, of course, impossible to separate human interactions into neat categories labeled choice and endowment. Still, equal opportunity principles suggest some generalizing assumptions. With certain caveats I will discuss later, the paradigmatic relationship of choice would be unrelated individuals who become friends in adulthood, when both are fully formed, capable of choice, and have access to a variety of

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possible relationships. Two friends or partners choose each other from a large pool of peers. They begin as strangers but come together because of affection, shared interests, and so on.<sup>106</sup> By contrast, a relationship forms part of an individual's endowment when it is part and parcel of his life circumstances. Here, the paradigm is the family: one's parents, siblings, grandparents are simply a given. In cases of adoption, both biological and adoptive parents are endowed in this sense.

To be sure, parents make important choices about child-rearing — they can be involved or uninvolved, warm or cold, dedicated or hap-hazard. And these efforts affect equality of opportunity, because adequate child-rearing is necessary (though not sufficient) for the child's healthy emotional and intellectual development. But when it comes to inheritance, the focus is on the child's endowment and choices. Her winnings (or losses) in the parental lottery are purely brute luck. By contrast, the libertarian argument for unlimited inheritance focuses on the parent and her choices — to have children and to leave wealth to them.

Adult children's relationships with their parents have an element of choice, but they inevitably take color from the early parent-child relationship. An adult child may choose — or refuse — to develop a friendship with her parents, but the friendship can never be independent of the parent-child bond. They cannot meet as strangers, taking back the early interactions. Even if the parent and child believe — quite genuinely — that their adult friendship is one of reciprocity, based on shared interests and mutual care, the child had differential access to the parent because of her endowment. Imagine that Brenda, the mother, age 60, and Gwen, the daughter, age 40, are fast friends. They go to the movies, talk about books, and share a love of horse racing. The fact remains that Brenda and Gwen did not meet as strangers. There might be hundreds of potential friends whom Brenda would like as well as she likes Gwen but did not meet, precisely because the daughter stood first in line, in a preferential position to gain her mother's friendship. Differential access is the hallmark of endowed relationships.

More controversially, even if parents were absent, or even abusive or neglectful, the adult child's decision to overlook or come to terms with parental behavior is arguably tied up with the early relationship or longing for one. The adult parent and child may find forgiveness, reconciliation, understanding — but they, too, cannot meet as strang-

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<sup>106</sup> See Rakowski, *supra* note 90, at 448 (pointing out that the choice-chance distinction could lead to the taxation of "unearned" gifts and the exemption of gifts from friends, which reflect personal choice).

ers. The child has sought out her parent because of the endowed relationship. Setting aside soap-opera cases of hidden identity or unusual coincidence (“Your best friend is actually your *father!*” “*Gasp!*”), the parent-child relationship seems inevitably to have a large dollop of endowment.

There is, of course, no metric for deciding precisely how much choice is involved in a given relationship. The unfortunate corollary is that treating all adult child-parent relationships as endowed disregards differences in individual ambition. Some people actively choose to spend time with their parents, to stay involved in their lives, and to care for them when they need care. These people may forgo other life options in order to pursue this vision of the good. Ideally, the system of inheritance would be sensitive to these differences. But any administrable rule for taxation will be imprecise. Just as Dworkinian income taxation is imperfect because it fails to distinguish (in part because it is impossible to do so) choice-based earnings from talent-based earnings, so will any system for equalizing inheritance define endowment imperfectly.

Are there other relationships that ought to be treated as endowed rather than chosen? Above, I asserted (without argument) that adult peer relationships are chosen. But elements of our endowment surely affect our opportunities for friendship. Alice’s friends love her goofy sense of humor and ready laugh, inherited from and nurtured by her parents. Bob has lost many friends due to his gloomy, despairing outlook, the product of years with his own inadequate and depressive parents. Charlize’s friends value the fact that she is smart and gorgeous too. If endowment is always in the mix when it comes to friendship, shouldn’t the law treat all relationships as endowed?

This line of thought lands us back into the midst of the talent-pooling debate. There, as we have seen, the critical question is whether Alice’s good humor, Bob’s gloominess, and Charlize’s beauty can and should be separated from the individuals themselves. Alice may have inherited a certain temperament, but perhaps she also works hard at maintaining a positive outlook. It is the combination of her disposition and her inclination to capitalize on it, to treat it as a valuable and defining attribute, that makes her Alice. (Imagine, by contrast, a Goth Alice, who disdains her parents’ jokes and works hard to stifle her cheerful side.)

Whichever way one resolves this debate, there are implications for inheritance. If one takes the Dworkinian view in favor of talent-pooling, then one is more likely to see all relationships as having a strong element of endowment. That implies the initial position described above: that inheritance ought to be equalized, regardless of its source. In such a regime, there would be no exemption for inheritance (or gifts) from spouses or peers. In contrast, if one rejects talent-pooling, then there is wider scope for distinguishing chosen from en-

dowed relationships. In that case, inheritance from blood or adoptive relatives would (ideally) be equalized, while inheritance from peers, including spouses, partners, and even more casual friends, would be exempt.

The following analysis adopts the latter view, which is more institutionally demanding, to illustrate how such a regime would look. To refine the principle a bit, an endowed relationship is one in which the relationship itself is initially not chosen *and* the element of endowment is likely to play a strong, even dominant role in later interactions. The latter criterion distinguishes a parent-child relationship from, say, a friendship struck up with a chance seat companion on the bus. One doesn't choose one's fellow bus passengers (although one does choose to ride the bus, so perhaps this is option luck and not brute luck). But in any case, if a friendship arises, it will reflect choice and not some early dependence on or lasting obligation to other bus riders. The requirement that the endowment element actually affect the terms of the friendship also avoids the conundrum posed by distant degrees of relationship. The problem is culturally contingent. Being a first cousin may carry quite a strong element of endowment in a culture with a strong tradition of loyalty to the extended family, but much less in a culture with primary allegiance to the nuclear family.

Translating these principles into workable rules would require some guesswork and arbitrary assumptions, but these are inevitable in designing legal institutions. Drawing the line between endowed and chosen relationships will be difficult in borderline cases. But the same difficulty arises in any normative theory: recall the raft of assumptions about preference structures and interpersonal utility comparisons necessary to make progress on a utilitarian tax policy.<sup>107</sup> Here, I want to focus on inheritances received from the most common sources: parents, grandparents, and spouses.

With these principles in place, we can now see that the equal opportunity perspective suggests a striking departure from the European inheritance tax model and from prior proposals for accessions taxation. Instead of taxing gifts and bequests from closer relatives at lower rates, the inheritance tax should tax bequests from relatives in full and should exempt those from nonrelatives.

How should the relative vs. stranger principle apply to married couples? The current estate tax has an unlimited marital deduction,<sup>108</sup> available only to opposite-sex spouses considered married under federal and state law,<sup>109</sup> and Andrews's accessions tax proposal offers an

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<sup>107</sup> See *supra* note 56 and accompanying text.

<sup>108</sup> I.R.C. § 2056.

<sup>109</sup> See 1 U.S.C. § 7 (2000) (defining marriage).

unlimited exclusion for accessions from a spouse.<sup>110</sup> The equal opportunity approach suggests a much broader exclusion — for bequests and gifts received from any other person who is not in the “related” category of parents, grandparents, and siblings. Both the principle of ambition sensitivity and the neutrality principle support the exclusion, which would not attempt to define or to endorse one model of marriage or partnership. The exclusion would encompass not only marital gifts and bequests, but also those from any partner or, indeed, any friend.<sup>111</sup>

This broad exclusion sidesteps — or perhaps leaps beyond — the controversy over same-sex marriage. Since the unrelated-individual exclusion does not attempt to define marriage (or, indeed, to differentiate in any way among casual and committed relationships), the tax law need not police the marriage line. The law would avoid distinctions based either on sexual orientation or on entry into a legally sanctioned relationship.

Now to practical considerations. The major abuse possibilities involve unrelated individuals making gifts and bequests on behalf of related ones. For example, people might structure gifts and bequests to “launder” them through unrelated parties. If John and David are unrelated but good friends, perhaps John gives David’s children \$1 million, and David does the same for John’s children. A filter for intergenerational gifts and bequests would catch this arrangement but potentially could penalize true intergenerational friendships in the process. So might a standard attempting to catch gifts and bequests made on behalf of a relative. The IRS would have difficulty detecting such arrangements, and so the key issue would be how feasible it would be for people to enter into them.

Gifts and bequests from unrelated individuals are rare today, but the danger is that they might become the newest shelter for the rich. One approach would be to treat inter vivos gifts differently from bequests. If John completes a gift during his lifetime, he will know whether David has done the same — indeed, they might sit down with their lawyers and sign simultaneously. But if the law were to exempt only bequests from unrelated individuals, and require that the testator be able to change his mind up to the very last moment, it might help undermine David’s and John’s willingness to leave large amounts to

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<sup>110</sup> See Andrews, *supra* note 5, § A43, at 541–42.

<sup>111</sup> For a donee, the exemption of accessions from nonrelatives (“strangers”) would also exempt any accessions from charity, unless the charity were “related,” meaning either a family private foundation or another charity over which the donee or his family exercises control. *Cf. id.* § A45, at 543 (explaining that an accessions tax should, but need not, include an exemption for accessions from charity).

each other's children: each would fear that if he were the first to die, his compatriot would change his will thereafter.

In some cases, the legal distinction between relatives and strangers may be difficult to draw. Consider what could be a common plan. Dad has remarried Stepmother. He would like to give his daughter \$1 million. If he gives the gift directly, the daughter will face inheritance tax. But if he gives the money to his wife first, isn't she a "stranger" with respect to his daughter? Or should a stepmother be considered related to any child of her spouse?

