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DEATH AND TAXES: A LIBERTARIAN REAPPRAISAL

By Miranda Perry Fleischer*

Abstract: *Imagine two friends. Anna inherits nothing and works for every penny she has, while Mary inherits millions. How should a world that respects individual autonomy and private property rights treat Anna's earnings and Mary's inheritance? Should it tax them the same, or tax one more heavily than the other? If the latter, which one? The conventional wisdom holds that although some "right" libertarian theories justify taxing income, none justify taxing inheritances. Such taxes are "expropriations" and "an especially cruel injury" that "run[] roughshod over [a] deceased's interest in the ends his property will serve." This essay explores the standard libertarian objections to taxing gifts and bequests and argues that libertarians overstate their case when distinguishing the taxation of gratuitous transfers from other types of taxation. At minimum, the benefit theory of taxation embraced by many minimal statists and classical liberals mandates that the receipt of gifts and bequests should be taxed to the recipient. Moreover, the goals of curbing inherited political power and preventing wealthy families from insulating their members from market competition provide two additional explanations for why taxing inheritances to recipients is compatible with classical liberal values.*

KEY WORDS: Tax policy, libertarianism, classical liberalism, inheritance taxation, estate taxation, wealth taxation, gifts, bequests, inheritance law

I. Introduction

Imagine two friends. Anna inherits nothing and works as a housekeeper for every penny she has. Mary, the daughter of a successful businessman, inherits millions. How should a world that respects individual autonomy and private property rights treat Anna's earnings and Mary's inheritance? Should it tax them the same, or tax one more heavily than the other? If the latter, which one should be taxed more heavily? The conventional wisdom holds that "left" libertarianism justifies taxing inheritances and that some "right" libertarian theories justify taxing income—but that right libertarianism is incompatible with taxing inheritances. Right libertarians of all stripes have branded such taxes as "expropriations" and "an especially cruel injury," arguing that they "run[] roughshod over [a] deceased's interest in the ends his property will serve."[1]

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[1] Loren E. Lomasky, *Persons, Rights and Moral Community* (Oxford: Oxford University Press, 1990), 270; Ludwig von Mises, *Planning for Freedom* 3rd ed. (South Holland: Libertarian Press, 1974), 32.

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This essay explores the standard libertarian objections to taxing gifts and bequests. It argues that libertarians overstate their case when distinguishing the taxation of gratuitous transfers from other types of taxation. Some objections—such as the double taxation argument—demonstrate a misunderstanding of the income tax treatment of gifts and bequests. Other objections have merit as applied to donor-focused estate taxes, but not as applied to the more fundamental question of whether *any* taxation of gifts and bequests is justified. At minimum, the benefit theory of taxation embraced by many minimal statists and classical liberals mandates that the receipt of gifts and bequests should be taxed to the recipient. Moreover, the goals of curbing inherited political power and preventing wealthy families from insulating their members from market competition provide two additional explanations for why taxing inheritances to recipients is compatible with classical liberal values.

Articulating these ideals is especially important today. In the United States alone, baby boomers are in the midst of gratuitously transferring an estimated $59 trillion of wealth over the next few decades.[2] Unlike salary and lottery winnings, recipients of gifts and bequests—no matter how large—need not include them in income (this reflects law in the U.S., as do future references in this essay to current rules or current law). And even though individuals must pay income tax on appreciated property when they sell, any accrued gain on unsold property forever disappears at death and is never taxed. The United States does have an estate tax, but it only applies to wealth transfers over $12.92 million for individuals and $25.84 million for couples.[3] As a result, much of that $59 trillion will pass tax-free.

Before proceeding, a few words about terminology and scope. First, libertarianism is not monolithic.[4] It is a family of theories sharing core values such as a strictly limited role for government, the right of individuals to be free from coercion, a celebration of private property rights, respect for free markets, and the presumption that market distributions should be disturbed only in very limited circumstances. As in any family, different personalities emerge, each with its own perspective on just taxation.

"Anarcho-capitalism" is the most stringent of these conceptions; it argues that individuals can adequately protect their lives and property either on their own or by voluntarily forming mutual protective associations. This negates the need for a state, rendering any taxation unjust—regardless of form. Taxing gifts and bequests is therefore illegitimate for the same reasons that *any* taxation is illegitimate. As theorists have ably discussed the latter

[2] Cornellus Cappelen and Jorgen Pederson, "Just Wealth Transfer Taxation: Defending John Stuart Mill's Scheme," *Politics, Philosophy and Economics* 17, no. 3 (2018): 317-18 n. 1.

[3] These exemption levels reflect inflation adjustments as of 2023. The base exemption amount was increased to $10 million in 2017, indexed to inflation. It is scheduled to return to a benchmark of $5 million in 2026 (this too is adjusted for inflation, and is projected to be somewhere between $6 million and $7 million in 2026).

[4] Miranda Perry Fleischer and Daniel Hemel, "Atlas Nods: The Libertarian Case for a Basic Income," *Wisconsin Law Review* 2017, no. 6 (2017): 1203–1207.

point elsewhere, I will set aside anarcho-capitalism to focus on less-explored territory. For similar reasons, I also set aside "left" libertarian theories, which proceed from the foundational assumption that property in the state of nature is jointly owned. This assumption necessarily mandates various amounts of redistribution, and Hillel Steiner, Peter Vallentyne, and others have already capably argued that these theories easily support taxing inheritances.[5]

Instead, I focus on two popular "right" libertarian theories—minimal state libertarianism and classical liberalism. As explained below, most theorists agree that the former justifies taxation for basic protective services; a small minority argues that minimal state libertarianism also justifies very limited amounts of redistribution. "Classical liberalism" easily justifies taxation for protective services as well as additional public goods; many classical liberals also support varying amounts of redistribution.[6] Prior scholarship reflects the common wisdom that although these theories generally accept the legitimacy of some types of taxation, they do not justify taxing gifts and bequests. This essay challenges that conclusion and argues that taxing gifts and bequests to recipients is compatible with the principles most commonly invoked to justify minimal state libertarianism and classical liberalism.

Some readers may wish to contest whether some of the interpretations just mentioned should properly be characterized as "libertarian." As in many philosophical domains, intramural debate exists as to precisely who should count as a libertarian—just as consequentialists debate what counts as welfare and egalitarians debate what metrics should be equalized. I take no position in that debate. Instead, I note that the foregoing conceptions share the core values articulated above and are often grouped together under the heading of "libertarianism." Similarly, I do not aim to convince readers of the superiority of one interpretation over another, or even of libertarianism over other moral theories. And lastly, I acknowledge that reasonable disagreements exist even with the various strands of libertarianism. Not everyone who calls himself a "classical liberal," for example, necessarily subscribes wholesale to all of the reasoning described below regarding the legitimacy of taxation. For ease, however, this essay often refers to "libertarianism" as short-hand for minimal-state libertarianism and classical liberalism together.

Second, the taxation of gifts and bequests can take a variety of forms. Some countries impose taxes on wealth transfers that are separate from income tax systems. The United States imposes an estate tax, which focuses on the total wealth transferred by a donor by gift and bequest over his lifetime. Such taxes have a per-donor exemption level and, except for

[5] Hillel Steiner, "Original Rights and Just Redistribution," in Peter Vallentyne and Hillel Steiner, eds., *Left-Libertarianism and Its Critics: The Contemporary Debate* (New York: Palgrave, 2000), 89.

[6] Ibid.

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transfers to spouses and charities, generally do not differentiate among recipients. If Robert bequeaths $20 million to his daughters, it does not matter how he splits it up among them. Accessions taxes are recipient-focused and tax an individual cumulatively on the total sum of gifts and bequests she receives over her lifetime. Each individual has an exemption level allowing her to receive some amount of gratuitous transfers over her lifetime that are free of tax. If Mary inherits $5 million from Robert, the tax burden depends only on how many other gifts and bequests Mary has received during her life, not on how much other wealth Robert has transferred. An inheritance tax also taxes gifts and bequests received by an individual but is not cumulative. Instead, it is imposed annually on gifts and bequests received that year in excess of an annual exemption amount per recipient.[7] Mary's tax bill depends only on how many other gifts and bequests she receives that year.

Taxes on wealth transfers could also be integrated into the income tax system. One approach is to include gifts and bequests above a certain exemption level in income, just like salaries, gains from sales, and lottery winnings; Mary would just add any gifts or bequests received in a given year to her other income. As with an inheritance and accessions tax, Mary's tax bill would depend only on her receipts, not on Robert's wealth. A final approach is to tax unrealized gains at death. Imagine that Robert bought stock for $100,000 that is now worth $5 million. Most (if not all) income tax systems only tax that growth in value if Robert sells the stock while alive. As a result, many individuals die holding property with substantial untaxed growth. Some countries (such as Canada) tax the decedent's estate as if the property had been sold, thus including these increases in value as part of the decedent's final income tax bill (again, usually above an exemption amount). Here, the amount of such untaxed gain held by Robert at death —$4.9 million in our example—would determine the tax bill, regardless of to whom he bequeathed the property. Although income inclusion and estate, inheritance, and accessions taxes represent distinct approaches, they are often conflated.

