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## Unseating Privilege: Rawls, Equality of Opportunity, and Wealth Transfer Taxation

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# Unseating Privilege: Rawls, Equality of Opportunity, and Wealth Transfer Taxation

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# UNSEATING PRIVILEGE: RAWLS, EQUALITY OF OPPORTUNITY, AND WEALTH TRANSFER TAXATION

JENNIFER BIRD-POLLAN †

## ABSTRACT

This Article is the second in a series that examines the estate tax from a particular philosophical position in order to demonstrate the relevance and importance of the wealth transfer taxes to that position. In this Article, I explore Rawlsian equality of opportunity, a philosophical position that is at the heart of much American thought. Equality of opportunity requires not only ensuring that sufficient opportunities are available to the least well-off members of society but also that opportunities are not available to other members merely because of their wealth or other arbitrary advantages. Therefore, an income tax alone, even one with high rates on the wealthy, would be insufficient to achieve these goals. While revenue raised via the income tax should be used to provide additional opportunities to low-income members of society, wealth transfer taxes provide the additional safeguard of preventing the heirs of wealthy individuals from inheriting wealth that would provide them with additional, unwarranted and unjust, opportunities. Given the importance of the wealth transfer taxes, this Article also examines the question of what form of tax is most consistent with Rawls' position, ultimately determining that an inheritance or accessions tax best fits the role.

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## I. INTRODUCTION

The modern estate tax in the United States dates from 1916,<sup>1</sup> but the recent history of the tax makes clear that it is in decline.<sup>2</sup> While

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1. See generally Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, INTERNAL REVENUE SERVICE 118, <http://www.irs.gov/pub/irs-soi/ninetyestate.pdf> (last visited Mar. 12, 2014). The estate tax (a tax on transfers made at the death of the donor) was first enacted in the United States in 1916. The first estate tax was enacted with no accompanying gift tax, meaning that the tax could easily be avoided by having the donor transfer the majority of her assets tax-free during her lifetime rather than wait until death to pass on her wealth. Congress realized the absence of a gift tax was eviscerating the estate tax. As a result, the first gift tax (a tax on transfers made during the donor's lifetime) was enacted in 1924 but repealed in 1926. The modern gift tax was enacted in 1932, and the United States has had both gift and estate taxes for all years since then, with the exception of the one-year repeal of the estate tax in 2010.

2. Before the passing of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), the Code provided a lifetime credit against tax of \$675,000. Internal Revenue Code of 1986, 26 U.S.C. § 2010 (2006) [hereinafter Code] (all citations to sections are citations to the Code). Any transfers made, whether *inter vivos* or after death, that exceeded the credit amount were taxed at 55%. § 2001. EGTRRA slowly increased the lifetime credit amount and simultaneously lowered the rate, culminating in a one-year repeal of the estate tax in 2010. CONG. BUDGET OFFICE, ECONOMIC AND BUDGET ISSUE BRIEF: FEDERAL ESTATE AND GIFT TAXES (Dec. 2009), [hereinafter ECONOMIC AND BUDGET ISSUE BRIEF], available at [http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/108xx/doc10841/12-18-estate\\_gifttax\\_brief.pdf](http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/108xx/doc10841/12-18-estate_gifttax_brief.pdf). The peculiarities of EGTRRA resulted in a complete sunset of the law on December 31, 2010. *Id.* Congress and President Obama signed a two-year extension of the EGTRRA provisions, including a reinstatement of the estate tax with a \$5 million lifetime credit (indexed for inflation) and a 35% rate on amounts transferred above the credit amount. *Id.* That extension expired on December 31, 2012, at which point the estate and gift tax credit and rate were scheduled to revert to 2001 levels. *Id.* The Congressional Budget Office estimated that extending

historically the tax collected as much as ten percent of total tax revenues, that percentage has decreased dramatically in recent years, and now the wealth transfer taxes (including the estate tax, the gift tax, and the generation-skipping transfer tax) account for less than one percent of total tax revenues.<sup>3</sup> Observing this shift in the importance of the estate tax, one might be led to believe that there is a reason for the change. That is, one might think that the values embodied by the estate tax are not values that are held by Americans in contemporary society. Perhaps this change in the role of the wealth transfer taxes reflects a concurrent change in Americans' beliefs about the importance or impact of concentrated, inherited wealth in the modern-day United States. I argue in this Article that this is not, in fact, true. This Article is the second in a series meant to demonstrate that wealth transfer taxes are, in fact, consistent with most commonly held philosophical beliefs about social justice.<sup>4</sup> In this Article, I examine the view that a just society is one in which all citizens are given equal opportunity to achieve success. In particular, this Article explores the form of equality of opportunity

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the EGTRRA estate and gift tax provisions that lowered the transfer tax rate and increased the lifetime credit amount would have cost approximately \$402 billion over the period of 2010 to 2019 as compared with the revenue that would have been raised if EGTRRA had been allowed to expire. CONG. BUDGET OFFICE, BUDGET OPTIONS, VOLUME 2, AT 240 (2009), available at <http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/102xx/doc10294/08-06-budgetoptions.pdf>; CONG. BUDGET OFFICE, AN UPDATE TO THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2012 TO 2022, at 64 (2012), available at [http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update\\_One-Col.pdf](http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf). Leaving the 2009 rates and exemption levels in place would have raised a total of \$420 billion (or 1.2% of total revenues) from 2010 to 2019. ECONOMIC AND BUDGET ISSUE BRIEF, *supra*, at 5. Instead of these options, Congress and the President reached an agreement to avoid going over the so-called "fiscal cliff." Deborah L. Jacobs, *After the Fiscal Cliff Deal: Estate and Gift Tax Explained*, FORBES (Jan. 2, 2013), [www.forbes.com/sites/deborahljacobs/2013/01/02/after-the-fiscal-cliff-deal-estate-and-gift-tax-explained/](http://www.forbes.com/sites/deborahljacobs/2013/01/02/after-the-fiscal-cliff-deal-estate-and-gift-tax-explained/). The agreement was reached in the final hours of 2012, and the bill was signed into law on January 2, 2013. *Id.* The law sets the estate tax lifetime exemption-equivalent credit at \$5 million, adjusted annually for inflation (which brought it to \$5.25 million in 2013 and set the tax rate at a flat 40% for amounts in excess of that). See 26 U.S.C. §§ 2001, 2010. The new tax law does not have a sunset date and thus will not have to be extended by another congressional vote.

3. See Jacobson et al., *supra* note 1, at 125.

4. The first Article in the series addressed libertarianism arguments about taxation and wealth transfer taxes in particular. See Jennifer E. Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 ME. L. REV. 1 (2013). In that Article, I demonstrated that libertarian arguments about property rights, which depend upon moral rights stemming from effort exerted on the world, are entirely consistent with a robust estate tax, even at a rate of 100%, because the death of the property holder eliminates the property right. See *id.* The estate tax is then, on libertarian grounds, one of the few entirely appropriate taxes. See *id.*

endorsed by John Rawls. Rawls endorsed the principle of justice as fairness, primarily based on the concept of luck egalitarianism.<sup>5</sup> For readers familiar with Rawls' writings, it may not come as a surprise that Rawls' position is consistent with an estate tax. However, I argue in this Article that the wealth transfer taxes are, in fact, especially well suited to achieve equality of opportunity goals. Indeed, without a wealth transfer tax system in place, even a robust income tax would be unable to address the fundamental inequality of opportunity present in the contemporary United States.

Equality of opportunity is at the heart of American political thought. At least in part, the United States was founded as a rejection of the European traditions of aristocracy and inherited privilege.<sup>6</sup> However, contemporary American society is more unequal than ever before.<sup>7</sup> Equality of opportunity does not necessarily require actual social economic equality—this is what distinguishes equality of opportunity from egalitarianism.<sup>8</sup> However, when that inequality results in an inequality in the opportunities being made available to future generations, then equal opportunity theorists should object. Perhaps even more noteworthy than the marked differences in wealth between the best and worst off in contemporary American society is the information we have about social mobility in the modern United States.<sup>9</sup> The presence of social and economic inequality in the United States does, without question, result in unequal opportunities being made available to members of society, and this is a violation of the equality of opportunity principle. As I will demonstrate in this Article, great social and economic

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5. For a detailed exploration of Rawls' theory, see discussion *infra* Part II.

6. Much has been written about the fundamental reasons for the American Declaration of Independence and the American Revolutionary War. For one argument that the Founding Fathers were motivated by the goal of reducing inequality of opportunity, see GORDON WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* (1993).