The relationship between stepparent and stepchild is variable, and it is difficult to generalize: it may be very much like a parent-child relationship, or it may be very different. On the one hand, the relationship arises only because of the child's continuing relationship to the parent, giving it a flavor of endowment: Stepmother is the father's chosen partner, and not the daughter's chosen friend. On the other hand, and especially if the remarriage occurs after the daughter is grown up, the daughter can exercise a great deal of choice about the kind of relationship to have with the stepmother. In this example, we see an extension of the problem: the gift is not genuinely *from* the stepmother; it is really from the father.

The same problem arises when an unrelated heir receives a gift or bequest on behalf of a related one. Suppose that Dad gives the \$1 million to his son-in-law instead of to his daughter. In this case, if the gift were genuinely from the father to the son-in-law, it ought to be excluded. Dad comes along with Son-In-Law's marriage to Daughter, but the son-in-law chose to marry the daughter, and the relationship with the father is part and parcel of the marital choice. However, if the gift is made to Son-In-Law but is really intended for the benefit of the daughter, it ought to be taxed at the daughter's marginal rate.

The question in both cases is whether the married pair (father/stepmother or daughter/son-in-law) ought to be considered a unit for purposes of determining relatedness. (For the moment, I will stay with the hypothetical involving married couples, but I will shortly turn to other relationships, since any attempt to define "pairs" takes us right back to the contested matter of defining relationships.) This is a familiar puzzle in the income tax, and there are two possible approaches: the attribution-rule approach and the joint-filing approach. The attribution-rule approach is most familiar in business taxation, which sometimes applies harsher rules to related-party dealings than to unrelated-party transactions.<sup>112</sup> The joint-filing approach arises from the

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<sup>112</sup> See, e.g., I.R.C. § 267 (2000 & Supp. IV 2004) (disallowing losses on related-party transactions).

income-splitting possibilities inherent in marriage. Neither completely solves the problem of the “hidden relationship.”

The attribution-rule approach would treat an accession made or received by either member of the couple as if it were made or received by the related person.<sup>113</sup> Thus, Stepmother’s gift would be treated as if made by Dad to Daughter, so that Daughter would be taxed. Son-In-Law’s accession would be treated as if it were an accession by Daughter, and again she would be taxed. In both cases, the gift is rendered taxable and taxed at the proper individual rate.

The joint-filing approach replicates a dilemma well known in the income tax.<sup>114</sup> If Daughter and Son-In-Law are treated as a unit, they will face a single marginal tax rate. This approach would tax the gift from Dad at the same rate whether he designates it for Daughter or her husband. The joint-filing approach permits accessions splitting — a “marriage bonus” — if it permits a rich-heiress Daughter and an inheritance-poor Son-In-Law to take advantage of a larger exemption or a more favorable rate structure than that applicable to a single individual. Conversely, if the exemptions and rates are no more generous for a pair than for an individual, a “marriage penalty” arises if Daughter marries someone who also receives gifts and bequests. In addition to these tradeoffs, there is another legal problem: the joint-filing approach requires some criterion for identifying donee relationships that trigger joint filing, and this line-drawing enterprise lands the law squarely back in the fray over same-sex marriage. But, as contested as it is, the marriage debate glosses over another major social change — the rise of cohabiting-partner households. Marriage was traditionally taken to be synonymous with households involving the pooling of economic resources, and the law has clung to this thinning fiction. But as scholars have pointed out for several decades now, marriage has become a poor proxy for economic pooling.<sup>115</sup> A more accurate rule would capture individuals living in the same household and sharing resources, whether married or unmarried,<sup>116</sup> but that definition is harder for the law to implement than the simple married/not married line.

Another special case involves inheritance by minors. Gifts received by a minor from parents and other relatives reflect endowment even

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<sup>113</sup> Halbach recommends this rule for gifts received by a couple. See Halbach, *supra* note 5, at 237–38. However, Halbach would permit couples to split accessions up to the annual exclusion. *Id.* at 238.

<sup>114</sup> See Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533, 560–61 (1995).

<sup>115</sup> See Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2027–28 (1996).

<sup>116</sup> See Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 107 (1993).

more clearly than do those received by an adult, because the child does not choose her own relationships. The capacity for choice grows with time, so that the situation of a 17-year-old is rather different from that of a 5-year-old; still, we conventionally draw a bright line separating childhood from adulthood. The key difference is that a child's inheritance from unrelated individuals reflects endowment as well. The law (mostly) does not hold children responsible for commercial (and even personal) choices before age 18, on the thought that children are imperfectly formed, subject to influence, and still under parental supervision. The implication is that *any* relationship with a minor is one of endowment. If it seems unfair to group toddlers with teenagers, then perhaps the age at which we draw the line should be lowered: At what age would we consider a child's friends, particularly those likely to leave a bequest or make a major gift, to be truly chosen? Sixteen? Twelve? Eight? Luckily, as an empirical matter, the slightly worrisome case of a chosen friend leaving a major bequest to a minor child is likely to be rare.

Should parental support for minor children be taxable? The federal estate tax exempts support if legally required, meaning that parents or children's legal guardians can spend unlimited amounts on support of minor children without incurring gift tax liability. Andrews's accessions tax follows a similar but somewhat broader principle, exempting parents' support of minor children (in unlimited amounts) and amounts paid by any person for support of any other person (regardless of the relationship if "reasonable and moderate" given the circumstances).<sup>117</sup> The justification for the exemption may be family privacy: families ought to have significant leeway to define how they wish to rear their children and live their lives together. But that rationale conflicts with the leveling-down impulse, at least in cases of children who benefit from very high levels of support. Would taxing very expensive transfers to children really undermine the family's emotional connection? Parents might feel frustrated, since giving expensive piano lessons, an indoor pool, or a trip to Europe would now cost even more, but would their frustration really weaken the parent-child bond? Would parents love their children less or pay less attention to them if very expensive items for children became even more expensive? In a leveling-down spirit, fewer piano lessons, private pools, and trips to Europe for the children of the elite might be a good thing. If the parents simply spent more money so as to provide the children with the same support in after-tax dollars, the society

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<sup>117</sup> Andrews, *supra* note 5, § A41, at 540.

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would collect more in tax revenue, while the children would be no further ahead than before.<sup>118</sup>

This tension — between parental freedom and leveling down — reflects in part the divergence between the ideal and the second best. The equal opportunity ideal for child-rearing is not that equal dollars be spent on each child, but rather that sufficient dollars be spent on each child such that she can develop the capabilities she will need to make informed choices about her life as an adult. Material conditions matter for child development, but other aspects of the child's environment — her parents, her peers, her access to education and medical care — may matter as much or more. It may also be that a minimum level of investment in each child is more important than strictly equal resources devoted to each child. If every child had caring parents, a good school, a safe neighborhood, and access to good medical care, it might not be worrisome, *even on equal opportunity grounds*, if some children had somewhat more (or much more) in the material realm. In part, this reflects the neutrality principle: if society ensured each child had a truly adequate foundation, then the differences among children reared in a Fifth Avenue penthouse, an Iowa farm, and an inner-city Baltimore apartment house might be morally insignificant. Of course, we do not live in that world yet, and so we have run squarely into the question of the second best once again, where the leveling-down impulse may be more attractive.

### *B. No Penalty on Generation-Skipping*

The equal opportunity view also suggests there should be no generation-skipping tax, in sharp contrast both to present law<sup>119</sup> and to some (though not all) accessions tax proposals. That is, gifts and bequests from grandparents and other relatives in the prior generation should be taxed the same as those from parents or siblings.

The absence of any generation-skipping tax may seem odd at first, because relative to a no-tax world and to present law, an accessions tax may encourage gifts to younger people and to younger generations. We shall see, in section C below ("Timing"), an important countervailing feature of the particular accessions tax proposed here. But it is worth tackling this issue now, because past analyses, including most importantly Andrews's accessions tax proposal, have identified incen-

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<sup>118</sup> If in-kind support for minor children were untaxed, while cash inheritances were taxed, the incentive effects could be perverse, leading wealthy parents to purchase even more education, culture, and early training than they already do, in order to give their children a head start in a tax-wise fashion.

<sup>119</sup> See I.R.C. §§ 2601–2604 (2000 & Supp. IV 2004).

tives for generation-skipping gifts to be an important drawback of accessions taxation.<sup>120</sup>

To set the stage, consider a family with an 80-year-old grandfather, who has wealth of  $\$X$  to leave at his (imminent) death. He has a 55-year-old son, who in turn has a 21-year-old daughter. Call the grandfather's death Time 0, the son's future death Time 1, and the granddaughter's future death Time 2.

The problem, it is said, is that an accessions tax creates an incentive for Grandfather to leave his wealth to Granddaughter. Unpacking this a bit, there are two sources of this incentive. One arises in any wealth transfer tax, and the other arises only when the accessions tax model is adopted. The first incentive is to give money to younger people to *minimize the number of wealth transfer taxes imposed*. If Grandfather's goal is to maximize post-tax wealth while keeping it in the extended family, he will prefer to leave his  $\$X$  to Granddaughter, because if she keeps the money until Time 2 and then passes it to the next generation, the family as a unit will have paid one tax (on Granddaughter's accession) rather than two (first on Son's accession at Time 1 and then on Granddaughter's).

Any wealth transfer tax creates this incentive, and if tax rates are comparable in the estate tax and the accessions tax, the incentive is in principle the same: both taxes may alter behavior compared to a no-tax world. That is, even if Grandfather might prefer to leave the money to Son — perhaps Son is needier, or steadier, than his daughter — the existence of the transfer tax creates a reason to skip Son entirely and leave the money directly to Granddaughter.

