

TAXING DYNASTIES

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ABSTRACT

The estate tax and the broader wealth-transfer-tax system are even more broken than is commonly understood. Over the past two decades, researchers and policy experts have identified a handful of key tactics that mega-rich families use to pass wealth from generation to generation without paying tax. These tax dodges are notorious enough to be known by their acronyms, such as the IDGT and the GRAT. Scholars and policymakers have proposed reforms to block these tactics, or at least to make them more difficult.

In this Article, we present new analysis, backed by new empirical findings, to show that these proposed reforms would not suffice for restoring wealth-transfer taxes to their original purpose—curbing intergenerational transmission of vast dynastic wealth and power. We argue that this is because an obscure but key anti-abuse tool, the generation-skipping transfer tax (GST), has failed almost completely. Because of the GST’s poor design, and some changes in state law, even if the proposed reforms aimed at IDGT and GRAT techniques were to be enacted, the GST’s failures would continue to undermine the wealth-transfer-tax system.

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Consistent with this theory, we present new data showing that wealthy families have successfully stowed staggering sums outside the reach of existing wealth transfer taxes. We estimate that between eighty and ninety percent of the wealth that rich families have set aside for their heirs will likely never be subject to the estate tax. By our most conservative estimate, that represents at least \$4.1 trillion, that is owned by trusts that should be taxed but that are now perpetually exempt from transfer taxes—a substantial fraction of the total wealth held by all U.S. families. One-third or more of all the wealth controlled by the top .1% of households may be held in these trusts.

With U.S. inequality high and still rising, these data support an urgent case for reform. We distinguish arguments from commentators who favor subsidizing rather than taxing intergenerational transfers, on the basis that those arguments are only persuasive with respect to families of relatively modest means. For example, Louis Kaplow's well-known rationale for tax-favoring gifts and bequests breaks down when the gifts comprise vast transfers of dynastic political power and social influence.

Accordingly, we set out some key criteria for transfer-tax reforms to be successful, and we propose a new approach for reform that satisfies those criteria. Historical and economic analysis suggests that transfer taxes fail in part because they trigger large one-time tax bills at death. But spreading payments out over the period after the transfer incentivizes repeal or undermining of the transfer taxes before the revenues even arrive. We thus propose instead an annual withholding tax on trust-held wealth, in effect a down-payment against future transfer-tax liability, and detail several of its key design components. We argue that this structure both complements earlier reform proposals—making the combination of reforms politically feasible and sustainable—and also can by itself successfully address the full alphabet soup of estate-tax dodges, from IDGT to GST.

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INTRODUCTION

The American estate tax was designed to break up vast accumulations of family-held wealth.¹ Adopted in 1916, it was an answer to the rising power of Rockefeller, Vanderbilt, and J.P. Morgan, and the fear that their families would effectively control large sectors of the U.S. economy and polity for generations. As President Teddy Roosevelt, one of its leading early supporters, explained, an effective tax on inherited wealth would “put a constantly increasing burden on the inheritance of those swollen fortunes, which it is certainly of no benefit to this country to perpetuate.”²

That project has failed. In this Article, we present new data showing that wealthy families have successfully stowed staggering sums outside the reach of the estate-tax system. We estimate that between eighty and ninety percent of the wealth that families have set aside for their heirs will likely never be subject to the estate tax under current law. By our most conservative estimate, that represents at least \$4.5 trillion and likely \$6.1 trillion or more, that is owned by trusts that are perpetually exempt from the estate tax and related tax measures—a substantial fraction of the total wealth held by all U.S. families.³ Of these funds, we estimate about two-thirds are held by families rich enough to pay estate tax, which is to say likely at least \$4 trillion.

We might call this Roosevelt’s nightmare.⁴ Instead of a steadily rising tax on family-held wealth that helps to reduce dynastic power, the effective tax burden on huge fortunes now seems likely to *fall* steadily with each generation. We can only speculate what effects that growing concentration of private wealth will have on the political economy of the nation, but certainly in Roosevelt’s view the prospect would have been a grim one.⁵

Commentators have long recognized that the estate tax has serious flaws, and have proposed thoughtful reforms aimed at those specific flaws.

¹ Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, IRS STATISTICS OF INCOME BULLETIN, Summer 2007, at 118, 120.

² MICHAEL GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS 8 (2011).

³ In this version, we omit certain data provided to us by other researchers under the condition that we do not fully disclose the underlying data until the authors have made their own work public, and we indicate the omission with [redacted].

⁴ With apologies to our friend Dan Ernst. See generally DANIEL ERNST, TOCQUEVILLE’S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014); see also Richard Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335 (1990).

⁵ SIDNEY RATNER, TAXATION AND DEMOCRACY IN AMERICA 258–59 (1980) [1967].

But we argue that the form of dynastic perpetual exemption that we examine here differs in important ways from the flaws that reformers have focused on in the past. By the early 2000s, Congress and academics had identified several categories of exploitative legal planning that estate planners have used to minimize their tax burdens.⁶ The most important of these are strategies for misvaluing assets at less than their real economic worth, and tactics in which families swap assets back and forth between themselves and trusts that they control.⁷ The American Bar Association, and later Professor Lily Batchelder, developed detailed and careful ideas for limiting these categories of tax planning.⁸

While those reform proposals—still not enacted—remain valuable today, our claim here is that they would no longer suffice to resolve the core failings of wealth transfer taxes. Misvaluations and asset swaps can reduce and delay a family’s estate tax burdens, but using these strategies alone typically shields only a single generation from tax. For subsequent generations, the tax bill would often still come due.⁹ If these were the only gaps in the estate tax, then Roosevelt might still rest somewhat easy. Families would not be able to pass along vast dynastic fortunes over many generations without likely facing substantial and increasing tax bills.

Instead, we argue that the key failure is the poor design of an obscure but crucial anti-abuse rule known as the generation-skipping tax, or GST.¹⁰ The GST is supposed to offer a tax backstop ensuring that family wealth held in trusts will be taxed at least every other generation. However, the GST has an “exemption” amount, and this exemption generally applies based on the value of assets at the time they are contributed to the trust, not at the time they are distributed.¹¹ For instance, suppose that before Zeta goes public its founder Zark Muckerberg puts \$13.5 million in Zeta stock in a trust for his future great-grandchildren, and then allocates his entire GST exemption

⁶ GRAETZ & SHAPIRO, *supra* note 2, at 20–21; Jesse Drucker, *How One of the World’s Richest Men is Avoiding \$8 Billion in Estate Taxes*, N.Y. TIMES, Dec. 5, 2024

⁷ U.S. DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2013 REVENUE PROPOSALS 80 (2012); Richard Schmalbeck, *Avoiding Federal Wealth Transfer Taxes*, in RETHINKING ESTATE AND GIFT TAXATION 113, 132–39 (William Gale et al. eds. 2001).

⁸ Dennis L. Belcher & Mary Louise Fellows, *Report on Reform of Federal Wealth Transfer Taxes Task Force on Federal Wealth Transfer Taxes*, 58 TAX LAW. 93 (2004); Lily Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 62–67 (2009).

⁹ See *infra* Part I.B.

¹⁰ I.R.C. §§ 2601–64. For explanation of the GST, see *infra* Part I.A.

¹¹ I.R.C. §§ 2631, 2642.

amount (currently \$15 million) to that trust. All of that trust is now exempt from GST, even if in the next year Zeta goes public and the stock value increases to \$135 billion, and even if Zark subsequently uses asset swaps and misvaluations to further multiply the wealth stored within the trust. As our data show, this GST loophole—combined with some important changes in state trust laws—has given free rein to perpetual growth of vast family fortunes.

Accordingly, we attempt here to refocus the estate-tax debate on what we call “dynasty” trusts: huge, family-controlled fortunes that will likely escape wealth transfer tax for hundreds of years, if not forever. That focus also fits with several other trends that have developed since the early 2000s. Today, only estates of more than \$30 million are taxable at all, up from just \$2 million at the millennium.¹² This is a difference between taxing those who may see themselves as upper middle class, the top 5% or so of America, versus those with more money than they can reasonably spend in a lifetime, the .1% richest citizens.¹³ Recent developments at the Supreme Court also somewhat complicate efforts to tax wealth directly, making taxes on vast inherited wealth an important remaining avenue for efforts to address growing inequality.¹⁴

One reason this shift in focus is important is because the philosophical and economic rationales for taxing inheritances are much more powerful with respect to dynastic wealth. Critics of inheritance taxes have suggested that far from taxing inheritances, we should subsidize them, in order to encourage generosity and later generations’ opportunity to start with a fair pool of resources.¹⁵ Yet even if those points are persuasive with respect to relatively modest estates, they make little sense when it comes to dynasties.¹⁶ Economic inequality and concentrated wealth and political power undermine society. We should not encourage families to expand and transmit their grip over important segments of the economy, and obviously we cannot give every heir the equal opportunity to exercise disproportionate power and influence.

¹² One Big Beautiful Bill Act, Pub. L. No. 119-21, § 70106, 139 Stat. 162 (2025) (codified as amended at I.R.C. § 2010(c)(3)). The Act’s official title is “An Act to provide for reconciliation pursuant to title II of H. Con. Res. 14.”

¹³ Board of Governors of the Federal Reserve System, Distribution of Household Wealth in the U.S., <https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/chart/>.

¹⁴ BRIAN GALLE, HOW TO TAX THE RICH CH. 3, 9 (forthcoming 2025); John R. Brooks & David Gamage, *The Original Meaning of the Sixteenth Amendment*, 102 WASH. U. L. REV. 1, 22-27 (2024).

¹⁵ See *infra* Part III.

¹⁶ See *infra* Part IV.B.

Yet designing a tax system that can meaningfully affect dynastic wealth presents some challenges. We therefore suggest a set of design features for taxing dynasties. Here we build on our earlier work in proposing, and in some cases drafting, legislation to tax the accumulated wealth of megamillionaires and billionaires.¹⁷

One challenge is to address what one of us has called the “political optionality” problem.¹⁸ A key driver in the undermining of the estate tax has been the powerful motivating force of large impending tax bills for the megawalthy families who lead the political opposition, and their access to the full pre-tax resources they can use to fund that opposition.¹⁹ We argue that pre-payments of tax can substantially weaken this incentive. This is because with pre-payments there is less for the opponents to win when they have already paid the government a share of the expected bill, and because pre-payments strengthen government budgets and enforcement incentives, especially over the ten-year accounting window that Congress generally employs. While reforms based on requiring pre-payments might face constitutional challenges if implemented for a tax on individual income or wealth, we argue that pre-payment reforms face no such obstacles for taxes on trusts or estates. Thus, the estate-tax system may offer a preferable tool for taxing large stores of accumulated wealth.

We derive other lessons from Michael Graetz and Ian Shapiro’s definitive history of the near-death of the estate tax.²⁰ They recount how fear of forced sales to pay inheritance tax, and the close association of the tax with the time of a beloved family member’s death, helped drive political narratives that undercut public support.²¹ From this, we infer that a politically viable tax should spread liability out into small bite-sized pieces over time, ideally in advance.

We propose reforms that would meet these criteria: an annual federal withholding tax on trust-held wealth. Each year, every trust subject to U.S.

¹⁷ Brian Galle, David Gamage, & Darien Shanske, *Solving the Valuation Challenge: The ULTRA Method for Taxing Extreme Wealth*, 72 DUKE L.J. 1257, 1311–12, 1315 (2023) [hereinafter Galle et al., *Valuation Challenge*]; Brian Galle, David Gamage, & Darien Shanske, *Money Moves: Taxing the Wealthy at the State Level*, 113 CAL. L. REV. 635, 642–43(2025) [hereinafter Galle et al., *Money Moves*].

¹⁸ David Gamage & John R. Brooks, *Tax Now or Tax Never: Political Optionality and the Case for Current-Assessment Tax Reform*, 100 N.C. L. REV. 487, 495 (2022).

¹⁹ *Id.* at 545–46.

²⁰ GRAETZ & SHAPIRO, *supra* note 2, at 219–65.

²¹ *Id.* at 62–73, 124–25, 229, 255

jurisdiction—except for certain exempt categories, such as charitable trusts or the trust accounts that companies use to hold funds invested for their workers’ pensions, and also trusts for which the amount of trust-held wealth falls below applicable exemption thresholds—would pay a small percentage of its current value, such as 1%. Over time, trusts’ accumulated tax burdens would come to reflect what they would owe under a well-functioning estate tax.

We argue that collecting these withholding tax payments gradually over time is a workable solution for fixing the estate tax system, among other reasons, because the estate tax system is somewhat like a basket for holding eels. The tax avoidance techniques we described above do work, but they take many years or often decades to eliminate large tax bills. The basket can thus hold eels for a while, but eventually the eels will all wiggle through the gaps if there is too long of a delay before tax is assessed and collected.

We explain that both current law and other alternative reform proposals generally offer wealthy taxpayers too long a delay before any meaningful tax is assessed or collected, thus allowing the metaphorical eels sufficient time to escape. By contrast, our proposed withholding tax reforms would begin collecting and assessing tax immediately.

We call this a “withholding” tax approach because for the most part prepayments would be fully creditable against any later estate or GST tax liabilities of the trust or its beneficiaries, so that the overall effect would be equivalent to a family pre-paying the wealth-transfer-tax liabilities that would eventually be owed if the estate tax were well functioning. For example, if Zark’s family trust pays \$100M in withholding tax, but then at his death the total estate-tax liability is only \$90M, his heirs could receive a \$10M refund. This aspect of the proposal is an alternative response to the misvaluation and asset-swap problems, in that it takes away the tax deferral that those strategies generally exploit.

In addition, our proposal solves the GST loophole. Because GST-exempt trusts face no transfer tax liability on the passage of a generation, the credit would be of no benefit and the “withholding” tax would effectively function as a minimum tax for certain trusts that now look as though they have permanently escaped the wealth-transfer-tax system. The exact functioning of the credit mechanism is fairly technical, and so we reserve a

complete discussion of the details for elsewhere.²² Here, we will highlight certain major incentives our mechanisms create, such as the powerful incentive to make distributions out of a GST-exempt trust before the first generation of beneficiaries, thereby breaking up the family dynasty.

Part I mostly offers background on the estate tax system. In Part I.B., we detail the tax avoidance techniques familiar to other reformers, and explain why these techniques typically only accomplish tax deferral, not perpetual escape from tax. Part II describes the way in which the GST's flaws do permit perpetual exemption, and Part II.B. summarizes our empirical findings on the vast scale of wealth now held in perpetually-exempt trusts; our methods and assumptions are related in the Data Appendix. Part III explores critiques of the estate tax. Part IV then argues that dynasties are different: historically, the estate tax was aimed at curtailing transfers of vast intergenerational wealth, and the Part III arguments against estate taxation are unpersuasive when it comes to dynasties. Part V sets out the key design features needed for successfully taxing dynasties. Part VI then proposes a withholding tax on trust-held wealth as an approach for reform that satisfies those design criteria. We then conclude.

I. IS THE WEALTH TRANSFER TAX BASKET TRULY EMPTY?

We are far from the first to identify serious flaws in the wealth-transfer-tax system. Indeed, scholars have engaged in a long-running debate over whether the estate tax is “voluntary.”²³ The loophole-ridden nature of the system was perhaps best captured by the cynical declaration of Gary Cohn, Donald Trump’s then senior economic advisor, that “only morons pay estate tax.”²⁴ By the early 2010s, commentators and policy makers had

²² Following the passage of the Inflation Reduction Act of 2022, we began working with Sen. Patty Murry’s office to devise legislation to implement a variation of our proposed withholding tax approach for reform, that we publicly propose and explain in this Article for the first time. At the time of this writing, Sen. Murray is preparing to introduce legislation sometime during the 2025 legislative session. When ready, we plan to coordinate the public release of both this draft Article (for general legal audiences) and our accompanying more technical and detailed explanation of the proposed legislation’s credit mechanism (for specialized tax law audiences) with the public release of the proposed legislation that we helped draft.

²³ E.g., Paul Caron & James Repetti, *The Estate Tax Non-Gap: Why Repeal a “Voluntary” Tax?*, 20 STAN. K. & POL’Y REV. 153, 159–63 (2009); George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161, 170–209 (1977).

²⁴ CNBC, “Only Morons Pay the Estate Tax,’ Says White House’s Gary Cohn” (Aug. 29, 2017). <https://www.cnbc.com/2017/08/29/only-morons-pay-the-estate-tax-says-white->

identified several key techniques that wealth planners use to dodge tax liability.²⁵ In this Part, we first summarize the workings of the wealth-transfer-tax system, and then set out a high-level summary of the most well-known dodges. We then offer, in Part I.B., two key analytic takeaways. First: with access only to these tools, it is likely that many non-morons would eventually pay estate tax. Second: these dodges, while effective to an extent, take time and careful planning to construct and fully execute.

A. *How the Wealth Transfer Tax System is Supposed to Work*

The tax popularly known as the “estate tax” actually comprises three related taxes, which we collectively refer to as the “wealth-transfer-tax system” or “transfer taxes.”²⁶ The first of the three legs is the estate tax itself.²⁷ The aim of the estate tax was historically to impose a steadily-rising tax on large stores of inherited wealth as it passed from generation to generation. Originally, the tax applied at the rate of ten percent to all transfers of wealth at death in excess of \$50,000.²⁸ The rate was increased to 25 percent in 1917.²⁹ Beginning in 1932, the estate tax rate increased substantially, reaching 70 percent in 1935 and remaining at or above that level through 1981.³⁰ Beginning in 1982, the maximum estate tax rate declined, reaching a low point of 35 percent in 2011 and 2012 (after a brief one-year “holiday” in 2010 when it was zero).³¹ Currently it stands at 40 percent.³² The tax is imposed only on the portion of an estate that exceeds the deceased’s lifetime exemption amount, which is \$15 million per person in 2026.³³ In the case of a married individual, no tax is imposed until the death of their surviving spouse, who gets both their own lifetime exemption amount as well as any unused by the decedent, so that typically only combined estates of more than

houses-gary-cohn.html

²⁵ See sources cited *supra* note 7.

²⁶ Jane Gravelle, *The Estate and Gift Tax: An Overview*, Cong’l Res. Svc. Report No. R48183, at 5 (2024).

²⁷ *Id.*

²⁸ Tax Foundation, “Federal Estate and Gift Tax Rates, Exemptions, and Exclusions, 1916-2014” (Feb. 4, 2014), <https://taxfoundation.org/federal-estate-and-gift-tax-rates-exemptions-and-exclusions-1916-2014>. Fifty thousand dollars in 1917 would be about \$1.35 million today.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² I.R.C. § 2001.