7. A widely seen video has been circulating on the Internet, demonstrating the growing divide between what Americans think is a fair distribution of wealth, what they think the current distribution of wealth looks like, and the *actual* distribution of wealth in America today. The differences are stark. See *Wealth Inequality in America*, VISUALLY, <http://visual.ly/wealth-inequality-america> (last visited Mar. 12, 2014).

8. For more on this distinction, see discussion *infra* Part II.

9. For evidence on social and economic mobility within the United States, see Daniel Aaronson & Bhashkar Mazumder, *Intergenerational Economic Mobility in the U.S., 1940 to 2000* (Fed. Reserve Bank of Chi., Working Paper No. 2005-12) (demonstrating that social and economic mobility in the United States has decreased since 1980 after rising sharply between 1940 and 1980); Sommarat Chantarat & Christopher B. Barrett, *Social Network Capital, Economic Mobility, and Poverty Traps*, 10 J. ECON. INEQUALITY 299 (2012) (arguing that social network capital contributes greatly to the amount of social and economic mobility available to individuals).

inequality, such as that seen currently in the United States, limits equality of opportunity, both as a theoretical matter, consistent with Rawls' arguments, and also as an empirical matter, as can be seen in studies of social and economic mobility in the United States.<sup>10</sup>

Unlike the income tax,<sup>11</sup> or the less common but occasionally proposed wealth tax,<sup>12</sup> wealth transfer taxes are especially well-suited to achieve equality of opportunity goals. Because wealth transfers typically occur between family members, they are at the very heart of the advantages that stem from being born into a wealthy family. Taxing these transfers with the goal of reducing the amount transferred and possibly discouraging such transfers altogether increases the likelihood that members of modern American society will experience true equality of opportunity. In addition, if the funds raised through the taxation of wealth transfers are then used to fund expenditure programs meant to benefit the least well-off, this system will go even further towards attaining the equality of opportunity goal.<sup>13</sup>

This Article is not meant to be an endorsement of the equality of opportunity position, luck egalitarianism, or Rawlsianism itself. Because of the general consistency of public beliefs with Rawlsian arguments

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10. Aaronson & Mazumder, *supra* note 9; Chantarat & Barrett, *supra* note 9.

11. The United States personal income tax is imposed by the Code in § 1 and is imposed on the basis of marital and household status in graduated rates that increase by income bracket to a maximum, in 2013, of 39.6%. Tax Imposed, 26 U.S.C. § 1 (2013). In addition to the personal income tax, § 11 of the Code imposes a tax on corporations, with a maximum rate in 2013 of 35%. Tax Imposed, 26 U.S.C. § 11 (2013).

12. There is no wealth tax currently imposed by the United States federal government. Indeed, a wealth tax would be unconstitutional under current U.S. law. Article I, Section 9 of the United States Constitution requires apportionment of a direct tax. "No capitation or other direct tax, shall be laid unless in proportion to the census or enumeration herein before directed to be taken." U.S. CONST. art. I, § 9, cl. 4. A wealth tax, as a tax on the holding of property rather than the transfer of property, is a classic example of a direct tax. For a discussion of the possibility of imposing a wealth tax, see, for example, David J. Shakow & Reed Shuldiner, *A Comprehensive Wealth Tax*, 53 TAX L. REV. 499 (2000); Beverly Moran, *Wealth Redistribution and the Income Tax*, 53 HOW. L.J. 319 (2010) (discussing the possibility of a wealth tax and specifically exploring the use of a wealth tax as a means of funding reparations). India currently imposes a wealth tax on its citizens. See generally Wealth Tax Act, No. 27 of 1957, INDIA CODE (2011), available at [http://law.incometaxindia.gov.in/DIT/other-income-tax-acts.aspx?page=ODTA&TabId=tab\\_WTA](http://law.incometaxindia.gov.in/DIT/other-income-tax-acts.aspx?page=ODTA&TabId=tab_WTA).

13. In her article, *Equal Opportunity and Inheritance Taxation*, Anne Alstott argues that, in addition to wealth transfer taxation, the federal government should enact a social inheritance program that would ensure all members of society access to a certain amount of money, regardless of their socio-economic status. Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469 (2007). This is one form of expenditure program aimed at helping those whose social positions reduce their opportunities from birth. For more on this proposal, see the discussion *infra* Part III.

(whether or not most people are aware of this consistency), tax scholars should take Rawls seriously in contemplating good tax policy. In this Article, I adopt the Rawlsian position and explore whether and to what extent wealth transfer taxation can help to achieve the goals of that theory. I further explore what forms of wealth transfer taxation are best suited to achieve Rawls' aims. The goal of the Article is both to demonstrate the way in which some form of wealth transfer tax plays a critical role in Rawls' overall theory and also to make clear how such a tax would help to achieve the egalitarian goals of that theory.<sup>14</sup> In order to make these arguments, I first lay out the fundamental principles of Rawls' philosophy, but this Article is not an evaluation of those arguments. Rather, it begins by accepting Rawls' argument and moving on from there. Part I introduces the issues;<sup>15</sup> Part II describes the Rawlsian theory of equality of opportunity;<sup>16</sup> Part III examines wealth transfer taxes in the context of Rawls' second principle of justice;<sup>17</sup> Part IV compares models of wealth transfer taxes from a Rawlsian perspective;<sup>18</sup> Part V looks at the question of gifts;<sup>19</sup> and Part VI concludes.<sup>20</sup>

### A. *Wealth Transfer Taxes*

The current wealth transfer tax system in the United States is a combination of three taxes imposed by the Internal Revenue Code (the Code).<sup>21</sup> The system includes the estate tax,<sup>22</sup> the gift tax,<sup>23</sup> and the

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14. Note that these two points are not the same. Rawls is not an egalitarian as such, although he does believe that societies that satisfy his criteria for justice are much more likely than unjust societies to be egalitarian. For true egalitarian arguments, see G.A. COHEN, *SELF-OWNERSHIP, FREEDOM, AND EQUALITY* (1995); G.A. COHEN, *IF YOU'RE AN EGALITARIAN, HOW COME YOU'RE SO RICH?* (2000); KARL MARX, *CAPITAL* (Ben Fowkes trans., Penguin Books 1976) (1867).

15. See discussion *infra* Part I.A-B.

16. See discussion *infra* Part II.

17. See discussion *infra* Part III.

18. See discussion *infra* Part IV.

19. See discussion *infra* Part V.

20. See discussion *infra* Part VI.

21. Internal Revenue Code of 1986, as amended; (Code). All citations to sections are citations to the Code. Internal Revenue Code of 1986, 26 U.S.C. § 1 (2006).

22. The estate tax is imposed by § 2001. The Code imposes the tax on the gross estate minus deductions for charitable transfers (§ 2055), liabilities of the decedent (§ 2053), funeral expenses (§ 2053), and transfers to the surviving spouse (the so-called "marital deduction," § 2056).

23. The gift tax is imposed by § 2501. The Code imposes the tax on amounts transferred gratuitously in excess of an annual exemption, provided by § 2503, of \$14,000 in present interests per recipient.



generation-skipping transfer tax.<sup>24</sup> The taxes are imposed upon the transfer of wealth either during the donor's lifetime (*inter vivos* gifts are subject to the gift tax) or upon the transfer of estate assets at the death of the donor (transfers at death are subject to the estate tax).<sup>25</sup> The current wealth transfer taxes are actually imposed at graduated rates,<sup>26</sup> although the rates are effectively flat, as there is a credit that effectively excludes all amounts that fall within the graduated rate schedule.<sup>27</sup> The lifetime credit, which is available to shelter up to \$5.25 million (adjusted annually for inflation) of wealth transfer, is also now portable between spouses, which results in \$10.5 million of tax-free wealth transfers that can now be made per married couple.<sup>28</sup> Transfers beyond that amount are subject to tax at the rate of forty percent.<sup>29</sup>

In addition to the lifetime exemption equivalent credit, donors can transfer up to \$14,000 a year tax-free to any individual they choose and can make direct payments for educational and medical expenses without incurring any tax liability.<sup>30</sup> In addition, legally required parental support

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24. § 2601. The generation-skipping transfer tax (the "GST tax") is imposed on transfers that attempt to avoid one generation of the estate or gift tax by passing wealth to a member of a generation that is one more generation below that of the donor. Alstott, *supra* note 13, at 516. For instance, if A leaves an inheritance to her granddaughter C, even though her daughter B is still alive, that is a generation-skipping transfer. *Id.* at 517. Without the GST tax, there would be estate tax imposed on the transfer, but that would be all. This would be, from a tax perspective, a less expensive transfer than if A left an inheritance to B, who then passed the wealth on to C. That scenario would incur wealth transfer taxes twice rather than only once. To ensure that the same amount of tax is imposed regardless of how many generations are effectively "skipped" in the transfer, the GST tax is imposed in instances such as this one. While this is clearly an important tax as a backstop measure, it does not rely on the same philosophical foundation as the estate and gift taxes. Therefore, I will not examine it closely in this Article. Note, however, that in her article, *Equal Opportunity and Inheritance Taxation*, Anne Alstott points out that if one is concerned primarily with equality of opportunity, then a generation-skipping transfer tax is not necessarily an essential part of a wealth transfer tax system. *Id.* at 516. Because the goal is ensuring that no one is given an advantage from the outset, it does not matter from whom the transfer is made. Imposing taxation at each generation is less important, from this perspective, than equalizing the amount received by any particular individual. *Id.*

25. §§ 2001, 2501.