Trusts create even more attractive options. For instance, suppose Grandfather leaves the money in trust for Son for life and remainder to Granddaughter. This arrangement may reassure Grandfather that Son's needs are taken care of, and perhaps Son would have wanted to leave the money to his daughter in any event. Moreover, the transfer tax is minimized. An outright transfer to Son and a subsequent bequest to his daughter would incur two full taxes on the entire transfer, while in the trust case (simplifying a bit), there are two accessions, but each is taxed only on a fraction of  $\$X$ , so that  $\$X$  as a whole is taxed only once. Son should be taxed on the portion of  $\$X$  represented by the life interest, and Granddaughter should be taxed on the portion of  $\$X$  represented by the remainder. (We shall see, in section C, that timing issues arise here, but in principle this is the correct result.)

An accessions tax with graduated rates does, however, create an additional generation-skipping incentive not found in the estate tax, because gifts to younger generations can *split the inheritance among*

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<sup>120</sup> For a thorough analysis, see Andrews, *supra* note 5, § A2, at 474–86.

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*more recipients, taking advantage of the exemptions and low brackets available to each individual.* In this case, suppose that there are several grandchildren. The family as a whole can pay less tax if Grandfather splits the gifts among as many recipients as possible. Here, the advantage of grandchildren arises not because of their youth but because they expand the number of individuals within the family unit.

The incentive to split gifts and bequests across individuals is a familiar feature of accessions taxation compared to estate taxation. Some analysts have found the ability to split bequests among grandchildren problematic, however, because the wealth remains within the family rather than truly spread beyond the confines of the dynasty.<sup>121</sup>

Why are these two incentives — to give to younger generations and to split bequests among many relatives rather than few — problematic? The fact that generation-skipping gifts can reduce revenue is not itself a problem of principle; it simply suggests that rates may be higher under a tax that permits generation-skipping gifts without penalty. The deeper issue, once again, turns on the objective of accessions taxation. From an individualistic, equality-of-opportunity perspective, neither incentive is troubling.<sup>122</sup> By contrast, if the aim of the tax is to fight the concentration of wealth within family dynasties or to create a proxy for the periodic taxation of income or wealth, generation-skipping incentives are indeed troubling.

To see the difference, note that the objection to generation-skipping requires one to view the family rather than the individual as the real unit. If we understand Grandfather, Son, and Granddaughter all to be part of a dynastic family unit, then it seems abusive for them to pay a lower tax by shifting the money among individuals in different generations. But how we understand the relationship among these people is a function of which social arrangements we intend to discourage via taxation. The anti-dynastic view focuses on the fact that these three people may share a common aim to pass on a fortune to future generations. That view supports a tax that is equally heavy whether the wealth passes through the hands of two individuals or just one. Similarly, if the social goal is to impose a periodic tax on wealth, it also ought to be irrelevant whether the wealth passes through the hands of two individuals or just one during the relevant period.

Both the anti-dynasty and periodic capital taxation rationales would support some kind of measure to combat generation-skipping

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<sup>121</sup> See *id.* § A2, at 478 (“Some might argue that the purpose of the accessions tax is served [by the inducement to split gifts among grandchildren]. But giving to grandchildren instead of children does not generally represent broader dispersion of wealth; it only represents accelerated progress down the same road.”).

<sup>122</sup> Joseph Dodge also rejects the GST and the norm of one tax per generation. See Dodge, *supra* note 6, at 578.

transfers.<sup>123</sup> More precisely, both rationales would support abandoning accessions taxation in favor of a periodic tax on wealth kept within the family. Imagine a tax levied, say, once every thirty years on wealth inherited from a defined class of family members. Such a tax would produce equivalent taxation per dynasty regardless of the number of transfers within the family or the age of heirs. But, by definition, the tax would no longer reach individual accessions, and it would impose very different taxes on individuals who received similar inheritances, depending on the family wealth of each.

By contrast, the equal opportunity view focuses attention on the opportunities available to each individual. When an individual inherits wealth that significantly exceeds the social inheritance, her opportunity set has unfairly expanded beyond that of her peers, and the accessions tax ought to apply. Whether the inheritance came from Grandfather or Dad is irrelevant: the focus is on Granddaughter's enhanced opportunity set, and the tax is intended both to level down (by reducing her net inheritance) and to level up (by collecting revenue to fund social inheritance for others). As discussed in section C, below, it may be that a 55-year-old heir and a 21-year-old heir ought to pay a different rate of tax because of their different stages in the life cycle. But the age and generation of the *donor* are not strictly relevant to the donee's tax burden.

Although the accessions tax might influence donors to leave wealth to younger generations, the change is arguably a productive one from an equal opportunity point of view. As an empirical matter, whether donors change behavior will depend on whether dynastic motives or other motives dominate. Perhaps Son needs the money now, or perhaps the family tradition is to leave the money to one's children and let them take care of their own offspring. But even if Grandfather does change his decision, the fact of the change, standing alone, is not necessarily significant, because pre-tax behavior is not a normative baseline. The effects of the change may be significant, but here, the social consequences may be more productive from an equal opportunity perspective. Splitting up the wealth among individuals makes private inheritance more functional by giving extra resources to many individuals rather than few. And to the extent that inheritance is pushed a bit earlier in the life cycle, this too can be socially productive, because the impact on younger heirs' opportunity sets is greater.

As I discuss in greater detail below, this latter proposition highlights a real tension in the resource equality view of inheritance. On

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<sup>123</sup> Andrews is quite clear on this point: "The argument is only that when any transfer tax is viewed from the perspective of a family over a period of time it operates as a kind of periodic capital levy, and that it is appropriate to adjust rates to produce comparable burdens as gauged from that viewpoint." Andrews, *supra* note 5, § A2, at 476-77.

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the one hand, if society is to permit private inheritance, it ought to be as expressive and as functional as possible, helping mark individual lives and life-planning as the enterprise of critical importance, and helping individuals carry out their life plans. On the other hand, as I have emphasized to this point, private inheritance worsens inequality of opportunity, and the impact of private inheritance on inequality of resources may be most severe if the recipient is young — precisely because a given amount of wealth does do more to open up lifetime opportunities. In section C, I take up issues of timing and suggest that an inheritance tax without a generation-skipping penalty but with a higher rate of tax on younger heirs is a plausible translation of the equal opportunity view. The key point is that the higher rate on younger heirs is not a response to generation-skipping incentives but, instead, to a separate issue relating to opportunity over the life cycle.

One might worry that the equal opportunity view ignores identity of interest within the family and undertaxes the social element of inheritance that comes from being a part of a rich family even when one's individual wealth is modest. This is an important point, and one I address in section C, below; the question is really whether class background ought to be taxed, and this is a serious matter for an equal opportunity regime. But the anti-dynastic view may presuppose more unity within families than actually exists. What about children (and grandchildren) who are independent, willful, rebellious, or who simply intend to spend their money in ways that would not meet Grandfather's approval? When individuals are free to pursue lives of their own choosing, the family gives up control, and would-be heads of dynasties may find that it matters very much whether they leave their wealth to like-minded offspring or spread it widely, taking the chance that future generations will make less appealing use of the money.

Some readers will be discomfited by the fact that an accessions tax without any penalty on generation-skipping will tax families very differently, depending on whether they have grandchildren or not. The grandparent of a large family may find that she can pass on large amounts of wealth to future generations with minimal tax, while the equally wealthy grandparent of a family with few grandchildren may find her tax options less attractive.<sup>124</sup> The source of the discomfort, however, reflects a focus on the donor and her family. On an individual basis, each heir will be taxed correctly — on the wealth she receives.

Still, one abusive strategy is of concern under the equal opportunity view: when a transfer is purportedly for one individual but actually benefits another. For example, suppose that Son is 35 and Grand-

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<sup>124</sup> See *id.* § A2, at 479.

daughter is 1. If Grandfather leaves the money to Granddaughter for immediate use, it is likely to benefit Son, if he uses it to pay for his daughter's support and amusement. Here, the accessions tax might adapt the income tax rule known as the "kiddie tax,"<sup>125</sup> deeming any inheritance by a child under some age to be inheritance by her parents for purposes of determining the marginal rate of tax. (That is, the inheritance would still legally be the child's, but it would be taxed at the parents' rate.)<sup>126</sup>

### C. Timing

When should a donee pay tax on a gift or an inheritance? The equal opportunity ideal suggests that the tax should be assessed when the gift or inheritance changes the recipient's opportunity set — when the recipient can use the resources to make or change a life plan.<sup>127</sup> Because accession to resources by the individual is the appropriate time for assessing tax, any deferral or acceleration of the tax should be measured by that event — and not relative to the donor's death or a norm of one tax per generation.

In some cases, the application of the principle is straightforward. If Alice, at 21, receives \$1 million in cash or Treasury bonds, Alice should immediately be taxed on the inheritance. But what if Alice inherits the money at 31 or 71: should her age matter? What if Alice at 21 is guaranteed an inheritance of \$1 million in ten years: should she be taxed at 21 or upon receipt? And what if there is some uncertainty about the amount or existence of the future inheritance?

This section will consider these issues in turn, but the analysis begins with a common starting point: a conventional accessions tax with graduated rates will overtax deferred accessions. To see this, begin with a flat-rate accessions tax and an example that will be deployed throughout this section. Suppose that Larry inherits, at Time 1, a trust interest guaranteed to be worth \$1 million in ten years, at Time 2. At a discount rate of 5%, Larry's inheritance at Time 1 is worth \$613,913. With a flat-rate tax of, say, 80%, Larry would pay \$491,131 if taxed on the present value of his inheritance at Time 1. If he paid, instead,

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<sup>125</sup> See I.R.C. § 1(g) (West 2002 & Supp. 2007), amended by Pub. L. No. 110-28, § 8241, 121 Stat. 112, 199 (2007).

<sup>126</sup> A final issue related to generation-skipping has to do with the taxation of trusts. Some analysts have worried that the failure to adopt a penalty on generation-skipping gifts may necessitate complex rules for trust taxation. I will take up this issue in section C.