In arguing that libertarianism justifies taxing gifts and bequests, this essay proceeds as follows. Section II briefly reviews libertarian theories of private property rights and discusses their implications for taxation. Section III canvasses and critiques the standard libertarian objections to inheritance taxation. Section IV first argues that at minimum, the benefits theory mandates taxing gifts and bequests to recipients, much like individuals are taxed on other inflows received. It further contends that two additional justifications for taxing the receipt of gifts and bequests—minimizing the transmission of hereditary political power and facilitating fair competition in the market—are compatible with classical liberalism. Section V concludes.

[7] Miranda Perry Fleischer, "Divide and Conquer: Using an Accessions Tax to Combat Dynastic Wealth," *Boston College Law Review* 57, no. 3 (2016): 920–21.

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II. Libertarianism, Private Property Rights, and Taxation

The standard libertarian argument against inheritance taxation stems from its deep commitment to private property rights. Yet despite this commitment, very few libertarians believe that *all* taxation is unjust. This section first outlines the minimal state and classical liberal justifications for private property rights and limited taxation, and then explores the implications of these views for taxation.

A. Justifications

Minimal state libertarians commonly justify private property rights and minimal taxation deontologically, combining a Kantian emphasis on the separateness of persons with Lockean natural rights theory.[8] Locke argues that natural resources in the state of nature are unowned, and that an individual has property rights in her person and labor. When someone mixes her labor with a previously unowned resource, she acquires ownership rights in that resource—subject to various conditions. The most important of these (commonly referred to as the "Lockean proviso") is that "enough and as good" be left for others.[9] If an appropriation fulfills these conditions, then nobody else can lay claim to those resources. Theorists generally interpret the proviso as requiring that others not be made "worse off" overall by an appropriation. If Tom appropriates an island's beachfront land for himself, Daisy and Henry may seem worse off because they can no longer appropriate those particular parcels themselves. But Tom's appropriation satisfies the proviso, for example, if he builds a coconut water factory and employs Daisy and Henry, leaving them no worse off than before.[10]

Almost three hundred years later, Robert Nozick relied on similar principles when crafting his "entitlement theory." Nozick's theory, designed to rebut egalitarian and utilitarian calls for redistribution, has three components. The first, "justice in acquisition," holds that an owner can do whatever she likes with property *so long as* its initial acquisition is just (based on the Lockean principles just discussed). The second principle, "justice in transfer," holds that if an owner voluntarily transfers justly acquired property, the resulting distribution is necessarily just and immune from interference. The third component, "rectification," is relevant when one of the first two is violated. If an owner's initial acquisition of property—or a later

[8] Fleischer and Hemel, "Atlas Nods," 1205-06.

[9] John Locke, *Second Treatise of Government*, C. B. Macpherson, ed. (Indianapolis, IN: Hackett 1980 [1689]), 19–30.

[10] Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2002), 115–17.

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transfer of it—is unjust, then compensation is due to whomever was harmed.[11]

Right libertarians also argue that self-ownership implies that an individual is not required to contribute her labor to benefit others. As Nozick elaborates:

> [t]here are only individual people, different individual people, with their own individual lives. Using of these people for the benefit of others, uses him and benefits the others… . To use a person this way does not sufficiently respect and take account of the fact that he is a separate person, that his is the only life he has.[12]

He later argues that forcing one individual to work for another's benefit violates the separateness of persons. Redistributive taxation does exactly that, rendering it unjust.[13]

Yet very few minimal state libertarians argue that *all* taxation is unjust—someone, of course, must pay the night watchman's salary. Although a few minimal statists argue that voluntary contributions alone can finance the minimal state, most minimal statists conclude that free-rider problems justify taxation to fund the state's protective services. And within the latter group, a small minority further believes that Lockean and Nozickian principles justify very limited redistribution.[14]

Compared to minimal state libertarianism, *classical liberalism* justifies comparatively heavy taxation.[15] Specifically, it legitimizes taxation for public goods in addition to protective services and has little trouble justifying some redistribution. Like its stricter peers, however, classical liberalism rejects the large-scale social welfare programs favored by utilitarians and egalitarians.

Proponents of classical liberalism generally rely on a mix of arguments. The first type are consequentialist arguments that emphasize the benefits of free markets, strong private property rights, and individual autonomy,

[11] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 150–53, 174-82 (hereinafter "ASU").

[12] Ibid., 33.

[13] Ibid., 169.

[14] These theorists—admittedly a small group—use a variety of arguments. Mack argues that "no plausible moral theory" would require one individual to sacrifice her only life for another's property rights. Therefore, a minimal state-financed safety net for the very destitute protects others' property rights by removing the conditions under which the very poor can justifiably infringe on those rights. Eric Mack, "Non-Absolute Rights and Libertarian Taxation," *Social Philosophy and Policy* 23, no. 2 (2006): 109. Others argue that the Lockean proviso that "enough and as good" be left for others requires a minimal safety net to make sure the proviso is true on an individual level and not just a societal one. Matt Zwolinski, "Property Rights, Coercion, and the Welfare State: The Libertarian Case for a Basic Income for All," *Independent Review* 19 (2014): 521, 523. Finally, some argue that Nozick's principle of rectification justifies some redistribution. For further explorations of these arguments, see Miranda Perry Fleischer, "Taxation," in Matt Zwolinski and Benjamin Ferguson, eds., The *Routledge Companion to Libertarianism* (Abingdon, Oxon: Routledge, 2022), 380; Fleischer and Hemel, "Atlas Nods," 1207-20.

[15] Miranda Perry Fleischer, "Libertarianism and the Charitable Tax Subsidies," *Boston College Law Review* 56, no. 4 (2015): 1376–86; Fleischer and Hemel, "Atlas Nods," 1220-31.

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compared to the costs of government action. F. A. Hayek argues that the diffusion of knowledge across individuals renders free markets superior to centralized government planning. In a free market, the decision-makers and those with the best information are one and the same, while decision-makers are disconnected from the best available information in a centralized economy.[16] Moreover, freedom from coercion allows individuals to experiment and engage in a discovery process, which also enhances welfare. Richard Epstein argues that private property rights are the most efficient way to solve problems such as the tragedy of the commons. Occasionally, these arguments blend in deontological constraints—such as the right to be free of coercion—that limit the state's ability to further any given consequentialist goal.

Contractarianism provides an additional set of arguments. Under these theories, state coercion is legitimate only if it is justifiable to all citizens—meaning any given social order must be such that individuals *would* consent. Gerald Gaus argues that because individuals are free and equal, any coercion must be justified to them.[17] But because free and equal individuals will inevitably differ over how much coercion is justified, the only just state is one that each individual concludes is better than none at all. Epstein characterizes the state as a "network of forced hypothetical exchanges" in which individuals surrender some natural rights for benefits such as security and public goods.[18] So long as the forced exchanges render each person at least as well off as in the state of nature, then "[i]n principle, no person can object to … [a] world in which the use of sovereign power leaves him better off than he was with his natural endowments."[19]

These arguments simultaneously justify and limit state power as follows. Although all individuals should agree that a state that provides basic infrastructure, classic public goods, and a minimal safety net renders them better off than no state at all, no such agreement exists with respect to a more extensive state. As the state and its coercive power expands, some individuals will object. Only the classical liberal state—not the modern welfare and regulatory state—obtains the necessary buy-in from all.

B. Structural implications

These theoretical justifications, when combined with the libertarian values of neutrality, administrability, invulnerability to rent-seeking, and

[16] See generally Friedrich A. Hayek, *The Constitution of Liberty* (Chicago: University of Chicago Press, 1960).

[17] Gerald Gaus, "Coercion, Ownership, and the Redistributive State: Justificatory Liberalism's Classical Tilt," *Social Philosophy and Policy* 27, no. 1 (2010): 233, 234.

[18] Richard A. Epstein, "Taxation in a Lockean World," *Social Philosophy and Policy* 4, no. 1 (1986): 53.

[19] Ibid.

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fairness,[20] have two relevant implications. They justify benefits-based taxation in both the minimal and classical liberal state, as well as countenancing Pigouvian taxation in the latter.