26. § 2010.

27. § 2001.

28. § 2010.

29. § 2001.

30. § 2503. The \$14,000 transfer must be a transfer of a present interest. Future interests (such as interests in a trust) are ineligible for the exemption. For a further discussion of this issue, see *infra* note 95 and accompanying text.

for minor children is not currently taxable, although there is regularly debate about how liberally “support” should be understood.<sup>31</sup>

Many commentators note that, although the official estate tax is as described in this Part, the real concern in contemporary U.S. estate tax policy is the way in which estate tax attorneys are able to structure their clients’ wealth transfers to either entirely or nearly entirely avoid the estate tax.<sup>32</sup> While these concerns about the effectiveness of the wealth transfer taxes as enacted in the United States are critically important, they are not the focus of this Article. Once a society agrees on the necessity of a tax like the U.S. wealth transfer tax system, then all efforts should be made to enact and enforce it as intended. This Article is concerned with the more fundamental question of whether and to what extent a wealth transfer tax is appropriate for achieving the goals embraced by society. In particular, this Article will show why the wealth transfer tax, rather than the income tax alone, is uniquely well situated to achieve equality of opportunity goals.<sup>33</sup>

Often tax policy analyses focus exclusively or primarily on the economic consequences of the tax in question. While this approach is clearly valuable (one would not want to enact a tax that had the actual effect of working against the goals one had in enacting the tax), this Article will not be concerned with economics. Before one can determine, as an economic matter, how best to attain a particular goal, one must determine just what that goal is.<sup>34</sup> While that depends, at least in part, on

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31. “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.” Alstott, *supra* note 13, at 515.

32. Much contemporary writing about the estate tax focuses on the way in which the tax is entirely avoidable using current planning techniques. For this reason, the estate tax is sometimes called a voluntary tax. For excellent examples of these arguments, see Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255 (2013); George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161 (1997); Paul L. Caron & James R. Repetti, *The Estate Tax Non-Gap: Why Repeal a Voluntary Tax?*, 20 STAN. L. & POL’Y REV. 153 (2009); Brant Hellwig, *Estate Tax Exposure of Family Limited Partnerships Under Section 2036*, 38 REAL PROP. PROB. & TR. J. 169 (2003); Ronald H. Jensen, *The Magic of Disappearing Wealth Revisited: Using Family Limited Partnerships to Reduce Estate and Gift Tax*, 1 PITT. TAX REV. 155 (2004).

33. Indeed, there is no other tax (e.g., a sales tax, a wealth tax, or an income tax) that can achieve the same ends as a wealth transfer tax. Because of the special nature of the wealth transfer tax and its particular aim of combating the transfer of wealth between generations, this tax is especially well suited to achieving equality of opportunity ends.

34. Rawls emphasizes this point as well, arguing for the priority of liberty over distributive justice goals. Distributive justice goals are important precisely because of their importance in preserving liberty within society. This view is not new, although it is

the preferences expressed by society at large, this Article takes the relatively common Rawlsian position valuing equality of opportunity and looks at the way the wealth transfer tax system might work towards attaining that end, without particular concern for the mechanics that might be needed from an economic perspective. If it turned out, as an economic matter, that the wealth transfer tax structure that was most consistent with Rawlsian equality of opportunity had consequences that reduced the likelihood of the society that adopted it actually achieving equality of opportunity, then clearly the system would have to be reevaluated. But starting from the perspective of determining whether and to what extent a wealth transfer tax is consistent with Rawlsian equality of opportunity, as well as what form that tax should take, gives us an important beginning point for this analysis.<sup>35</sup>

### *B. Rawls and the Estate Tax*

Commentators generally agree that Rawlsian liberalism is compatible with heavy redistribution.<sup>36</sup> Below I discuss the elements of Rawls' writings (the original position and the veil of ignorance) that most clearly contribute to the view that Rawlsian equality of opportunity requires redistributive tax policy.<sup>37</sup> However, much of the work using Rawls to analyze or justify tax policy has focused on the income tax.<sup>38</sup>

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also easily forgotten. Murphy and Nagel advocate the necessity of examining foundational arguments before applying economic theories to the resulting rules:

Though economic theory provides essential information about the likely effects of different possible schemes of taxation, it cannot by itself determine a choice among them. Anyone who advocates the tax policy that is, simply, "best for economic growth" or "most efficient" must provide not only an explanation of why the favored policy has those virtues, but also *an argument of political morality that justifies the pursuit of growth or efficiency regardless of other social values.*

LIAM MURPHY & THOMAS NAGEL, *THE MYTH OF OWNERSHIP* 12 (2002) (emphasis added).

35. For Rawls, there is no purely economic realm. That is, questions of liberty, justice, fairness, and opportunity are all already economic issues as well. And, simultaneously, economic issues cannot be considered independently from issues of justice and liberty—economics is not a separate question but is tied up with justice. This makes Rawls especially applicable to, and interesting from, a tax perspective.

36. Most, if not all, tax law articles that make reference to Rawls do so in support of the proposition that Rawls endorses a redistributive liberal position. *See, e.g.*, Alstott, *supra* note 13; Eric Rakowski, *Taxing Wealth Liberally*, 51 *TAX L. REV.* 419 (1996); Charles R. T. O'Kelley, *Rawls, Justice, and the Income Tax*, 16 *GA. L. REV.* 1 (1981); Kerry Ryan, *Human Capital and Transfer Taxation*, 62 *OKLA. L. REV.* 223 (2010).

37. *See* discussion *infra* Part II.

38. *See, e.g.*, Barbara H. Fried, *The Puzzling Case for Proportionate Taxation*, 2 *CHAP. L. REV.* 157 (1999); Linda Sugin, *Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems*, 72 *FORDHAM L. REV.* 1991 (2004);

While this work is incredibly useful in making arguments about the fundamental nature of philosophical arguments in justifying tax policy, I argue in this Article that the income tax alone is not capable of satisfying the goals of a Rawlsian equality of opportunity.<sup>39</sup> Because of the incredible opportunities afforded to recipients of transferred wealth, the estate tax is the appropriate tool to use in order to achieve true equality of opportunity.<sup>40</sup>

## II. RAWLSIAN EQUALITY OF OPPORTUNITY

John Rawls' central work of political philosophy, *Theory of Justice*, published in 1971, was seen in many ways to change the conversation that had been happening in that field for thousands of years.<sup>41</sup> An intellectual descendant of Immanuel Kant, among others, one of Rawls' central arguments was the principle that, in contrast to the arguments of utilitarianism (one of the dominant political philosophical positions of the twentieth century), there are central human liberties that cannot be violated in a just society, regardless of the overall good of society that might be attained by such a violation.<sup>42</sup> The extension of Rawls' thought

O'Kelley, *supra* note 36. Notable exceptions include Alstott, *supra* note 13, and Ryan, *supra* note 36.

39. Sugin argues that "[Rawls'] analysis of philosophical principles does not require commitment to any particular tax system at all. Numerous tax systems could conceivably satisfy Rawls's principles of justice." Sugin, *supra* note 38, at 1998. While this may be true with regard to the particular mechanics of the tax system imposed, I argue in this Article that some kind of wealth transfer taxation is, in fact, required by Rawlsian principles of equality of opportunity.