³³ One Big Beautiful Bill Act, Pub. L. No. 119-21, § 70106, 139 Stat. 162 (2025) (codified as amended at I.R.C. § 2010(c)(3)).

\$30 million are taxable.³⁴

Because a tax that is imposed only upon the death of the transferor would be easy to avoid through death-bed transfers, the transfer-tax system has long also included a tax on gratuitous transfers during the life of the giver, known as the gift tax.³⁵ After some early experiments, the gift tax returned on a more permanent basis in 1932 and was integrated with the estate tax into a unified system.³⁶ In general, gift-givers pay the tax.³⁷ Givers can ignore relatively small transfers, currently \$19,000 per donor-donee pair per year.³⁸ For amounts over that exclusion threshold, in the unified system, a person's lifetime gifts are taxable only once they exceed the lifetime exemption amount, which again is \$15 million per person in 2026.³⁹ Gifts made during life are also included in the giver's estate, but a credit is allowed against the person's estate tax liability for any gift tax paid.⁴⁰ In effect, the gift tax is a form of tax withholding mechanism for the estate tax, much like the bi-weekly amounts employers set aside to cover workers' year-end income tax bills, under which wealthy households begin to make advance payments against their expected estate tax liability before they die.⁴¹

An important wrinkle in the gift tax is that, because the donor is still alive, it is possible for them to receive value back from the donee at the time of the transfer—for example, through a sale. A transfer is only defined as a taxable “gift” to the extent that the value the transferor receives back is less

³⁴ Internal Revenue Service, *Frequently Asked Questions on Estate Taxes*, <https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-estate-taxes>.

³⁵ Mitchell M. Gans & Jay Soled, *Reforming the Gift Tax and Making It Enforceable*, 87 B.U. L. REV. 759, 762 (2007).

³⁶ Jacobson et al., *supra* note 1, at 122.

³⁷ I.R.C. § 2501(a).

³⁸ I.R.C. § 2503(b).

³⁹ I.R.C. § 2505.

⁴⁰ *See supra* note 34.

⁴¹ The gift and estate taxes operate differently in the tax treatment of the tax paid, however, making the gift tax only a partial withholding mechanism. Gift tax generally is applied only to the amount received by the transferee. Thus, if a person pays \$400,000 in gift tax on a \$1 million gift, the \$400,000 generally is not subject to tax. This reduces the effective gift tax rate to about 28.57 percent. In the foregoing example, \$400,000 tax is paid on \$1,400,000 of wealth. Estate tax applies to the amount in the estate, including the amount used to pay tax. Thus, if a person leaves \$1,400,000 in his taxable estate, the estate tax will be \$560,000. Although gifts are included in the estate, this inclusion does not fix the rate mismatch problem, because the funds used to pay gift tax generally are not included. In our example, for instance, the donor would include only the \$1 million after-tax value of their gift in their estate at death, not \$1.4 million.

than the fair market value of what they transferred.⁴² If Ma and Pa sell their \$100 million family business to Daughter for \$60 million, they have made a \$40 million gift. This rule, and related rules involving transfers of partial interests in property, turn out to be the bedrock of a variety of tax-avoidance techniques that we will discuss shortly.

The third in the trio of wealth-transfer taxes, the generation-skipping transfer tax (GST), first was enacted in 1976, but its effective implementation was delayed until 1986.⁴³ The GST is an additional tax on certain transfers of wealth that “skip” generations, such as a bequest a person makes to her grandchild.⁴⁴ As originally conceived, the GST was intended to address a perceived unfairness in the application of the unified estate and gift tax.⁴⁵ Families of modest wealth would pass wealth from one generation to the next, incurring gift or estate tax with the passage of each generation. Families of immense wealth, by contrast, could pass large amounts of wealth directly to more remote generations, thereby avoiding transfer tax.⁴⁶ A common strategy was for the income-earning generation to leave their children only a “life estate,” or entitlement to a stream of payments, with all the remaining assets going to subsequent generations.⁴⁷ Because by definition a life estate terminates with the death of the life-estate holder, there would be no formal transfer of property interests from children to grand-children, and so no additional estate tax would occur at that time.⁴⁸

Because we will argue that the GST and its loopholes are quite important to understanding how the transfer tax system is failing, we sketch its complex mechanics here for readers who are unfamiliar with its intricacies. In general, the GST imposes an extra tax, at estate-tax rates, on transfers to a person who is two generations or more removed from the donor.⁴⁹ This is known as a “direct skip” transfer.⁵⁰ For example, say Jill Bates leaves a \$1 billion taxable estate to her grandchild, George (skipping

⁴² I.R.C. § 2512(b).

⁴³ MADOFF, *supra* note , at 80.

⁴⁴ For an overview, see John A. Miller & Jeffrey Maine, *Wealth Transfer Tax Planning After the Tax Cuts and Jobs Act*, 46 B.Y.U. L. REV. 1411, 1464–67 (2021).

⁴⁵ Jacobson et al., *supra* note 1, at 123.

⁴⁶ See U.S. Treasury Department, Tax Reform Studies and Proposals pt. 3, at 389 (Comm. Print 1969), <https://www.finance.senate.gov/imo/media/doc/PrfTaxReform3.pdf>

⁴⁷ Schmalbeck, *supra* note 7, at 119.

⁴⁸ I.R.C. § 2033.

⁴⁹ In the case of transferees who are unrelated to the transferor, the GST is also due when the transferee is 37.5 or more years younger than transferor.

⁵⁰ I.R.C. § 2611(a).

her daughter, Debra) an estate tax of \$400 million would apply. The remaining \$600 million would be subject to the GST and, disregarding the exclusion from GST, would result in an additional \$240 million of transfer tax liability. George would inherit \$360 million net of all wealth transfer taxes. If instead Jill had left the taxable estate to her daughter Debra, Debra would have inherited \$600 million. If Debra never touched the \$600 million during her lifetime and left a \$600 million taxable estate to George, George would inherit the same \$360 million net of wealth transfer tax. Thus, if the GST actually worked as intended, the GST would make family dynasties largely tax-indifferent between a transfer to children versus a transfer that skips a generation.⁵¹

The GST commonly comes into play when families have transferred assets in trust, rather than making outright gifts directly to heirs. A trust is a bundle of legal arrangements, like a corporation, with separate legal existence from its funders or “grantors.”⁵² Trusts are administered by trustees, generally selected by the grantors.⁵³ Trustees have a fiduciary duty to follow the terms of the trust documents.⁵⁴ Thus, among other uses, a trust can be a way for a family to help ensure that funds intended for grandchildren or great-grandchildren are not consumed by intervening generations, but instead are disbursed according to the trust documents and the discretion of the trustee.⁵⁵

Accordingly, the GST has special rules for trusts.⁵⁶ Distributions by a trust are subject to GST when the beneficiary receiving payment is a “skip person,” that is, when the beneficiary is two or more generations removed from the trust’s grantors.⁵⁷ In the case of a trust that only pays out life estates to succeeding generations, this rule might impose tax on the amounts actually paid out, but the bulk of the family wealth still held in trust might never be subject to estate tax. To foil this strategy, the GST rules have a concept known as the “taxable termination,” which occurs on the date on which the last of any generation following the grantor (usually, the grantor’s children) dies.⁵⁸

⁵¹ Miller & Maine, *supra* note 44, at 1464–65.

⁵² Robert Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 627–34 (2004).

⁵³ *Id.*

⁵⁴ RESTATEMENT (THIRD) OF TRUSTS § 2 (2001).

⁵⁵ Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981, 989–90, 995 (2020).

⁵⁶ Grayson McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291, 1292 (2013).

⁵⁷ I.R.C. § 2612(b).

⁵⁸ *Id.* § 2612(a)(1).

A taxable termination triggers GST liability for all the current assets of the trust.⁵⁹ Once a taxable termination occurs, the trust is treated as if it was created by the recently deceased generation for purposes of subsequent application of the GST, so that distributions to the next generation are not taxed, but distributions to the grandchildren of the recently deceased would be.⁶⁰

Like other transfer taxes, the GST has a mechanism to exempt smaller-value transfers, similar to the lifetime exemption amount. However, the GST exemption operates differently for transfers made in trust. Each individual receives a lifetime GST exemption amount, also currently \$15 million.⁶¹ Whenever a person gifts assets to a trust, they must decide how much of their GST exemption to allocate to that transfer.⁶² If the transferor allocates an exemption amount that equals or exceeds the amount of the transfer *on the date of the transfer*, then the trust is exempt from GST, no matter how much the assets are worth when they are later distributed.⁶³ For example, if Ma and Pa gift \$15 million in stock to Family Trust, and allocate \$15m of their lifetime exemption to that transfer, and the trust receives no other contributions, then the trust has an “inclusion ratio” of 0%, meaning that it and its beneficiaries are entirely exempt from GST, even if the trust later distributes hundreds of millions or even billions of dollars.

As we describe in more detail below, this innocuous-seeming rule is at the root of critical modern abuses. After several generations, the difference in accumulated family wealth between an initial transfer in trust and successive generation-to-generation transfers is enormous. For example, in its promotional literature, the South Dakota Trust Company compares the growth of a \$5 million bequest left in trust with one left from generation to generation.⁶⁴ Under the assumptions that the wealth grows at six percent per

⁵⁹ I.R.C. § 2611(a)(2).

⁶⁰ I.R.C. § 2653(a).

⁶¹ I.R.C. § 2631.

⁶² GST exemption can also be used for direct skips given to living persons, but sophisticated planners today rarely do so because this is usually highly tax disadvantaged relative to making a gift in trust. Mark E. Powell, *The Generation-Skipping Transfer Tax: A Quick Guide*, J. ACCOUNTANCY, Oct. 2009, at 30, 33.

⁶³ Stuart A. Rader, *The Importance of GST Exemption Allocations on Gift Tax Returns for Lifetime Transfers to Trusts*, ABA TAX TIMES, 2008, at 13, 13 n.7, https://www.americanbar.org/content/dam/aba/publishing/aba_tax_times/01win/08-rader.pdf. If the initial value of the gifts to the trust exceed the exemption amount that is assigned, the trust is partially taxable; this partial taxability is known as the “inclusion ratio.”

⁶⁴ See *Why South Dakota*, SOUTH DAKOTA DYNASTY TRUST, <https://sdtrustco.com/why-south-dakota/dynasty-trust/>

year and is subject to a combined federal and state estate tax rate of 50 percent every 30 years when it passes from generation to generation, the wealth accumulates after 120 years to an amount 16 times as large (\$5,440,938,740 vs. \$340,058,671) when left in trust as compared to when passed from generation to generation.⁶⁵

B. Standard Single-Generation Deferral Techniques

Over the decades, tax lawyers have developed a slew of avoidance strategies, which, collectively, have broken the wealth-transfer-tax system.⁶⁶ Many of these are now well-understood by commentators, in part thanks to private wealth planners who, in an effort to recruit new customers, have openly boasted on the internet about their details.⁶⁷ Existing policy reform proposals are thus mostly aimed at these familiar dodges. In broad strokes, the familiar strategies consist of a combination of aggressive valuation discounts with a set of “estate freeze” transactions.

Valuation techniques exploit the fact that death does not provide any new information about the value of a decedent’s property—that is, transfer taxes do not typically coincide with a sale of the transferred assets.⁶⁸ Thus, the value of the transferred property must be determined through appraisals, instead of from direct evidence of what an unrelated purchaser would pay. Families can take steps to reduce the appraised value of an asset, often in ways that do not affect the actual value of the asset while it is still in their hands, such as by dividing its control among several related persons.⁶⁹

⁶⁵ *Id.*

⁶⁶ See, e.g., Bob Lord, Americans for Tax Fairness, *Dynasty Trusts* 10–21 (2022), <https://americansfortaxfairness.org/wp-content/uploads/DT-2.2.pdf>; Drucker, *supra* note 6.

⁶⁷ Jay Soled & Mitchell Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 WASH. & LEE L. REV. 257, 285 (2015).

⁶⁸ Belcher & Fellows, *supra* note 8, at 203.

⁶⁹ Jay A. Soled & Mitchell Gans, *Related Parties and the Need to Bridge the Gap Between the Income Tax and Transfer Tax Systems*, 62 ALA. L. REV. 405, 416–19 (2011). A common approach is to lodge assets in a family-owned entity, structured such that the great majority of the interests lack the power to control the affairs of the entity. *Id.* at 416–17. That lack of power, together with the limited marketability of the interests, causes their value to be substantially discounted from the value of their proportionate share of the entity’s assets. *Id.* at 417. An unrelated person would not be willing to pay full price for a small minority stake in a business otherwise controlled by a family, but the family is indifferent to divided ownership (assuming they aren’t the fictional Roys and can govern collectively). For example, a one percent limited partner interest in a family limited partnership that holds a business with a value of \$100 million might have a market value of only \$700,000, 30 percent less than the \$1 million value of its proportionate share of the business.

While there are several flavors of estate freeze, they share a common ingredient. Each involves transferring assets, usually to a trust, before the grantor dies and at a time when the value of the assets can be claimed to be relatively low.⁷⁰ Of course, transfers during life are subject to the gift tax. But assuming certain legal formalities are followed, trusts can be designed so that they are not considered part of the decedent's estate.⁷¹ Thus, the power of the estate freeze is that by transferring assets out of the hands of the older generation, the family can pay tax on the assets only at the value at the time of the transfer, not the (presumably) much higher value the assets will have when the transferor ultimately dies—hence the term “freeze.”⁷²

This approach is best exemplified by Sam and Helen Walton, who gave to their children 80 percent of Walton Enterprises, the entity that owns Wal-Mart, in 1953, when their business empire was still in its infancy.⁷³ Ultimately, when Sam and Helen passed, 80 percent of that empire, by then having a value well into the billions, was held by their children, and so beyond the reach of the estate tax. Today, Sam and Helen's descendants collectively own over \$400 billion in Wal-Mart shares,⁷⁴ with three heirs each having over \$100 billion in net worth.⁷⁵

Most successful freezes, though, rely not just on good timing but also on aggressive legal maneuvers. These maneuvers have exotic names, such as “grantor retained annuity trusts” (GRAT) and “intentionally defective grantor trusts” (IDGT).⁷⁶ Other commentators have explained these in detail so our summary here will be brief.⁷⁷ The key features are that instead of just gifting property to a trust, the transferor sells the asset to the trust (in the case of the typical IDGT transaction)⁷⁸ or gifts it subject to the condition that the trust

⁷⁰ Belcher & Fellows, *supra* note 8, at 229.

⁷¹ Soled & Gans, *supra* note 69, at 420–21.

⁷² Soled & Gans, *supra* note 69, at 426.

⁷³ See Tom Metcalf, *Welcome to Waltonville, where the richest clan reigns*, BLOOMBERG, Jun. 27, 2018, <https://www.bloomberg.com/news/articles/2018-06-27/welcome-to-waltonville-where-the-world-s-richest-family-reigns?sref=I6K1T2KU>

⁷⁴ *3 Walmart Heirs Are Each Worth Almost \$100 Billion — and Together They're Way Richer Than Elon Musk*, BUSINESS INSIDER (Aug. 2024), <https://www.businessinsider.com/walton-family-wealth-walmart-record-stock-billionaires-retail-rich-list-2024-8>.

⁷⁵ *Id.*

⁷⁶ Soled & Gans, *supra* note 69, at 425.

⁷⁷ *E.g.*, Schmalbeck, *supra* note 7, at 132–39.

⁷⁸ Soled & Gans, *supra* note 69, at 426. In the most commonly used vehicle employing a grantor trust, the grantor sells assets to the trust in exchange for a promissory note bearing

pay the grantor a stream of annual payments (in the GRAT technique).⁷⁹ Either way, the value of the taxable gift is only the net of the value of the property transferred to the trust, less whatever the grantor gets back.⁸⁰ Importantly, in both cases this net value is computed up front, at the time of the transfer, but the actual promised payments only happen later.⁸¹ In this way, the transaction can be structured to totally eliminate gift tax even as substantial net value passes to the trust.⁸²

interest at the lowest permissible rate. *Id.* The trust then uses the income from the assets to repay the grantor, which the grantor uses in part to pay the income tax on the trust's income. As long as the grantor survives until the note is fully paid, the entire transfer escapes both gift and estate tax.

Of course, a sale usually results in income tax for the seller, but planners can avoid that result by using grantor trusts. If a person who contributes money to a trust also retains certain key aspects of control over that trust, such as the power to personally direct who will receive distributions, then for income tax purposes the trust is treated as the same taxpayer as the transferor. Richard W. Nenno, *Perpetual Dynasty Trusts: Planning and Jurisdiction Selection*, ST02-ALI-ABA 371, 392–93 (2011); Soled & Gans, *supra* note 69, at 426.

⁷⁹ GRATs are creatures of statute that allow the grantor to transfer assets to the trust and retain the right to receive annuity payments from the trust. James M. Delaney, *Split Interest Valuation: The Devil is in the Details*, 37 CAP. U. L. REV. 929, 937–39 (2009). If the trust is structured in the manner dictated by the statute, the value of the annuity retained by the grantor is subtracted from the value of the assets transferred to the trust in determining the value of the grantor's gift. The value of the annuity retained by the grantor is determined under Code Section 7520 by discounting the annual payments at a rate equal to 120 percent of the federal midterm rate of interest then in effect under Code Section 1274(d)(1), otherwise referred to as the Section 7520 rate. Thus, if the trust assets grow in value at a rate greater than the Section 7520 rate, the excess growth passes free of wealth-transfer tax to the trust's beneficiaries. Delaney, *supra*, at 941.

The most extreme form of GRAT, yet also one commonly employed by tax avoidance planners, is the zeroed-out GRAT, which is structured to have the grantor's retained annuity valued under Section 7520 at an amount equal to the value of the assets transferred to the GRAT, such that the value of the grantor's gift is zero. Robbie Ottley, *Gratuitous Wealth: How Wealth Transfer Tax Avoidance Contributes to America's Unwinding*, 58 GA. L. REV. 1347, 1379–82 (2024). This creates a “heads I win, tails we tie” situation between the grantor and the IRS. Austin Bramwell, *Generation-Skipping Transfer Tax Consequences of GRATs: Finding the Answers*, 114 J. TAX. 260, 261 (2011). If the growth rate of the GRAT's assets exceeds the Section 7520 rate, the value remaining upon payment of the retained annuity will pass free of gift tax. But if the GRAT's assets fail to grow at the Section 7520 rate, such that the GRAT is unable to pay the retained annuity in full, and if the GRAT was structured as a grantor trust (they almost always are) the whole exercise become a “nothing” for tax purposes, with tax consequences identical to those that would obtain had the GRAT never been established in the first place.

⁸⁰ Schmalbeck, *supra* note 7, at 137–38.

⁸¹ See Gravelle, *supra* note 26, at 18–19.