1. Benefits and income taxation

First, many classical liberals endorse the "benefits theory," which justifies taxation as payment for the benefits provided by the state. In their view, this sanctions a flat-rate income tax (albeit one unlike any currently in existence).[21] Theorists as early as Locke and Smith hint at this concept, which Epstein has more recently expanded upon.[22] Recall Epstein's justification of a classical liberal state as a *"network of forced hypothetical exchanges."* These exchanges render each person at least as well off—and some better off—than in the state of nature because of the benefits provided by the classical liberal state. These benefits—such as security and public goods—aren't free, however, and to overcome free-riding and other coordination problems "individuals can be required to pay the state for the benefits conferred upon them by state protection."[23] One's tax burden should therefore match how much one benefits from the state. Without such correlation, the forced exchanges could leave some individuals worse off, violating the conditions for Pareto superiority and undermining the justification for taxation in the first instance. As Epstein emphasizes, "[g]overnment coercion is justified only to the extent that it provides net benefits to those individuals subjected to coercion."[24]

Although minimal state theorists aren't as explicit, similar reasoning applies. Nozick justifies the state's monopoly on force by first noting that allowing individuals to defend themselves imposes risks on others. Because individual self-protection rights impose risks on others, prohibiting those rights does not violate them if individuals are compensated in the form of state protective services.[25] Although Nozick doesn't adequately address how these services shall be funded, other theorists have extended this reasoning. Generalizing greatly, taxation to pay for services that protect

[20] Epstein lists the first three considerations in "Lockean World," 54-55, but does not explicitly list *fairness.* Yet surely libertarianism requires that a tax not unfairly burden some individuals more than others, or that individuals each pay their fair share, even if a libertarian might give substance to those ideals differently than an egalitarian or a welfarist. Indeed, these concepts undergird libertarian concerns about rent-seeking and burden-shifting, ibid., 57, 70.

[21] Richard A. Epstein, "Can Anyone Beat the Flat Tax?" *Social Philosophy and Policy* 19, no. 1 (2002): 144.

[22] Locke, *Second Treatise;* Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, ed. Edwin Cannan (Chicago: University of Chicago Press, 1977 [1776]), 350; Epstein, "Lockean World."

[23] Epstein, "Flat Tax," 143. One wrinkle is that some individuals may be honest holdouts, meaning that they are not attempting to free-ride but are truly willing to forego state protection. One response is that the difficulty of distinguishing honest holdouts from free-riders means that everyone must assumed to be the latter.

[24] Ibid., 154.

[25] This is Nozick's task in the first section of *ASU.*

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individuals' lives and property does not violate individuals' rights to liberty and property because of the compensation received—that is, the protective services.[26] This suggests that tax burdens should correlate to benefits received. Eric Mack essentially endorses this reasoning, arguing that individuals' tax burdens must be less than the value of benefits received in the form of state protective services.[27]

But how should we measure how much someone benefits from the state's services? A per-capita "head" tax captures that all lives are of equal value,[28] but ignores the fact that state services do more than simply protect our bodily persons. They also protect our property and, in a classical liberal state, provide an infrastructure for market activity. Yet focusing solely on property also understates how much one benefits from the state. If Violet owns a mansion full of priceless art while Penelope lives in a shack containing threadbare furniture, one might assume that Violet benefits more than Penelope from the state's infrastructure. Yet what if Violet's salary is the same as Penelope's, but Penelope loves to travel and spends her salary on extravagant trips, while Violet spends hers furnishing and maintaining her mansion?

To account for differences in spending, we must also tax consumption. And once we do, we are taxing income. The "Haig-Simons" formulation commonly used by tax theorists defines income as the sum of personal consumption plus increases in one's wealth. If Violet earns $100, spending $90 on a home and $10 vacationing at a campsite, her wealth increases by $90, and her consumption equals $10. If Penelope earns $100 and spends $90 traveling to Europe and $10 on her tiny shack, the opposite is true. Penelope's wealth increases by $10, and her consumption equals $90.

But Violet and Penelope each have the option to allocate $100 as they see fit, meaning that they each have economic power over $100. In that sense, they benefit equally from the state's provision of the protective services and public goods that facilitate their spending and saving, such as roads and courts. Hayek acknowledges this principle, writing that "since almost all economic activity benefits from the basic services of government, these services form a more or less constant ingredient of all we *consume and enjoy* and that, therefore, a person who commands more of the resources of society will also gain proportionately more from what the government has contributed."[29]

Two points about this conclusion. First, Jeffrey Paul argues earlier in this volume that the benefits theory justifies taxing wealth—but not income. He argues (accurately) that taxing consumption alone does not reflect the extent to which property-rich low spenders like Violet benefit from the state.

[26] Fleischer, "Taxation."
[27] Eric Mack, "Self-Ownership, Taxation and Democracy," in Donald P. Racheter and Richard E. Wagner, eds., *Politics, Taxation, and the Rule of Law*, (Boston: Kluwer, 2002), 23–24.
[28] Thomas Hobbes, *Leviathan*, ed. C. B. McPherson (1985 [1651]), 386.
[29] Hayek, "Constitution," 315-16.

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But rejecting an *income* tax for this reason ignores the fact that wealth comes from somewhere. A pure income tax is the same as taxing wealth as it accrues, before one chooses whether to save it (increasing one's wealth) or consume it. Paul is somewhat correct in that the realization requirement allows income to accrue in the form of appreciation free of tax for a time—but as this essay argues, requiring realization at death ensures it will be taxed at some point. An income tax, then, reaches both consumption and wealth, whereas taxing only one of the two undercounts benefits received by the state. Second, others might argue that none of income, consumption, or wealth is the best measure of benefit. On this view, individuals with higher overall welfare benefit more from the state than others, such as a professor who loves her job but is paid the same wage as an accountant who hates his. Measuring welfare is next to impossible, however, such that tax theorists use income as the closest workable proxy.

2. Pigouvian taxation

In addition to financing public goods, classical liberals recognize that addressing market failures also includes correcting negative externalities.[30] Some classical liberals therefore justify Pigouvian taxes, which aim to reduce negative externalities by requiring polluters to internalize more of the costs of their activities.[31] This concept overlaps somewhat with Lockean limits on use, insofar as any individual who emits pollutants into the air or water does not leave "enough, and as good" for others. To satisfy the Lockean proviso, the polluter needs to compensate her fellows for the harm she causes, and a Pigouvian tax with the revenues distributed among those affected is one way to do so. As explored below, if large inheritances cause negative externalities or interfere with efficient markets, it is plausible that Pigouvian grounds could justify inheritance taxes.

III. Taxing Gifts and Bequests: The Standard Libertarian Take

The conventional wisdom concerning libertarianism and wealth transfer taxation—stemming from the foregoing commitment to property rights—is that such taxation is *de facto* unjust. Right libertarians ranging from Locke[32] to Mill[33] to Nozick[34] to Lomasky[35] to Rothbard[36] and to Mises[37]

[30] Richard A. Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism* (Chicago and London: University of Chicago Press, 2003), 7, 190–91.
[31] Ibid. 190-93.
[32] Locke, *Second Treatise.*
[33] Mill, *Principles*, 226.
[34] Nozick, *ASU*, 150-53, 157-58, 168.
[35] Lomasky, *Persons*, 212-21.
[36] Murray N. Rothbard, *For a New Liberty: The Libertarian Manifesto* (Auburn: Ludwig Von Mises Inst., 2006), 49–50.
[37] Mises, *Planning*, 32.

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overwhelmingly argue that if an individual justly acquires property, she has the right to transfer that property freely.[38] As Epstein explains, this right of transfer includes "dispositions during life, by gift or by sale and it includes dispositions at death … ."[39] Walter Block argues that "[P]arents … certainly deserve to be able to give their hard earned and, we posit, legitimately owned property, to whomever they choose … . They worked to preserve and expand what their own parents gave them, and/or earned it themselves. If they do not have the right to dispose of it as they see fit, it is difficult to see who would be in a better (moral) position to do so."[40]

Because inheritance taxes interfere with this right, the story goes, they are unjust.[41] Moreover, they are unjust in a *uniquely* bad way. Lomasky asserts that "confiscatory inheritance taxation runs roughshod over the deceased's interest in the ends his property will serve. … If it is wrong while an individual lives to commandeer his goods as collective property subject to the collective will, it is equally wrong to do so after he dies." Taxing inheritances is even worse than taxing income. "[It] is an especially cruel injury because it deprives the dead of one of their last opportunities for securing the goods they value."[42]

But as illustrated above, both minimal state libertarianism and classical liberalism justify some taxation. Taxes on income and consumption—under certain conditions—do not unjustly burden rights to self-ownership and private property. Although property rights include the right to dispose of property by sale, they do not preclude taxes on profits from selling property; the concept of self-ownership does not automatically preclude taxes on wages. Why, then, do libertarians argue that taxing gratuitous wealth transfers is automatically unjust? Objections fall into three camps.