40. In her article, *Equal Opportunity and Inheritance Taxation*, Anne Alstott notes the way in which wealth transfer taxes are especially well suited to achieve equality of opportunity goals more broadly. "Equal opportunity . . . is widely understood to be the bedrock principle for wealth transfer taxation . . ." Alstott, *supra* note 13, at 542.

41.

In the 1950s and 1960s political philosophy was declared to be dead, or at least moribund, and it was claimed that creatively constructing a valuational frame of reference had been abandoned. . . . Political philosophy, which is after all a field that by definition is concerned with normative questions, came in academic circles to be considered an "unscientific activity," and it was pushed more and more into the background. . . . It is in this context that "at the right moment" *A Theory of Justice* was published. While acknowledging that it is "scientifically" impossible to prove the "correctness" of a normative opinion, this theory provided the possibility of reasoning on normative issues in an intersubjective manner.

PERCY B. LEHNING, JOHN RAWLS: AN INTRODUCTION 12-14 (2009).

42.

The basic shortcoming of utilitarianism—in whatever form—is that basic rights of individuals can be sacrificed for a collective societal goal such as

in the form of so-called “luck egalitarianism” holds that equality of opportunity within society must account not only for economic inequalities but also for the many individual characteristics (beauty, intelligence, family connections) that make up opportunities in contemporary society.<sup>43</sup> Rawls’ primary concern was to explain how a society could be understood to be just and how its citizens could be seen to be equal.<sup>44</sup> In order to explain the way that the wealth transfer taxes can contribute to the version of equality that Rawls sees as best, I will first lay out the fundamentals of Rawls’ political philosophy. This Part will explain the veil of ignorance, the original position, and the two principles of justice (including the famous difference principle); these are the three central elements of Rawls’ political philosophy and the central components of the role the wealth transfer taxes can play in ensuring a just society under Rawls’ theory.

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

*Id.* at 17-18.

43.

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

*Id.* at 220-21.

44.

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

JOHN RAWLS, JUSTICE AS FAIRNESS 4 (2001) [hereinafter JUSTICE AS FAIRNESS].

Importantly, Rawls endorses an equality of opportunity position, *not* an equality position. That is, Rawls focuses on the equality of members of society at the outset rather than on whether or not there is an equal distribution of assets within society at any given moment.<sup>45</sup> Ultimately, a lot hangs on this distinction. An egalitarian might require a regular and ongoing redistribution of wealth to ensure that goods are distributed equally among all, but such redistribution would not necessarily be required on an equality of opportunity theory.<sup>46</sup> If the distribution of assets (both economic and non-economic) were sufficiently equal *ex ante* to ensure that all members of society were afforded an equal opportunity to achieve success, then later redistribution would not be required.<sup>47</sup> At that point, any uneven distribution within society would arguably be attributable to differences in effort.<sup>48</sup> That would not, on an equality of opportunity theory, require alteration, because the individual members of society all began from the same position. There is much to be said on what it means for assets to be distributed equally *ex ante*. In particular, one central question faced by equal opportunity theorists is whether or not talents and tastes should be considered assets whose original distribution must be accounted for.<sup>49</sup> One could go even further and argue that the ability to work hard is itself an arbitrary characteristic, whose presence should qualify as an asset from the perspective of equality of opportunity. However, in all of this, the central argument remains that material distributions must be evaluated in the context of their ability to serve liberty and justice. That is, the optimal economic distribution *constitutes* justice.

The argument for equality of opportunity generally comes from the principle that all individual members of society are equally valuable. If one believes that each person has equal worth, then each person's goals and choices should be valued equally as well. However, the equal opportunity argument does not claim that throughout an individual's life her choices should be rewarded equally, regardless of how the market values that choice. Rather, the equal worth of all individuals is reflected by the assurance of equal opportunities and the freedom to engage in those opportunities for all individuals from the beginning. However, this freedom cannot be merely a formal freedom, meaning that an individual

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45. As Linda Sugin writes, "the benefits from individual effort appropriately produce inequalities in income and wealth, and should not require adjustment under the difference principle." Sugin, *supra* note 38, at 2004.

46. *Id.*

47. *Id.*

48. *Id.*

49. *See, e.g.*, Alstott, *supra* note 13.

will not be restrained from acting in accordance with her wishes. That kind of negative freedom does not ensure any true opportunity if the individual in question has significantly fewer material goods than other individuals. Instead, material resources must be made available to all individuals in approximately equal amounts before it can be said that true equality of opportunity has been attained.<sup>50</sup>

#### A. *The Veil of Ignorance and the Original Position*

In *Theory of Justice*, Rawls first articulated his famous theory of the original position and the veil of ignorance.<sup>51</sup> He then clarified and extended his view in *Justice as Fairness*.<sup>52</sup> A central concern with any work in political philosophy, Rawls contends, is that one's views of justice will necessarily be influenced by one's own actual place in the world.<sup>53</sup> In response to this, Rawls proposes that political philosophy and evaluations of justice should be done from behind a veil of ignorance.<sup>54</sup> That is, the justice of any particular distribution of wealth and other beneficial qualities should be evaluated before one knows where one will fall within that society. In this way, even the worst off member of society will have a position that will have been endorsed as acceptable by all.<sup>55</sup>

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50. See PHILLIPPE VAN PARIJS, *REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM?* (1995); BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* (2008); BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* (1999).

51. Rawls describes the original position as follows:

First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like. Nor, again, does anyone know his conception of the good, the particulars of his rational plan of life, or even the special features of his psychology such as his aversion to risk or liability to optimism or pessimism. More than this, I assume that the parties do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve. The persons in the original position have no information as to which generation they belong.

JOHN RAWLS, *A THEORY OF JUSTICE: REVISED EDITION* 118 (1999) [hereinafter *THEORY OF JUSTICE*].

52. *JUSTICE AS FAIRNESS*, *supra* note 44, at 15.

53. "The difficulty is this: we must specify a point of view from which a fair agreement between free and equal persons can be reached; but this point of view must be removed from and not distorted by the particular features and circumstances of the existing basic structure." *Id.*

54. See *supra* note 51 and accompanying text.

55. One might argue that it is impossible to fully engage in this thought experiment because one cannot truly shed one's own identity in evaluating the justice of particular distributions. Rawls himself acknowledges the difficulty of appropriately applying the original position when he writes "Some may object that the exclusion of nearly all

Rawls views this hypothetical ignorance as critically important in attaining a truly just society, as various inequalities that result from historical accidents should not be allowed to influence the definition of justice.<sup>56</sup> This is central to Rawls' particular view of equality of opportunity because it is not only economic particularities that are hidden behind the veil of ignorance but also, among other things, the particulars of an individual's race, sex, geographical location, and level of education. As a result, insights about justice can be made from the point of view of a truly blank slate, free from the prejudices of any specific individual situation.

The point of view of the individual who is hidden behind the veil of ignorance is what Rawls calls the original position.<sup>57</sup> It is from this position that we are best poised to determine what true justice looks like. Rawls argues that without the prejudicial influences of particular situations, reasoned argument can be used to arrive at the social structure that most closely satisfies the requirements of justice.<sup>58</sup> Rawls moves from the original position to establish what he views as the social structure that satisfies the requirements of justice. It is from this argument that the title of his last work, *Justice as Fairness*, comes.<sup>59</sup> In the original position, all individuals are equal, and they develop fair rules regardless of their particular subjectivity.<sup>60</sup> That is to say, the rules developed from the original position are those one would choose, regardless of whatever else it is that one would want in the world.

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particular information makes it difficult to grasp what is meant by the original position." THEORY OF JUSTICE, *supra* note 51, at 119. However, Rawls' response to this concern is that the goal of the original position is limited to determining what principles should apply universally. "[S]ince the differences among the parties are unknown to them, and everyone is equally rational and similarly situated, each is convinced by the same arguments. Therefore, we can view the [choice] in the original position from the standpoint of one person selected at random." *Id.* at 120.

56. "Contingent historical advantages and accidental influences from the past should not affect an agreement on principles that are to regulate the basic structure from the present into the future." JUSTICE AS FAIRNESS, *supra* note 44, at 16.

57. THEORY OF JUSTICE, *supra* note 51, at 118.

58. *Id.* at 121.

59. "[The] position is set up as a situation that is fair to the parties as free and equal, and as properly informed and rational. Thus any agreement made by the parties as citizens' representatives is fair. . . . Hence the name: justice as fairness." JUSTICE AS FAIRNESS, *supra* note 44, at 16.