<sup>127</sup> The tax might be *paid* at that time or at a later time with interest, but the amount of the liability should initially be fixed when the opportunity set changes, and interest charges should run from that date to avoid deferral.

\$800,000 at Time 2 (80% of \$1 million), the tax would have a present value of \$491,131.<sup>128</sup>

But the introduction of conventional graduated rates means that Larry will pay tax *at a higher rate* if he is taxed at Time 2 rather than at Time 1. In a conventional progressive marginal tax-rate structure, the bracket breakpoints may be adjusted for inflation but otherwise remain fixed over time.<sup>129</sup> This feature means that if Larry's tax is assessed and paid in Year 10, he pays more tax (in present value terms) than if his tax is calculated in Year 1. Table 2 illustrates a hypothetical progressive rate structure, and Table 3 illustrates the difference in tax calculated in Year 1 or Year 10.

TABLE 2. HYPOTHETICAL TAX RATES

Inheritance	Marginal Tax Rate
\$0 to \$99,999.99	0%
\$100,000 to \$499,999.99	75%
\$500,000+	90%

TABLE 3. PROGRESSIVE RATE INHERITANCE TAX WITH FIXED BRACKET BREAKPOINTS

Inheritance of \$1 million in 10 years PV in Year 1 = \$613,913		
	Amount of Tax	PV of Amount of Tax
Tax Assessed and Paid in Year 1	\$402,522 Average tax rate = 66%	\$402,522
Tax Assessed and Paid in Year 10	\$750,000 Average tax rate = 75%	\$460,435

As Table 3 shows, Larry pays inheritance tax at an average rate of 66% if the tax is assessed and paid in Year 1. His average rate rises to 75% if the tax is assessed and paid in Year 10. Put another way, the *future* (Year 10) value of the Year 1 taxes is \$655,666, or 66% of his \$1 million inheritance.

<sup>128</sup> As Andrews points out, the flat-rate result also obtains when the amount of an accession is insufficient to move the taxpayer between tax brackets, so that the flatter the rate structure, the more likely the flat-rate result is to apply to a range of accessions. See Andrews, *supra* note 5, § A22, at 514.

<sup>129</sup> See, e.g., *id.* § A2, at 461–62 (providing an illustrative rate schedule for an accessions tax); *id.* intro., at 454 (noting that the tax grows proportionally over time if rates are flat and more than proportionally if rates are graduated); see also Halbach, *supra* note 5, at 248–60.

The increase in Larry's taxes arises because the rate-bracket thresholds do not reflect investment growth over time. Thus, even though \$613,913 in Year 1 and \$1 million in Year 10 have the same present value, they put Larry in different tax brackets because their nominal value is different: more of Larry's inheritance is taxed at the top rate when he is taxed on the higher nominal value in Year 10. Larry is deferring the use of an exemption level and lower-bracket endpoints that are fixed in dollar amount — he is losing the time value of money because his inheritance is growing but the tax brackets are not.

The tax increase accompanying deferral has been observed by others, notably Andrews.<sup>130</sup> The following sections take up the normative questions — how *should* an accessions tax treat deferred accessions? Is the tax increase troubling or appropriate? Throughout, we shall see that the increase in taxation with time plays a pivotal role.

1. *Inheritance and the Life Cycle.* — The ambition of the accessions tax, compared to an annual inheritance tax, is to tax lifetime inheritance, rather than year-by-year inheritance. Generally speaking, the idea is that two people who receive the same inheritance over a lifetime should pay the same tax.

However, it is not entirely obvious what “equal inheritance over a lifetime” should mean. Begin with an example. Suppose that Nancy and Larry are both 21. Nancy inherits \$1 million in cash at age 21, and Larry receives \$1 million in cash at age 31. Neither receives any additional gift or inheritance during his or her lifetime. In one sense, Larry and Nancy have the same lifetime inheritance; they both receive \$1 million dollars at some point during their lives. But should they pay the same tax?

If we compare Larry and Nancy at the same life stage, Larry inherits less than Nancy in present value terms and in opportunity terms as well. Nancy has the money sooner and has ten additional years to use it as she wishes — to consume, save, invest, or fritter, in accordance with her life plan. Even if 21-year-old Larry has an ironclad (and creditworthy) promise of \$1 million in ten years, the present value of the inheritance would be only \$613,913: that is the amount against which creditors might lend him money in advance. (An important aside: all the calculations in this section reflect a 5% discount rate. Below, in section C.2, I consider the implications if the legal system adopts a discount rate that differs from a market rate.)

This line of thinking suggests that Larry should pay less in inheritance tax than Nancy does, even though they receive equal dollar amounts. The key to the argument is that “equal inheritance over a

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<sup>130</sup> See Andrews, *supra* note 5, § A22, at 512–21.

lifetime” should be interpreted as equal dollars made available at the threshold of adulthood rather than as equal dollars received at any time during one’s life. This is a controversial point, and it mirrors the ongoing debate within the resource equality camp between advocates of “basic capital,” paid at 21 (or so), and proponents of “basic income,” paid in equal installments over the lifetime.<sup>131</sup>

Proposals for basic capital tend to operate on the premise that early adulthood is a critical life stage, and that individuals should take control of their social inheritance then. This is in part a practical and empirical point: one’s opportunity set tends to be greater early in adulthood than later in life. The focus on early adulthood also serves an expressive function: every individual has one life, and she should take control and bear responsibility from the onset of adulthood.<sup>132</sup> We might debate when one’s opportunity set is greatest: At 21? At 30? But most people would agree that opportunities diminish with time, due to path dependency and aging. At 40 and perhaps more so at 60 or 70, one’s opportunities depend crucially on education, family networks, and choices that have affected one’s health; although some of these decisions can be altered, some cannot.<sup>133</sup>

The identification of early adulthood as the time of greatest lifetime opportunity is also a normative claim. Basic capital proponents tend to defend the ideal of “one person, one life,” meaning that the younger self is properly (as well as de facto) author of her life.<sup>134</sup> The argument is that the older person ought to live with the consequences of choices made by her younger self, and while self-reinvention ought to be permitted, there is no moral ground for state-mandated *intrapersonal* redistribution in favor of the older self. In effect, the older Larry must properly live with the life choices made by the younger Larry, even if the older-and-wiser person has deep regrets.

Basic income proposals reflect an alternative view: that resources for an individual’s lifetime are properly (indeed, mandatorily) spread over the lifetime, giving successive “selves” a chance to share equally in social capital and pursue a life plan on an equal footing. On this view, Larry at 21, at 40, and at 70 has an equal claim to a share of so-

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<sup>131</sup> Compare Ackerman & Alstott, *Why Stakeholding?*, *supra* note 64 (advocating basic capital), and Bruce Ackerman & Anne Alstott, *Macro-Freedom*, in ACKERMAN ET AL., REDESIGNING DISTRIBUTION, *supra* note 7, at 209 (same), with Van Parijs, *supra* note 68 (advocating basic income), and Phillippe Van Parijs, *Basic Income Versus Stakeholder Grants: Some Afterthoughts on How Best To Redesign Distribution*, in ACKERMAN ET AL., REDESIGNING DISTRIBUTION, *supra* note 7, at 199 (same).

<sup>132</sup> See Ackerman & Alstott, *Why Stakeholding?*, *supra* note 64, at 48.

<sup>133</sup> A utilitarian analysis might also note one’s differential utility over the life cycle. See, e.g., Richard Zeckhauser & Donald Shepard, *Where Now for Saving Lives?*, 40 LAW & CONTEMP. PROBS. 5, 11–15 (1976) (introducing the idea of quality adjusted life years, or QALYs).

<sup>134</sup> See Ackerman & Alstott, *Why Stakeholding?*, *supra* note 64, at 48.

ciety's resources. While, as a matter of fact, the older Larry's options will be limited by his earlier choices, the state should improve his options throughout the life cycle by requiring payment of the social inheritance over time.

These competing visions of opportunity and the life cycle are only part of the debate over basic capital and basic income. Practical considerations also come into play: Would the young waste their money? Could the state prevent individuals from borrowing against their basic income on the black market to convert it to basic capital? Which program would mesh better with the ideals of a just welfare state? And so on. There are also, of course, a host of intermediate options between one payment at age 21 and lifetime payments in equal amount. For example, if early adulthood and early midlife were thought to be critical stages for early planning and midcourse correction, the state could pay one stake at age 21 and then a "top up" at age 40.

The choice between these ideals matters for the timing of inheritance taxation. If one accepts the idea that opportunity is greatest in early adulthood, it would follow that the public inheritance ought to take the form of a basic capital grant at age 21, *and* that everyone who received additional private inheritance should be taxed according to their position in the life cycle. The leveling-down rationale for the tax would imply that younger heirs should face heavier tax burdens (in percentage terms) than should older ones, because the additional inheritance above and beyond the social inheritance would have its greatest (unjust) impact on opportunity in young adulthood.<sup>135</sup>

More concretely, imagine that an 80-year-old receives an inheritance of \$10 million. The bequest likely has a limited impact on his life options. He may consume at a higher level than he would have otherwise for the rest of his life. He can live more comfortably, take trips, and buy a new home and a fancy car. Depending on the terms of the inheritance tax, the bequest may also improve the man's options for leaving money to his heirs. But the bequest is unlikely to work a major change in what the 80-year-old does with the remainder of his life. He may look back with satisfaction at the pleasures the money brought in his last decade of life, but he probably will not radically change his understanding of the life he lived or the person he is.

By contrast, the same \$10 million inheritance in the hands of a 21-year-old is likely to have a greater impact on his life options. Instead of merely making the life he has already chosen more comfortable, the money would redefine the options from which he might choose. The

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<sup>135</sup> Joseph Dodge makes a similar point in his recent article. He briefly notes that the equal opportunity rationale for accessions taxation "wane[s] as the transferee advances in age." Dodge, *supra* note 6, at 560. He suggests that the exemption level might be raised at ages 30 and 60. *See id.*

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fortune could launch him into business or give him a cushion for intellectual or artistic pursuits; it could free him to start a family or allow him to avoid family entanglements; it could support philanthropy or a life of moneyed leisure.