Distinctiveness. The first is that gifts and bequests are inherently different from other economic activities and therefore deserve greater protection from state interference. Some argue that gifts and bequests express the identity of the transferor and represent intimate family matters that should be beyond state interference. As such, they should be completely immune from taxation, unlike wages or profits from property sales. But much economic activity reflects choices about values and identities. Whether I spend Saturday at a NASCAR event or a showing of Hamilton; eat at Cracker

[38] In contrast, many left libertarians assert that private property rights end at death and that a decedent's property should revert to common ownership. See, e.g., Hillel Steiner, *An Essay on Rights* (Oxford and Cambridge: Blackwell Publishers, 2004), 249–60. Somewhat similarly, Jennifer Bird-Pollan argues that under Nozickian reasoning, property rights do not extend beyond death in "Death, Taxes and Property (Rights): Nozick, Libertarianism and the Estate Tax," *Maine Law Review* 66, no. 1 (2013). But see Lamont Rodgers, "Death, Taxes and Misrepresentations of Robert Nozick: Why Nozickians Can Oppose the Estate Tax," *Libertarian Papers* 7, no. 1 (2015).

[39] Richard A. Epstein, *Takings* (Cambridge, MA: Harvard University Press, 1985), 304.

[40] Block, "James Buchanan on Inheritance: A Critique," *Journal of Entrepreneurship and Public Policy* 1, no. 2 (2012): 160.

[41] Epstein, *Takings*, 304.

[42] Lomasky, *Persons*, 270.

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Barrel or an organic vegan restaurant; or invest in Fortune 500 companies or a local start-up making compostable diapers, all reflect my values and identity. Same with the larger economic decisions in our lives—where to live, what car to buy, and even what profession to pursue. The choice to become a law professor instead of a big firm lawyer or an inner-city kindergarten teacher reflects my values. Further, although gifts and some bequests may express a transferor's ideals and values, not all do. Many bequests are accidental, meaning that they represent assets a decedent thought she might need during her life but turned out not to—instead of a reasoned decision to save wealth in order to transfer it to loved ones.[43]

Even if one accepts that other market activities also reflect values, one might believe that gratuitous transfers are distinct in other ways. One potential distinction is that the latter take place within the private sphere of the family, whereas choices about professions, consumption, and investment represent voluntary entrances into the public realm of the market. If one voluntarily enters the public sphere, perhaps tracking, valuing, and taxing the resulting activities do not invade one's autonomy the way taxing private intra-family activities do. The problem with this argument, however, is that engaging in market transactions is not really a voluntary choice: people need to sell their labor, buy food, and house their families. Perhaps in the distant past, one could grow everything one needed for oneself without trading with others, but not today. The voluntary exposure distinction fails as well.

A related concern is that absent a market transaction, valuation difficulties render taxing gratuitous transfers unworkable. Although such difficulties exist, they should not doom the enterprise. First, most countries already tax items that, like gifts and bequests, may be in-kind and that lack an indication of value from a market exchange (think of prizes and some fringe benefits). Second, most assets held by the non-wealthy are easily valued, such as cash, life insurance, investment accounts, and fairly straightforward residential real estate. The estates of "somewhat" wealthy individuals (perhaps people with a net worth around $1,000,000 or so) would likely include small businesses and potentially harder-to-value real estate. Valuing these assets is admittedly more difficult and imprecise, but owners already occasionally value them for insurance and similar purposes. Valuation concerns have the most merit when it comes to the very wealthy; estimates suggest that roughly half the assets owned by the wealthiest 1 percent of Americans (those with wealth over $2 million) are not easily valued. Imagine, for example, unique real estate, farm assets, private equity and hedge funds, and art.[44] These difficulties are not trivial, and undergird the realization requirement and many critiques of an annual wealth tax. Yet tackling these

[43] See text at notes 48-49.

[44] Miranda Perry Fleischer, "Not So Fast: The Hidden Difficulties of Taxing Wealth," in Jack Knight and Melissa Schwartzberg, eds., *Nomos LVIII: Wealth* (New York: New York University Press, 2017), 276.

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challenges annually is more burdensome than dealing with them roughly once a generation, such that these difficulties should not be dispositive.

Contingent concerns and the purposes and structure of taxation. The second set of objections relates to libertarian concerns about the legitimate purposes and structures of taxation. These are consistent with libertarian principles as a theoretical matter but are contingent upon existing justifications for inheritance taxes and their current structure as separate and apart from income taxes. For example, those who reject redistribution as unjust will naturally reject wealth transfer taxes designed for that purpose. That said, a small minority of minarchists and many classical liberals accept some amount of state-financed redistribution. These libertarians must then determine whether taxing gifts and bequests to finance that redistribution is just or not, a topic addressed below.

Another common objection is that estate taxes are illegitimate because they are progressive,[45] and libertarians favor proportionate rate structures for a variety of reasons. For example, libertarians oppose progressive taxation on the grounds that benefits received do not increase at a greater rate than income received.[46] Here, libertarians are correct that the current U.S. estate tax does not accurately reflect the benefits principle. It has an extremely large exemption—over $10 million—and rates that rise with wealth. Even assuming that wealth at death is a good measure of how much one has benefitted from government, it is highly unlikely that such benefits (1) begin only when one has several million dollars and (2) increase at a rate disproportionate to the size of that wealth. Moreover, wealthy people benefit from government throughout their life, suggesting that imposing a tax at death creates a timing mismatch.

Additional grounds for opposing progressive taxes—that they punish success or facilitate rent-seeking—are also legitimate objections to *progressive* wealth transfer taxes. But objections to progressive estate taxes designed to effectuate redistribution do not necessarily apply to all methods of taxing gifts and bequests. Wealth transfer taxes need not be progressive, and they could be used to fund libertarian-approved activities such as protective services or courts (and for classical liberals, public goods). This leaves open the possibility that, depending on structure, some type of transfer tax could be an acceptable tool for raising revenue for legitimate governmental activities.

Critiques that ignore context. The third set of concerns—which might be deployed even if estate taxes were used to fund nothing more than the night watchman or public goods—doesn't withstand scrutiny from a tax policy perspective. These arguments continue to reappear, largely because

[45] Epstein, *Takings*, 303-5; Mises, *Planning*, 32 (calling estate and inheritance taxes "expropriation" and opposing them on the same grounds he opposes progressivity generally, which is that "[t]he philosophy underlying the system of progressive taxation is that the income and the wealth of the well-to-do classes can be freely tapped.").

[46] Fleischer, "Taxation."

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libertarians often critique inheritance taxes in a vacuum, without considering their context within the broader tax system. Consider the following:

1. Incentives and inefficiency

First take the common argument that transfer taxes punish savers and reward spenders, distorting decisions between saving and spending—an argument that focuses on behavioral responses of *donors*, assuming that the full incidence of such taxes falls on them.[47] But here, empirical evidence suggests that transfer taxes have only a modest influence on savings. This is so because their incentive effects depend largely upon the motivation for the wealth transfer.[48] Individuals accumulate wealth over their lifetimes for a variety of reasons—including, but not limited to, an altruistic desire to benefit one's heirs by a specific amount. Other individuals derive a "warm glow" from leaving wealth to their chosen beneficiaries, without really caring how much. Others save so that they have enough funds with which to finance retirement and pay for medical and nursing care in their old age. Although these individuals may be happy to pass along anything left over at death, that is not their main goal. These are "accidental" bequests. Some accumulate wealth because it gives them power, security, and status; these are "egoistic bequests." Still others leave "exchange-motivated bequests" of a transactional nature, for example, rewarding adult children who care for them later in life. Batchelder's extensive review of the literature on wealth accumulation and bequests concludes that "very roughly, about 50% of wealth transfers are accidental, about 20% altruistic, and the bulk of the remainder egoistic." Only a small portion are exchange-motivated.[49] Of course, many individuals are motivated by a mix of these reasons, and it is also plausible that very wealthy individuals have differing motives than the non-wealthy.

As Batchelder explains, motives matter because the extent to which transferors care how much recipients receive will determine the incidence of the tax and whether both, one, or neither of donors and recipients will change their behavior. For accidental and egoistically-motivated bequests, decedents do not care how much their beneficiaries receive. Estate taxes will not influence their behavior and heirs alone bear the burden. When transfers are altruistic, transferors and transferees share the burden, although the latter's share is probably larger. Recipients bear the burden of the tax actually paid, as well as any reduction in the amount of pre-tax wealth held at death in response to the tax. A transferor is only burdened "to the extent that she

[47] A related concern is that estate taxes encourage wasteful tax planning, Richard A. Epstein, "Justice Across Generations," *Texas Law Review* 67, no. 7 (1989): 1475–77.

[48] Lily L. Batchelder, "What Should Society Expect from Heirs," *Tax Law Review* 63, no. 1 (2009): 7; David Joulfaian, *The Federal Estate Tax: History, Law, and Economics* (Cambridge, MA: MIT Press, 2019), 101–16.

[49] Batchelder, "Society," 38.