60. THEORY OF JUSTICE, *supra* note 51.



*B. The Two Principles of Justice*

The rationale Rawls uses for applying the veil of ignorance to deliberations about the just distribution of goods in society is that individuals in the original position (that is, the position of individuals behind the veil of ignorance) are uniquely qualified to evaluate fairness within society.<sup>61</sup> As a result, the position of justice that deliberation behind the veil of ignorance arrives at is necessarily a fair position. Rawls argues that deliberation regarding fairness in society that occurs behind the veil of ignorance results in the adoption of two principles of justice, which are the articulation of freedom.<sup>62</sup> Rawls articulates the two principles as follows:

(a) Each person has the same inalienable claim to a fully adequate scheme of equal basic liberties, which scheme is compatible with the same scheme of liberties for all;<sup>63</sup> and

(b) Social and economic inequalities are to satisfy two conditions: first, they are to be attached to offices and positions open to all under conditions of fair equality of opportunity; and second, they are to be to the greatest benefit of the least-advantaged members of society (the difference principle).<sup>64</sup>

These two principles are at the core of Rawls' theory of what social structure constitutes a just system. The first of these two principles (point (a) above, the "first principle of justice"), deals with the required liberties an individual must have in society in order for that society to be properly considered just.<sup>65</sup> Rawls endorses a Kantian view of liberty.<sup>66</sup> At the

61. For more on this point, see *supra* note 51 and accompanying text.

62. *THEORY OF JUSTICE*, *supra* note 51.

63. The basic liberties that Rawls endorses are freedom of thought and liberty of conscience; political liberties (for example, the right to vote and to participate in politics) and freedom of association, as well as the rights and liberties specified by the liberty and integrity (physical and psychological) of the person; and finally, the rights and liberties covered by the rule of law.

*JUSTICE AS FAIRNESS*, *supra* note 44, at 44.

64. *Id.* at 42-43.

65. Sugin argues that this first principle of justice has significant negative implications for the design of any tax structure held to be just on Rawlsian grounds.

The first principle may impose significant limitations on systems of taxation because it demands that every individual have equal basic liberties. Based on this limitation, justice as fairness would preclude an endowment tax, which taxes people according to their abilities to earn, regardless of the actual

core of his first principle is a notion of equal liberty, in which there are no special liberties available to people on the basis of race, gender, economic or social status, or any other arbitrary criteria.<sup>67</sup> Instead, under Rawls' theory, essential liberties must be available to all members of society equally, regardless of their specific situations.<sup>68</sup> While this is a critically important issue, and much has been written about it,<sup>69</sup> the first principle of justice is not as essential to an analysis of the tax system as the second principle of justice (point (b) in the excerpt above).<sup>70</sup>

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choices they make to earn. *Protection of individual autonomy, not economic justice, drives the limitation.* In addition, the first principle precludes any tax system that allows economic inequalities to interfere with the integrity of the political system. Thus, where concentrations of wealth produce concentrations of political power, the first principle would require the tax system to break up politically threatening concentrations of wealth so that equal liberties of citizenship are possible.

Sugin, *supra* note 38, at 2005 (emphasis added).

66. His Kantian view differs from other views like those of Locke and Mill in that it is ultimately a view of positive liberty, much closer to Hegel's view of Ethical Life than to Mill's harm principle. *See, e.g.*, GEORG WILHELM FRIEDRICH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* (1821); JOHN STUART MILL, *ON LIBERTY* (Longman, Roberts & Green 1859). Rawls elaborates his positive view of liberty in the third part of *Theory of Justice*. *THEORY OF JUSTICE*, *supra* note 51. For Rawls' Kantian heritage, see *id.* at § 40 and JOHN RAWLS, *Themes from Kant's Moral Philosophy, in KANT'S TRANSCENDENTAL DEDUCTIONS: THE THREE CRITIQUES AND THE OPUS POSTUMUM* 81 (Eckart Forster ed., 1989).

67. "It is assumed, then, that the parties do not know certain kinds of particular facts. First of all, no one knows his place in society, his class position or social status; nor does he know his fortune in the distribution of natural assets and abilities, his intelligence and strength, and the like." *THEORY OF JUSTICE*, *supra* note 51, at 118.

68. From the original position behind the veil of ignorance, priority is given to basic liberty. This priority is independent of any particular characteristics because, again, behind the veil of ignorance no individual knows her particular characteristics. As Rawls writes,

The persons in the original position are moved by a certain hierarchy of interests. They must first secure their highest-order interest and fundamental aims (only the general form of which is known to them), and this fact is reflected in the precedence they give to liberty; the acquisition of means that enable them to advance their other desires and ends has a subordinate place.

*Id.* at 476.

69. *See, e.g.*, MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (2d ed. 1998); AMARTYA SEN, *THE IDEA OF JUSTICE* (2009); RONALD DWORKIN, *THE ORIGINAL POSITION, in READING RAWLS* 16 (Norman Daniels ed., 1989).

70. Importantly, Rawls sees the first principle of justice as prohibiting an endowment tax, which could easily take the form of a wealth tax (although not all wealth taxes would necessarily be endowment taxes). In *Justice as Fairness*, Rawls writes,

[An endowment tax] would violate the priority of liberty. It would force the more able into those occupations in which earnings were high enough for them to pay off the tax in the required period of time.

Therefore, I will focus the rest of this Part on the second principle of justice, also known as the difference principle.

### C. The Difference Principle

At the core of Rawls' equal opportunity theory of justice is the second principle of justice, known as the difference principle. Importantly, this principle does not forbid social and economic inequalities in a just society.<sup>71</sup> Rather, such inequalities are permitted, but only to the extent that the positions with which the inequalities are associated are open to all and the inequalities are such that they improve the position of the least well-off.<sup>72</sup> This requirement is at the center of the distinction between an egalitarian philosophy (such as that endorsed by Karl Marx and G.A. Cohen, among others)<sup>73</sup> and a philosophy requiring equality of opportunity. Egalitarian theories generally would not view as

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. . . [O]ur native endowments are ours and not society's: . . . we cannot be subject to [an endowment tax] to equalize the advantages our endowments might confer. That would violate our basic liberties.

JUSTICE AS FAIRNESS, *supra* note 44, at 158.

71. While it is true that Rawls' position tolerates inequalities, it does not tolerate massive inequalities, as he explicitly explains:

The objection is that since we are to maximize (subject to the usual constraints) the prospects of the least advantaged, it seems that the justice of large increases or decreases in the expectations of the more advantaged may depend upon small changes in the prospects of those worst off. To illustrate: the most extreme disparities in wealth and income are allowed provided that they are necessary to raise the expectations of the least fortunate in the slightest degree.

THEORY OF JUSTICE, *supra* note 51, at 136. Rawls' response to this objection is to refer back to the way in which the two principles of justice reinforce one another, which means that in a truly just society, massive disparities of wealth will not occur.

The possibilities which the objection envisages cannot arise in real cases; the feasible set is so restricted that they are excluded. The reason for this is that the two principles are tied together as one conception of justice which applies to the basic structure of society as a whole. The operation of the principles of equal liberty and fair equality of opportunity prevents these contingencies from occurring.

*Id.*

72. Rawls illustrates the so-called maximin rule nicely when he writes, [T]he two principles are those a person would choose for the design of a society in which his enemy is to assign him his place. The maximin rule tells us to rank alternatives by their worst possible outcomes: we are to adopt the alternative the worst outcome of which is superior to the worst outcomes of the others.

*Id.* at 133.

73. See KARL MARX, *THE COMMUNIST MANIFESTO* (Penguin Classics 1985); COHEN, *supra* note 14.

just a system that permitted any social or economic inequalities.<sup>74</sup> By contrast, Rawls' theory understands that such inequalities may be present in a just society. However, if the inequalities are such that the positions that bring higher incomes and better rewards are only available to those who are born into certain families, or who look a certain way, or who live in certain places, then those inequalities would violate the first requirement of the difference principle (namely, the requirement that positions associated with inequalities be open to all).<sup>75</sup>

The second requirement of the difference principle, the requirement that inequalities be to the benefit of the least well-off, is the element that is often appealed to in order to justify progressive taxation and general theories of taxation that impose heavier taxation on economically better-off members of society.<sup>76</sup> Under this theory, the current levels of inequality in contemporary American society might be permissible under the theory that large concentrations of wealth allow for high levels of tax, which create government revenues that can, in turn, be used for the benefit of the lowest-income members of society.<sup>77</sup> However, the second requirement of this principle of justice is clearly not met in contemporary American society. Much contemporary wealth is passed down from generation to generation. Social mobility in the United States is surprisingly low, and individuals generally grow up to enter the same social and economic class in which their parents lived.<sup>78</sup> This fact about contemporary American society flies in the face of the second Rawlsian principle of justice.