⁸² Steven J. Arsenault, *Grantor Retained Annuity Trusts: After \$100 Billion, It's Time to Solve the Great GRAT Caper*, 63 DRAKE L. REV. 373, 387 (2015).

For example, a typical sale to an IDGT might exploit this timing mismatch through a combination of low-interest debt and payments in kind. Suppose a hypothetical billionaire, Jill Bates, sells \$1 billion in stock of her company, Portals Inc., to her IDGT. The IDGT does not pay cash, but instead delivers a promissory note agreeing to pay Jill \$1 billion at some future date, typically nine years later.⁸³ The terms of the note provide that the IDGT can pay in stock of Portals, not cash. Since the net value of the transfer is zero—\$1 billion in stock minus \$1 billion in (promised) payment, Jill pays no gift tax. Now suppose that over the next few years, Portals, Inc. stock doubles in value. Jill can then take payment on the note, getting back \$1 billion in stock but also leaving \$1 billion in stock inside the trust, which will not be part of her estate when she dies.⁸⁴ In effect, Jill has wiped \$1 billion in taxable value from her estate in exchange for paying a gift tax of \$0. And nothing stops Jill from repeating the transaction with the \$1 billion in stock she now holds personally.

Through repeated use of this sort of tax planning over many years or often decades, massive wealth can be stored in trusts without triggering any gift tax. For instance, in one prominent real-world example, the Adelson family used a series of thirty or more GRATs, funded with the stock of Las Vegas Sands corporation, to avoid wealth-transfer tax on \$7.9 billion of transferred wealth.⁸⁵ Most of those thirty-plus GRATs failed to accomplish any permanent transfer of wealth because the Sands stock did not increase during the repayment term. But several that were formed shortly before spikes in the value of Las Vegas Sands succeeded dramatically, thus making the whole exercise wildly advantageous, tax-wise, for the Adelson family.⁸⁶ In another prominent example, Phil Knight, the founder of Nike, similarly used a series of GRATs to avoid wealth-transfer tax on the transfer of over

⁸³ Edward McCaffery, *Distractions from Distraction by Distraction: Reimagining Estate Tax Reform*, 40 PEPP. L. REV. 1235, 1247–48 (2013). As noted above, the note must be interest-bearing, and planners believe the trust must hold about 10% of the face amount of the note in liquid assets other than the contributed stock.

⁸⁴ More realistically, the trust will also have to pay Jill some interest, so she will end up with a bit more than \$1 billion while the trust ends up with a bit less.

⁸⁵ See Carlyn S. McCaffrey & John C. McCaffrey, *Our Wealth Transfer System—A View from the 100th Year*, 41 ACTEC L.J. 1, 27 (2015); Zachary Mider, *Accidental Tax Break Saves Wealthiest Americans \$100 Billion*, BLOOMBERG, Dec. 16, 2013, <https://www.bloomberg.com/news/articles/2013-12-17/accidental-tax-break-saves-wealthiest-americans-100-billion?sref=I6K1T2KU>.

⁸⁶ See Ben Steverman et. al., *The Hidden Ways the Ultrarich Pass Wealth to Their Heirs Tax-Free*, BLOOMBERG, Oct. 21, 2021, <https://www.bloomberg.com/features/how-billionaires-pass-wealth-to-heirs-tax-free-2021/?sref=I6K1T2KU>.

\$6 billion of Nike shares to a trust benefitting his descendants.⁸⁷ And these are hardly the only examples; ProPublica has reported that at least half of America's hundred wealthiest families have used GRAT transactions.⁸⁸

With these estate-planning techniques available, it is not “morons” who pay the estate tax, but the unlucky or indifferent. All these strategies take time to develop. To minimize transfer tax, families will try to move assets into trusts at a time when they can best defend a very low appraisal price. But accidents happen; a wealthy founder might die while waiting for a market dip.⁸⁹ Similarly, the GRAT and IDGT techniques are limited by the underlying volatility of the contributed assets: they only work to the extent that assets rise in value between the time of the initial transaction and later payment.⁹⁰ In many cases it might be decades, and many failed transactions, before 100% of a founder's worth can be tucked tax-free into trusts. Founders who begin planning only late in life, who time their GRAT efforts badly, or who die unexpectedly, may still leave large taxable estates.⁹¹

More importantly, though these techniques can be highly effective at escaping estate tax for the first wealthy generation, the bill will often come due in later generations (absent further planning that we explain below).⁹² When the last of Jill's children dies, the trust will be subject to GST on the full value of its holdings (unless, as we describe below, it is exempt from GST).⁹³ Alternatively, if the trust distributes funds to George, her grandson, George will owe GST on the amount of the distributions. To be sure, this shift in liability from Jill to George has enormous value. By delaying the payment of tax for some period of years—perhaps for all of her children's lives—the Bates family is able to keep earning investment returns on the assets they would otherwise have needed to sell to pay the estate tax; tax mavens call this the “time value of money.”⁹⁴ And to the extent that Jill might have otherwise

⁸⁷ *Id.*

⁸⁸ See Jeff Ernsthause et. al., *More Than Half of America's 100 Richest People Exploit Special Trusts to Avoid Estate Taxes*, PROPUBLICA, Sep. 28, 2021, <https://www.propublica.org/article/more-than-half-of-americas-100-richest-people-exploit-special-trusts-to-avoid-estate-taxes>; see also Drucker, *supra* note 6.

⁸⁹ Cf. Wojciech Kopczuk, *Bequest and Tax Planning: Evidence from Estate Tax Returns*, 122 Q.J. ECON. 1801, 1822 (2007) (reporting evidence that taxable estates are smaller when decedent has more time to plan).

⁹⁰ Zeydel, *supra* note 78, at 607.

⁹¹ McCaffrey & McCaffrey, *supra* note 85, at 30.

⁹² MADOFF, *supra* note 111, at 80; cf. Soled & Gans, *supra* note 69, at 416 (calling valuation techniques “temporary”).

⁹³ I.R.C. § 2612(a)(1).

⁹⁴ Daniel I. Halperin, *Interest in Disguise: Taxing the 'Time Value of Money'*, 95 YALE

left funds to her Daughter Debra, who would then have died and left the remainder to George, Jill's planning eliminated tax on Debra's estate. Our key point, however, is that for families whose goal is not simply to pass money to their children, but instead to bankroll many generations of a family dynasty, these familiar techniques are likely limited to a one-generation deferral of the initial tax bill.⁹⁵

Families might conceivably aim to repeat the GRAT strategy in each generation,⁹⁶ but that approach has some significant risks. Each time it executes the GRAT maneuver, the family trust would need to distribute its assets to the children of the trust's grantors, as distributions to grandchildren would trigger GST. Once the assets are in the children's hands, there is then no legal requirement that the children re-establish a trust. They could instead decide to sell off the family business and use the funds for their own benefit. Founders may be reluctant to grant later generations this degree of control over their family future. Additionally, there is the risk that a child who happens to be holding some of the inherited fortune could well die before managing to shift the inherited wealth back into a trust, triggering estate tax earlier than the GST (which otherwise would not have been due until the last of that child's generation had passed) would hit.⁹⁷ It thus seems unlikely that a strategy of repeatedly using GRATs each generation would succeed at protecting dynastic wealth perpetually across multiple generations.

In short, though the single-generation tax-avoidance techniques reformers have focused on do indeed sap or delay a good deal of estate-tax revenue, these techniques alone would probably not suffice to defeat the tax's original aims. Over time, dynastic families relying exclusively on these methods would likely face substantial and increasing transfer-tax liabilities, whether through the operation of the GST or through occasional ill-timed deaths.

II. DYNASTY TRUSTS: ESTATE-LESS INCOME

We ended the last Part on a somewhat optimistic note, but that is not the end of the story. If the GST worked as it was designed to, dynastic families would still face rising tax bills over time as each successive

L.J. 506 (1986).

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⁹⁶ David L. Weinrib & Warren Litman, *Intergenerational GRATs: Moving Wealth to Grandchildren and Beyond*, 12 J. WEALTH MGMT. 32, 34 (2009).

⁹⁷ Cf. Schmalbeck, *supra* note 7, at 144–45 (explaining that freeze techniques can lose money if they incur up-front tax without generating savings over time).

generation passes on. Unfortunately, because of a combination of the poor design of the GST's exemption system and changes in state trust law, the GST no longer performs that role. Instead, it now is possible for many dynasties to leave vast fortunes for their heirs in perpetuity, without ever paying a dollar of transfer tax. And this is not just a theoretical possibility. In Part II.B., we summarize our empirical findings (detailed more in the data appendix) on the genuinely mind-boggling extent of tax-free family dynasties.

A. *Perpetually Estate-less Wealth Transfers*

The GST fails because it was written with a built-in estate freeze.⁹⁸ Recall that trusts with an “inclusion ratio” of 0% can never trigger GST, whether through the passing of a generation or through distributions to heirs.⁹⁹ Again, the inclusion ratio is the value of assets contributed to the trust, divided by the amount of GST exemption the transferor assigns to the trust.¹⁰⁰ Both of these are determined on the date the assets are contributed to the trust.¹⁰¹ If Jill—or the real-world Waltons—contribute stock to their family trust when they can defensibly claim that it is worth less than their available GST exemption amount, then that trust will never trigger GST, no matter how much money the grandchildren or later generations receive.

It might seem implausible that families could accumulate vast fortunes inside a trust when the GST exemption amount is a relatively low \$15 million, but we have already seen how easily wealthy transferors can manipulate asset valuation. For example, IDGT transactions can trim at least 90% of the needed GST exemption amount, among other techniques.¹⁰²

⁹⁸ See Joseph Dodge, *Comparing a Reformed Estate Tax with an Accessions Tax and an Income-Inclusion System*, 56 SMU L. REV. 551, 584 (2003).

⁹⁹ I.R.C. § 2641(a)(2).

¹⁰⁰ I.R.C. § 2642.

¹⁰¹ *Id.*

¹⁰² MADOFF, *supra* note 111, at 83; McCaffrey, *supra* note 83, at 1248; McCaffrey & McCaffrey, *supra* note 85, at 34. In a sale to an IDGT, the net sale price is not considered a gift that must be assigned a GST exemption amount. Weinrib & Litman, *supra* note 95, at 33. However, the transferor must use GST exemption on the “seed money” cash contributed to the trust in advance of the transaction, which practitioners believe must be at least 10% of the face amount of the trust’s promissory note. *Id.* But given enough time this 10% initial contribution can be leveraged many times over, as a family can use amounts previously sold to the trust as the needed seed money for later transactions. Life insurance trusts can have similar benefits. Rader, *supra* note 63, at 15.

Arguably, GRATs do not combine with GST exemption as cleanly. GST exemption can only be assigned to property contributed via GRAT at the end of the annuity period, which

Families can use timing and valuation discounts to drive down the amount of GST exemption needed.¹⁰³ More aggressive families might simply underreport the value of their assets.¹⁰⁴ The IRS only has three years from the date of a gift-tax return to audit the return or challenge a trust's inclusion ratio.¹⁰⁵ Private wealth planners hint in public materials that it is very important to start this three-year clock, which we take to mean that large dollars are often at stake in avoiding an audit.¹⁰⁶

The combination of wealth-transfer tax avoidance planning and the GST exemption allows for the near complete evisceration of the wealth-transfer tax system and the creation of massive trusts holding wealth well into the billions of dollars.¹⁰⁷ These GST-exempt trusts, structured to hold dynastic family wealth for centuries or longer, are referred to as dynasty trusts.¹⁰⁸ Under current law, they have the potential to grow to practically infinite levels. Consider the example used by The South Dakota Trust Company in its literature, discussed above, but where the grantor, instead of leaving \$5 million to the GST-exempt trust on her death, is able to transfer \$1 billion to the GST-exempt trust during her lifetime. If that trust were to grow at a six percent annual rate for 120 years, it would then hold over \$1

means that typically the property will have appreciated for two years before GST can be assigned. I.R.C. § 2642(c); see Powell, *supra* note 62, at 35. In addition, some practitioners claim that using GST exemption in a GRAT transaction is inefficient because to achieve a 0% inclusion ratio the exemption amount must also be assigned for funds that are repaid back to the transferor. Bramwell, *supra* note 79, at 261, 265. But there are several potential planning strategies to mitigate or avoid this result, though to our knowledge none have been tested in court. McCaffrey & McCaffrey, *supra* note 85, at 30; Michael Mulligan, *The Reinvigorated GRAT: Is a Sale to a Defective Trust Still Superior?*, 29 ESTATE PLANNING 379, 389–90 (2002). We believe that our data suggest most GRATs are indeed GST exempt. See *infra* text accompanying notes 326–335.

¹⁰³ McCaffrey & McCaffrey, *supra* note 85, at 33–34

¹⁰⁴ McCaffrey & McCaffrey, *supra* note 85, at 29–30.

¹⁰⁵ I.R.C. §§ 6501(a), (c)(9).

¹⁰⁶ See Austin W. Bramwell, *Considerations and Consequences of Disclosing Non-Gift Transfers*, 116 J. TAX'N 19, 24 (2012) (describing practice of disclosing sales to “start[s] the clock” in hope that “sale may never attract IRS scrutiny”); Daniel Cooper & Ellen Deringer, *The Ins and Outs of GRATs, with a Discussion of GST Planning*, Morgan Lewis, Nov. 2014, at LL-18, https://www.morganlewis.com/-/media/files/publication/presentation/speech/pbi_insoutsofgrats-gsiplanning_20nov14.pdf; Jennifer Lan, UBS, *Grantor-Retained Annuity Trusts*, at 3, https://advisors.ubs.com/mediahandler/media/603266/Grantor%20Retained%20Annuity%20Trusts%201_.pdf; see also Soled & Gans, *supra* note 69, at 437 (calling gift tax returns “the perfect taxpayer noncompliance formula”).

¹⁰⁷ See Bob Lord, *Dynasty Trusts*, Americans for Tax Fairness, Feb. 2022, at 25–26 <https://americansfortaxfairness.org/wp-content/uploads/DT-2.2.pdf>.

¹⁰⁸ Tait, *supra* note 177, at 1979.

trillion of family wealth.¹⁰⁹

Reformers have not have focused much on this alarming possibility before in part because perpetually-exempt dynasties are fairly new.¹¹⁰ Until relatively recently, perpetual trusts were illegal.¹¹¹ In 1986, when the GST exemption first came into effect, the rule against perpetuities applied in all states other than Wisconsin, Idaho, and South Dakota.¹¹² Under the rule against perpetuities, property held in trust would have to vest in (that is, be distributed to) some beneficiary within 21 years after the death of an individual alive at the time of the trust's formation.¹¹³ The effect of this rule was to limit the life of a trust to about a century from the time of its creation.¹¹⁴ Beginning in 1995, when Delaware eliminated the rule, however, states have begun to compete aggressively for trust business by allowing trusts with perpetual, or at least extremely long, lives.¹¹⁵ Arizona, for example, uses a 500-year limit on the life of a trust.¹¹⁶ In an important sense, states have thus effectively all but repealed the federal estate tax system.¹¹⁷

Perhaps would-be reformers have also been reassured by a pair of prior commentators who argued that dynasty trusts cannot really last perpetually, because over generations the estate will have to be divided among hundreds or thousands of beneficiaries, and administrative costs and

¹⁰⁹ Banks and other professional fiduciaries might well capture a portion of the tax savings through management fees and the like, but typically only a relatively small portion. Lucy A. Marsh, *The Demise of Dynasty Trusts: Returning the Wealth to the Family*, 5 ESTATE PLANNING & COMM'Y PROP. L.J. 23, 44–45 (2012).

¹¹⁰ McCouch, *supra* note 56, at 1303. Ray Madoff was sounding the alert more than a decade ago, however. MADOFF, *supra* note 111, at 82–83. The Treasury Department did propose a federal response in 1997, shortly after Delaware legalized perpetual trusts. Recent proposals from the Obama and Biden Administrations and Sens. Bernie Sanders and Elizabeth Warren would also address perpetual exemption, as we discuss in Part VI below.

¹¹¹ RAY MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 77–78 (2010).

¹¹² *Id.* at 78. The rule could also be sidestepped in Delaware. McCouch, *supra* note 56, at 1294.

¹¹³ MADOFF, *supra* note 111, at 77.

¹¹⁴ *Id.*

¹¹⁵ Grayson McCouch, *Perpetual Generation-Skipping Trusts*, 58 REAL PROP. TRUST & EST. J. 167, 175 (2023); Max M. Schanzenbach & Robert Sitkoff, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 403–12 (2005).

¹¹⁶ Ariz. Rev. Stat. § 14-2903.

¹¹⁷ See Max M. Schanzenbach & Robert Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2494 (2006) (finding evidence that states eliminated the rule against perpetuities in order to undermine the GST).

income taxes will eat into growth.¹¹⁸ However, this claim ignores the tactic that dynasties throughout history have used, namely limiting the pool of available claimants in each generation.¹¹⁹ There are not thousands of Windsors each with a room at Buckingham Palace, for example. Trusts do pay income tax on undistributed funds (but not on earnings they distribute to beneficiaries).¹²⁰ But they can use tactics familiar to wealthy individuals—such as loss harvesting and exploitation of the realization rule—as well as some trust-specific strategies to drive their taxes on capital gains and dividends dramatically lower in effective terms, even to an effective zero percent rate.¹²¹ For instance, a trust that exists to maintain control of a family business can avoid realizing net gains and thereby deliver extensive benefits to the family without ever needing to pay any tax.¹²² Moreover, later generations may themselves earn money and add to the family fortune;¹²³ there is extensive empirical evidence that inherited wealth is a powerful predictor of earning power.¹²⁴

Finally, a well-known claim during the estate-tax repeal debates was that wealthy individuals do not like to give up control of their enterprises during their lifetimes, and some have inferred that this makes the GST exemption techniques difficult to implement.¹²⁵ This claim of course does not extend to fungible portfolio investments, which may be the bulk of wealth for many families.¹²⁶ In addition, many modern techniques mitigate any real loss of control. At the most basic level, families can use their power to shop for trustees to ensure that a trustee will almost certainly follow family wishes.¹²⁷

¹¹⁸ William J. Turnier & Jeffrey L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX REV. 779, 789–803 (2009).

¹¹⁹ John V. Orth, *Escaping the Malthusian Trap*, 17 GREEN BAG 29, 32–35 (2010).

¹²⁰ Miller & Maine, *supra* note 44, at 1485.

¹²¹ Bruce Paulson, *Asset Location and Integration: Several Old and New Ideas*, 11 J. WEALTH MGMT. 60, 61, 63 (2009).

¹²² Eric Kades, *One Trust, Two Taxes*, 20 PITT. TAX REV. 341, 356 (2023).