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values transferring the wealth to her heirs more than she values spending it on herself."[50] Lastly, donors in exchange-motivated transfers will care how much their heirs receive because that affects the amount of services they'll obtain. Both transferors and transferees will share the burden, with the proportion turning on "their relative elasticities of labor supply and demand."[51] Batchelder concludes that the only scenario in which a donor bears the lion's share of the burden is when a transferor has an inelastic demand for labor (or whatever the transferee is providing) and the bequest is largely exchange-motivated.

This reasoning explains why empirical studies find a smaller-than-expected effect on savings decisions by donors—roughly a ten percent drop in the reported net worth of the richest half-percent of the population.[52] Interestingly, this drop is among the very wealthiest, who one might assume to be more influenced by estate taxation on the grounds that they might be the least likely to leave accidental bequests (although they may be more likely to accumulate wealth for egoistic motivations than the less-wealthy). Moreover, it is not clear if this is due to increased consumption, early gifting, or tax-avoidance.[53]

Even if inheritance taxes decrease savings somewhat, that should not end the analysis for libertarians for several reasons. Consider the income versus consumption tax debate. Although an income tax penalizes savers as compared to a consumption tax, most libertarians think this should only be one of many factors in choosing between the two, not the sole factor. And compared to an income tax, estate taxes are likely *less* distortive because income taxes are imposed immediately, whereas estate taxes are not imposed until later. Similarly, for a given revenue target, using several types of taxes at a low rate is more efficient than one type of tax at a higher rate. This is because the deadweight loss of a tax increases exponentially with the rate.[54] (This observation, of course, assumes that the government wouldn't increase rates once a given tax had been enacted). Adding gifts and bequests into the tax base could increase savings if doing so lessens the impact of more distortive and immediate taxes.

Finally, this concern ignores the impact of inheritances on *recipients.* Studies suggest that large inheritances decrease the work incentives of heirs, for example, by speeding up retirement.[55] Taxing inheritances might increase the work effort of recipients, even if it does decrease that of some transferors. Next, compare the treatment of gifts and bequests with other forms of income, recalling that the income tax already excludes gifts and

[50] Ibid., 9.
[51] Ibid.
[52] Joulfaian, *Federal Estate Tax*, 101-16.
[53] Ibid.
[54] David Gamage, "The Case for Taxing (All of) Labor Income, Consumption, Capital Income, and Wealth," *Tax Law Review* 68, no. 2 (2015): 55.
[55] Batchelder, "Society," 27; Joulfaian, *Federal Estate Tax*, 116-33.

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bequests. Viewed in this lens, *not* imposing inheritance taxes penalizes labor by treating someone who earns her wealth more harshly than someone who inherits it. Moreover, taxing gifts and bequests received is less distortive than taxing other sources of wealth. One chooses how much to work and at what job, but one does not choose to be born to wealthy and generous parents. Looking only at the behavioral changes of donors thus provides an incomplete picture of whether, and to what extent, taxing gifts and bequests distorts incentives and hampers growth.

2. *Double taxation*

Many libertarians also reject wealth transfer taxation as "double taxation." One argument focuses on the transferor and the assumption that she has already paid tax on her wealth when she earned it. This ignores the fact that much of the value subject to transfer taxes has *not* already been taxed by the income tax system due to the interaction of two rules. Imagine that Matthew buys Tesla stock for $100 that increases in value to $1000. He is not taxed on that increase in his wealth until he sells, due to the realization requirement. Yet if Matthew dies while owning the stock, his heirs do not have to pay tax on that increase. They only have to pay tax if they later sell, and even then, they are allowed to act as if its value at Matthew's death (here, $1,000) was their purchase price. Estimates suggest that untaxed appreciation accounts for an average of 32 percent of smaller estates (a few million dollars) to 55 percent of larger estates (in the $100 million range).[56] Even viewed from the transferor's perspective, the double taxation argument is overstated.

Second, focusing on the transferee, the income tax excludes gifts and bequests, meaning that heirs are not taxed when they inherit property. Taxing them is not double taxation, because they benefit from the property just as the transferor did. Assume that Matthew earns $1,000 as a lawyer and then pays Tom $1,000 to fix his car. They are each taxed once because they each benefit from the $1,000. Yet none would characterize that as "double taxation." One response might be that if Matthew instead gives his son $1,000, then Matthew is giving up his ability to benefit from and enjoy those funds. If only one person benefits, only one person should be taxed. Although Matthew is now transferring consumption opportunities to his son, Matthew himself enjoyed economic power over that property—as evidenced by his decision to gift it instead of spending it or saving it. If Matthew and his son are viewed as separate units, then each has benefited. Yet if one views the family as a unit, then the family has only benefited once. The tax code generally treats parents and adult children as separate

[56] Chye-Ching Huang and Chloe Cho, "Ten Facts You Should Know About the Estate Tax," *Center on Budget and Policy Priorities* (2017).

economic units, although this argument may have some force with respect to gifts to minors.

Third, let's assume that Matthew's entire estate at death consisted of salary income that had already been taxed, and that one views the estate tax as a tax on Matthew, not his heirs.[57] Even so, the mere fact of double taxation isn't a determinative factor. Consider Matthew's house and his snazzy Tesla—both were purchased with already taxed money, yet triggered property and sales taxes, respectively. What should matter to a libertarian is the overall tax burden, not the absolute number of times something is taxed.[58]

IV. Arguments for Taxing Gifts and Bequests

Knocking away objections to inheritance taxes, of course, is not the same as making an affirmative case for them. This section tackles that challenge. It first argues that the benefits theory embraced by both minarchists and classical liberals mandates that gifts and bequests be treated like any other inflow under the *income* tax system. Next, it argues that Pigouvian reasoning offers two additional reasons why taxing gifts and bequests to recipients is compatible with classical liberalism.

A. The benefits theory

The prior section has emphasized that gifts and bequests are often *undertaxed* by the income tax system. This section argues that the benefits theory embraced by both minarchists and classical liberals does not justify this distinction. Decedents should be taxed on unappreciated gains at death, and gifts and bequests received should somehow be taxed to recipients. Although either a distinct tax on wealth transfers or reforms to the income tax could achieve these goals, the latter is simpler and better reflects the theoretical justifications for taxing gifts and bequests. Although the need for these reforms has been acknowledged elsewhere,[59] they have not been sufficiently highlighted.

First, as mentioned, current law allows recipients of gifts and bequests to exclude them from income. But under the benefits theory, recipients should be taxed on them just like any other inflow. If Matthew receives $1,000 by gift or bequest, he benefits just as much as if he earned $1,000 practicing law

[57] In reality, the tax's incidence is more complicated, as explored in text surrounding notes 47-51.

[58] That said, it is plausible that libertarians fear additional tax structures such as a distinct inheritance tax on the grounds that they add arrows to the government's quiver, facilitating government expansion. Asbjorn Melkevik, "A Tax Dead on Arrival: Classical Liberalism, Inheritance, and Social Mobility," *Critical Review of International and Social Philosophy* 2, no. 2 (2017): 13. The more types of taxes there are, the easier it might be for the government to raise taxes in dribs and drabs without calling attention to this expansion.

[59] See, e.g., Epstein, "Lockean World," 67-68; Henry Simons, *Economic Policy for a Free Society* (Chicago: University of Chicago Press, 1948), 65, 67.

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or won $1,000 in the lottery. (In a sense, he benefits more, since he did not have to expend time, effort, or risk for those funds.) In either case, he now has $1,000 that he can invest if he likes, or spend on fancy cheese or a trip to Disneyland. Principles of fairness and a desire to preclude burden-shifting should mandate the equal treatment of all sources of income. Moreover, not taxing gifts and bequests undermines other libertarian values. It increases complexity by encouraging individuals to disguise otherwise taxable inflows (such as compensation) as gratuitous wealth transfers. And to the extent that libertarians desire to reward virtuous behavior, it makes no sense to tax labor but not gifts and bequests.[60]

To this, some might respond that if we consider receiving a gift or bequest income to the recipient, we should give the transferor a deduction on the grounds that she is no longer enjoying the economic power associated with the gift. But this overlooks the consumption benefits of wealth transfers to donors. In the case of altruistic transfers, donors voluntarily decide to give gifts, instead of spending their money on a new sweater or bottle of wine. Such transferors also receive intangibles, such as the warm glow of giving and increased affection from the potential objects of their bounty. Exchange-motivated transferors may have received shelter, care, and attention from their transferees. And regardless of motive, decedents have enjoyed the benefits that come from holding wealth during their lives, such as security, recognition, and power. For these reasons, gratuitous transfers should not be deductible to donors.