The first part of the second principle of justice requires that the positions associated with social and economic inequalities be open to all

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74. MARX, *supra* note 73; COHEN, *supra* note 14. Marx and Cohen, as well as other egalitarians, are primarily concerned about equality of outcome more than merely equality of opportunity. As a result, these theories tolerate heavy redistributive taxation throughout an individual's lifetime.

75.

[P]ositions are to be not only open in a formal sense, but all should have a fair chance to attain them. . . . [T]hose with similar abilities and skills should have similar life chances. More specifically, assuming that there is a distribution of natural assets, those who are at the same level of talent and ability, and have the same willingness to use them, should have the same prospects of success regardless of their initial place in the social system . . . .

THEORY OF JUSTICE, *supra* note 51, at 63.

76. See, e.g., MARX, *supra* note 73; COHEN, *supra* note 14.

77. Note that I am not making the argument here that this is in fact the case in contemporary American society. Much empirical work would be needed to determine whether the least well-off are or are not better off under the system of inequality in place today. That is not the work of this Article.

78. See, e.g., Aaronson & Mazumder, *supra* note 9.

members of society. This requirement of equal opportunity means that inherited wealth, which provides economic advantages to the children of wealthy parents, must be limited in a just society. Importantly, though, it is not only the inheritance of wealth that offers social and economic advantages to the children of wealthy parents. Even if a government imposed a confiscatory wealth transfer tax so that no wealth could be passed down to future generations, parents would still have numerous ways to improve the lives of their children. Education, health care, clothing, vacations, and even introductions to the right social circles are all benefits given to children by their parents, none of which would be affected by a confiscatory wealth transfer tax. Indeed, our current wealth transfer tax system exempts from transfer taxation amounts that are paid for the education or health care of another.<sup>79</sup> Properly following the second principle of justice, all of these benefits made available by parents to their children violate a just society.

### III. WEALTH TRANSFER TAXES AND RAWLS' SECOND PRINCIPLE OF JUSTICE

Wealth transfer taxes are not the only tool a government can use to try to ensure equality of opportunity. Indeed, in most societies, wealth transfer taxes have been a relatively small part of the tax system. Further, many argue that one cannot determine the justice of any particular governmental system without examining both the tax and transfer regimes of that government.<sup>80</sup> Government revenues are primarily generated through taxation.<sup>81</sup> This means that an analysis of the justice of any particular society must involve a consideration of both the tax system and the transfer systems or expenditure programs that are funded by the revenues raised through that tax system. A society that demonstrates the equality of opportunity required by Rawls must have

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79. § 2503 of the Code exempts transfers made directly to the provider of health care or education services from the gift tax. § 2503. As a result, large amounts of wealth can be transferred for the benefit of another without the imposition of any tax. This exemption can apply to the payment of insurance premiums, tuition for university, high school, primary school, and even preschool. Courts have ruled that even the prepayment of tuition, as long as it is non-refundable, can be excluded under § 2503. See, e.g., I.R.S., Tech. Adv. Memo. 99-41-013 (Oct. 15, 1999); I.R.S., Priv. Ltr. Rul. 06-02-002 (Jan. 13, 2006). For more on this issue, see Kerry A. Ryan, *Human Capital and Transfer Taxation*, 62 OKLA. L. REV. 223 (2010).

80. LOUIS KAPLOW, *THE THEORY OF TAXATION AND PUBLIC ECONOMICS* (2008).

81. For example, in 2012, the revenue collected by the United States federal government was \$2,450,164,000,000. See *Historical Tables*, OFFICE MGMT. & BUDGET, <http://www.whitehouse.gov/omb/budget/historicals> (last visited Mar. 12, 2014). The tax system was responsible for collecting over 95% of that amount. *Id.*

robust expenditure programs in place in order to ensure that education, health care, housing, and more are made available to all members of that society. The revenues needed to provide these programs must be raised by taxation, and it has generally been accepted that wealth transfer taxation alone would be insufficient to generate that kind of revenue.<sup>82</sup> If that is true, then Rawlsian equality of opportunity will require not only a wealth transfer tax but also an income tax.<sup>83</sup> However, an income tax alone, even one with high rates, would be insufficient to achieve Rawlsian equality of opportunity.<sup>84</sup> Income taxes do not address the privileged position of heirs, which is why wealth transfer taxes are especially well suited for attaining equality of opportunity.

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82. This has primarily been true because the base of the wealth transfer tax has always been small (and has been shrinking dramatically in recent years). If the base was increased by reducing the amount of the exemption equivalent credit, and if the rate was increased beyond the current 40% level, then the wealth transfer tax system would generate significantly more revenue.

83. Anne Alstott explains the concerns associated with using an income tax to fund the expenditure programs necessary to achieve equality of opportunity. Because an income tax can violate the principles of equality of opportunity, tending instead towards egalitarianism, Alstott sees risks in funding her proposed public inheritance (one form of an expenditure program meant to equalize opportunity) with income tax revenues. She writes,

Whether this solution [a 100% inheritance tax] 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).

Alstott, *supra* note 13, at 495.

84. The current U.S. federal income tax does not include gifts and inheritances in income. § 102. Because of that, even a robust income tax would not tax amounts received in gratuitous transfers. One possible solution to this part of the problem would be to include gratuitously transferred amounts in income. Indeed, several commentators have proposed this. See, e.g., 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). However, even including these amounts in income would be insufficient to achieve equality of opportunity because those who are born into positions of privilege would receive wealth merely as a result of their position, even if the amount of that transfer is reduced via the income tax. Treating earned and inherited amounts in the same way (rather than preferencing inherited amounts, as our current tax system does) will not resolve the problem Rawls sees.

### A. *Inequality of Position*

Contemporary American society has significant economic inequality.<sup>85</sup> This in itself is not a violation of Rawls' theory of equal opportunity because, again, Rawls endorses equality of opportunity rather than equality of position or egalitarianism.<sup>86</sup> If the inequalities present in society had been arrived at only through differences in effort, then it is entirely possible that Rawls would accept the current distribution of wealth as just.<sup>87</sup> Because equality of opportunity theorists accept that even with true equality of opportunity present, equality of condition does not necessarily result, Rawls need not critique current society as necessarily unjust. It is possible that with the same original opportunities, different members of society end up in different positions with regard to social and economic status. Equality of opportunity does not necessarily view as unjust the uneven distribution of talents or ability to exert effort.<sup>88</sup> If that uneven distribution of talents and effort results in additional opportunities being made available to the children of the talented, then that would violate the principles of Rawlsian equality of opportunity. It is not difficult to see that if wealth is allowed to pass unchecked down to future generations, the inequality present in the original, equal opportunity state could grow exponentially.

### B. *Inequality of Position: An Example*

Consider the following example: Assume a society with true equality of opportunity where no child is given any financial or social advantages at birth.<sup>89</sup> Michael and Nicholas are born into this society in the same year and have exactly the same economic situation at birth. Through a series of events, because he works harder, is more intelligent, and is more cutthroat than Nicholas, Michael becomes significantly wealthier than Nicholas. By the time they are thirty, Michael has \$500,000 in

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85. See, e.g., Aaronson & Mazumder, *supra* note 9.

86. For a discussion of equality of opportunity versus equality of outcome, see discussion *supra* Part II.

87. As discussed earlier, Rawls did not actually believe that a society following his two principles of justice would have great social and economic inequality. See *supra* note 71 and accompanying text.

88. However, proponents of equality of opportunity might actually view the uneven distribution of talents as unfair. See discussion *supra* Part II.