One complexity here, which I alluded to above, is that resource equality liberalism fosters two competing impulses. On the one hand, taxing older heirs at lower rates, which may create incentives for gifts to older heirs rather than to younger ones, comports with the leveling-down portion of the ideal of equalizing inheritance. If the state must tolerate inequality in inheritance in order to raise revenue, it can minimize the damage, in opportunity terms, by encouraging private inheritance to take place at later life stages. Indeed, if private inheritance largely took place at later life stages (which is somewhat the case already), then even more young people would start life on an equal footing, having access only to the universal, public inheritance. On the other hand, as we have seen, resource equality (interpreted as advocates of basic capital understand it) also places a positive value on the deployment of resources by the young. That is what motivates the (leveling-up) payment of stakeholder grants in early adulthood. The idea is to deploy society's resources to greatest effect at the point they have the greatest impact on life options. On this view, it seems perverse for the state to encourage the old to lock up social resources that could be used to enrich young lives.

As we have already seen, the leveling-down and leveling-up aspirations of the inheritance tax can often conflict with each other. Setting rates at less-than-confiscatory levels is one effort to manage the tension. Here, the same considerations might dictate some moderation in the gradation of rates from younger ages/higher rates to older ages/lower rates. But in neither case can the tension be entirely eliminated.

In the following, I sketch one way to incorporate into the inheritance tax some sense of the declining opportunity value of inheritance over the lifespan, but this is by no means the only possibility. The inheritance tax could tax each person on the *present value of her inheritance at age 21*. For example, if Nancy receives \$1 million in cash at 21, and Larry receives \$1 million in cash at 31, the tax system could have Nancy report the full \$1 million, while Larry reports only \$613,913. Such a system would take the perspective of a 21-year-old Larry, who is looking ahead to a \$1 million inheritance in ten years, and tax him as if he received \$613,913 at age 21.

It would be impossible actually to tax every individual at age 21 on his lifetime inheritance, since in many cases inheritance is settled only in later years. (I consider contingent and unexpected inheritance below.) Even if the future inheritance has vested at 21, there are liquidity and valuation issues that could be resolved by waiting to tax him until he actually receives the money at age 31. But it is possible to

construct an ex post system of taxation that would mimic that ex ante perspective. For example, suppose that Larry's inheritance at age 31 comes out of the blue: he had no prior commitment or expectation. The tax system could discount his inheritance back to age 21, calculate the tax that would have been due then, and have Larry pay the tax at 31 with interest (as if he were filing a return that is ten years late). Call this the "lookback method": the tax is assessed and paid at age 31, but the tax is calculated as if he had received the (discounted) value at 21 and had simply deferred payment until age 31.

As we have seen, if the inheritance tax had completely flat rates, there would be no point in discounting Larry's \$1 million back to \$613,913 and then adding an interest charge at 5%, since the two would be a wash. It would be simpler, and would achieve the same result, to tax Larry on \$1 million at age 31.<sup>136</sup>

But the introduction of graduated rates means that the lookback method produces different results from those obtained by taxing Larry at age 31 on his \$1 million. Using the illustrative rate schedule set forth in Table 2, above, the lookback method taxes Larry at an average rate of 66%, while the "wait and see" method, which waits until age 31 to tax Larry, imposes an average tax rate of 75%.

From the equal opportunity perspective, the wait-and-see method produces the wrong pattern of tax rates over the life cycle. Instead of lowering rates for later-in-life accessions, it raises rates as the life cycle proceeds. To understand why, consider a modification of the earlier hypothetical: if Nancy actually receives \$613,913 at age 21, she would pay a lower average tax rate than would Larry, who receives the same (present value) amount at age 31. In this sense, the younger person would be favored relative to her older counterpart. Table 4 illustrates the point. The lookback method mimics taxation of Larry at 21 and puts him in the same position as Nancy, while the wait-and-see method taxes Larry at a higher rate than Nancy.

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<sup>136</sup> If the present value of Larry's inheritance interest at Time 1 is  $PV$ , and the inheritance tax is  $t$  (where  $t$  is a flat rate), then the Time 1 tax would be  $PV$  times  $t$ . But if  $PV$  grows to some larger amount, say,  $PV(1+r)^t$ , then the tax at Time 2 would be that larger amount times  $t$ . The tax grows proportionally with the growth in the value of the remainder, so that collecting the tax later on does not deprive the fisc of revenue.

TABLE 4. PROGRESSIVE RATE INHERITANCE TAXATION  
OVER THE LIFE CYCLE WITH CONVENTIONAL RATES

	Nancy	Larry
Inheritance	\$613,913 at age 21	\$1 million at age 31 PV at age 21 = \$613,913
Ex Ante Method (tax assessed on PV at age 21 and paid at age 21)	\$402,522 Average tax rate = 66%	\$402,522 Average tax rate = 66%
Lookback Method (tax assessed on PV at age 21 but paid, with interest, when inheritance is received)	Same as ex ante method	\$655,665 Average tax rate = 66%
Wait-and-See Method (tax assessed on value in year of receipt and paid when in- heritance is received)	Same as ex ante method	\$750,000 Average tax rate = 75%

If, however, the tax brackets were to grow over time at the discount rate, the wait-and-see method would produce the same results as the ex ante and lookback methods do. Table 5 illustrates the point. When the exemption level and low-bracket thresholds grow at the discount rate, beginning when the individual is 21, the result is that the wait-and-see method accurately mimics the lookback method.

TABLE 5. PROGRESSIVE RATE INHERITANCE TAXATION  
WITH ADJUSTED BRACKET BREAKPOINTS

	Nancy	Larry
Inheritance	\$613,913 at age 21	\$1 million at age 31 PV at age 21 = \$613,913
Ex Ante Method	\$402,522 Average tax rate = 66%	\$402,522 Average tax rate = 66%
Lookback Method	Same as ex ante method	\$655,665 Average tax rate = 66%
Wait-and-See Method <sup>137</sup>	Same as ex ante method	\$655,665 Average tax rate = 66%

<sup>137</sup> On the stated assumptions, the adjusted tax rate schedule in Year 10 would be:

\$0 to \$162,889.46	0%
\$162,889.46 to \$814,447.31	75%
\$814,447.31+	90%

An accessions tax conventionally adopts *both* the wait-and-see method *and* fixed bracket breakpoints. But, as we have seen, that combination of features predictably overtaxes later-in-life accessions compared to those received earlier in life — here, Larry compared to Nancy. An accessions tax thus must either abandon the wait-and-see method *or* abandon fixed bracket breakpoints in order to tax each individual on the present value of her inheritance at age 21.

The appeal of adjusting bracket breakpoints rests on the normative proposition that the present value of one's inheritance at age 21 is the proper measure of taxation. This criterion implies that two people of different ages should pay different taxes on the same dollar inheritance received in the same year. For example, modify the example again so that Nancy and Larry are 21 and 31 respectively in 2006 and each receives \$1 million (neither has received any other inheritance to this point). Larry would still pay the familiar 66% rate, but Nancy would pay \$750,000 in tax, or a 75% average tax rate. The two individuals may understand themselves to have similar options in that year: both have \$1 million (pre-tax) to spend, and both have a lifetime inheritance of \$1 million. Why should Larry's tax rate be lower than Nancy's?

The answer takes us back to the question that began this section: what should "lifetime taxation" mean? I have shown that an equal opportunity perspective might plausibly take the view that adult life begins at age 21 and that opportunities at the threshold of adulthood have a special normative status in measuring opportunity. If financial inheritance at age 21 is the appropriate benchmark for equal — or unequal — opportunity, then Nancy's \$1 million at age 21 is worth more (in opportunity terms) than Larry's \$1 million at age 31. Accordingly, Nancy appropriately pays tax at a higher rate under a progressive rate structure. By contrast, a conventional accessions tax would tax Nancy and Larry at the same rate.

All else equal, the conventional accessions tax with fixed bracket breakpoints will tend to encourage donors to make *earlier-in-time* gifts, while an equal opportunity rate structure will tend to encourage donors to make gifts to donees who are *older*. These differences arise because the conventional accessions tax imposes higher rates on later accessions — the higher rate is a function of the passage of time rather than of the donee's age. In contrast, the equal opportunity rate structure keys taxation to the age of the donee and will therefore tend to encourage gifts to older recipients.

Returning to an earlier hypothetical, suppose that Grandfather is 85, Son is 55, and Granddaughter is 21, and that neither Son nor Granddaughter has yet inherited anything. Suppose that Grandfather is interested in maximizing after-tax gifts received by his descendants; he wants "the family and not the government" to get his money. Under the conventional accessions tax, Grandfather ought to make gifts

sooner rather than later, because deferral of the gift raises the tax rate. The conventional accessions tax also encourages gifts to Granddaughter rather than to Son, but (as we have seen) that incentive arises from a different source — the possibility of incurring one transfer tax rather than two and the benefits of splitting the gift among more recipients. The standard accessions tax motivates earlier-in-time gifts, even if Grandfather has decided to give the money to Son.

In contrast, an accessions tax that either uses the lookback method or adopts adjusted rate brackets will tend to encourage gifts to older recipients but will not change the incentives for making gifts earlier or later in time. That is, there would be no need to make the gift immediately to take full advantage of the fixed exemption brackets. But there would still be an incentive to give to Son, whose rate at 55 on an inheritance of  $\$X$  will be lower than Granddaughter's rate on the same amount. This incentive, to the extent it operates, will tend to counter the incentive to skip generations.