Any income inclusion rule should, of course, account for libertarian considerations such as complexity and simplicity, as well as values like autonomy and privacy. These suggest an exemption for small gifts, such as those given for birthdays, holidays, and weddings (as well as an exemption for smaller bequests). This obviates the need for intrusive reporting and recordkeeping. Family members need not keep lists of how many presents they find beneath the Christmas tree, nor ask Aunt Betty the cost of that dreadful reindeer sweater, nor ferret out the cost of the painting with sentimental value bequeathed in Grandma's will. Moreover, such a structure could contain rules to ease liquidity considerations, such as those that might arise when transferring family-owned businesses.[61]

The benefit principle also suggests ensuring that accrued gains at death are taxed. Recall the example where Matthew purchases Tesla stock for $100 that is worth $1,000 at his death. We could either treat death as a realization event (meaning Matthew's estate would pay income taxes on the $900 gain)

[60] On this point, welfarists might respond that gifts and bequests should be taxed more lightly—or even subsidized—because they generate positive externalities to the recipient that the donor ignores. This argument ignores that (1) not all gifts and bequests are altruistically motivated and (2) libertarians are generally skeptical of government intervention to increase overall welfare. For a longer discussion of subsidizing wealth transfers, see Batchelder, "Society," 30-33.

[61] For discussions of income inclusion schemes, see ibid.; Joseph Dodge, "Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income," *Harvard Law Review* 91, no. 6 (1978).

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or require Matthew's heirs to measure future gain as if they had paid $100 (as Matthew did).[62] The former is the better approach for both theoretical and practical reasons. First, Matthew is the one who benefited from the stock's increased value during his life, and it should be his final tax return that reflects this. Second, the complexities of transferring Matthew's basis to his heirs and then tracking it are daunting, as the gap between purchase and a potential sale could span generations. Canada's experience with making death a realization event demonstrates that such a rule is feasible and could provide a starting point for other countries to do so.[63]

B. *Pigouvian taxation*

Both minarchists and classical liberals should support treating gifts and bequests like other items of income under the benefit principle. In addition, doing so is compatible with (even if not mandated by) some classical liberal principles. Classical liberalism generally holds that there is some role for the government to play in maintaining free markets and a system of government in which political power is earned, not inherited. If one believes that inherited wealth creates inequalities that hinder the proper functioning of free markets and democratic self-governance, then taxing such wealth is compatible with classical liberalism. Intriguingly, Nozick himself raised this possibility, although he did not identify his reasoning as being explicitly classical liberal. In *This Examined Life*, he mused that "bequests that are received sometimes then are passed on for generations unknown to the original earner and donor, producing continuing inequalities of wealth and position. … The resulting inequalities seem unfair."[64] He suggested allowing individuals to bequeath what they themselves earn free of estate taxes, but taxing property that is received by bequest and then passed on again, a structure known as a *Rignano* tax.[65] Unfortunately, Nozick did not elaborate on *why* inequalities stemming from intergenerational wealth are unfair. Two possible concerns exist.

1. *Equality of opportunity and the market.* The first potential concern is equality of opportunity. As many classical liberals acknowledge, some people enter the market sphere from more advantageous starting points than others due to a variety of factors—including differing financial

[62] Epstein, "Lockean World," 67-68.

[63] See Lawrence Zelenak, "Taxing Gains at Death," *Vanderbilt Law Review* 46, no. 2 (1993): 361; Michael J. Graetz, "Taxation of Unrealized Gains at Death," *Virginia Law Review* 59, no. 5 (1973): 830; American College of Trusts and Estates Counsel, *Report on Proposals to Tax the Deemed Realization of Gain on Gratuitous Transfers of Appreciated Property* (2019).

[64] Robert Nozick, *This Examined Life*, 30-31.

[65] Daniel Halliday, *The Inheritance of Wealth: Justice, Equality, and the Right to Bequeath* (Oxford: Oxford University Press, 2018); Miranda Perry Fleischer, "Taxing Old Money: Considerations in Crafting a Rignano Tax," *Law, Ethics and Philosophy* 2020, no. 8 (2020): 86–106.

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circumstances at birth.[66] Although these circumstances do not predetermine outcomes, they can make it harder for some children to compete in the market than others.[67] Although this fact in and of itself does not generally concern classical liberals, classical liberals should care when these differing starting points create inefficiencies in the market. This could occur for two reasons.

First, a child born to poor parents generally has fewer educational opportunities than one born to wealthy parents. Consider the myriad ways well-off parents invest in their children, such as private schools or houses in neighborhoods with high-quality public schools, each supplemented by tutors, expensive after-school academic and athletic programs, and intense summer camps. To use a common metaphor, these advantages help wealthier children win races by making it easier for them to develop their speed, agility, and stamina—even if they start at the same place as poorer children. In contrast, some individuals are so disadvantaged in developing their human capital that that the market cannot harness their talents.

Second, wealthier families can provide numerous additional advantages that also minimize competition from others. Students in financially secure families don't have to work to help pay the rent. Instead, they can spend time on their studies and résumé-building activities like volunteer trips and internships. Imagine that two recent graduates apply for a job in journalism. Many interviewers might believe that the safer bet is the one who has experience writing for her college newspaper and who interned at a news channel during the summers. Likewise, wealthy parents can provide seed money for a business or pay for graduate school, again creating opportunities that might be unavailable to less-wealthy individuals.[68] These advantages are akin to allowing some people to start closer to the finish line than others with the same talents and abilities, and again leaves some human capital underdeveloped.

Libertarians generally acknowledge these differences[69] and in some cases, advocate for governmental responses.[70] Most classical liberals

[66] Frank H. Knight, "Abstract Economics as Absolute Ethics," *Ethics* 76, no. 3 (1966): 166; Friedman, *Capitalism*, 107; Friedrich A. Hayek, *Law, Legislation and Liberty Volume 2: The Mirage of Social Justice* (Chicago: University of Chicago Press, 1976), 84–85.

[67] Harry Brighouse, *Justice* (Cambridge: Polity Press, 2004), 48–49; Anne L. Alstott, "Equal Opportunity and Inheritance Taxation," *Harvard Law Review* 121, no. 2 (2007): 486

[68] See Alstott, "Equal Opportunity," 485-89; Mark L. Ascher, "Curtailing Inherited Wealth," *Michigan Law Review* 89, no. 1 (1990): 87–91; Miranda Perry Fleischer, "Charitable Contributions in an Ideal Estate Tax," *Tax Law Review* 60, no. 4 (2007).

[69] See, e.g., Knight, "Abstract Economics," 166 (recognizing the "unfairness of an unequal start in the competition of life by the members of each oncoming generation, an inequality inheritance tends to increase through succeeding generations. It is only made tolerable by counteracting political compulsion").

[70] Henry Simons, whom tax scholars will recognize as a key contributor to the widely accepted Haig-Simons definition of income, endorsed equality of opportunity as "an ideal that free societies should constantly pursue, even at much cost in terms of other ends." Simons, *Economic Policy*, 6. Although some libertarians debate whether Simons "counts" as a libertarian or classical liberal, at minimum, his views are adjacent to such theories and, as such, help shed

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support publicly financed education (though not necessarily publicly administered schools).[71] They also occasionally admit that too much inequality can stifle competition by allowing the very wealthy to insulate themselves from it.[72] For example, Friedman acknowledges that "imperfections in the capital markets" can place professions requiring expensive training out of reach for individuals from less-wealthy families, thus "perpetuat[ing] inequalities in wealth and status."[73]

Granted, the extent to which the wealthy can insulate themselves from competition and bypass the market itself is difficult to measure. But economists who study intergenerational mobility have demonstrated that in the U.S., mobility has decreased in recent decades.[74] This suggests that something is preventing an efficient matching of rewards with skill and effort. In theory, the distribution of physical and mental endowments should be somewhat random across income levels, although it will vary some after factoring in differences such as assortive mating and variations in prenatal care, nutrition, environmental pollution, and so on. Even so, it is highly unlikely that endowments differ across income so greatly that they are the sole cause of the current lack of social mobility—which suggests an imperfect market.

Despite classical liberal acceptance of mechanisms to maintain a competitive market, classical liberal attitudes toward inheritance taxation on these grounds is generally hostile, nonexistent, or tepid. Hayek frequently voiced his opposition to such taxation, although at one point he wrote that "inheritance taxes could, of course, be made an instrument toward greater social mobility and greater dispersion of property and consequently, may have to be regarded as important tools of a truly liberal policy which ought not to stand condemned by the abuse which has been made of it."[75]

The sole full-throated defense of inheritance taxation along these lines comes from James Buchanan. Buchanan offers a contractarian defense, which, when coupled with an update to the Lockean proviso, some classical liberals may find appealing. He first argues that distributive outcomes are just if they result from a "fair game," meaning one in which the participants have agreed to the rules. [76] In any game, Buchanan writes, outcomes reflect four things: "birth, luck, effort and choice."[77] Outcomes determined by effort and choice are just. Same for outcomes determined by luck (such as

light on whether support for the principle of equality of opportunity might be found in and around the libertarian movement.