89. Clearly such a state seems at least unlikely, if not impossible. However, a small commune with these characteristics might not be as impossible. History provides examples of many such communes, none of which has continued successfully. For further discussions of this issue, see Clifford F. Thies, *The Success of American Communes*, 67 S. ECON. J. 186 (2000).

assets, and Nicholas has only \$50,000 in assets. Michael has a son named Oliver and Nicholas has a son named Paul. Both Michael and Nicholas die in a car accident as soon as their sons are born. Assuming no prohibitions on inheritance, no wealth transfer tax, and no other heirs, Oliver inherits \$500,000, while Paul inherits only \$50,000. Even if everything else is equal in this society and even if nothing has changed since Michael and Nicholas were children, I submit that Oliver and Paul will likely end up in very different places by the time they are adults. Whereas the difference between the positions of Michael and Nicholas was a result of the differences in their personal qualities (intelligence, effort, etc.), differences between Oliver and Paul will come, at least in part, from the very different economic situations from which they begin. Not only that, but it is very likely that the gap between Oliver and Paul will continue to grow. Oliver's large amount of wealth will permit him to engage in opportunities that just will not be available to Paul. Oliver will be able to afford an expensive education, better health care, memberships in influential clubs, and nicer housing. Further, Oliver can invest his wealth to increase his income even further. In this way, the mere presence of additional wealth at birth results in significant differences (and, at least potentially, exponentially growing differences) between these two members of what was, just one generation ago, a society with equality of opportunity for all of its members.

This is to say, it is not the mere existence of social or economic inequality that violates the Rawlsian requirements of justice. Even a society rife with inequality, like the contemporary United States, could satisfy Rawls' requirements if inheritance is prohibited. But allowing wealthy individuals to transfer their wealth to the objects of their affection ensures that the wealth gap will continue to grow. In this way, significant wealth inequality in society makes it *more likely* that equal opportunity will not be available within that society. Additionally, the accumulation of large amounts of wealth in the hands of a small number of people also makes it significantly less likely that such a society is an equal opportunity society. If an individual accumulates more wealth than she is able to spend in her lifetime, then that wealth will pass to her heirs upon her death. As wealth in the United States becomes more concentrated in the hands of fewer people, it becomes more likely that those people will transfer some of their wealth to others rather than consuming all of their wealth during their lifetimes.<sup>90</sup>

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90. The concentration of wealth in the United States has, in turn, led to further concentrations of wealth, thereby limiting social and economic mobility. For a further discussion of this issue, see *supra* note 9 and accompanying text.



## IV. A RAWLSIAN WEALTH TRANSFER TAX

So far this Article has focused on the role that a wealth transfer tax can play in achieving the equality of opportunity goals endorsed by Rawls and others.<sup>91</sup> I will now turn to an exploration of what form of wealth transfer tax best suits those goals. Currently, the United States imposes an estate and gift tax on wealth transfers.<sup>92</sup> These taxes are, as a matter of mechanics, imposed on the transferor.<sup>93</sup> The tax is imposed in the same way and at the same rate regardless of the recipient.<sup>94</sup> As a result, a donor can transfer large sums of money, indeed, the entirety of her wealth, to a single donee with the same tax consequence as if she had distributed it to several donees.<sup>95</sup> There is, of course, great debate about where to set the transfer tax rate, but unless the rate is set at 100%, the wealthiest members of society will still be able to transfer all of their wealth (minus the transfer tax that they owe) to one donee.<sup>96</sup> As a result, concentrated wealth will remain in the hands of heirs.<sup>97</sup> The tax system, as it stands now, creates no incentive for wealthy donors to diversify their gifts because the amount of tax owed is the same whether the donor

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91. See discussion *supra* Part II.

92. §§ 2001, 2501.

93. §§ 2002, 2502. The estate and gift taxes are excise taxes imposed on the transfer of wealth, but the tax itself is levied on the transferor—the estate in the cases of an inheritance, the donor in the case of a gift.

94. The only exception to this is transfers made to the spouse of the transferor. There is an unlimited marital deduction in both the gift and estate taxes. §§ 2056, 2523. As a result, a donor (or decedent) can give (or bequeath) unlimited wealth to her spouse without having any tax imposed. This marital transfer, combined with the newly implemented portability of the lifetime credit, is at the heart of much estate planning. Any credit that goes unused in the hands of one spouse can now be used by the surviving spouse. § 2010. As a result, for many couples, the best strategy now is to leave all wealth at death to the surviving spouse and also leave the entirety of the \$5.25 million exemption equivalent credit to that spouse. That way the surviving spouse can both use what he needs during his lifetime and still get the benefit of both spouses' credits when he dies.

95. There is one way that transfers to several recipients can reduce the amount of transfer tax owed by a donor. § 2503 of the Code permits an annual transfer of \$14,000 per individual to occur tax-free. § 2503. In fact, this Code section defines this first \$14,000 present-interest transfer as *not a gift at all*. *Id.* There are limits, primarily the limit that the transfer must be of a present interest and not a future interest. *Id.* However, a donor could conceivably transfer all of her wealth tax-free if she finds a sufficient number of donees to receive the \$14,000 per year. While this is an important exception, I do not consider this a real impact on the equality of opportunity provided by our current system, because most donors do not, in fact, transfer all of their wealth in increments of \$14,000 to millions of people.

96. *Id.*

97. *Id.*

gives to several recipients or only one.<sup>98</sup> Another transfer tax structure could do more to encourage the breaking up of large concentrations of wealth.

Rawls himself, in *Justice as Fairness*, endorsed an accessions tax.<sup>99</sup> An accessions tax, a version of an inheritance tax, imposes a tax on the recipient of the transfer.<sup>100</sup> An accessions tax incorporates a lifetime perspective, meaning that in most accessions tax structures, an individual will have one lifetime exemption above which all inheritances received will be taxed either at graduated or flat rates.<sup>101</sup> While the federal government does not have an inheritance tax in place, several states in the United States do have such a system.<sup>102</sup> In addition to the imposition of the tax on the recipient of the transfer, inheritance taxes typically have a per donee exemption.<sup>103</sup> Because of this per donee exemption, an

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98. *Id.*

99. JUSTICE AS FAIRNESS, *supra* note 4. As Alstott notes, “The familiar—and correct—point is that equality of opportunity tends to support a lifetime tax on inheritance, that is, an accessions tax.” Alstott, *supra* note 13, at 502-03 (citing David G. Duff, *Taxing Inherited Wealth: A Philosophical Argument*, 6 CAN. J. L. & JURIS. 3, 45-62 (1993); Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX L. REV. 419, 431 (1996)). See also Sugin, *supra* note 38, at 2009.

Because equal opportunity must be renewed at every generation, an accessions tax may be preferable to an estate tax because it is sensitive to the concentrations of individual wealth going forward. If the allocations of resources that develop over time produce concentrations of wealth that prevent equal opportunities across generations, then taxation would be necessary to readjust those opportunities at every generation.

*Id.*

100. *Id.*

101. “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.’” Alstott, *supra* note 13, at 502.

102. Indiana (I.C. 6-4.1), Iowa (Iowa Code Ch. 450), Kentucky (KRS 140.010), Maryland (Maryland Code 7-202), Nebraska (Nebraska Statute 77-2018.04), New Jersey (N.J.S.A. 54:33-1 et seq.), and Pennsylvania (Pa. Code section 2106) each have a different set of criteria, rates, and exemption classes and amounts. However, in general, transfers to surviving spouses or children are either exempted from the tax or are subject to tax only after a large exemption amount, or at lower rates, or both.

103. In the version that is currently in place in most of the states in the United States, in addition to a per donee exemption, there is a larger exemption for those who are more closely related to the decedent. For instance, in Kentucky, Class A beneficiaries, including spouses and children, are not taxed at all on their inheritances; while Class B beneficiaries, including nieces and nephews, receive a \$1,000 exemption, are taxed at 4% on inheritances between \$1,000 and \$10,000, and are taxed at rates that graduate to 16% on amounts over \$200,000; and Class C beneficiaries, including those with no blood or legal relation to the decedent, receive a \$500 exemption from the inheritance tax, are taxed at 6% on inheritances between \$500 and \$10,000, and are taxed at rates that

accessions tax encourages the diffusion of wealth by reducing the tax owed when wealth is distributed more widely, rather than being transferred all to one or two donees.<sup>104</sup> In this way, the tax system itself can be set up to encourage the dilution of concentrated wealth.<sup>105</sup>

However, merely imposing tax at a higher rate, or offering additional tax exemptions if the wealth is transferred to several recipients, cannot, on its own, *ensure* that concentrated wealth is dispersed or that the children of wealthy parents will not receive additional opportunities as a result of their position. It is entirely conceivable that a wealthy decedent would decide to leave all of her wealth to her daughter despite the fact that such a decision would increase the total amount of tax that would be paid on that wealth.