But note that this hypothetical adopts a somewhat peculiar account of Grandfather's motivation. The hypothesis is that he wants to maximize after-tax gifts received. But why should that be the case? If Grandfather cares about his family as individuals (rather than vehicles for depriving the government of his money), he might still prefer the gift to Granddaughter despite the higher rate. He will understand (as the designers of the tax system do) that an earlier-in-life gift will convey greater options than one received late in life. Thus, depending on Grandfather's motivations, the adoption of a rate structure with lower rates for older recipients may — or may not — encourage gifts to older recipients.

It is important to keep in mind that taxing the present value of inheritance at age 21 is only one way of implementing the insight that opportunity declines over the adult life cycle. Present value is a financial concept based on an estimated market rate of return. But there is no reason why the financial decline in value of a dollar should mirror its decline in opportunity value over the life cycle. Instead of taxing Nancy at age 21 and Larry at age 31 based on the present value of their inheritance at age 21, we could imagine a discrete rate schedule based on some theory of life stages. Is a 31-year-old really very different from a 21-year-old in terms of her opportunities to use wealth for life planning? And should the tax advantage compound over time, so that a 41-year-old pays just 55% of her  $\$1$  million inheritance in taxes, and the 71-year-old pays nothing at all? Table 6 illustrates these relationships:

TABLE 6. AVERAGE TAX RATES ON INHERITANCE AT DIFFERENT AGES, USING ADJUSTED TAX RATE SCHEDULE

	Nancy, Age 21	Larry, Age 31	Sherry, Age 41	Terry, Age 71
Inheritance	\$1 million	\$1 million	\$1 million	\$1 million
Tax	\$750,000	\$655,665	\$551,003	\$0
Average Tax Rate	75%	66%	55%	0%

To be sure, there are practical advantages to using the financial concept of present value to adjust rate brackets over a lifetime. For example, the adjustment function is continuous — there are no cliffs that would create extreme incentives for giving or withholding gifts around particular birthdays. Still, it would be possible to lower tax rates over the life cycle by some other method. For example, Erik Erikson identifies three stages in adult life: early adulthood (roughly ages 18 to 34), middle adulthood (35 to 60), and later adulthood (60+).<sup>138</sup> The tax system could adopt these as benchmarks for adjusting rates. But that, too, would be pseudoscience. Erikson's work identifies life stages by their distinctive psychological conflicts (intimacy vs. isolation, generativity vs. stagnation, and ego integrity vs. despair)<sup>139</sup> and not according to the opportunity sets created by material resources at each life stage.

In contrast, the Meade Committee proposes a tax, the progressive annual wealth and accessions tax (PAWAT), that also imposes a lighter tax on older recipients, but for very different reasons.<sup>140</sup> The PAWAT is a wealth transfer tax intended to mimic annual wealth taxation. The logic is that a tax of  $x\%$  on wealth held for one generation is equal to a periodic wealth tax (at a rate of less than  $x\%$ ). The difficulty, which the Meade Committee notes, is that individuals have different lifespans, so that the tax of  $x\%$  may correspond to a very high rate of annual tax if the person lives a short time, or a very low rate of tax if the person is long-lived. The Meade Committee partially solves this problem by calculating the tax as if each recipient would live to age 85.<sup>141</sup> Early death would entitle the person's estate to a partial tax refund, and so would regifting the funds before age 85.<sup>142</sup>

As a proxy wealth tax, the PAWAT differs significantly from the equal opportunity approach. Although both taxes would feature a tax

<sup>138</sup> See ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* 263–69 (2d ed., reissued 1993).

<sup>139</sup> See *id.*

<sup>140</sup> See MEADE COMMITTEE REPORT, *supra* note 3, at 320–30.

<sup>141</sup> See *id.* at 321.

<sup>142</sup> See *id.* at 323–24.

rate that declines (in some fashion) with the age of the recipient, the PAWAT provides a partial refund for early death or regifting, whereas the equal opportunity tax would not. To understand the difference, consider 21-year-old twins each of whom receives \$10 million on her twenty-first birthday. The first twin keeps her money for her lifetime, while the second twin invests it in her career, makes a good living, and gives a similar amount to her own child when she (the mother) is 50. The equal opportunity perspective would impose the same inheritance tax on the original twins, since both had \$10 million at their disposal at maturity. But the PAWAT would refund part of the tax paid by the second twin, in order to approximate the results of a periodic wealth tax. Put another way, the PAWAT aims at taxing *wealth once per generation* while the equal opportunity inheritance tax aims at taxing individuals, without regard to whether the tax is imposed once per generation, more often, or less often.<sup>143</sup>

2. *Taxing Contingencies and Expectations.* — The last section considered the taxation of gifts received at different points in the life cycle and concluded that the proper approach is to tax gifts *as if* the present value had been received at age 21, using either a lookback method or a wait-and-see method with adjusted rates.

This section takes on the next question: how should the tax system handle deferred and contingent gifts? The deferred gift is the easier case, and the last section addressed it in the case of Larry, who at age 21 was guaranteed the amount of \$1 million at age 31. The accession that is deferred but not otherwise contingent should be taxed like a cash gift: the deferred accession would be taxed as if its present value had been received at age 21.

But contingencies introduce a new wrinkle, and contingencies are pervasive. Even the “guaranteed” \$1 million gift in Larry’s case might not be \$1 million if the donor goes bankrupt in the interim. Life interests and remainders in trusts are subject to investment risk and mortality risk. Discretionary trusts add another dimension of risk, since any particular trustee may use her discretion to make liberal or minimal distributions to any particular individual.

In this section, I consider accessions that are both contingent and deferred, meaning accessions to which the donee has a legal right of ownership at Time 1 (that is, ownership has vested) but where payouts may not begin until later, at Time 2. (The next section takes up expected inheritances where there is not yet a vested legal right to them.) Returning to the example from the previous section, suppose that Larry at age 21 inherits a trust interest. The trust has a corpus of

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<sup>143</sup> For additional analysis of the PAWAT, see MURPHY & NAGEL, *supra* note 17, at 156–57; and Rakowski, *supra* note 17, at 335–47.

\$613,913. The trust instrument directs that all income is to be accumulated, and the entire corpus plus income are to be distributed to Larry at age 31. At the 5% rate of return prevailing in the market today, Larry would inherit \$1 million at age 31. But he may inherit more or less than that, depending on market movements and investment decisions by the trustee.

The threshold question is normative: Should an accessions tax treat Larry as having inherited \$613,913 in Year 1? Or should the inheritance tax wait and see how much Larry actually inherits in Year 10, which might be \$1 million or \$3 million or zero?

Note that this problem differs from the life-cycle issue discussed in the last section. The question here is the *time for assessing the amount of the accession*, and not the rate to be applied. That is, even if the rate bracket breakpoints are adjusted as described above, contingent accessions raise the question of whether the system should fix the amount of Larry's accession at 21 (in which case his taxable accession is \$613,913) or whether the rules should instead capture the actual amount Larry receives as a payout at age 31. Even though the latter amount would be discounted back to present value at age 21 and taxed at the rate prevailing at that time, plus interest, the time for fixing the amount of the accession affects the total tax paid.

Table 7 helps explain the issue. If the actual accession in Year 10 is the same as the projected amount in Year 1, then one might use an ex ante or ex post method. The ex ante, lookback, and wait-and-see methods all reach the same result. But when the trust return soars to 17%, so that Larry receives \$3 million, or when the trustee loses all the money, so that Larry receives nothing, the difference in timing matters. Both the ex ante and lookback methods rely on Year 1 valuation, so both assess tax based on the predicted (not actual) value of Larry's inheritance. In this sense, both are ex ante methods, and the only difference is administrative: the lookback method permits payment in Year 10, thus avoiding liquidity problems inherent in the ex ante method.

But the wait-and-see method produces a very different result, because it assesses the tax based on the Year 10 value. (Technically, the wait-and-see method might be accomplished either by adjusting the rate schedules for the passage of time *or* by discounting the actual inheritance back to Year 1, assessing the tax based on unadjusted schedules, and then having the tax paid with interest in Year 10. But both methods involve taking the ex post value in Year 10 as the measure of the accession.) Using this method, Larry might pay as much as \$2.46 million or as little as zero, depending on whether the trustee hits it big or loses it all.

TABLE 7. DETERMINING THE AMOUNT OF CONTINGENT ACCESSIONS

	In Year 10, the amount paid by the trust is . . .		
	\$1 million	\$3 million	\$0
Ex Ante Method (tax assessed on PV at age 21 and paid at age 21)	Tax of \$402,522 is assessed on an expected accession of \$1 million Average tax rate = 66%	Same as ex ante method for \$1 million inheritance	Same as ex ante method for \$1 million inheritance
Lookback Method (tax assessed on PV at age 21 but paid, with interest, when inheritance is received)	Same as ex ante method	Same as ex ante method	Same as ex ante method
Wait-and-See Method (tax assessed on value in year of receipt and paid when inheritance is received) <sup>144</sup>	Same as ex ante method	Tax of \$.46 million is assessed on an actual accession of \$3 million Average tax rate = 82%	Tax of \$0 is assessed on an actual accession of \$0 Average tax rate = 0%

As Andrews points out, the wait-and-see method makes the government a co-investor with the donee, and the government shares in investment (and mortality) gains and losses.<sup>145</sup> The same conclusion roughly follows even with adjusted rates: once the rate structure is determined, valuing the accession ex ante leaves investment and mortality risk to the donee, while valuing the accession ex post makes the government a partner in the enterprise.

One might interpret the choice-chance distinction as favoring the ex ante perspective. In principle, one might argue, an equal opportunity

<sup>144</sup> Per the preceding examples, in Year 10 the exemption would be \$162,889.46 and the 90% rate would begin at \$814,447.31.