[71] Friedman, *Capitalism*, 107; Hayek, *Law*, 84-85; Buchanan, *Liberty*, 134-35.

[72] Melkevik, "Dead on Arrival," 19.

[73] Friedman, *Capitalism*, 107.

[74] See, e.g., Miles Corak, "Income Inequality, Equality of Opportunity, and Intergenerational Mobility," *Journal of Economic Perspectives* 27, no. 3 (2013): 79.

[75] Friedrich A. Hayek, *Individualism and Economic Order* (Chicago: The University of Chicago Press, 1948), 118.

[76] James M. Buchanan, *Liberty, Market and State* (New York: NYU Press, 1985), 126.

[77] Ibid. 128-29.

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finding oil under one's property), so long as "all persons 'could have been' in the game."[78] These conclusions are likely uncontroversial to libertarians.

Where Buchanan breaks with the standard classical liberal take is in arguing that birth *should be* of concern, because it affects distributions even before choices are made, effort is exerted, and one enters the game. More specifically, he recognizes that birth influences starting points in two distinct ways: in terms of both financial resources and one's inherited physical and mental endowments, talents, and capacities. He also notes that if choice, effort, and luck predominate in outcomes, then we could plausibly overlook the influence of birth.

In his view, financial resources available at birth have enough of an impact to merit some handicapping. Buchanan analogizes to an Easter egg hunt. If multiple hunts occur, such that younger children can have their own hunt apart from older children, then nothing need be done about the fact that older children have an inherent advantage. Yet if there is only one hunt, he notes that most would agree to rules that give younger children a bit more time. He implies that a seemingly neutral set of rules that allowed the older (and therefore faster) children to take all the eggs for themselves, leaving nothing for the slower younger children, would be deemed unfair.

Buchanan thus argues that individuals agreeing on the rules of the game without knowing their position would agree to handicap with respect to financial resources—but not physical and mental endowments. He believes people would reject handicapping the latter for a variety of reasons: they are hard to measure; each person has a mix of talents and endowments that advantage her in some respects and disadvantage her in others; and doing so would unduly dampen the creation of social value. We want those who can create social value to do so, and everyone is better off when markets reward those lucky enough to have scarce talents.[79] In the Easter Egg hunt, we want the older, taller, and more coordinated children to find the eggs hidden high in the trees. In contrast, Buchanan argues that people would agree to handicap financial resources in order to equalize starting positions, resulting in "some system of taxation of asset transfers."[80] We give the younger children a head start so that they, not the older kids, can snatch up the eggs "hidden" in plain sight at ground level, while still allowing the latter access to the trickier eggs.

In some ways, this overlaps with the Lockean proviso's requirement that "enough and as good" be left for others. In modern society, individuals aren't roaming around snapping up unused parcels of land. Instead, they are competing with each other for jobs and other opportunities in a complex market. A functioning employment market replaces the chance to

[78] Ibid.
[79] Melkevik, "Dead on Arrival," 20.
[80] Buchanan, *Liberty*, 133.

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appropriate unowned natural resources.[81] But if some individuals can co-opt jobs and other opportunities without competing on the market, then they are not leaving "enough and as good" for others.

What is tricky is that we don't want to discourage the development of human capital and unique talents in individuals lucky enough to be born into wealthy families. A foundational classical liberal concept is that society as a whole is better off when people are incentivized to be productive, for this generates the most surplus. We thus need to balance this recognition with the aims of (1) preventing wealthy individuals from buying their way out of competition, and (2) ensuring that poor children have real opportunities to develop their talents and abilities.

Here, it is important to distinguish between the type of large wealth transfers that enable individuals to opt out of competition—by buying their way into college, or having a small business bankrolled by their father, or opting out of work altogether—and those that give upper-middle class children a leg up in developing their abilities. As many have recognized, the transfers that give financially-secure children an advantage in developing their talents—such as private schooling—come when they are young and their parents are still alive.[82] Taxing wealth transfers to them in their middle-age, when their life paths are set, does little to address their advantage. Moreover, early "transfers" their parents make to them are hard to track and often consist of consumption by the parents, such as a house in a good school district or family trips to Europe, instead of discrete transfers of property.

It is plausible that a classical liberal could support taxing the former (that is, the very, very "opt out of competition" wealthy) in order to engage in "levelling up" efforts to assist children from less-wealthy families to compete in the market. This "levels down" only the very wealthy, without falling prey to the liberal egalitarian conceit of levelling down the upper-middle classes. These large transfers are generally distinct enough from the type of everyday, upper-middle class child-rearing expenditures such that tracking them should not be intrusive or burdensome. To be sure, these transfers may also come toward the middle or later part of a child's life, but in the case of extremely wealthy families, children generally know that they will inherit large sums and adjust their behavior accordingly—perhaps taking more risks during their younger adult years. Such families are also much more likely to engage in lifetime gifting programs to their children. The argument that taxing wealth transfers comes too late to have an effect holds less sway when we are talking about multimillion-dollar transfers, not "mere" six-figure transfers.

[81] Fleischer and Hemel, "Atlas Nods," 1213; Eric Mack, "The Self-Ownership Proviso: A New and Improved Lockean Proviso," *Social Philosophy and Policy* 12, no. 1 (1995): 212–13.
[82] Epstein, "Generations," 1475-77.

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This tax could be income inclusion, or a distinct accessions or inheritance tax—so long as the chosen structure has a very high exemption level and is recipient-focused.[83] From an equal opportunity perspective, it is irrelevant how much wealth a given transferor transfers. What matters is how much gratuitous wealth an individual receives. If Bruce inherits $20 million, he can "opt out" in a way that Steve, who receives only $500,000 cannot.

Moreover, this structure takes into account two common critiques of inheritance taxation, both of which Buchanan addresses in his discussion. The first is the potential impact on savings and capital growth.[84] Buchanan acknowledges this impact but argues that it shouldn't be determinative. Instead, it simply suggests "the relevance of some trade-offs between the requirements for fairness in the rules and the objectives for economic efficiency and growth."[85] An extremely high exemption, coupled with the empirical evidence that incentive effects are relatively modest, should alleviate these concerns.

The second critique is that taxing financial inheritances to further equalize opportunity inevitably requires "the government to control the whole physical and human environment of all persons" and would lead to demands that all "handicaps be removed—or compensated for by putting extra burden on the still relatively favoured."[86] Some phrase the objection in the negative—because we can't do anything about differences in mental and physical capabilities, or whether one comes from a loving family, why should we bother addressing differences in material assets?[87] Buchanan answers succinctly: "The fact that the non-taxable elements in the transfer of endowment exist so as to make [equality] ultimately unattainable should lend support rather than opposition to faltering efforts to go as far as is feasible, given the trade-off with other objectives."[88] Again, limiting the tax to very large wealth transfers—the kind that allow individuals to opt out of the market —should alleviate these fears.

2. *Inherited political power.* The second concern is that transferring wealth across generations is tantamount to transferring political power across generations, which is antithetical to the libertarian ideal that power should be earned, not inherited. On this view, taxing wealth transfers minimizes the intergenerational transmission of political power.[89] This is distinct from the question of whether wealth or wealth inequality in and of themselves

[83] For a sketch of such a structure (albeit through a liberal egalitarian lens), see Alstott, "Equal Opportunity."

[84] Buchanan, *Liberty*, 133.

[85] Ibid., 134.

[86] Hayek, *Law*, 84-85; Block, "A Critique," 160.

[87] Friedman and Friedman, *Free to Choose*, 136.

[88] Buchanan, *Liberty*, 124.

[89] See, e.g., Ascher, "Inherited Wealth;" Fleischer, "Divide and Conquer;" James R. Repetti, "Democracy, Taxes and Wealth," *New York University Law Review* 76, no. 3 (2002): 828–50.

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create negative political externalities[90] and whether political power stemming from earned money is legitimate. Instead, this concern focuses on the less controversial claim that rejecting hereditable power is one of our country's fundamental values.[91] This ideal led early American legislatures to overturn English property arrangements on the grounds that concentrated inheritances "tend[] only to raise the wealth and importance of particular families and individuals, giving them an unequal and undue influence in a republic."[92]

Although power is not tied to land today as it was in pre-World War I Britain, great wealth brings political power over others. Consider the links between wealth and political power:[93]

Contributions. Most directly, money enables one to make substantial (yet limited) donations to candidates, parties, and political committees. Donors often become *de facto* gatekeepers and agenda setters in elections, as donations can affect which candidates are successful and which issues gain prominence.[94] Large contributions likely increase access to elected officials once in office; more access means more opportunities to present one's views in an attempt to sway elected officials' behavior.[95] It is also plausible that contributions influence legislative behavior such as voting and the drafting of bills or amendments.[96] Finally, large contributions are thought to purchase positions of influence, such as ambassadorships[97] and other positions, likely affecting policymaking.