¹²³ Jack Whiteley, *Perpetuities in an Unequal Age*, 117 N'WESTERN UNIV. L. REV. 1477, 1495–97 (2023).

¹²⁴ *E.g.*, Andreas Fagereng et al., *Heterogeneity and Persistence in Returns to Wealth*, 88 ECONOMETRICA 115, 159–63 (2020); *see* OECD, *Inheritance Taxation in OECD Countries*, OECD Tax Policy Studies No. 28, at 42 (2021); Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. ECON. PERSPECTIVES 79, 82–85 (2013).

¹²⁵ Schmalbeck, *supra* note 7, at 144, 156; *see* Wojciech Kopczuk, *Taxation of Intergenerational Transfers and Wealth*, in HANDBOOK OF PUBLIC ECONOMICS (Alan J. Auerbach et al. eds. 2013) at [16].

¹²⁶ Cooper, *supra* note 23, at 205.

¹²⁷ Galle et al., *Money Moves*, *supra* note 16, at 665.

Family businesses can also be split so that controlling voting shares are held by the family while most of the value goes into trust.¹²⁸ But ultimately, this is an empirical claim that can be tested by data.¹²⁹ We turn there now.

B. How Big is the Potential Basket?

While strategies for avoiding transfer taxes are now well understood at a conceptual level, it is difficult to know exactly how widespread those strategies are. As best we can tell, the IRS has never released any information to the public about GRATs or other transactions between a grantor and a trust, about the number of trusts that are exempt from GST, nor even any information on how much GST has been paid. Even basic data about the universe of trusts established by or benefitting U.S. taxpayers is hard to come by, in part because many trusts have no obligation to file tax returns.¹³⁰

As a result, there is considerable value in providing even rough estimates about the scale of the tax avoidance wealthy families are now enjoying through the use of perpetually-exempt trusts and related strategies. In this sub-Part we report the topline results of our empirical study of perpetually tax-exempt trusts, in which we draw on both publicly-available data summaries released by IRS. We describe our methods and assumptions in detail in the Data Appendix. Because of the sparsity of available data, any estimates of the magnitudes of the problems we are describing necessarily involve some conjecturing.

With that caveat, we estimate that the magnitudes are quite large. To begin with, the amount of U.S. wealth held in trust likely exceeds \$5.6 trillion, according to the economists Gabriel Zucman, Thomas Piketty, and Emmanuel Saez (“ZPS”).¹³¹ Updating those methods with somewhat more recent data yields an estimate of \$7.7 trillion. We think, however, that this

¹²⁸ This is a common planning technique among current Silicon Valley founders. Julie Cohen, *Oligarchy, State, and Cryptopia*, unpublished manuscript, at 13–14 (Jan. 2025).

¹²⁹ Indirect prior evidence suggests that individuals may delay some tax planning until they are diagnosed with a terminal illness. Kopczuk, *supra* note 89, at 1821–22, 1845–46. These data are from 1977, before the GST or the rise of IDGTs and GRATs, *id.* at 1804–05, so their applicability to modern conditions is uncertain.

¹³⁰ Bridget Crawford, *Magical Thinking and Trusts*, 50 SETON HALL L. REV. 289, 304–06 (2019).

¹³¹ Gabriel Zucman, Thomas Piketty, and Emmanuel Saez, “Distributional National Accounts: Methods and Estimates for the United States,” Table S.B2, Current annual series, February 2022, <https://gabrielzucman.eu/usdina/>. ZPS use tax return data that ends in 2011, and use statistical methods to project trust income and wealth for later years.

estimate is probably rather low. For one, it excludes grantor trusts, which researchers with access to confidential IRS data (“Dowd et al.”) conclude are a substantial fraction of all trusts.¹³² This figure also assumes that trust assets have grown only at the rate of inflation since 2019. If they have instead grown at the same rate as the S&P 500, the figure would be upwards of \$13 trillion. Dowd et al., drawing on additional tax returns filed by entities that do business with trusts, suggest that figure may well be larger.¹³³

We then use IRS data on gift tax returns to draw inferences about the portion of this trust wealth that is likely to be perpetually exempt from estate tax or GST liability. For trusts that were funded during the life of the grantor, and established after 1997 (the earliest year of the public IRS gift-tax return data), we estimate that at least 80% of the funds are in trusts that have an inclusion ratio of 0%, and so are perpetually exempt from GST. For more recent trusts, those funded after major changes to the estate-tax system in 2010, the figure is more like 90%. Some of this wealth is likely held by families that would never face transfer-tax liability, but we estimate that between 67 and 80% of all trust wealth is held in trusts that by themselves exceed the estate-tax exemption amount. That in turn implies that in recent years between 57% and 70% of all trust-held wealth is in trusts that should face transfer tax but escape through the GST loophole.

These estimates have several potential gaps, including trusts funded at death (so-called testamentary trusts), trusts in existence before the GST went into effect in 1986, and trusts funded through aggressive GRAT transactions. As we explain in the Data Appendix, we doubt testamentary trusts would meaningfully affect our bottom-line number. For the other two data categories, some trusts in those categories may “only” be exempt for another five or six decades, such that while we may be overstating the share with perpetual exemption, we are still accurately capturing the share of trusts exempt through, say, the last years of this century.¹³⁴

¹³² The data table ZPS (and we) draw from reports values taken directly from the Form 1041 trust tax return, and with minor exceptions grantor trusts do not report their income on that form. <https://www.irs.gov/pub/irs-pdf/i1041.pdf>. These data, together with a spreadsheet summarizing our calculations, are separately available on the web site of the University of Pennsylvania Law Review.

¹³³ Conor Dowd et al., *How Much Wealth is Held in U.S. Trusts?*, unpublished manuscript, at 14 (Nov. 2024). We have agreed not to disclose exact details of the Dowd et al. paper before it is made publicly available.

¹³⁴ Trusts established before 1986 are exempt from GST but may not be perpetual. Similarly, GRAT-funded trusts likely provide large but temporally-limited tax benefits.

We also interpret the data as consistent with our hypothesis that most trusts funded through GRAT transactions are GST exempt.¹³⁵ While in theory the most aggressive “zeroed out” GRAT structure arguably does not require the taxpayer to file a gift-tax return, filers have substantial incentives to do so anyway.¹³⁶ Thus, we believe that most GRAT-funded trusts are captured in our data, and all else equal that implies that 57 to 70% of them are GST exempt.¹³⁷ We’ll argue later these are important facts to consider in choosing the best options for reform.

In sum, though the exact dollar value of perpetually-exempt or generationally-deferred trusts is highly uncertain, it is also likely to be extremely large. Putting the estimates together, we can calculate that exempt trusts likely hold between \$4.5 trillion (80% times the low-end estimate of \$5.6 trillion) and \$ 6.93 trillion (90% times our updated conservative estimate of \$7.7 trillion) in current wealth.¹³⁸ For perspective, recent estimates suggest that all individual U.S. wealth totals about \$140 trillion,¹³⁹ implying that wealthy Americans have successfully stowed between three and five and a half percent of all U.S. wealth in trusts that will never be subject to transfer tax.¹⁴⁰ Trust-held wealth may be one-third or more of all the wealth controlled by the richest 340,000 of 340 million Americans.¹⁴¹ If between 57 and 70 percent of trust wealth is escaping transfer tax through the GST loophole, the lost tax revenue on that amount, at the current 40% rate, is \$1.3 trillion to \$2.77 trillion.

III. THE WEALTH TRANSFER TAX DEBATES

¹³⁵ See *infra* text accompanying notes 326–335.

¹³⁶ *Id.*

¹³⁷ We cannot rule out the possibility that most or all GRATs are included in the 10 to 20% of trusts that are subject to GST, however.

¹³⁸ We emphasize that this higher-end estimate is lower than the figures that could be implied by other research.

¹³⁹ Matthew Smith, Owen Zidar, & Eric Zwick, *Top Wealth in America: New Estimates Under Heterogeneous Returns*, 138 Q.J. ECON. 515, [43–45] (2023). The Federal Reserve estimates that total U.S. net wealth, including non-profits, private equity, and trusts, but excluding corporations, is about \$170 trillion, https://www.federalreserve.gov/releases/z1/dataviz/z1/balance_sheet/table/

¹⁴⁰ The top .1% own about 13.5% of U.S. wealth. <https://fred.stlouisfed.org/series/WFRBSTP1300>.

¹⁴¹ That is, the top .1% of households own about \$23 trillion, and trusts that are large enough to by themselves qualify for the top .1% hold around \$7 trillion in our estimates. As we discuss in the Data Appendix, this share may be lower if survey estimates of high-end wealth fail to capture wealth in trusts.

Though we have just argued that the U.S. wealth-transfer-tax system is riddled with loopholes, some might counter that this state of affairs is not much of a concern because they view transfer taxes as undesirable. In this Part, we review three key arguments against taxing inherited wealth: (1) that it is economically inefficient, (2) that it interferes with equality of opportunity, and (3) that governments should actually subsidize, not tax, intergenerational gifts. Though each of these claims has at least some merit, we argue in the next Part that they are unpersuasive responses to taxes imposed on the transmission of vast, dynastic, wealth.

One common argument against the estate tax (and against taxes on inherited wealth more generally) is that it is an inefficient tax on savings.¹⁴² That is, these critics hold that the government should not tax any form of investment income, whether that investment is sold during the investor's life or instead held until their death.¹⁴³ In particular, some readers may be familiar with an older literature arguing that governments should not tax investments or investment income, or should impose tax on these kinds of capital only in particular limited circumstances, because those taxes distort households' decisions about whether to spend or save.¹⁴⁴

Research over the last decade has undermined this view.¹⁴⁵ Taxes on investments can be an effective response to taxpayer efforts to conceal their labor income or recharacterize it as earned through investments.¹⁴⁶ Some economists have argued that even if taxing investments and inheritances changes the time when households choose to spend their money, that change is good because it encourages productivity.¹⁴⁷ And the mathematical models

¹⁴² For a comprehensive overview of the economic debate through 2013, see generally Wojciecj Kopczuk, *Taxation of Intergenerational Transfers and Wealth*, in 5 HANDBOOK OF PUBLIC ECONOMICS 329 (Alan J. Auerbach et al. eds. 2013).

¹⁴³ LOUIS KAPLOW, THE THEORY OF TAXATION AND PUBLIC FINANCE 251–53 (2011); see Kopczuk, *supra* note 142, at 345 (describing this view).

¹⁴⁴ E.g., Joseph Bankman & David Weisbach, *The Superiority of an Ideal Consumption Tax Over an Ideal Income Tax*, 58 STAN. L. REV. 1413, 1422–30 (2006).

¹⁴⁵ For a useful overview, see Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421, 1443–44 (2018).

¹⁴⁶ Emmanuel Saez & Stefanie Stantcheva, *A Simpler Theory of Optimal Capital Taxation*, 162 J. PUB. ECON. 120, 126 (2018); David Schizer, *Between Scylla and Charybdis: Taxing Corporations or Shareholders (Or Both)*, 116 COLUM. L. REV. 1849, 1882–84 (2016); David Gamage, *The Case for Taxing (All of) Labor Income, Consumption, and Wealth*, 68 TAX L. REV. 355, 373–83, 413–31 (2015).

¹⁴⁷ See Mikhail Golosov, Narayana Kocherlakota, & Aleh Tsyvinski, *Optimal Indirect and Capital Taxation*, 70 REV. ECON. STUDIES 569, 575–77 (2003); Mikhail Golosov & Aleh Tsyvinski, *Policy Implications of Dynamic Public Finance*, 7 ANN. REV. ECON. 147, 154–

on which the most prevalent critique of investment taxation was built have been shown to lack any real foundation.¹⁴⁸ Taxes on inheritances could also be more efficient than other investment taxes to the extent that some households would not change their own behavior to save on taxes for their heirs.¹⁴⁹

Even if taxes on savings can sometimes be desirable, there are at least two important potential arguments against taxes on inheritances in particular, and potentially even to subsidize rather than tax estates. First, and somewhat counter-intuitively, some commentators argue that society should avoid taxing inherited wealth on the grounds of equality of opportunity. This is counter-intuitive because historically, equal opportunity was an important consideration for Congress in adopting estate taxes.¹⁵⁰ John Rawls and other philosophers who engaged with him argued that it is much easier to treat each person's wealth and social standing as fairly earned if everyone begins life with similar opportunities to earn fame and fortune.¹⁵¹ Inherited wealth seems at least in some tension with that goal.¹⁵²

But there may also be arguments that equal opportunity can be a reason to fund inheritances, at least those of the merely comfortable, rather than the mega-rich.¹⁵³ As Miranda Perry Fleischer has argued, many of the key advantages of inherited wealth are common among not just the very wealthiest, but more broadly among families of professionals who can pass along social connections, start-up funds, and the savvy to navigate America's complex higher-education funding and application systems.¹⁵⁴ It would not

57 (2015). The full implications of this approach are complex, however. *See* Daniel Hemel, *Capital Taxation in the Middle of History*, 99 N.Y.U. L. REV. 1554, 1613–25 (2024).

¹⁴⁸ Ludwig Straub & Ivan Werning, *Positive Long-Run Capital Taxation: Chamley-Judd Revisited*, 110 AM. ECON. REV. 86, [29-30] (2020) (“The original proofs are magically so simple that they almost feel too good to be true. And indeed, they are.”); *see* Saez & Stantcheva, *supra* note 146, at 122 & n.11.

¹⁴⁹ STUART ADAM ET AL., *TAXATION BY DESIGN: THE MIRRLEES REVIEW* 352–54 (2011); Batchelder, *supra* note 8, at 27–29.

¹⁵⁰ JOSEPH FISHKIN & WILLIAM E. FORBATH, *THE ANTI-OLIGARCHY CONSTITUTION* 180, 467 (2022).

¹⁵¹ JOHN RAWLS, *A THEORY OF JUSTICE* 277–79 (1971); *see also* Tait, *supra* note 55, at 1030–31 (summarizing similar views in Rousseau, Bentham, and Mill).

¹⁵² Anne Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 476–87 (2007); Etienne Fize et al., *Can Inheritance Tax Promote Equality of Opportunity?*, 2 LSE PUB. POL'Y REV. 9, 16 (2022).

¹⁵³ *Cf.* LARRY BARTELS, *UNEQUAL DEMOCRACY* 191–93 (2d ed. 2016) (arguing that many voters have moral intuitions that connect inherited wealth with economic opportunity).

¹⁵⁴ Miranda Perry Fleischer, *Not So Fast: The Hidden Difficulties of Taxing Wealth*, in

be practical, or probably politically viable, to tax away these advantages, and many of them would be better made more widely available rather than less.¹⁵⁵ Thus, it might be better to “level up,” encouraging wider transmission of these goods, rather than (only) leveling down.¹⁵⁶ The economists Emmanuel Farhi and Ivan Werning have offered similar arguments for directly subsidizing bequests.¹⁵⁷

More broadly, Louis Kaplow argues that there is a positive externality from gift-giving and so society should subsidize bequests.¹⁵⁸ The basic structure of Kaplow’s argument is that gifts create more utility than other forms of consumption.¹⁵⁹ Suppose that giving is an act of consumption for Jim: he derives utility from making the recipient better off, or he derives utility from others observing his generosity, or some combination of the two. If Jim buys himself a watch for \$100, he gets \$100 worth of consumption (presumably). If he instead gives Della a set of combs, he might derive \$60 in utility, while Della also receives \$100, a \$160 total. To encourage Jim to take Della’s well-being further into account, Kaplow suggests, we should give Jim a \$100 subsidy, so that he fully internalizes all her benefits as well as his own.¹⁶⁰

We have many reservations about Kaplow’s claims. If Jim does not observe or care about Della’s tax results, subsidies would not change his

WEALTH 261, [35–37] (Jack Knight & Melissa Schwartzberg eds. 2017) [hereinafter Perry Fleischer, Difficulties]; see Corak, *supra* note 124, at 91–92, 94–95; Benjamin Means, *Wealth Inequality and Family Businesses*, 65 EMORY L.J. 937, 942 (2016); Miranda Perry Fleischer, *Equality of Opportunity and the Charitable Tax Subsidies*, 91 B.U. L. REV. 601, 643 [hereinafter Perry Fleischer, Opportunity].

¹⁵⁵ Perry Fleischer, Difficulties, *supra* note 154, at 36–37; see Perry Fleischer, Opportunity, *supra* note 154, at 654, 658–59. Similarly, Anne Alstott argues for leveling up at least for households that would receive no private inheritance. Alstott, *supra* note 152, at 490–92. But Alstott also supports heavy taxation of private inheritances to fund these transfers. *Id.* at 492.

¹⁵⁶ Perry Fleischer, Difficulties, *supra* note 154, at 36–37; cf. Perry Fleischer, Opportunity, *supra* note 154, at 658–59 (suggesting that government policy towards charities should encourage both leveling up and down).

¹⁵⁷ Emmanuel Farhi & Ivan Werning, *Progressive Estate Taxation*, 125 Q.J. ECON. 635 (2010).

¹⁵⁸ KAPLOW, *supra* note 143, at 249–74.

¹⁵⁹ *Id.* at 253–54.

¹⁶⁰ *Id.* Similarly, we might impose lower taxes on families that highly value dynastic savings because those families get more utility out of their money than average. Cf. Daniel Shaviro, *Beyond the Pro-Consumption Tax Consensus*, 60 STAN. L. REV. 745, 785 (2006) (noting this potential argument for households with preferences for savings generally).

behavior.¹⁶¹ So, too, if bequests are mostly accidental, instead of deliberate, subsidies are wasteful.¹⁶² And the underlying model of how social planners should account for preferences about the well-being of others is controversial and can lead to improbable policy outcomes.¹⁶³ Still, Kaplow's argument is widely recognized as the standard economic account of how tax should treat gifts and bequests.¹⁶⁴

So far, in reviewing the case against inheritance taxes, we have assumed that both the tax and the arguments against it must be assessed equally for all manner of inheritances. In the next Part, we revisit another, older justification for taxes on the very largest estates.

IV. DYNASTIES ARE DIFFERENT

We concluded in the last Part that the case for taxing all inherited wealth is somewhat uncertain, particularly with respect to small inheritances that enhance the life opportunities of heirs of relatively moderate means. But today, only families with more than \$30 million in savings face any risk of transfer taxation.¹⁶⁵ Inherited wealth is an increasingly important component of the global rise in inequality.¹⁶⁶ And the key failings of the contemporary transfer-tax system, we've seen, turn on the elaborate tax planning of the mega-rich, who hold a surprisingly large share of national wealth in trusts that will not face transfer tax until the twenty-second century, if ever.