<sup>145</sup> See Andrews, *supra* note 5, § A22, at 513-21 (analyzing the wait-and-see method). In this context, mortality gains and losses arise when the amount of an inheritance depends on the longevity of the recipient or some other person. Ex ante valuation generally would use mortality tables, valuing an inheritance based on an assumed lifespan for the donee and any other persons of interest (for example, the life tenant when the donee is the remainderman). Under that method, the donee would be untaxed on gains or losses arising because actual lifespans differed from predicted ones. The wait-and-see method, by contrast, taxes *actual* amounts received. So, for example, if the life tenant lives longer than expected, the remainderman will be taxed only when she actually receives her money — incorporating a loss in value due to deferral.

accessions tax should tax the individual when a gift or inheritance changes her lifetime opportunities — when it first makes a difference in the choices and plans she can make. Alternatively, it may seem that the ex post inheritance is the proper measure: after all, the Larry who receives \$3 million has much wider opportunities than the Larry who inherits \$1 million or \$0 does.

But a closer look suggests that the ex post perspective conflates chance with choice. Larry's inheritance at age 21 is (by hypothesis) a matter of chance, of brute luck, of endowment. But from the moment Larry owns the inheritance, at age 21, we have to scrutinize the trust arrangements to determine whether his choices have influenced the outcome.

Still, the trustee's role is a complicating factor for this interpretation of choice and chance. In the simplest case, if Larry is given investment discretion, he ought to take responsibility for the outcomes of his investments. Similarly, if Larry can hire and fire the trustee or otherwise direct her actions, Larry should bear the investment risk.

But what if the trustee invests the funds according to directions given by the donor? In that case, it seems more difficult to claim that *Larry's* choices influence the amount of the investment.

In this way, choice and chance may turn on the terms of each specific trust. For example, suppose that the marketplace offers Larry the chance to sell his inheritance for something like its present value of \$613,913, and the trust instrument does not prohibit such a sale. If Larry could sell but chooses not to do so, then the tax system might treat him as if he is endorsing the trustee and investment instructions chosen by the donor. The argument would be that Larry is, in effect, voting with his feet: if he chooses not to sell his inheritance, he is ratifying the donor's investment choices as his own.

But many inheritances cannot be sold. Spendthrift trusts, for example, prohibit beneficiaries from using the trust as security for borrowing. Marketability may also be limited if the trust amount is small, if the investments are peculiar or hard to value by outsiders, or if there are many contingencies. For example, suppose that Charlotte's mother dies, leaving a family business and a stock portfolio worth \$1 million in trust for Charlotte, her two sisters, and their descendants. The terms of the trust leave discretion to the trustee to dispense the funds "as needed" by the beneficiaries, so that Charlotte and the others may receive nothing or quite a large sum. Charlotte and her sisters may find it quite difficult to sell their interests or to borrow much against them.

The tax law might approach these problems in different ways, deploying rules or standards, presumptions or case-by-case determinations. In principle, however, choice remains the criterion: if an heir has the capacity to make a choice about the disposition or investment of her deferred interest, then she ought to be taxed ex ante on the pre-

sent (expected) value of the investment. Taxing her on the *outcome* of the investment would be, in essence, grafting an income tax onto the inheritance tax. If, however, the individual has no choice about the disposition or investment of the money, she ought to be taxed on the *ex post* amount of the accession.

Moving from principle to practicalities, valuation represents the stickiest problem. The simple example of Larry as the sole beneficiary of a trust with a corpus of \$613,913 is easily handled, since the present value is known. But additional contingencies can easily make a trust interest difficult to value. For instance, suppose that Larry were to receive a life interest or a remainder interest in a trust. The law can use actuarial tables to predict how long Larry or the life tenant will live, and it could assume some rate of income and capital appreciation. But the devil is in the assumptions, and assumptions that hold in the aggregate may be inappropriate for very healthy or very ill individuals, or for trusts directed to make very aggressive or very safe investments. More complex trust interests, especially those that involve trustee discretion, may truly defy valuation, as in the above example of Charlotte.<sup>146</sup>

The wait-and-see method avoids the valuation problems of *ex ante* taxation, but it can permit taxpayers to defer the payment of tax for long periods, even indefinitely. In the Charlotte example, Charlotte and the other beneficiaries will pay tax when funds are distributed, but the undistributed trust assets will not be taxed at all. With a perpetual trust and minimal distributions, a family could accumulate assets for generations, paying no inheritance tax at all.

It may at first seem that deferral of the accessions tax would cheat the government of revenue, but recall that, in a conventional accessions tax, deferral generally works to the financial detriment of the family since, all else equal, the tax rate *rises* with deferral. Charlotte and her family would pay accessions tax as funds were distributed from the trust (including distributions paid to others for a family member's benefit). It is for this reason, among others, that Andrews's *ALI Reporter's Study* recommends wait-and-see taxation of small and moderate-sized trusts.<sup>147</sup> The downside of such a rule is that the wait-and-see regime with conventional, fixed bracket breakpoints overtaxes trust beneficiaries, discouraging the use of trusts to the extent they are used for deferred gifts.

Here, the adjusted rate schedule developed in the preceding section (which adjusts rate brackets upward by a set interest rate each year)

<sup>146</sup> For a discussion of difficulties in valuing trust interests *ex ante*, see *id.* § A22, at 522–24.

<sup>147</sup> See *id.* § A22, at 513 (“Tax deferral is not considered to be a serious problem in small or middle-size estates . . . . This effect — the compensating increase in taxes that accompanies tax deferral — is of crucial and fundamental importance.”).

could play a constructive role. In the preceding section, the adjusted rates served to mimic a tax on the present value of investments at age 21. Here, the adjusted rate schedule would help by removing the tax penalty on deferred and contingent interests. This is, to be sure, a second-best solution, since it would apply to some trust interests that ought to be (but cannot be) valued *ex ante*.

To see how the adjusted rates would work, consider some familiar numbers, now adapted to the Charlotte hypothetical. In one scenario, Charlotte receives \$613,913 in Year 1 when she is 21; that is, the trustee distributes that amount to her based on need. In a second, alternative scenario, Charlotte receives nothing until Year 10, when she receives a distribution of \$1 million. The by-now familiar result is that the conventional, unadjusted rate schedule would tax Charlotte at 66% in the scenario involving earlier distribution but at 75% in the scenario involving later distribution. The adjusted rates would bleach out this difference, leaving Charlotte to be taxed at 66% in either Year 1 or Year 10. The adjusted rates thus have the virtue of *making the taxation of accessions invariant to timing during Charlotte's lifetime*. Whether Charlotte is 21 or 31, or 61 or 71, the passage of time will not alter the average tax rate on her distribution, because the tax rate is determined by discounting the distribution back to age 21.

This is a useful feature of the adjusted rate schedules, but it remains a modest achievement. The reason that the passage of time does not alter the present value of the inheritance at age 21 is that the wait-and-see method (with adjusted bracket breakpoints) discounts back to age 21 using the same rate regardless of the *actual* rate of return on the investment. If Charlotte receives \$1 million in Year 10, the tax rules in effect assume that the Year 1 value of her interest was \$613,913, even if the market value was quite different at that time. That is, the adjusted rate schedules *cannot* reproduce *ex ante* taxation, but they *can* eliminate the bracket creep that occurs with investment growth in an *ex post* method with unadjusted rates.

More concretely, if the interest rate used to construct the adjusted rate schedules is off-market, then the government will improperly subsidize or overtax deferred transfers. This is true even in the simplest case of Larry, who is to receive a guaranteed \$1 million in ten years. In all the examples above, the 5% discount rate is assumed to be correct without any discussion of what the correct rate would be. But suppose that a "market" rate of return is 7%. In that case, market creditors in Year 1 would consider Larry's inheritance worth only \$508,350, instead of the \$613,913 value based on the government discount rate. Just as *ex ante* valuation would be incorrect if it used a 5% discount rate instead of a 7% rate, so will the wait-and-see method with rates adjusted at 5%. If the government discount rate is too low, donors will have an incentive to pay a cash gift in Year 1 of \$508,350, instead of a deferred gift that will be (mistakenly) valued as if it were

worth \$613,913 in Year 1. The flip side is that if the government discount rate is too high relative to the market, deferred gifts will be undertaxed and donors will have an incentive to use deferred rather than present gifts.

The potential inaccuracy of the government discount rate thus creates a pervasive problem of valuation. It makes *ex ante* valuation difficult, and it makes it equally difficult to construct an *ex post* (wait-and-see) system of taxation that is invariant to the timing of transfers. One might conclude that adjusted rate schedules are worthless, but that is probably too quick a jump. The dilemma posed by inaccurate discount rates is familiar in income taxation, where it affects attempts to capture the time value of money. But the wait-and-see approach with unadjusted inheritance rate schedules reflects a discount rate of 0% on rate brackets, which will inevitably overtax donees. If the federal government adopts an assumed discount rate of  $x\%$ , while the true market rate is  $y\%$ , has the system improved its results, on net?

In any event, even if the inaccuracy of the government discount rate undermines one important aim — taxing deferred and contingent inheritance at market value — it does not necessarily undermine the distinct aim (explored in the preceding section) of adjusting taxation of bequests received by a person at different ages. The preceding analysis explored the meaning of “lifetime taxation” and how to tax a person who receives the same dollar bequest at different ages. There, the financial concept of present value was used as an admittedly rough proxy for a very different concept, for which there is no market rate: the change in one’s lifetime opportunities with age. Administratively, it would be best if the market interest rate were used for both aims — but conceptually, the two uses of the discount rate are distinct.