Consider the following example: Assume an inheritance tax is in place that has a \$1 million per heir exemption, regardless of the relationship between the heir and the donor. Assume further that, after amounts excluded by the exemption, an inheritance tax is assessed on the donee at the rate of 75%. Abigail has a \$101 million estate. She has many friends and relatives, all of whom would be thrilled to receive \$1 million transfer tax-free upon Abigail's death. However, Abigail has only one child, a daughter, Beatrice. Abigail is not especially opposed to taxation, and she would prefer to transfer all of the assets in her estate to her daughter rather than distributing the assets in \$1 million pieces to 101 various friends and relatives, thereby avoiding taxation entirely. If Abigail leaves everything to Beatrice, \$1 million of the inheritance will be exempt from tax, and Beatrice will owe \$75 million in tax on the remainder of the transfer. This leaves \$26 million to Beatrice (the \$1 million exempted amount and the \$25 million left over after the tax is imposed). In this instance, the inheritance tax, meant to encourage the breaking up of Abigail's \$101 million of concentrated wealth, did not truly attain that end. Despite the fact that more taxes were imposed on her wealth, Abigail's desire to transfer her wealth in as concentrated a form as possible to her daughter trumped her desire to pay less tax. If

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graduate to 16% on amounts over \$60,000. See KY. REV. STAT. ANN. §§ 140.060, .070, .080 (West 2013). This system actually flies in the face of equality of opportunity goals. Because additional exemptions and lower tax rates are given for transfers to those closest to the decedent, this system works to ensure that the wealth *remains* concentrated in the hands of that wealthy family. In this way, not all inheritance or accessions tax systems are necessarily best for the goal of equality of opportunity. For a further discussion of this issue, see Bird-Pollan, *supra* note 4.

104. "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." Alstott, *supra* note 13, at 503.

105. *Id.*

donors remain more motivated to keep their wealth within their family than they are motivated to pay less tax, then it will not matter what form the tax takes. Perhaps Abigail would leave a few million dollars tax free to some of her nieces or nephews—this may break up a bit of her wealth. However, because every additional dollar that Abigail gives to someone other than Beatrice reduces by twenty-five cents the amount that her daughter receives, if Abigail's primary concern is to provide for her daughter, she is likely to limit the amount she gives to other people even though this approach will increase the total amount of tax incurred by the transfer.<sup>106</sup> For many donors, this seems likely to be true.

Despite the fact that the inheritance tax system described above does not prevent the continued concentration of wealth in the example I give, there is a clear benefit to the transfer described. Because of the heavy tax rate, the government collects \$75 million in taxes on that transfer. With that new revenue, the government could create significant programs aimed at improving the situations of the least well-off members of society, thus increasing overall equality of opportunity in that society. Because this is the goal of this transfer tax system, at least for the purposes of this Article, one might still call this overall result a success. Of course, the imposition of an estate tax at 75% would also raise significant amounts of revenue. However, a 75% inheritance tax seems more politically feasible than a 75% estate tax. Because the inheritance tax is, at least arguably, avoidable if the decedent distributes her wealth more widely, it seems possible that a heavy tax on amounts transferred above the exemption amount would be seen as more reasonable than a heavy tax on all amounts transferred above one total exemption amount, as in the current estate tax model.

Given that it is unlikely that the form of transfer tax imposed on wealth transfers will have a significant impact on the concentration or dilution of that wealth, it seems at least possible that the only truly effective strategy to prevent the continued transfer of concentrated wealth is the prevention of transferring wealth altogether. However, given the political unpopularity of all wealth transfer taxes in the contemporary United States, it seems incredibly unlikely that a 100% confiscatory tax would garner any political support.

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106. In the proposed model, every dollar over \$1 million that Abigail transfers to Beatrice incurs a tax of 75 cents, leaving Beatrice with 25 cents of inherited wealth. Abigail could choose to transfer that entire dollar to a niece, which would be a tax-free transfer, assuming that person has not yet used up her \$1 million exemption. As a result, leaving an addition dollar to another heir would reduce Abigail's transfer to Beatrice by 25 cents.

## V. WHAT ABOUT GIFTS?

Imposing an estate tax at a rate of 100% with no exemption would effectively prevent transfers of wealth at death. This prevention of inherited wealth would reduce the additional opportunities afforded to the children of wealthy parents, at least to some degree.<sup>107</sup> However, even a rate of 100% could not prevent transfers of wealth by gift, as demonstrated in the following example: Suppose Charlotte has \$100 million in assets and wants to transfer the assets to her daughter Diana. Suppose further that there is no wealth transfer tax exemption, and the federal tax rate on all wealth transfers is 100%. Assuming that Charlotte holds on to the assets until she dies, the tax will be assessed at a rate of 100% with no exemption, and the federal government will collect \$100 million from Charlotte's estate in the form of an estate tax. By contrast, if the transfer happens while Charlotte is still alive, then she can transfer \$50 million to Diana, and the assessed transfer tax at a rate of 100% will result in a gift tax of \$50 million paid to the federal government. In other words, a 100% estate tax is essentially a prohibition on transfers at death, but there is no way to prohibit *inter vivos* transfers through the use of a tax. Even if the gift tax is at 200%, Charlotte can make a transfer of \$33 million to Diana, which would incur a tax of \$66 million, which she could pay out of her existing assets. If Charlotte is willing to pay the tax, then a wealth transfer tax on a transfer she makes by gift cannot prohibit that transfer; it can only reduce the amount available to be transferred. While this reduction is clearly desirable from an equality of opportunity perspective, large amounts of wealth could still be transferred by gift. There are U.S. citizens with tens of billions of dollars of wealth. Even a 200% or 300% gift tax would still allow these donors to transfer vast amounts to their loved ones. Of course, those transfers would generate a lot of tax revenue, and that revenue could be used to fund programs aimed at increasing the opportunities available to the least well-off members of society. But despite the additional opportunities made available by this revenue, a gap in opportunity will remain if *inter vivos* wealth transfers occur.<sup>108</sup>

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107. Even without the possibility of leaving wealth to children, wealthy parents could still provide significant advantages to their children in the form of education, good health care, and a powerful last name, among other things. For more discussion of this point, see *supra* note 79 and accompanying text.

108. In her article, *Equal Opportunity and Inheritance Taxation*, Anne Alstott does not distinguish between *inter vivos* transfers and post-death transfers. She does not argue for a distinction between the two, claiming "unless otherwise specified, the tax treatment of gratuitous transfers should be the same whether the transfer is *inter vivos* or at death." Alstott, *supra* note 13, at 501. In this respect, I disagree with Alstott because the effect of

If the government permits the transfer of wealth by gift, then some of those transfers will, in fact, occur. No amount of taxation can prevent those transfers; the tax system can only make *inter vivos* transfers more expensive. It might be, then, that in order to achieve true equality of opportunity in the United States, the government must impose a prohibition on these transfers rather than merely attempting to tax them. As a matter of political viability, however, it seems extremely unlikely that the government would enact a prohibition on transfers by gift. If an outright prohibition on transfers is impossible, the next best option, from the perspective of equality of opportunity, is likely a high tax rate on those transfers. At a minimum, that high rate would reduce the amount of wealth available to be transferred. In addition, the tax could raise significant amounts of revenue for the government, which could then be used to fund programs aimed at improving opportunities for the least well-off members of society. While this would not ensure complete equality of opportunity (because the wealthy would still be able to transfer wealth to their children), it would generally improve the situation by reducing inequalities of opportunity, at least to some degree.

## VI. CONCLUSION

In this Article, I have demonstrated that Rawlsian equality of opportunity is consistent with and, indeed, demands a heavy wealth transfer tax in order to ensure justice within a society. Further, I have demonstrated that the form of transfer tax that is most consistent with Rawls' goals is an accessions tax with one lifetime exemption, above which the tax should be imposed at a rate of 100%. In order to ensure that this tax is not avoided through the transfer of wealth by gift during the donor's lifetime, gifts above the lifetime exemption rate should be prohibited by law.

Without this system in place, equality of opportunity would be impossible because individuals who accumulate more than they can spend in their lifetime would pass that accumulated wealth on to their children, who would, as a result, have a significant advantage over other, less well-off members of society from the beginning. The income tax would go some way towards combatting this inequality by raising revenue that could be used to provide opportunities to low-income members of society, but that alone would not ensure equality of opportunity within society. Rawlsian liberty requires that no special advantages be made available on the basis of any arbitrary criteria.

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an estate tax at 100% is radically different from the effect of a gift tax at 100%. That is the argument of this Part.

Whether or not one is related to a wealthy person who then decides to bestow her wealth in one's direction is the epitome of arbitrariness. A wealth transfer tax, in particular one designed as an accession tax, is at the core of ensuring that such arbitrariness does not result in an unjust society.