In this Part, therefore, we consider a narrower version of the inheritance-tax debate. The original purpose of the estate tax was to discourage the concentration of inherited wealth and power in a relatively small group of the most powerful.¹⁶⁷ We argue that the case for taxing these massive inheritances is indeed the original core purpose of the estate tax, and

¹⁶¹ ADAM ET AL., *supra* note 149, at 354.

¹⁶² See KAPLOW, *supra* note 143, at 264 (acknowledging that subsidies would not affect accidental bequests).

¹⁶³ Kopczuk, *supra* note 142, at 342–43.

¹⁶⁴ *Id.*

¹⁶⁵ Sara A. Wells, *IRS Announces Increased Gift and Estate Tax Exemption Amounts for 2025*, Morgan Lewis Lawflash, Oct. 24, 2024, <https://www.morganlewis.com/pubs/2024/10/irs-announces-increased-gift-and-estate-tax-exemption-amounts-for-2025>

¹⁶⁶ Fize et al., *supra* note 152, at 15.

¹⁶⁷ See David Duff, *Alternatives to the Estate and Gift Tax*, 57 B.C. L. REV. 893, 904–06 (2016); David Frederick, *Historical Lessons from the Life and Death of the Federal Estate Tax*, 49 AM. J. LEGAL HIST. 197, 206 (2007).

that it remains urgent as a policy matter today. In particular, the philosophical and economic arguments against taxing inheritances are not persuasive when it comes to large dynastic estates. There is thus a strong case for supplementing the general tax system, as it applies intra-generationally, with a special additional tax aimed specifically at curbing the inter-generational accumulation of massive dynastic wealth.

A. *Dynasties Are Rich*

The first, and most obvious, way in which dynastic inherited wealth differs from other estates is that it is passed and received by the very richest Americans.¹⁶⁸ Nearly every commentator agrees that all else equal, tax systems should put heavier burdens on households with a greater ability to pay.¹⁶⁹ Arguably, for the very wealthiest families, the real burden of paying tax is almost zero on the margin, as another dollar means almost nothing to that family's well-being.¹⁷⁰ Those families also likely have less need for transfers from the government to help equalize their opportunities with others. Further, because there are strong correlations between earning power, wealth, and the likelihood of leaving an estate, taxing inherited capital can be an efficient way to “tag” or target an individual's ability to pay.¹⁷¹

Even if it were the case that taxes on capital should be kept low or at zero, it's difficult to see that as a justification for the modern state of wealth-transfer taxes for the wealthy. Many families are able to achieve minimal effective tax rates, but only by means of navigating a complex maze of tax planning under the guidance of expensive legal counsel. Some inherited assets, such as publicly-traded stock, are relatively more difficult to plan with.¹⁷² If low rates are the goal, it would be much preferable to institute something like our proposal, but with a low statutory rate, along with lowering the rates of the estate and gift taxes more generally. That way, all families would face similar rates, instead of the current world in which those with a willingness and ability to engage in extensive tax planning get far lower rates than others—a situation that is both unfair and economically distortive.¹⁷³

¹⁶⁸ Kopczuk, *supra* note 142, at 344.

¹⁶⁹ Stephen Utz, *Ability to Pay*, 23 WHITTIER L. REV. 867, 867 (2002).

¹⁷⁰ Saez & Stantcheva, *supra* note 146, at 122–23.

¹⁷¹ Batchelder, *supra* note 8, at 23–26; Kopczuk, *supra* note 142, at 352; Saez & Stantcheva, *supra* note 146, at 125.

¹⁷² See WILLIAM STRENG, ESTATE PLANNING 475–513 (2015) (describing unique planning opportunities with family-controlled businesses).

¹⁷³ See ADAM ET AL., *supra* note 149, at 362.

B. *Dynasties Have Unique Opportunities*

Next, equality of opportunity arguments about inherited wealth play out differently for dynastic wealth, as Prof. Perry Fleischer has herself observed, because dynasties bring unique opportunities that other inheritances lack.¹⁷⁴ In a sense this is tautological, to the extent that we define dynastic wealth as intergenerational family control of resources that far exceed what other families can access.¹⁷⁵ The easiest examples here are single families that own controlling stakes in nationwide or major regional businesses: Waltons, Murdochs, Buffetts.¹⁷⁶ For these families, inheritance goes beyond mere material assets to include the prestige, social capital, and connections of their famous names.¹⁷⁷ The wealthy in America increasingly drive political outcomes.¹⁷⁸

Even setting aside the power of money, control over business assets and operations grants dynastic families a kind of influence that few others can match. Obviously, big businesses today can have important influence over the economy and society, whether through their supply-chain choices, their hiring practices, or what they choose to make and sell.¹⁷⁹ Increasingly, their data about how to reach consumers, and what those consumers want, gives them a kind of cultural reach that few institutions can match.¹⁸⁰ And of course some enterprises directly convey the power to influence what the public hears and sees, whether via cable news or social media posts.¹⁸¹ Others

¹⁷⁴ See Miranda Perry Fleischer, *Divide and Conquer: Using an Accessions Tax to Combat Dynastic Wealth Transfers*, 57 B.C. L. REV. 913, 918–20 (2016); see also OECD, *supra* note 124, at 44 (arguing that taxes on small inheritances would reduce equality of opportunity, but taxes on large inheritances would improve it).

¹⁷⁵ See Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287, 312–15 (1999).

¹⁷⁶ See generally CHUCK COLLINS, *THE WEALTH HOARDERS* (2021).

¹⁷⁷ Allison Anna Tait, *Inheriting Privilege*, 106 MINN. L. REV. 1959, 1976–77, 1991, 2005 (2022).

¹⁷⁸ JACOB S. HACKER & PAUL PIERSON, *WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER--AND TURNED ITS BACK ON THE MIDDLE CLASS* 70–72 (2010).

¹⁷⁹ C. Fritz Foley et al., *Multinational Activity in the Modern World*, in *GLOBAL GOLIATHS: MULTINATIONAL CORPORATIONS IN THE 21ST CENTURY ECONOMY* 1, 1–33 (C Fritz Foley et al. eds. 2021); Lukas Arndt, *Linking Wealth and Power: Direct Political Action of Corporate Elites and the Wealthiest Capitalist Families*, Centre for Research on Social Inequalities Paper. No. 2023-1, at 2.

¹⁸⁰ JULIE E. COHEN, *BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM* 80–90, 105–07 (2019).

¹⁸¹ SHOSHANA ZUBOFF, *THE AGE OF SURVEILLANCE CAPITALISM* 8, 218–21, 294 (2019);

can literally shape the future through control over key components of national infrastructure, whether shipping companies or battery manufacturers.¹⁸² By offering to put these powers at the disposal of favored elected officials, business owners can turn their economic might into political influence, as well.¹⁸³

Unlike most business owners, dynasties do not have to share control of these kinds of powerful institutions with thousands or millions of other owners.¹⁸⁴ In a typical publicly-traded company, equity owners can influence the firm only very indirectly, through their vote for a board of directors that in turn selects and writes contracts with managers. Coordinating with others who have similar preferences for the firm's behavior is often costly and difficult, and owners must at the same time guard against the coordinated efforts of others who might have contrary goals.¹⁸⁵ But a Mark Zuckerberg, who owns a controlling share of the votes of Meta, has no such problems.¹⁸⁶ Like Zuckerberg, founders can use dual-class stock to gain the tax benefits of an estate freeze while retaining voting control of their company.¹⁸⁷ If Zuckerberg wants Meta to spotlight political communications (as he did in 2020) or downplay them (as he did in 2024),¹⁸⁸ that is largely his decision to make, albeit subject to potential costs if markets believe his choices reduced the value of the firm.

see Maria Petrova, *Inequality and Media Capture*, 92 J. PUB. ECON. 193, 199–204 (2008).

¹⁸² CONGRESSIONAL RESEARCH SVC., INFRASTRUCTURE INVESTMENT AND THE FEDERAL GOVERNMENT 1 (Nov. 2018) (noting that energy and telecom infrastructure is “overwhelmingly in private ownership”); Josh Bivens, Economic Policy Institute, *The Potential Macroeconomic Benefits from Increasing Infrastructure Investment*, July 2017, <https://www.epi.org/publication/the-potential-macroeconomic-benefits-from-increasing-infrastructure-investment/> (stating that more than half U.S. infrastructure is privately held).

¹⁸³ FISHKIN & FORBATH, *supra* note 150, at 230; Tait, *supra* note 55, at 1024–29.

¹⁸⁴ Randall Morck, Daniel Wolfenzon, & Bernard Yeung, *Corporate Governance, Economic Entrenchment, and Growth*, 43 J. ECON. LITERATURE 655, 657, 660 (2005).

¹⁸⁵ George G. Triantis, *Organizations as Internal Capital Markets: The Legal Boundaries of Firms, Collateral, and Trusts in Commercial and Charitable Enterprises*, 117 HARV. L. REV. 1102, 1127–28 (2004).

¹⁸⁶ See Arndt, *supra* note 179, at 3, 21 (arguing that family-owned businesses are more likely to exert political influence on their own behalf because of lower agency and free-riding costs); Tait, *supra* note 177, at 1978, 1991–92.

¹⁸⁷ Morck et al., *supra* note 184, at 657; see James M. Delaney, *Split Interest Valuation: The Devil is in the Details*, 37 CAP. U. L. REV. 929, 935 (2009) (stating that dual-class strategy works with a GRAT despite 1990 congressional effort to block it).

¹⁸⁸ Rachel Treisman, *Meta is limiting how much political content users see*, NPR, Mar. 26, 2024, <https://www.npr.org/2024/03/26/1240737627/meta-limit-political-content-instagram-facebook-opt-out>.

Alternately, consider families whose wealth is vast but diversified. There are about 800 billionaires in the U.S. today, and their collective net worth (\$6.2 trillion, or 3.8% of all privately-held wealth) well exceeds the combined wealth of the 165 million poorest Americans (2.5% of all private wealth).¹⁸⁹ This kind of buying power can drive markets, even found new cities.¹⁹⁰ And with restrictions on campaign and political spending growing increasingly ragged, money today is easily turned into political influence.¹⁹¹ It's been reported that in 2024, billionaires alone spent more on U.S. elections than the entire country's political spending in 2020.¹⁹²

In short, dynasties uniquely possess opportunities that few others enjoy. Just societies, we argue, should try to limit the extent to which some individuals can inherit power to achieve their policy goals that is thousands or millions of times the power of others. The most plausible method for tipping these scales a bit closer to balanced is through taxation.¹⁹³ Dynasties hold opportunities that cannot be "leveled up"; even in Lake Wobegon, everyone cannot be vastly more influential than average. The equal-opportunity case for wealth-transfer taxes thus extends to taxation that aims to limit dynastic wealth, and indeed is at its most persuasive in that setting.

C. *Dynasties and Externalities*

A related economic frame in which to consider our argument is to see it as a version of a corrective or "Pigouvian" tax on the transmission of concentrated family wealth, along the lines suggested by Wojciech Kopczuk,¹⁹⁴ and more recently sketched by Eric Kades.¹⁹⁵ A Pigouvian tax, for readers unfamiliar with the concept, is a tax on something that creates

¹⁸⁹ Americans for Tax Fairness, *The Billionaire Century: Report*, July 11, 2024, <https://americansfortaxfairness.org/the-billionaire-century/>

¹⁹⁰ Conor Dougherty & Erin Griffith, *The Silicon Valley Elite Who Want to Build a City from Scratch*, N.Y. TIMES, Aug. 25, 2023.

¹⁹¹ Daryl J. Levinson, Foreword, *Looking for Power in Public Law*, 130 HARV. L. REV. 31, 123 (2016); Robert Yablon, *Campaign Finance Reform Without Law*, 103 IOWA L. REV. 185, 186 (2017).

¹⁹² Anna Massoglia, *Outside Spending on 2024 Elections Shatters Record, Fueled by Billion-Dollar 'Dark Money' Infusion*, OpenSecrets, Nov. 5, 2024, <https://www.opensecrets.org/news/2024/11/outside-spending-on-2024-elections-shatters-records-fueled-by-billion-dollar-dark-money-infusion/>.

¹⁹³ Felix B. Chang, *How Should Inheritance Law Remediate Inequality?*, 97 WASH. L. REV. 61, 89–93 (2022); see OECD, *supra* note 124, at 49–52 (showing through simulations that inheritance taxes significantly slow growth of extreme familial wealth).

¹⁹⁴ Kopczuk, *supra* note 125, at 343.

¹⁹⁵ Kades, *supra* note 122, at 355–60.

negative spillovers or “externalities” on others, such as taxes on carbon or alcohol, and is intended to discourage production of that thing, rather than just raising money.¹⁹⁶ Thus, if concentrated wealth creates significant negative externalities, taxing dynasties could be efficient, even if taxing inheritances more generally would not. That is, this argument is in many ways the mirror image of the subsidy argument we described earlier, in which authors such as Kaplow argued that inheritances should be exempt as a way of encouraging them.

1. Social Costs of Dynasty

A Pigouvian tax is supposed to measure the amount of social harm an activity causes.¹⁹⁷ A deep sociological and political science literature now attests to the social costs of concentrated wealth and power, and the corresponding benefits to even incremental reductions in extreme inequality.¹⁹⁸ At the macro level, wealth concentration tends to mean that the nation delivers what’s good for the wealthiest, not everyone else.¹⁹⁹ For example, because they have enough influence to achieve their goals without coordinating much with others, dynasts can achieve policy outcomes that a comparably-resourced collective could not.²⁰⁰ Because they do not have to rely on outside financing, they can acquire key assets that deliver power in the future—media companies and infrastructure, say—without having to worry about the liquidity needed to keep afloat until power arrives.²⁰¹ At the micro level, researchers find at least correlational linkages between highly unequal societies and deep individual stress, anxiety, and discontent with moderate success, even among the relatively affluent.²⁰² Rising wealth concentration means a diminishing sense of autonomy for others, and unsurprisingly that is demoralizing and frustrating.²⁰³

There are also purely economic accounts of the costs of highly

¹⁹⁶ David Gamage, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L. J. 1283, 1284 (2004).

¹⁹⁷ JONATHAN GRUBER, PUBLIC FINANCE AND PUBLIC POLICY 120 (6th ed. 2019).

¹⁹⁸ Bruce G. Link et al., *Stigma and Social Inequality*, in *Handbook of the Social Psychology of Inequality* 49 (Jane D. McLeod et al. eds., 2014).

¹⁹⁹ Edward Glaeser, Jose Scheinkman, & Andrei Shleifer, *The Injustice of Inequality*, 50 J. MONETARY ECON. 199, 211–15 (2003).

²⁰⁰ Morck et al., *supra* note 184, at 695.

²⁰¹ Morck et al., *supra* note 184, at 695.

²⁰² RICHARD G. WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* 43–44, 52–54 (2011).

²⁰³ Link et al., *supra* note 198, at 49.

concentrated and dynastic wealth, as well, though the causal evidence is not always overwhelming. For example, suggestive evidence points to links between egalitarian societies and greater competitiveness and economic efficiency.²⁰⁴ Dynasts use their power to protect their own interests, and often those interests are not the best use for investor or state resources.²⁰⁵ Firms controlled by families are apt to be less innovative and tend to underperform over time, and countries where this is common can lag in economic growth as a result.²⁰⁶ Societies with highly concentrated wealth are generally less resilient to crisis, perhaps because they tend to select for officials who are compliant with the ultra-rich and willing to indulge their idiosyncratic preferences, rather than choosing for competence or even a diverse set of ideas.²⁰⁷ Many of these societies experience ruinous inflation, likely because of their inability to credibly commit to set aside the preferences of their leaders in favor of long-run good policy.²⁰⁸

2. Taxes or Subsidies?

We've been arguing for a tax on dynastic wealth, but what about Kaplow's argument that we should actually subsidize gifts and bequests? Here again, dynasties are different. Recall that Kaplow suggested that we should subsidize giving with an exemption for heirs, because gifts create benefits for both the recipient and to a lesser extent the giver. We were skeptical that this latter premise should affect tax policy—that is, we argue

²⁰⁴ An important survey, although now two decades old, is James Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 831–36 (2001). A more recent synthesis, reporting generally negative long-run correlations between inequality and growth in developed countries, is Enea Baselgia & Reto Foellmi, *Inequality and Growth*, in HANDBOOK OF LABOR, HUMAN RESOURCES, AND POPULATION ECONOMICS 1, 9–13 (Klaus F. Zimmermann ed. 2023).

²⁰⁵ Morck et al., *supra* note 184, at 657, 674, 693–94; see Roy van de Weide & Branko Milanovic, *Inequality is Bad for the Growth of the Poor (but Not for That of the Rich)*, 32 WORLD BANK ECON. REV. 507, 516–17 (2018).

²⁰⁶ Morck et al., *supra* note 184, at 678, 680, 691–92; Eric Gedajlovic et al., *The Adolescence of Family Firm Research*, 38 J. MGMT. 1010, 1023 (2012); Francesco Caselli & Nicola Gennaioli, *Dynastic Management*, 51 ECON. INQUIRY 971, 974, 985 (2013). For evidence that later generations of family firms generally perform poorly, see Nicholas Bloom & John Van Reenen, *Measuring and Explaining Management Practices Across Firms and Countries*, 122 Q.J. ECON. 1351, 1383 (2007); Matthew Smith et al., *Capitalists in the Twenty-First Century*, 134 Q.J. ECON. 1675, 1704–1711 (2019); see also Gedajlovic et al., *supra*, at 1016 (noting that evidence later generations of family firms perform poorly is “compelling”).

²⁰⁷ Gamage & Brooks, *supra* note 17, at 514.

²⁰⁸ See Randall Morck & Bernard Yeung, *Family Control and the Rent-Seeking Society*, 28 ENTREPRENEURSHIP THEORY & PRAC. 391, 399 (2004).

that policy makers should not consider the utility effects that givers might get from thinking about the consumption their gift enables.

But even if we accepted that other-regarding preferences should be a factor in policy, there would be no subsidy for dynasties. Dynasts' preferences for the wealth of their descendants would likely be greatly outweighed by the other-regarding preferences of everyone else. Almost by definition, concentrated economic and political power is zero-sum, or worse: if dynasts are able to exert power, others in society have lost it.²⁰⁹ In a society that permits unlimited transfers of dynastic power, dynasts may be happier, but everyone else will be demoralized by the understanding that their own descendants will be subject to the preferences of the dynasts.²¹⁰ Presumably, dynasts value the transmission of power and influence because they believe their children will have preferences that would not otherwise be satisfied under majority voting. Thus, assuming that all members of the current generation have roughly equal regard for their heirs, transmittal of dynastic power will typically reduce social welfare, as the majority of parents understand that their families will lose power in the future. As a result, even if Kaplow's analysis makes sense for relatively small quotidian gift-giving, it does not extend to the case of vast inherited fortunes.