Expenditures to influence public opinion. Money also enables one to influence public opinion indirectly. First, one can make unlimited donations to Section 501(c)(4) social welfare organizations. These groups can engage in

[90] For a libertarian spin on this argument, see S. Stewart Braun, "Liberty, Political Rights and Wealth Transfer Taxation," *Journal of Applied Philosophy* 33, no. 4 (2016).

[91] See, e.g., Thomas Jefferson, *The Works of Thomas Jefferson*, ed. Paul Leicester Ford (New York; London: G. P. Putnam's Sons, 1904), 58; Ascher, "Inherited Wealth," 93-94.

[92] Ascher, "Inherited Wealth," 94-95; Stanley Katz, "Republicanism and the Law of Inheritance in the American Revolutionary Era," *Michigan Law Review* 76, no. 1 (1977): 1, 14.

[93] Thomas Christiano, "Money in Politics," in David Estlund ed., *The Oxford Handbook of Political Philosophy* (New York: Oxford University Press, 2012), 241; Repetti, "Democracy," 841-49; Fleischer, "Ideal Estate Tax," 278-79.

[94] Christiano, "Money," 244-45. Of course, the importance of small donors in recent elections may be mitigating this effect somewhat.

[95] *See* Jill Ornitz and Ryan Struyk, "Donald Trump's Surprisingly Honest Lessons About Big Money in Politics," *ABC News*, August. 11, 2015; Joshua L. Kalla and David E. Broockman, "Campaign Contributions Facilitate Access to Congressional Officials: A Randomized Field Experiment," *American Journal of Political Science* 60, no. 3 (2016): 545, 546; Laura I. Langbein, "Money and Access: Some Empirical Evidence," *Journal of Politics* 48, no. 4 (1986): 1052, 1060. But see Michelle Chin, Jon R. Bond, and Nehemia Gava, "A Foot in the Door: An Experimental Study of PAC and Constituency Effects on Access," *Journal of Politics*, 62, no. 2 (2000): 534.

[96] Amy Melissa McKay, "Fundraising for Favors? Linking Lobbyist-Hosted Fundraisers to Legislative Benefits," *Political Research Quarterly* 71, no. 4 (2018): 869; Christiano, "Money," 244; Kalla and Broockman, "Campaign Contributions," 546-48.

[97] Ryan M. Scoville, "Unqualified Ambassadors," *Duke Law Journal* 69, no. 1 (2019): 71, 73-74; Christiano, "Money," 247.

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some direct political advocacy regarding candidates and ballot initiatives, as well as all the lobbying and issue advocacy they like.[98] Second, the very wealthy can influence public opinion by shaping the media's news and editorial coverage. This can come through the granting or withholding of advertising purchases in an effort to shape editorial content,[99] or from owning media companies themselves.[100]

Running for Office. Having great wealth also makes it easier to run for office. Consider the crop of 2020 presidential candidates, including Democratic candidates Tom Steyer and Michael Bloomberg. In 2016, President Trump spent roughly $65 million on his initial White House bid, although his 2020 re-election campaign was almost exclusively financed by donations from others.[101] Down-ballot, numerous candidates in the U.S. Senate and House and state and local elections have also spent substantial amounts of their own funds.[102] Although this does not guarantee success, even unsuccessful candidates can influence agendas and change the focus of a race. Self-funding thus creates opportunities for political participation unavailable to others.

Informal agenda-setting. Wealth also enables one to influence policy decisions informally. Threats by businesses to relocate, cancel events, or jettison planned openings or expansions can impact the decisions of elected officials eager to protect jobs and industry—even on issues that don't appear business-related.[103] Moreover, elected officials often consult business leaders for advice,[104] ranging from informal conversations to asking them to serve on official advisory councils.[105] Lastly, business leaders often

[98] Ellen P. Aprill, "Examining the Landscape of 501(c)(4) Social Welfare Organizations," *New York University Journal of Legislation and Public Policy* 21, no. 2 (2018): 345, 346-47.

[99] Repetti, "Democracy," 841-43.

[100] Sydney Ember, "A. G. Sulzberger, 37, to Take Over as New York Times Publisher," *New York Times*, Dec. 14, 2017; Robert Barnes and David A. Farenthold, "The Grahams: A Family Synonymous with The Post and with Washington," *Washington Post*, August 5, 2013; "How Rupert Murdoch's Empire of Influence Remade the World," *New York Times*, April 3, 2019.

[101] Jeremy W. Peters and Rachel Shorey, "Trump Spent Far Less Than Clinton, but Paid His Companies Well," *New York Times*, December 9, 2016; Open Secrets.org, *2020 Presidential Race: Donald Trump*, https://tinyurl.com/k3y6hwxk.

[102] Open Secrets.org, *Self-Funding Candidates*, https://tinyurl.com/xr7ewm2v; Fredreka Schouten, "Trump Effect? Candidates Plow Record Amounts of Their Own Money Into Congressional Bids," *CNN Politics*, November 5, 2018; Anthony Cotton, "In An Era of Self-Funded Campaigns, Amendment 75 Aims To Even The Odds," *Colorado Public Radio*, November 1, 2018.

[103] *See* Cindy Carcamo, "Arizona Governor Jan Brewer Vetoes So-Called Anti-Gay Bill," *Los Angeles Times*, February 26, 2014; Dan Levin, "North Carolina Reaches Settlement on 'Bathroom Bill'," *New York Times*, July 23, 2019.

[104] Christiano, "Money," 247.

[105] See Anita Kumar, "Trump Hands US Policy Writing to Shadow Groups of Business Execs," *Miami Herald*, September 7, 2017; Municipal Research and Services Center of Washington, *Local Government Citizen Advisory Boards* (2008); Ohio Department of Education, *Business Advisory Councils in Ohio Schools*; Wooster City School District, *Business Advisory Council*; Gary Rivlin, "A Mogul Who Would Rebuild New Orleans," *New York Times*, September 29, 2005; Edward Wyatt, "Panel of Politicians is to Advise in Rebuilding," *New York Times*, February 1, 2002.

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naturally become civic leaders who help shape a community's goals and priorities from the ground up.[106]

Taking advantage of the foregoing generally requires spending really large amounts of money. For these reasons, it is plausible that transferring *really large* amounts of wealth—millions of dollars, not just thousands—to one's children is tantamount to giving them political power, creating distortions in the market for political influence. If so, perhaps taxing large wealth transfers can be justified on the grounds that they create negative externalities. Any such tax, however, should be structured as a tax on the recipient—what matters is the size of a transfer to a given recipient, not the total amount of wealth transferred by a transferor independent of who receives how much. Transferring $20 million to one son has different ramifications than splitting $20 million up among ten recipients. This could be done by requiring recipients of large wealth transfers to include them in income (that is, having income inclusion with an extremely large exemption), or by a transferee-focused accessions tax.[107]

To this argument, a skeptical classical liberal might offer two rebuttals. First, if the problem is political spending, might it be better to regulate that directly? That approach, however, risks trampling First Amendment rights. The second is that in a purer classical liberal world, there would be fewer opportunities for people to exert their power this way. That may be true, but such opportunities would still exist. In fact, they'd exist even in the minimal state. Someone must staff the protective agencies and supply their gear, someone must run the courts, and so on. Why are these institutions immune to capture and nepotism? What guarantees that the night watchman won't spend all her time on the wealthy side of town, leaving the poorer neighborhoods unprotected?

The argument that one shouldn't be able to hand political power down to one's heirs is fairly uncontroversial among libertarians. The crucial points, then, are whether wealth brings political power and whether handing down wealth to one's children means handing to them unearned political power over others. These are empirical points, and libertarians can reasonably dispute what the evidence suggests. At minimum, however, classical liberals should acknowledge that if the facts do prove these points, inheritance taxation is not necessarily inconsistent with libertarian ideals.

V. Conclusion

As this essay shows, the standard libertarian arguments against taxing gifts and bequests are overstated. Both minarchism and classical liberalism suggest taxing the receipt of gratuitous wealth transfers to the recipient under the benefits theory. Classical liberalism is plausibly compatible with

[106] Repetti, "Democracy," 828-50.
[107] Fleischer, "Divide and Conquer."

two additional justifications for taxing extremely large wealth transfers to recipients: maintaining a free and open employment market and a political system in which power is earned, not inherited. Notably, none of these arguments support the current U.S. estate tax, which focuses on the total amount of wealth transferred by an individual to his heirs. Instead, they suggest either income inclusion or a recipient-focused accessions tax, which would tax all gifts and bequests received by an individual above an exemption amount.[108] Nor do these arguments suggest imposing such taxes without regard to their effect on other libertarian values. What they do imply is that libertarians should not dismiss such taxes out of hand, but rather search for inheritance tax structures that balance these concerns with those of efficiency, incentives, and family privacy.

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[108] Ibid.; Alstott, "Equal Opportunity."

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