Andrews’s *ALI Reporter’s Study* suggests two alternative approaches to taxing deferred and contingent accessions, and these are quite useful. The Andrews proposal adopts *ex post* valuation as its goal, for reasons that appear to be practical ones of valuation and liquidity.<sup>148</sup> It uses the wait-and-see method for small and medium trusts, treating actual sale of a trust interest as an accession but without attempting *ex ante* market valuation of trust interests otherwise.<sup>149</sup> The Andrews proposal addresses the potential overtaxation of deferred interests by providing an election, limited to income beneficiaries of a trust, permitting them to prepay accessions taxes (based on *ex ante* valuation) if they prefer. The rationale is to permit taxpayers to elect out of the disadvantageous increase in accessions tax rates that accom-

<sup>148</sup> See *id.* § A22, at 522–25 (discussing reasons, largely administrative, for rejecting the taxation of accessions on vesting).

<sup>149</sup> *Id.* § A22, at 508–09.

panies deferral in a graduated rate system.<sup>150</sup> This is an elegant possibility, although it could create problems of valuation and liquidity. Liquidity issues could be mitigated by adopting generous rules for deferred *payment*, but the valuation problem is difficult to circumvent.

Andrews's proposal also adopts an *ex ante* withholding tax (called a "special estate tax") with later reconciliation for large trusts,<sup>151</sup> because his analysis concludes that the long-term deferral of accessions tax on large trusts is "unacceptable."<sup>152</sup> The reasons for this conclusion include the concern that families may benefit from "dominion" over wealth even before measurable distributions are made and that the prospect of deferral may have a psychological impact on donors leading them to utilize trusts solely for (illusory) tax benefits.<sup>153</sup> But the special estate tax differs in important respects from the *ex ante* valuation that is presented as the ideal here. The tax is imposed on the decedent's estate, and the rate of tax is based on the size of the trust — thus, there is no attempt to calibrate rates initially to beneficiaries' situations.<sup>154</sup>

Thus, the important advantage of the special estate tax relative to true *ex ante* taxation is that it nicely sidesteps the problem of valuing each donee's interest. Recall the case of the discretionary trust interests inherited by Charlotte and her sisters and their children. It is impossible to value each individual's accession, but the special estate tax would collect the withholding tax instead from the settlor of the trust. Charlotte and her sisters would then be able to claim a credit for a proportional amount of the initial withholding as distributions were made.

But the problem avoided on the front end — valuing beneficiaries' interests — plagues the withholding regime on the back end. It turns out to be surprisingly tricky to design a tax credit that will permit each beneficiary to recover the proper amount of the initial tax payment. The potential pitfall here is that if the rules permit any beneficiary to claim credits that are too large or too small relative to the market value of her interest, the system could either encourage or discourage the use of trusts. For instance, if the rules permitted credits to be used

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<sup>150</sup> See *id.* § A7, at 498–500. The Andrews proposal does not extend the same opportunity to remaindermen or to holders of contingent trust interests, because the problems of valuation are deemed too severe. For instance, a remainderman who knew that the present value of his interest was far higher than the government's valuation, due to the ill health of the life tenant, would elect to prepay and thus deprive the government of revenue, relative to a wait-and-see approach. See *id.* § A22, at 528–29.

<sup>151</sup> *Id.* § A61, at 544–45.

<sup>152</sup> *Id.* § A61, at 546.

<sup>153</sup> *Id.* § A61, at 546–47. Other reasons involve transitions, which are not addressed here.

<sup>154</sup> For another approach to lengthy deferral of trust taxation, see Halbach, *supra* note 5, at 262–70. Halbach conceptualizes the problem as perpetuating economic control without taxation.

quickly by low-bracket beneficiaries holding trust benefits of relatively small market value, taxpayers could quickly obtain refunds of the initial withholding tax, undermining the system. In the Charlotte trust, for instance, suppose that some of the sisters are in the 0% accessions tax bracket, while other sisters are in the top bracket. By sending the early distributions to the zero-bracket sisters, who would owe no tax and claim a refund, the trust could effectively reverse the withholding tax and continue deferral on behalf of the high-bracket sisters. The system could avoid this result by denying refunds (as Andrews's proposal does).<sup>155</sup> But denying refunds has the downside of overtaxing bona fide accessions received by low-bracket recipients.

The accurate way to calibrate the credit to which each beneficiary is entitled would be to compare the current market value of the individual's interest to the current market value of the trust corpus, and then to compare the market value of the distribution to the value of the interest as a whole. But the catch, of course, is that if the system could accomplish that kind of valuation, it could tax on an *ex ante* basis without any withholding tax at all. The *ex ante* withholding tax represents a middle path, but it cannot overcome the basic problem of valuation. The special estate tax imputes a fixed "credit ratio," so that each distribution carries a tax credit in the same ratio as the initial tax bears to the after-tax trust amount. The effect is that a donee could receive a larger tax credit than she initially paid, although there is a ceiling limiting the total credit to the initial tax plus interest. No refunds would be allowed, rendering the initial tax a final tax for donees in lower brackets.<sup>156</sup>

To this point, the discussion has considered accessions to which the donee has a legal right, but it has not yet taken account of a social fact: an individual may expect inheritances (or gifts) well before she takes legal title to them, and the expectation may alter the way she plans her life. Suppose that Ethan and Ethel, strangers, are both 21. Both are college students, and neither has a penny to his name. But Ethan comes from a wealthy family with a tradition of giving large gifts to their children at age 31, while Ethel comes from a family of modest means. The intuition is that Ethan has greater wealth, or at least greater expected wealth.

Should an equal opportunity system tax Ethan on his expectations? The idea goes well beyond the legal notion of "contingent" gifts explored in the previous section. While Charlotte owned something,

<sup>155</sup> See Andrews, *supra* note 5, § A64, at 561.

<sup>156</sup> See *id.* § A64, at 557-64. The aggregate credit would have an upper bound equal to the initial special estate tax plus simple interest at 6%, but Andrews questions whether that limitation is appropriate. See *id.* § A64, at 562-64.

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however contingent its value, Ethan owns nothing in a legal sense, and may never receive a penny.

Still, Ethan probably feels more confident about his financial future than Ethel does. He may be more comfortable taking risks or incurring additional student loans to finance graduate school. Ethan may also have access to a different peer group than Ethel does, since friends will be able to detect his expectations. Ethan's expectations surely put him in a privileged position. But should this kind of privilege warrant taxation?

Put another way, the question is whether the inheritance tax should be a tax on class background as well as on material wealth: at age 21, Ethan already has greater opportunities based on the former but not the latter, and he expects (but cannot be sure) that his parents will act in such a way as to continue his good fortune. In general, class background will be a good predictor of expected inheritance. Outside novels, it is rare for a person to expect an inheritance from anyone other than her close relatives, and it is also rare for a person to have, say, poor parents and grandparents (and thus, low socioeconomic status) but one rich and distant great-aunt who is expected to leave that person a fortune. In most cases, then, this question puts us squarely back into the interesting (and far more difficult) issue of equalizing life chances during childhood.

Throughout this Article, the focus has been on material inheritance and not the inheritance of other resources, including good nurture, a socially prominent family, and so on. Maintaining this assumption, if the inheritance *tax* is properly limited to material inheritance, it would seem that Ethan should not be taxed at 21. At this point, Ethan doesn't own anything; his expectations won't pay the rent now, and his protestations that Mom and Dad will leave him something "eventually" are unlikely to fend off creditors if he is in debt. Ethan may alienate his parents in the next ten years, so that they will give him nothing; or his parents may go bankrupt in the next decade. These arguments suggest a wait-and-see approach: if Ethan does come into wealth, it will be taxed when he receives it.

Does the wait-and-see approach disregard the fact that Ethan's expectations have *financial* as well as social and emotional value? Even in purely financial terms, Ethan's likely inheritance has some expected value: it is essentially a gamble. The gamble pays off if Ethan stays on good terms with his parents and if his parents remain wealthy and inclined to follow the family tradition of gifts to children. The gamble fails otherwise.

While Ethan's individual expectations would be difficult to value, it wouldn't be terribly hard to assign some value to these contingencies. The methods would be much the same as for other contingent financial instruments. Based on assumptions about patterns of bequests and Ethan's parents' life expectancies, the tax system could calculate

an expected inheritance. Ethan could be taxed at age 21 on the expected value of his inheritance. That *ex ante* calculation could either be taken as final or could be reconciled, later on, with actual amounts received, and he would then pay additional amounts or receive a refund with interest. In principle, given sufficient data about parental wealth, this method could be extended to all children.

In practice, of course, there are serious obstacles to such a system. For one thing, absent a national, annual wealth tax, data on parental wealth are scarce, although reconstruction from income tax data might be possible. And even in principle, the tax on “expectations” calculated by reference to parental wealth becomes a tax quite directly on class background and not on individual expectations.

## V. CONCLUSION

This Article demonstrates that the present estate tax and major proposals for inheritance taxation only weakly track the principle of equal opportunity. There is a general correspondence between the idea of “equal starting points” and the taxation of inheritance. But a closer look suggests that equal opportunity, interpreted as resource equality, supports legal rules that would look very different from the familiar forms.

Neither current law nor the canonical legal reform proposals incorporate a public inheritance. The estate tax taxes the wrong individual (the donor), burdens generation-skipping transfers, and imposes the same rate schedule regardless of relationships and the age of the heir. The accessions tax idea comes closer to the mark, since the tax reflects each individual’s lifetime inheritance. But classic accessions tax proposals reflect efforts to tax wealth and to combat dynastic accumulations. Typically, these include generation-skipping taxes, tax rate schedules that tax inheritance from close relatives more lightly than inheritance from more distant ones (or strangers), and a single rate schedule without regard to the age of the heir.

In taxation as in other fields, the law often reflects a mix of ideals rather than a pure philosophical system. Still, it is surprising to find that equal opportunity, which is widely understood to be the bedrock principle for wealth transfer taxation, supports legal rules that differ radically from actual practice and widely discussed reform proposals. Equal opportunity focuses on inequality in starting points for individual lives, and its central preoccupation is the distinction between choice and chance. By contrast, the law focuses on inequality in outcomes, and the goals of taxing wealth and limiting family wealth accumulation take center stage.