We might also essentially ignore the preferences of the very wealthiest households because of the very low marginal utility of money of their heirs.²¹¹ That is, a prospective dynast is unlikely to get any more utility from leaving their heirs \$1.01 billion than they would get from leaving behind \$1 billion. Further, the larger the bequest, the more likely it is that funds will not be consumed for several generations, and of course that is especially so in the case of dynasty trusts that deliberately limit distributions in order to preserve the family nest egg.²¹² While we do not have good evidence on the extent to which dynastic planners discount future expenditures, nearly all humans have a "discount factor" in which they prefer earlier to later consumption, if for no other reason than the time value of money.²¹³

²⁰⁹ See MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 103–08 (1983); Robert Goodin & John Dryzek, *Rational Participation: The Politics of Relative Power*, 10 BRIT. J. POL. SCI. 273, 276–78 (1980).

²¹⁰ Cf. Glogower, *supra* note 145, at 1442 ("wealth doesn't just provide additional economic opportunities to the wealthy, but ... forecloses similar opportunity for those without equal economic power").

²¹¹ Kopczuk, *supra* note 142, at 350; see Saez & Stantcheva. *supra* note 146, at 122–23.

²¹² See MADOFF, *supra* note 111, at 82; Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 729 (1990).

²¹³ See Shane Frederick et al., *Time Discounting and Time Preference: A Critical*

Accordingly, we might again think that the marginal dollar added to a dynastic bequest would have almost zero utility for the dynast, because even if they value the consumption of their heirs, the marginal dollar will go to heirs so distant that the present discounted value of the distant heirs' consumption is very low.²¹⁴

3. Can Taxes Reduce Dynastic Power?

Commentators sometimes argue that, rather than resisting oligarchy, wealth-transfer taxes would instead exacerbate political influence by the wealthiest. These authors claim that the threat of a future tax would encourage wealthy households to spend their money rather than saving it, and that one of the things households would purchase would be political influence.²¹⁵ If this were so, our anti-dynastic power goals might be turned on their heads. We agree that future taxes may motivate current lobbying efforts, and indeed in the next Part we describe the implication of that possibility for how best to design a tax on dynasties.

But because political influence today simply is not the same as political influence tomorrow, the commentators' argument goes wrong in its apparent claim that transfer taxes can only shift the timing of dynasties' political power without reducing it. Political influence is not like a spare refrigerator that can be kept in the garage; it must be renewed.²¹⁶ Further, there are likely diminishing returns to political spending in any given period—for example, because very large expenditures are hard to conceal and generate blowback for the recipient officials.²¹⁷ Investments themselves—savings, rather than spending—can be sources of political influence.²¹⁸ And of course taxes reduce the total resources available to the dynasty. Therefore, even if the commentators are right that transfer taxes shift political spending earlier

Review, 40 J. ECON. LIT. 351, 355–60 (2002).

²¹⁴ See David Weisbach & Cass R. Sunstein, *Climate Change and Discounting the Future: A Guide for the Perplexed*, 27 YALE L. & POL'Y REV. 433, 438–49 (2009).

²¹⁵ Bankman & Weisbach, *supra* note 144, at 1448–51; Edward McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 324 (1994).

²¹⁶ See Gary Jacobson, *How Do Campaigns Matter?*, 18 ANN. REV. POL. SCI. 31, 33 (2015) (summarizing evidence on transient effects of political expenditures); *cf.* Glogower, *supra* note 145, at 1447–48 (arguing that unspent wealth gives greater political power because it persists over time).

²¹⁷ See, e.g., Abby Wood & Christian Grose, *Campaign Finance Transparency Affects Legislators' Election Outcomes and Behavior*, 66 AM. J. POL. SCI. 516, 528–31 (2022).

²¹⁸ MADOFF, *supra* note 111, at 69; James R. Repetti, *Democracy and Opportunity: A New Paradigm in Tax Equity*, 61 VAND. L. REV. 1129, 1165, 1168–69 (2008).

in time, taxes are very likely to reduce a dynasty's influence, particularly in the later time periods that are the central concern of our proposal.

Lastly, we doubt the commentators' suggestion that more direct methods for limiting political influence, such as campaign-finance reform, could by themselves constrain the power of billionaire dynasties. For one thing, as we have already described, vast wealth and business holdings offer an array of means of social influence far beyond the scope of what can realistically be regulated through lobbying or campaign-contribution limits.²¹⁹ Moreover, campaign-finance law, like other regulatory regimes, is subject to influence and gaming.²²⁰ Reducing the resources available to dynasties through a transfer tax may diminish their capacity for bending campaign-finance rules to their own ends.²²¹

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In sum, the historical aim of the U.S. estate tax regime to constrain dynastic wealth fits well with philosophical and economic tax-design principles. While there is a solid case for taxing inheritances of the ordinarily well-off, that case is several orders of magnitude stronger when it comes to generational dynasties.

V. DESIGN CONSIDERATIONS FOR TRANSFER TAX REFORM

So far we have argued that although there are compelling reasons to tax dynastic wealth, our existing system of transfer taxation has several glaring flaws that allow families to defer and even perpetually avoid taxes on their inheritances. In this Part, we set out what we see as the key criteria for reform. To succeed politically and practically, reformers likely must disentangle inheritance taxes from death, such as by either deferring payments or instead collecting payment in small down-payments in advance. Advance payments are much preferable because, compared to deferrals, they are politically easier to enact, reduce the risk of repeal or being undermined over time, and mitigate concerns about taxpayer bankruptcy or avoidance. The next Part then details how a system of advance payments could operate.

²¹⁹ GRAETZ & SHAPIRO, *supra* note 2, at 4–5, 240–45, 251–52; Kades, *supra* note 122, at 354–55.

²²⁰ Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1, 40–51 (2012).

²²¹ Clint Wallace, *A Democratic Perspective on Tax Law*, 98 WASH. L. REV. 947, 992–93, 1003 (2023).

A. *Avoiding Liquidity and Valuation Problems Through Deferral*

A tax on intergenerational transfers doesn't have to be collected when someone dies, and indeed probably works much better if it is assessed and collected at times unassociated with death. We've argued that many of the key goals of a dynasty tax can be met so long as later generations don't enjoy disproportionate wealth and power, and it should be possible to achieve that with taxes that are spread out over time. For example, a tax collected over the lifetime of a family's second dynastic generation would obviously also reduce the dynastic wealth of the third generation. This is the underlying logic motivating some proponents of inheritance taxes, such as Lily Batchelder, who have argued that the transfer system can function by taxing a trust's distributions to heirs, rather than the initial transfer of wealth into the trust (say, at the time of the founder's death).²²² However, there is a significant potential problem with waiting until heirs actually receive cash, as we will return to momentarily.

Professor Batchelder argues that waiting until heirs actually receive wealth is preferable because it helps with the valuation problem that underlies the estate freeze techniques we described in Part I,²²³ and this insight can be generalized to estate taxes more broadly. Recall that a common planning technique is to transfer assets into a trust outside the transferor's taxable estate, and to do so at a moment when the transferor can claim the asset's value is very low. Again, there is little about the fact of a transfer—or even a sale, if it is between related parties like the transferor and her trust—that gives the government reliable information about an asset's value. Similarly, death does not give us new information about the value of an estate. Waiting until assets are actually sold, and maybe then distributed to heirs in the form of cash, is what allows for a reliable valuation.²²⁴

Voluntary sales or other forms of smoothing over time also help to overcome possible liquidity problems.²²⁵ A tax on the full value of an estate, whether at death or any other time other than when the underlying assets are sold, may lead the administrator or trustee to have to sell off a portion of the

²²² Batchelder, *supra* note 8, at 65–66.

²²³ *Id.*; see also McCaffrey & McCaffrey, *supra* note 85, at 41–43 (proposing that estate taxes be deferred until heirs sell assets).

²²⁴ Dodge, *supra* note 98, at 599.

²²⁵ David J. Herzig, *The Income Equality Case for Eliminating the Estate Tax*, 90 S. CAL. L. REV. 1143, 1196 (2017).

bequest to pay the resulting bill.²²⁶ The exact extent of this problem is uncertain, as many estates and trusts hold substantial liquid assets, or could borrow against others.²²⁷ But as Professors Graetz and Shapiro describe, voters seem to overwhelmingly dislike the possibility that families will be forced to sell their businesses to pay transfer tax, and opponents of the estate tax have skillfully played up these concerns.²²⁸

In addition, avoiding fire sales and other liquidity crunches is economically useful because it helps maintain the transfer-tax system as a “price instrument” that neither favors nor disfavors trusts per se. As Eric Kades has argued, a tax on perpetual trusts is a good compromise in the traditional debate over whether to outlaw perpetual trusts, in that it allows for perpetual trusts to continue to exist, but only if their founders internalize or take account of the social costs they create.²²⁹ A tax bill that was prohibitively large might instead serve as a *de facto* ban for some trusts.

Graetz and Shapiro also argue that estate taxes are unpopular exactly because they typically occur when someone has died.²³⁰ Spreading tax payments out over time would of course help to soften any perception that taxes on intergenerational wealth are somehow a tax on death itself.

B. Vulnerabilities of a Deferral-Only Approach

Although deferring tax on inheritances has some key advantages, it also has some serious downsides. In earlier work, we have described the dangers a tax system confronts when wealthy and influential taxpayers face

²²⁶ Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 363, 436 (1993).

²²⁷ Congressional Budget Office, *The Effects of the Federal Estate Tax on Farms and Small Businesses*, July 2005; see Jacobson et al., *supra* note 1, at 127 (reporting that less than five percent of reported estate value was in the form of small business assets); Repetti, *supra* note 204, at 866 (noting that families often use life insurance to cover estate tax expenses).

²²⁸ GRAETZ & SHAPIRO, *supra* note 2, at 62–73; see also Batchelder, *supra* note 8, at 4. Current law includes special exceptions for certain farms and family-held businesses, but these provisions are so complex that they failed to allay voter concerns about liquidity. GRAETZ & SHAPIRO, *supra* note 2, at 215–17. A simpler system in which no family faces liquidity crunches may be more persuasive. Cf. Brooks & Gamage, *supra* note 18, at 528. (arguing that informational complexity makes it easier for wealthy families to advance their interests). Provisions targeted at small business also distort investment decisions. Batchelder, *supra* note 8, at 57, 90.

²²⁹ Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (And Beyond)*, 60 B.C. L. REV. 145, 204–12 (2019).

²³⁰ See *supra* note 21.

the prospect of large future tax bills.²³¹ The concrete threat of a large impending tax liability motivates taxpayers to work to repeal or undermine the provisions that will affect them (and others) and to seek legal planning maneuvers to find and exploit loopholes.²³² With all of their money still in their pockets, taxpayers have both time and resources to implement these efforts.²³³ Even aside from lobbying and tax avoidance, taxpayers always have the simple option of spending most of their money before the date of tax collection, leaving the government only with the limited remedies the bankruptcy process can provide.²³⁴ Rational taxpayers who anticipate these effects will exploit the opportunity to defer tax in order to take advantage of the expected lower effective rate in the future.²³⁵ Delayed tax reform will predictably deliver less revenue than reform that brings in revenue immediately,²³⁶ and will distort taxpayer decisions about when to report taxable profits.²³⁷

A related weak point of some deferral systems, but not necessarily all, is that deferral usually gives taxpayers the advantage of the time value of money.²³⁸ That is, if tax revenues are delayed, the taxpayer can invest and earn interest with the deferred funds, while the government has to borrow and pay interest to make up the difference.²³⁹ Thus, a common criticism of past proposals to tax inheritances, such as the so-called “carryover basis” legislation Congress enacted in 1976, then quickly repealed, is that it is still a fairly large giveaway to patient taxpayers,²⁴⁰ and therefore distorts the time when heirs choose to sell.²⁴¹ In prior work, however, we have described how a deferred or “retrospective” tax system can close this gap by charging the taxpayer interest at the same rate of return they earn on their investments.²⁴²

²³¹ Brooks & Gamage, *supra* note 18, at 520–36; Galle et al., Valuation Challenge, *supra* note 16 at 1311–12, 1315.

²³² Brooks & Gamage, *supra* note 18, at 527–28, 543.

²³³ *Id.* at 532.

²³⁴ Michael S. Knoll, *Financial Innovation, Tax Arbitrage, and Retrospective Taxation: The Problem with Passive Government Lending*, 52 TAX L. REV. 199, 215–16 (1997).

²³⁵ Brooks & Gamage, *supra* note 18, at 523–24, 531.

²³⁶ *Id.* at 529.

²³⁷ *Id.* at 541.

²³⁸ Galle et al., Valuation Challenge, *supra* note 17, at 1286–88.

²³⁹ *Id.*

²⁴⁰ Herzig, *supra* note 225, at 1196; Richard Schmalbeck et al., *Advocating a Carryover Tax Basis Regime*, 93 NOTRE DAME L. REV. 109, 117–22, 150 (2017).

²⁴¹ Laura E. Cunningham & Noel Cunningham, *Commentary: Realization of Gains Under the Comprehensive Inheritance Tax*, 63 TAX L. REV. 271, 279 (2009).

²⁴² Galle et al., *supra* note 231, at 1309–13.

It is also probably more difficult to enact reforms whose payoffs are significantly delayed. Delay reduces the value of enactment for the political coalition that backs reform, as among other reasons delay increases both the risk that the reform will never arrive and the cost of holding the coalition together long enough to defend the reform until its arrival.²⁴³ In addition, under today's Senate rules, legislation that increases the deficit is more difficult to enact, so that the "revenue score" of a bill can be quite important.²⁴⁴ Congress operates within a ten-year budget "window," with controversial legislation often needing to at least break fiscally even over that span.²⁴⁵ Projects that raise money within the window thus are more likely to pass, because they help to "pay for" other legislative priorities.²⁴⁶ We suspect this is one factor that has held back estate-tax reform: most of the budget gains from fixing the estate tax happen more than ten years after enactment, so that the adopting Congress sees little payoff. And each time Congress fails to enact reforms, the budget gains resulting from those reforms move further into the future, thus remaining beyond the ten-year budget window the next time Congress takes up estate-tax reform.²⁴⁷

C. Improving Deferral with Withholding Payments

For these reasons, governments should generally try to smooth transfer-tax payments out by speeding them up, not solely through deferral. Taxpayers who will face significant transfer-tax liabilities in a future year could be obligated to make smaller annual down payments or "withholding" taxes in advance. Professional trust managers today charge an annual fee of about two percent of the assets under management,²⁴⁸ suggesting that most large trusts could readily pay a tax in that range without a major rearrangement of the trust assets. When the date of liability does eventually

²⁴³ Saul Levmore, *Precommitment Politics*, 82 VA. L. REV. 567, 571–72, 581 (1996).

²⁴⁴ George K. Yin, *Temporary-Effect Legislation, Political Accountability, and Fiscal Restraint*, 84 N.Y.U. L. REV. 174, 215–16, 224 (2009).

²⁴⁵ *Id.*

²⁴⁶ Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C. L. REV. 863, 878 (2002).

²⁴⁷ See Bob Lord, *Closing the Loopholes America's Super Rich Love: Can the Dog Catch Its Tail?*, Inequality.org, March 30, 2022, <https://inequality.org/article/tax-loopholes/>.

²⁴⁸ Schanzenbach & Sitkoff, *supra* note 115, at 397 n.115; Turnier & Harrison, *supra* note 118, at 792–93; Rachel McCrocklin, *Understanding the Impact of Fees on a Special Needs Trust or Settlement*, September 22, 2023 (stating that the national average for trustee fees is approximately 1.46% annually), <https://www.easternpointtrust.com/articles/understanding-the-impact-of-fees-on-a-special-needs-trust-or-settlement-protection-trust?t>.

arrive, the family will not have to conduct a fire sale because most of the balance will already have been paid.

Although withholding payments help solve the liquidity problem, they don't help much on valuation, suggesting that the ideal design might combine both deferral and withholding. That is, taxpayers might make annual down payments, but would only determine their exact liability when the underlying assets are sold. Assessing the taxpayer's exact liability at sale answers an obvious weak point of withholding: by taxing annually, the government must have some kind of method for annually assessing how much to tax, such as by measuring the current value of assets held in a trust or estate. For some assets, such as privately-held small businesses, that valuation effort might be costly, imprecise, or both.²⁴⁹ But if the annual payments are only intended to be a rough approximation, with the precise tax liability to be computed at sale, then the annual valuation system can be simpler and easier to operate.

If annual withholding is only intended as an approximation, government should likely pay refunds in the event the withholding payments proved too large. We acknowledge this would be a departure from the usual approach of the U.S. income tax system, which does not refund losses to individuals in any significant amount.²⁵⁰ Mostly, though, that policy stems from the fact that taxpayers have the power to choose when to sell, and will usually choose to sell loss properties (triggering deductions and potentially refunds) while holding on to properties that have gained in value, giving the taxpayer a net advantage in the time value of money.²⁵¹ If government charges interest on deferral as we recommend, however, this problem does not arise, making refunds more feasible. Refunds are also more economically efficient because, unlike current policy, they do not punish risk taking by taxing gains and giving little benefit for losses.²⁵²

VI. PROPOSING A WITHHOLDING TAX APPROACH FOR REFORM

There have been many prior proposals for reforming transfer taxes. Yet prior reform proposals have not been designed in accordance with the criteria we explained in the prior Part. Not coincidentally, prior reform

²⁴⁹ See Perry Fleischer, *supra* note 154, at 16–23.

²⁵⁰ Robert H. Scarborough, *Risk, Diversification and the Design of Loss Limitations Under a Realization-Based Income Tax*, 48 TAX L. REV. 677, 680–81 (1993).

²⁵¹ *Id.*

²⁵² Alan J. Auerbach, *The Dynamic Effects of Tax Law Asymmetries*, 53 REV. ECON. STUD. 205, 214–16 (1986).

proposals have either not been successfully enacted or sustained, or have proven overly vulnerable to taxpayer gaming over time, resulting in the current broken state of the wealth-transfer-tax system. In this Part, we explain our proposed withholding tax approach for reform. We first describe how the withholding tax approach works and why it satisfies the design principles we prescribed in the prior Part. We then compare our withholding tax approach to some alternative approaches for transfer tax reform. Finally, we discuss constitutionality and compare our proposed withholding tax approach to proposals for wealth taxes and billionaire income tax reforms.

A. *The Withholding Tax Approach for Reform*

The central element of our proposed approach for transfer-tax reform is an annual withholding tax on the value of large trusts. The tax should be imposed at a fairly low rate, such as one to two percent of the trust's stored wealth as of the end of each applicable year. Again, professional trust managers typically charge their client trusts annual management fees in this same range of one to two percent.²⁵³ Thus, since trusts are already structured to produce at least this modest flow of annual cash, we are confident that a tax in this range would not have especially disruptive effects on the trust's ability to hold and manage its assets.

Though the annual payments are relatively small, over long periods of time, the cumulative annual payments would add up to similar totals as the one-time taxes imposed on each generation under the transfer tax system.²⁵⁴ This withholding tax structure thus ensures that the longer a family exerts control over trust assets, the larger the tax, making the withholding tax a good measure for constraining generational control over the economy.²⁵⁵

Our proposed withholding tax approach is only intended to fill the gaps in the transfer tax system. To that end, design elements ensure that families who are not aggressively gaming the transfer-tax rules would not face an increased tax burden. The accumulated amount of withholding tax

²⁵³ See sources cited *supra* note 278.

²⁵⁴ For a simple illustrative example, if the wealth stored within a trust remained constant over time, a 2% annual tax would be equivalent to a 40% tax collected every twenty years. Because trust-held wealth is typically invested and grows over time, it will typically take somewhat longer than this for accumulated annual tax payments to reach a level equivalent to a once-a-generation transfer tax. Yet in the modern era generational transfers also typically occur much less frequently than every twenty years. In any case, the goal of the withholding tax approach is just rough equivalence not perfect equivalence.

²⁵⁵ See Kades, *supra* note 122, at 357–58.

should thus be capped at the top estate tax rate, so that if a trust's accumulated withholding tax payments as divided by the total wealth stored within the trust ever reached the top estate tax rate (currently 40%), then annual withholding tax payments would cease until such time as that ratio again became less than the top estate tax rate.²⁵⁶

We further suggest a withholding tax structure in which the accumulated annual payments can be credited against the family's eventual estate tax and GST liabilities. Thus, except for GST-exempt trusts as we will discuss below, a trust's accumulated annual payments should be creditable against any GST liability the trust incurs at the time of a taxable termination (i.e., when the first generation of heirs dies).²⁵⁷ When the trust makes distributions to beneficiaries, the distributions would be deemed to include a ratable portion of the withholding tax payments made by the trust, and beneficiaries would receive credit for those payments. Beneficiaries who are subject to GST because they received a generation-skipping transfer could apply the credit against their own tax.²⁵⁸ Alternately, they could retain the credit until their death and allow it to be credited against their estate's tax liability. As noted previously, total pre-payments would be capped at the estate-tax rate times the trust's (estimated) value. If pre-payments exceed estate tax or GST liability, the taxpayer would get a refund. In effect, then, the withholding tax is a series of down payments against the family's ultimate transfer tax liabilities. Example One illustrates how this works.

Example One

Ma and Pa Dynasty are the founders and majority shareholders of a business start-up, DynCo. Ma and Pa sell the shares to P, an irrevocable trust of which they are the grantors, in exchange for a promissory note of \$26 million. Suppose further that they have already exhausted their lifetime gift credit and GST exemption amount by that date. Nine years later, shortly before the death of Ma and Pa, the trust returns \$26 million of DynCo stock to Ma and Pa to pay off the promissory note.

When Ma and Pa die, the value of the transferred DynCo stock still held by the trust has risen to \$5 billion. Suppose that Son, Daughter-In-Law, Grandson, and Granddaughter are the only current living

²⁵⁶ "Total wealth" should be defined to include withholding payments, because the money used to make those payments would otherwise have been subject to the estate tax.

²⁵⁷ See *infra* text accompanying notes 292–94.

²⁵⁸ See I.R.C. § 2603(a)(1).

beneficiaries of P. Son and Daughter-in-Law are lifetime beneficiaries, with the exact amount of payment dependent on the discretion of P's trustee. The trustee distributes \$1 billion to Son and Daughter-In-Law during their lifetimes. Son and Daughter-In-Law expend these funds and none are left at the time of their deaths. When Son and Daughter-in-Law pass, P's remaining shares of DynCo are worth \$9 billion.

There is a trust withholding tax in place that imposes a 2% annual tax on trusts of more than \$1 billion. Suppose that twenty years pass between the deaths of Ma and Pa and the deaths of Son and Daughter-in-Law.

Results:

Since the DynCo stock is sold to the trust for fair market value, the amount of the taxable gift is \$0. Because P is not part of Ma and Pa's estate, no estate tax is due at their deaths. The distribution to Son and Daughter-in-Law is not taxable because they are not two or more generations removed from P's funders. When the later of Son and Daughter-in-Law die, they will trigger a taxable termination for P—that is, imposition of GST on P's remaining \$9 billion in assets.

During the twenty years between the deaths of Ma and Pa and Son and Daughter-in-Law, assume that the value of the trust is determined to be \$5 billion so that P makes annual tax payments of $2\% \times \$5 \text{ billion} = \100 million , for a total of \$2 billion. For simplicity, further assume the \$1B distribution to Son and Daughter-in-Law is made near the end of this period. At the date of the distribution, P has a tax credit amount of \$2 billion. Since Son and Daughter-in-Law receive $\frac{1}{3}$ of the assets of the trust, they will receive $\frac{1}{3}$ of the credit, or \$400m, but this amount is also included in their estate. When they die without other assets, their estate liability is \$160m ($40\% \times \text{the } \400m estate value), less the \$400m credit, for a net refund of \$240m. Their death also triggers a taxable termination of P, at a valuation of \$9 billion. P has a credit of \$1.6 billion remaining, and this amount is included in the amount of the taxable transfer, for a total tax liability of $40\% \times \$10.6 \text{ billion} = \4.24 billion . P will apply its credit against this amount, and so will owe a net of \$2.64 billion.

Analysis:

Imposition of the trust withholding tax accelerated the tax paid on P's assets. Instead of paying \$0 during the lives of Son and Daughter-in-Law and \$3.6 billion at their death, the family paid \$2 billion during their lives and \$2.4 billion at their death. The extra \$800 million represents tax on the \$2B in withholding payments P made on behalf of Son and Daughter-in-Law, which otherwise would have been included in their estate.

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The withholding tax structure requires annual valuations of the wealth stored within large trusts. While this is straightforward for publicly-traded securities, and also relatively easy for insured valuables such as rare art that typically are appraised regularly by the insurer, it might be more difficult for equity interests in closely-held businesses and some other categories of assets.²⁵⁹ However, the virtue of a withholding tax is that all the payments are approximations, because the ultimate tax liability is determined at a later date, such as the time of the taxable termination. For each of the annual down payments, there is more limited downside to using a valuation method that is relatively easy to apply and administer, even if it isn't perfectly accurate.²⁶⁰ For example, hard-to-value assets might be appraised once every five to ten years, or even assumed to be their original purchase price, with values in years in between assumed to have increased at the average rate of inflation.

While in a sense the withholding tax only rearranges the time when transfer tax is paid, we argued in the prior Part that timing is critically important because of political optionality and related issues. Moreover, the withholding tax would effectively solve the one-generation deferral loopholes we described in Part I. To refresh the reader's recollection, a trust that is not GST exempt still allows families to delay transfer-tax liability for a generation by placing funds in a trust that is not part of the estate of the grantor (before the grantor's death) and then providing only a life estate to the next generation. GST is not triggered until the generation that receives life estates dies. In effect, the family is able to borrow at zero interest from the government in the amount of the estate tax the first generation would have faced, and not repay until one generation later.²⁶¹

²⁵⁹ Galle et al., *supra* note 231, at 1269–70, 1282–83.

²⁶⁰ *See id.* at 1319–21 (explaining advantage of combining estimated annual payments with more accurate *ex post* valuation).

²⁶¹ *See* Daniel I. Halperin & Alvin C. Warren, *Understanding Income Tax Deferral*, 67 TAX L. REV. 317, 321 (2014).

The withholding tax would undo most of the tax advantages of this arrangement. Although families whose trusts pay withholding tax would get a credit against their future transfer-tax liability, the government would not pay interest on that credit. Therefore, at the same time that the families are taking out an interest-free loan from the government in the form of deferred estate tax, they are also granting the government an interest-free loan, in the form of their withholding tax payments. These two effects would largely wash out, minimizing the benefits of the estate-tax deferral scheme.

Critically, the withholding tax approach could also shut down the perpetual exclusion currently provided by the GST-exemption loophole. We argued in Part II that the up-front timing of the GST exemption is a mistake, especially when combined with perpetual trusts. We therefore propose that GST-exempt trusts should pay “withholding” tax but not get any credit against future taxable termination events.²⁶² With that change in place, formerly GST-exempt trusts will, over time, eventually pay transfer tax on the full value of the trust. Example Two illustrates how this works.

Example Two

The facts are the same as in Example One, except instead of selling their shares, Ma and Pa gift their shares of DynCo to a perpetual trust P at a time when they can plausibly argue the shares are worth \$26 million, just below their joint lifetime gift credit and GST exemption amount. They assign their full GST exemption to P, making its inclusion ratio 0%. P is not considered part of the estate of Ma or Pa. As a result, the transfer from Ma and Pa to P is potentially subject to gift tax. Shortly after Son and Daughter-in-Law die, P makes distributions of \$1 billion to Ma and Pa’s grandchildren, Grandson and Granddaughter.

Results:

There is no gift tax due on the transfer of DynCo stock to P because the value at the time of transfer is less than Ma & Pa’s lifetime gift credit. Because P is not part of Ma and Pa’s estate, no estate tax is due at their deaths. When the later of Son and Daughter-in-Law die, they will trigger a taxable termination for P—that is, imposition of GST on all of P’s assets. But because P’s inclusion ratio is 0%, the tax rate P pays is 0%. P’s distribution of \$1 billion to Grandson and

²⁶² In this sense, our proposal is not a pure withholding tax, but we still think the “withholding tax” label is useful and appropriate for expositional purposes.

Granddaughter triggers GST liability for the recipients, because these distributions are made to individuals two generations removed from P's funders, and no other exceptions apply. But because P's inclusion ratio is 0%, the rate of tax Grandson and Granddaughter pay is 0%.

As in Example One, P pays \$2 billion in withholding tax during the twenty years between the deaths of Ma and Pa and Son and Daughter-in-Law. At their deaths, the estate of Son and Daughter-in-Law receives a \$240m refund. Because P has an inclusion ratio of 0%, however, P's credit amount is reduced to zero. P pays no tax on the \$9 billion taxable termination because its inclusion ratio is 0%. When P makes a \$1 billion distribution to Grandson and Granddaughter, there is no credit amount to divide with the beneficiaries.

Analysis:

Imposition of the trust withholding tax results in an increased tax burden for the Dynasty family. Instead of paying \$0, the family pays a net of \$1.76 billion, and that amount will continue to accrue as the family continues to hold assets in trust. By making a distribution to Son and Daughter-in-Law, the family reduced its tax burden by \$240m, illustrating that the withholding tax incentivizes families to distribute and consume wealth rather than continue to control it.

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An alternative design mechanism could be to adjust the withholding structure to be more of an alternative minimum tax by changing the refundability and payment cap details. These two features are what limit the withholding tax to collecting the same amount of revenue that the estate tax would. If taxpayers successfully manipulate the appraisal value of family assets so that they owe little at the time of a taxable termination, then they will likely get a substantial refund. If, however, no refunds are available, and the valuation used for determining the payment cap is more government-favorable than the valuation method that would be used for computing estate tax and GST liability, then in effect the withholding tax has instead become a minimum tax. By the time of a taxable termination, the trust will have paid the greater of the withholding tax amounts or its GST liability. Example Three illustrates.

Example Three

Same as Example One, but there is no refund available under the trust withholding tax. Son and daughter will have estate tax liability of \$0. P will owe \$2b, for a family total liability of \$2b. In this scenario, relative to Example 6.1, a larger fraction of the trust's true value has been taxed at the time of Son and Daughter-in-Law's death. There is a weaker incentive, however, for the trust to make distributions to beneficiaries who will not have substantial estate-tax liability.

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Another alternative design approach would be to structure the prepayments as an excise tax rather than following the withholding tax approach. To transform our withholding tax reform proposal into an excise tax, all that is required is (1) to remove both the cap on annual payments once the ratio of accumulated annual payments to trust wealth stored within the trust reaches the top estate tax rate, and (2) to remove the credits and potential refunds for any subsequent estate tax or GST tax liabilities. This excise tax approach is thus simpler and can be defended based on arguments that large trusts impose costs on society, as we discussed in Part III. However, the excise tax approach would amount to a very large tax increase on families storing intergenerational wealth within trusts who are not currently gaming the estate tax system, as these families would pay both the excise tax and the estate tax. For this reason, we prefer the withholding tax approach despite its extra complexities.

While we reserve most of the technical workings of the withholding system for a specialized tax audience, one further detail is probably important enough to receive some mention here: the exemption threshold. Obviously, it would not be desirable or politically feasible to impose the withholding tax on small trusts, such as those middle-income earners use to avoid judicial proceedings when bequeathing the family home to their children.²⁶³ If the main point of the withholding tax is to close up gaps in the estate tax system exploited by dynasties, its scope should be limited to families whose wealth would likely exceed the estate-tax exemption amount. The difficulty is that the marginal cost of setting up and administering parallel trusts with identical terms and trustees is small.²⁶⁴ Therefore if the exemption amount is per trust,

²⁶³ Jonathan W. Michael and Stacy E. Singer, *How Does a Revocable Trust Avoid Probate?*, ACTEC ESTATE PLANNING ESSENTIALS, <https://www.actec.org/resource-center/video/how-does-a-revocable-trust-avoid-probate/>

²⁶⁴ Cf. Sitkoff, *supra* note 52, at 682 (noting relative uniformity of trust arrangements).

as in the Billionaires Income Tax proposal from Sen. Wyden,²⁶⁵ taxpayers could easily create dozens or hundreds of trusts to multiply the exemption amount as needed.

A more effective approach is to assign exemption amounts to families, not trusts. Individuals would receive a set exemption amount, such as the current \$15m estate tax exemption, to divide among all the trusts in which they hold an interest as beneficiary. As an anti-abuse rule to prevent planners from using straw beneficiaries to inflate the exemption amount, a trust would only have the smallest exemption amount of the exemptions assigned to it by its various beneficiaries. We detail elsewhere additional rules to foil other efforts to manipulate the exemption amount. Example Four illustrates the basics of how this would work.

Example Four

The F family has established a trust, T, to hold stock of the family business Y. The trust has three real beneficiaries, daughter D, son S, and granddaughter G. It also attempts to add a straw beneficiary, cousin C. The exemption amount available to each beneficiary is \$15m. Each of the real beneficiaries also has a personal trust used for asset protection, and they assign \$5m of their exemption amount to their respective personal trusts. Therefore D, S, and G each assign an exemption amount of \$10m to T. Cousin C assigns a full \$15m exemption to T. Because T's exemption amount is the lowest exemption of those assigned by all its (living) beneficiaries, T is only exempt on the first \$10m of its assets.

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In sum, by undercutting both the generational-deferral and perpetual exemption tax-avoidance techniques, a withholding tax can help restore the wealth-transfer-tax system to Roosevelt's vision and the goals of the other advocates and commentators who built it: a tool to prevent unending transfers of dynastic wealth. Under any variation of the withholding tax approach, families would face strong incentives to divide large and powerful businesses, distribute trust assets rather than roll them over to future

²⁶⁵ S. 3367, 118th Cong. (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/3367/text>; see also Belcher & Fellows, *supra* note 8, at 283 (noting possibility of a tax on trusts with a per-trust exemption amount).

generations, and to consume distributed wealth, thereby breaking up concentrated positions of influence.²⁶⁶ Rich families would of course still be rich, but each “family” would likely comprise many more individuals.

B. Comparison with Other Transfer Tax Reform Proposals

Our withholding tax approach builds on and is synergistic with some thoughtful existing proposals for reforming transfer taxation. For example, Senator Bernie Sanders, Senator Elizabeth Warren, the Obama Administration, and the Biden Administration’s 2024 “Green Book” of tax reforms each proposed amending the GST exemption so that it would no longer shield trusts that are perpetually exempt.²⁶⁷ This might seem to be a simpler and more straightforward option for reform as compared to our proposed withholding tax approach. However, each of these reform proposals included transition rules that would have allowed trusts to continue to claim GST exemption for a full generation after the reform went into effect—a large potential deferral benefit.²⁶⁸ This undermines most of the revenue-generating potential of these reform proposals within Congress’s 10-year budget window. For instance, the Green Book’s authors estimated that their proposal would have raised zero dollars within the 10-year budget window, reflecting the effect of the transition rule.²⁶⁹

By contrast, even based on our low-end estimate of \$4.5 trillion in GST-exempt trusts today, if those trusts face an average annual tax of 1.5% under the withholding tax, that is approximately \$675 billion over ten years, before behavioral effects. As we explained in Part V, it is critically important that any reforms begin to collect revenue soon after enactment, rather than putting off tax collections for a decade or more. Absent current revenue

²⁶⁶ See James R. Hines, Jr., *Taxing Inheritances, Taxing Wealth*, 63 TAX L. REV. 189, 204 (2009).

²⁶⁷ Gravelle, *supra* note 26, at 20–21; General Explanations of the Administration’s Fiscal Year 2012 Revenue Proposals at 129 (Feb. 2011); General Explanations of the Administration’s Fiscal Year 2025 Revenue Proposals at 125–26 (Mar. 11, 2024) [hereinafter Green Book 2025]; <https://www.congress.gov/bill/118th-congress/senate-bill/4824>.

²⁶⁸ See, e.g., Green Book 2025, at 126.

²⁶⁹ *Id.* at 243. A similar reform with no transition rule might still raise little revenue. Trustees could make tax-exempt distributions to new trusts between the time enactment looks likely and the statute’s effective date, pushing off any tax for two more generations. See I.R.C. § 2653(a). Even if the reform were made retroactive, revenues would probably be modest through the 2030s because perpetually-exempt trusts were very rare until the 1995 Delaware repeal of the rule against perpetuities. Thus, most affected trusts would be no more than 30 years old. It is unlikely, actuarially speaking, that the last first-generation beneficiary of such a trust would die between 2025 and 2035.

generation, experience teaches that affected families will lobby very intensively to repeal or undermine expected future taxes on inheritances as well as working with lawyers and accountants to devise new techniques for escaping the future taxes. As we discussed in Parts I and II, the most powerful techniques for escaping transfer tax liabilities typically take many years or decades to implement, and so are much less effective for avoiding tax liabilities that are assessed and collected soon after enactment as compared to more distant future tax liabilities.

Accordingly, even if the Green Book proposal or another similar reform were to be adopted, it would be relatively easy for opponents to successfully repeal or undermine it over subsequent years because the budget-window revenue cost of doing so would be minimal.²⁷⁰ Our withholding tax reform proposal greatly alleviates these political-optionality problems because the substantial positive revenue score increases political incentives to enact and sustain the reform. Opponents of the reform would likely need significant pay-fors in order to repeal it.²⁷¹

Further, as both an economic and political matter it is also important to smooth new tax liability for affected trusts over time. A taxable termination of course imposes tax on all a trust's assets at once, posing the same valuation and liquidity challenges as under the estate tax. As we have noted, experts believe voters strongly dislike these effects, especially when imposed at death, when a taxable termination generally occurs.²⁷² The Green Book proposal and similar reforms, in other words, would likely be extremely unpopular and make further reforms to the estate and gift tax system more difficult. The withholding tax avoids both these unfortunate timing outcomes. Our proposal somewhat resembles the U.K. and Canadian systems, which impose a tax on trust value once every ten or twenty-one years, respectively,²⁷³ but in our view it is preferable to have a smaller annual tax to smooth the tax burden.

Our proposed withholding tax reform could either supplement or replace these other proposals for fixing the transfer-tax system. Our proposal would begin collecting substantial tax revenues immediately through withholding tax payments and would spread tax liability over time through the combination of the withholding tax payments and the credit mechanism. Consequently, if enacted along with other transfer tax reforms, our proposal

²⁷⁰ Brooks & Gamage, *supra* note 18, at 536–37.

²⁷¹ *Id.* at 537.

²⁷² See *supra* text accompanying notes 228–230.

²⁷³ Belcher & Fellows, *supra* note 8, at 274.

would greatly alleviate the political optionality concerns that these other reforms would face if enacted on their own.

A potentially attractive variation of our proposed withholding tax approach might be to combine it with a retrospective valuation system along the lines that two of us have described in detail elsewhere.²⁷⁴ Briefly, that retrospective valuation system would allow taxpayers to delay paying tax until they sell an asset, but would then charge them interest at the asset's own internal rate of return, along with anti-abuse rules to prevent tax-free withdrawals from the asset.²⁷⁵ In the estate tax and GST context, that would mitigate the two weaknesses we just noted, by giving the government real evidence about the estate's value and distancing the tax from a time of family tragedy. In effect, this system would make the estate tax into an "accessions" tax, or tax on heirs, not decedents, which other commentators have argued would better fit with the goal of preventing intergenerational transfers of wealth and power.²⁷⁶

The downside of a retrospective system, of course, is that it postpones the day that the government gets its money, which has consequences even if the taxpayer is paying interest. Combining retrospective valuation with advance withholding, however, mitigates that problem.²⁷⁷ Professor Batchelder has previously suggested a narrower version of deferral and withholding payments for certain complex or illiquid trusts, with the government paying interest on some advanced payments.²⁷⁸ Our proposal can be seen as taking that route more generally. As we argued above, however, the government should not pay interest on advance payments, because otherwise families would have powerful incentives to defer their ultimate tax bill.

A third set of reforms others have considered centers around limiting the most abusive freeze transactions, such as the "zeroed-out GRAT" we discussed in Part II.²⁷⁹ The history of these kinds of highly targeted reforms

²⁷⁴ Galle et al., *supra* note 231, at 1297–1309.

²⁷⁵ *Id.* at 1297–98.

²⁷⁶ *E.g.*, Duff, *supra* note 167, at 911; Perry Fleischer, *supra* note 174, at 922–24.

²⁷⁷ Galle et al., *supra* note 231, at 1311.

²⁷⁸ Batchelder, *supra* note 8, at 66–67, 76, 91–92.

²⁷⁹ *See, e.g.*, Soled & Gans, *supra* note 69, at 434–35 (proposing that all grantor trusts be included in decedent's estate); Ottley, *supra* note 79, at 1387–92. We describe a GRAT as a form of freeze transaction, but we note that if asset prices are volatile a GRAT can produce results even better than a freeze.

is not promising, as prior efforts have either failed to close their targeted loopholes or actually created new ones.²⁸⁰ That is in part why we propose a rather different approach of imposing a withholding tax on trusts generally, rather than trying to describe the precise legal maneuver to prohibit.

Even if they were successful, reforms to close the GRAT loophole would still probably not solve the problem of perpetual exemption. As we noted above, it is unlikely that many families will rely solely on GRATs to escape tax in later generations.²⁸¹ For families that planned to do so, our reading of the data is that at least the majority of GRAT-funded wealth is in trusts that are GST-exempt, and so if the GRAT strategy is defeated, those trusts can switch instead to relying on their GST exemptions.²⁸²

That is not to say reforms aimed at the GRAT and IDGT have no value. If they were successful, these reforms would be useful in reducing one-generation deferral strategies. GRAT reforms would also block a route to perpetual exemption for the ten to twenty percent of trusts with assets that cannot be fit into the GST exemption. And because the IDGT structure can be a tool for multiplying the value of the GST exemption,²⁸³ reforms there might reduce the number of families who can achieve full perpetual exemption.²⁸⁴

We would note, though, that reformers likely need to look beyond GRATs if they want to limit gift-tax abuses. Although transactions involving GRATs are today the easiest and most popular form of estate freeze (among other benefits GRATs offer),²⁸⁵ there are numerous alternatives open to planners, especially those willing to take relatively aggressive valuation positions on gift-tax returns. For example, estate freezes are reportedly popular in Canada, even though the GRAT strategy is not legally viable there.²⁸⁶ We therefore believe the revenue potential of shutting down GRATs

²⁸⁰ Gamage & Brooks, *supra* note 17, at 552–53.

²⁸¹ See *supra* text accompanying notes 96 – 98.

²⁸² See *infra* text accompanying notes 326 – 335.

²⁸³ See *supra* note 102.

²⁸⁴ As we noted, it is uncertain whether GRATs can serve a similar exemption-multiplying function. See *supra* note 102.

²⁸⁵ S. Micah Salib, *Recent Developments in Trust and Estate Law*, in BEST PRACTICES FOR STRUCTURING TRUSTS AND ESTATES (2015 ed.), 2014 WL 7246992, at 4–5

²⁸⁶ Mary Anne Bueschkens & Rae Rechtsman, *Recent Changes in Canada in the Areas of Trusts and Estate Law*, 21 TRUSTS & TRUSTEES 117, 121–22 (2015); Charles P. Marquette, *Estate Freezes Involving Trusts*, 50 CAN. TAX J. 335, 351–54 (2002). An analogue to the IDGT appears to work under Canadian law, however. *Id.* at 345.

may be overstated unless accompanied by broader estate freeze reforms. For example, in earlier work, two of us have described how retrospective tax techniques can be used to constrain GRATs and other freeze transactions.²⁸⁷ When a taxpayer makes a gift, the transferee would still be subject to some conditional tax liability upon their own later sale or transfer of the gift. If the asset rises sharply in value after the gift, the transferee will owe additional transfer tax.

C. *Constitutionality and Comparison with Individual Income Tax or Wealth Tax Reform Proposals*

Wealth tax reforms are an alternative approach for addressing extreme wealth inequality and the problems of dynasties that we discussed in Part IV. Wealth tax reforms became increasingly prominent in the years following 2019.²⁸⁸ More recently, former President Biden, former Vice President Harris, and leading congressional Democrats have begun proposing so-called “billionaire taxes” that would tax the economic gains of the very wealthy that currently mostly escape income taxation (these proposals are sometimes alternatively labeled as “mark-to-market” taxes, “accretion” taxes, or “unrealized gains” taxes).²⁸⁹ Similar to wealth tax reforms, these proposals would also address extreme wealth inequality and at least some of the problems of dynasties.

However, opponents of these reform proposals responded with a campaign to convince courts to rule that these proposals are unconstitutional. To the surprise of many, the Supreme Court took and then decided the case of *Moore v. United States* in 2024. Although discussing that case in any detail is beyond the scope of this Article and the case was ultimately decided on quite narrow grounds, it is reasonable to read the *Moore* opinions as implying that a majority of the Justices might strike down at least some of the leading proposals for implementing wealth taxes or billionaire taxes.²⁹⁰ There are

²⁸⁷ Galle et al., *Valuation Challenge*, *supra* note 17, at 1323. Our proposal differs from earlier “open transaction” type approaches, such as in Dodge, *supra* note 98, at 588, mainly in that we impose economically accurate charges for the time value of money, and explain how to do so in an easily-administered way.

²⁸⁸ Galle et al., *Valuation Challenge*, *supra* note 231, at 1314-1322.

²⁸⁹ *Id.*; Andy Grewal, *Billionaire Taxes and the Constitution*, 58 GA. L. REV. 249, 251-53 (2023); Garrett Watson & Erica York, *Analysis of Harris’s Billionaire Minimum Tax on Unrealized Capital Gains*, TAX FOUNDATION, September 4, 2024.

²⁹⁰ John R. Brooks, David Gamage, & Edward J. McCaffery, *Moore Questions, Some Answers: Fixing the Personal Tax System Despite Constitutional Constraints*, FLORIDA TAX REVIEW (forthcoming 2025).

potentially alternative ways of implementing these sort of reforms to survive constitutional scrutiny—for instance, designing these forms as apportioned rather than uniform taxes—but there are both great political challenges and constitutional uncertainties involved in doing so.²⁹¹

By contrast, there should be no equivalent constitutional issues with our proposed withholding tax on trust-held assets. Although our proposal has similarities to a wealth tax as applied to just trust-held wealth, the Supreme Court has repeatedly held that taxes on wealth transfers or on wealth held in specific legal forms like trusts are not subject to the limitations that might apply to taxes on wealth held directly by individuals and families.²⁹²

For the foreseeable future, it seems likely that the combination of constitutional and political challenges facing wealth tax and billionaire income tax reforms will prevent these reforms from being seriously considered by federal lawmakers.²⁹³ This leaves us with transfer tax reform as one of the most plausible routes for addressing wealth inequality, the flaws in the overall tax system, and especially the problems with dynasties that we discussed in Part IV.²⁹⁴ Moreover, even if a wealth tax or a billionaire tax is someday successfully enacted, a withholding tax on trust-held wealth could still be a useful supplement for taxing dynasties at a higher rate than single-generation wealth accumulations. That is, combining a lower-rate general wealth tax or billionaire tax with an extra tax on dynasty trusts could serve to combat the special problems of dynasties without overly burdening the incentives for wealth creation by initial generations.

²⁹¹ *Id.*

²⁹² *E.g., Bromley v. McCaughn*, 280 U.S. 124, 136–37 (1929) (upholding the federal gift tax because tax on “a particular use of property” such as “the power to give the property owned to another” is not a direct tax); *Knowlton v. Moore*, 178 U.S. 41, 81–83 (1900) (tax on transmission of inheritances is not “direct”); *see also Pacific Co. v. Johnson*, 285 U.S. 480, 489 (1932) (noting “well-recognized distinction between a tax on the privilege of exercising the corporate franchise and a tax on corporate property or income”); *Flint v. Stone Tracy Co.*, 220 U.S. 107, 150–52 (1911) (tax on “the particular privilege of doing business” through a particular entity form not a “direct” tax); *Spreckels Sugar Refining Co. v. McCain*, 192 U.S. 397, 412–13 (1909) (tax on “privilege” of conducting business is an indirect excise, not a direct tax). For further discussion, *see, e.g., Brooks et al, supra* note 312; John R. Brooks & David Gamage, *Taxation and the Constitution, Reconsidered*, 76 TAX L. REV. 75 (2022).

²⁹³ *Brooks et al, supra* note 312. The *Moore* limitation does not apply to states. *See Galle et al., Money Moves, supra* note 16, at 654–55 (observing that “states may be the only legally or politically viable place to pursue wealth or mark-to-market taxation, at least initially”).

²⁹⁴ *Id.*

CONCLUSION

Experts are predicting an upcoming “Great Wealth Transfer”—that over the next several decades, “the US can expect the largest flows of intergenerational wealth transfers . . . in modern history.”²⁹⁵ Unless the reforms we have proposed in this Article are adopted, we have argued that this will likely result in massive, intergenerationally increasing accumulations of dynastic wealth. Thus, this Article explains why and how to restore the estate tax and the broader wealth-transfer-tax system to their original purpose of taxing dynasties.

²⁹⁵ William G. Gale, John Sabelhaus & Oliver Hall, *Taxing the Great Wealth Transfer with a Stronger Estate Tax*, Tax Policy Center, TAXVOX, January 23, 2025, <https://taxpolicycenter.org/taxvox/taxing-great-wealth-transfer-stronger-estate-tax>

DATA APPENDIX

This Appendix describes the methods and assumptions underlying our estimates of the amount of wealth held in perpetually-exempt trusts.

We form our basic estimates of the magnitude of trust-held wealth using aggregate return data reported by the IRS based on filed Forms 1041.²⁹⁶ Trusts only have to file in years in which they have income.²⁹⁷ For most assets, taxpayers only have “income” when they sell or otherwise dispose of the property, so that a trust that simply holds appreciating stock without selling might rarely file returns.²⁹⁸ Grantor trusts, because they are treated as the same taxpayer as their grantor, do not have to file any return.²⁹⁹ Grantor trusts that do choose to file a return, or trusts that are partially grantor trusts, can report their data on attachments that are not reflected in the aggregate IRS data.³⁰⁰ Taxpayers who may want to minimize IRS scrutiny of aggressive transactions thus have a ready blueprint to do so, making it likely that only the most compliant trusts are typically observable.

As a result of these gaps, we believe that the estimates by Zucman, Piketty, and Saez (“ZPS”) that 2021 U.S. wealth held in trust was about \$5.6 trillion is likely too low.³⁰¹ ZPS infer trust-held wealth by measuring trust income, determining the average rates of return of the asset classes held by trusts, and then using these rates of return to estimate the amount of wealth needed to generate the reported amount of income.³⁰² But ZPS rely on tax return data that ends in 2011, and use statistical methods to project trust income and wealth for later years.³⁰³ Whereas ZPS projected trusts would earn \$187B in 2021, in fact total reported trust and estate income by 2019

²⁹⁶ <https://www.irs.gov/statistics/soi-tax-stats-income-from-estates-and-trusts-statistics>

²⁹⁷ Internal Revenue Service, 2024 Instructions for Form 1041, at 4–5.

²⁹⁸ See I.R.C. § 1001.

²⁹⁹ Internal Revenue Service, *supra* note 297, at 13–14; see I.R.C. § 671. For income tax purposes, a trust is defined as a grantor trust when the grantor retains certain statutorily-defined aspects of control or influence over the trust. See *id.* §§ 672–677.

³⁰⁰ Internal Revenue Service, *supra* note 297, at 14; see IRS Statistics of Income, 2019 Fiduciary Income Tax Returns, Income Source, Deductions, and Tax Liability, by Tax Status and Size of Total Income, <https://www.irs.gov/pub/irs-soi/19fd01.xlsx> [hereinafter IRS SOI 2019] (noting that all income data are derived from line 23 of the Form 1041 trust tax return).

³⁰¹ Gabriel Zucman, Thomas Piketty, & Emmanuel Saez, “Distributional National Accounts: Methods and Estimates for the United States,” Table S.B2, Current annual series, February 2022, [https://gabriel-zucman.eu/files/PSZ2022AppendixTablesI\(Aggreg\).xlsx](https://gabriel-zucman.eu/files/PSZ2022AppendixTablesI(Aggreg).xlsx).

³⁰² *Id.* at Table S.B2 notes.

³⁰³ *Id.*

was \$233B.³⁰⁴ Using the ZPS method to translate this larger figure into a wealth estimate would yield \$6.98 trillion in 2019 wealth, and presumably more than that in 2021. Adjusted for inflation, that would be \$8.66 trillion in 2025 dollars. Of this, we estimate that about eleven percent was held by decedent's estates, leaving 89 percent, or \$7.7 trillion held by trusts.³⁰⁵

This estimate almost certainly undercounts trust-held wealth in several respects. First, financial assets have grown much faster than inflation since 2019. As we write in November of 2025, the S&P 500 stands at 6,818; on Dec. 31 of 2019 it was 3,234.85. If trust-held assets have grown at this rate (for instance, if trusts mostly hold a diversified portfolio of large-cap equity, and new contributions have exactly offset distributions over this period), then the 2019 SOI data would imply a current figure of \$13.1 trillion. In addition, the \$233B in reported trust income of course does not include income earned by non-reporting grantor trusts (or trusts that report only on attachments to the Form 1041).³⁰⁶ Another team of researchers with access to confidential data has used third-party tax filings to estimate the wealth held by non-reporting trusts, but those data remain embargoed as of this writing.³⁰⁷ What we can say is that grantor trusts are a large share of all trusts, so that the SOI data likely miss trillions of dollars of additional assets. An IRS study in 2005, for instance, found that grantor trusts that voluntarily filed a return (but reported little or no financial information) made up more than one-third of all trusts.³⁰⁸ We acknowledge, however, that rates of return for the very wealthy may be higher than the returns estimated in Zucman et al., which would reduce the implied value of the underlying assets.³⁰⁹

Because they are relatively small, we omit non-U.S. holdings from

³⁰⁴ IRS SOI 2019, *supra* note 300.

³⁰⁵ This estimate derives from the average share of estate income out of all income reported in summary data for estates and trusts for tax years 2009 and 2012 through 2014. We omit 2010 and 2011 due to the potential for unusual estate activity in those years arising from the one-year repeal of the estate tax in 2010 (although those data are in fact fairly similar to 2012 to 2014 data). Public IRS data end in 2014. $16.615+13.808+14.589+15.781 / 134.432+114.439+160.808+141.597 = 60.793 / 551.276 = .11$.

³⁰⁶ *See id.* (noting that all income data are derived from line 23 of the Form 1041 trust tax return)

³⁰⁷ Dowd et al., *supra* note 133, at 13.

³⁰⁸ Lisa Schreiber, IRS Statistics of Income Division, *Fiduciary Income Tax Returns, Filing Years 2003 and 2004*, at 158 Tbl. 4. As is true today, grantor trusts were not required to file a return in 2003 or 2004. *See* Internal Revenue Service, 2003 Instructions for Form 1041, at 5–6, <https://www.irs.gov/pub/irs-prior/i1041--2003.pdf>.

³⁰⁹ *See generally* Smith et al., *supra* note 139; Dowd et al., *supra* note 133, at 11 (estimating alternative measures of asset returns and therefore of wealth).

our totals. Foreign financial institutions reported that as of 2018 U.S. individuals owned another \$4 trillion in other entities that do not typically file a U.S. income tax return, including in trusts.³¹⁰ Trusts are listed as the direct owners of a little over 1.1% of these assets, about \$47 billion,³¹¹ and as the indirect owners of another \$104 billion.³¹²

As another potential data point, the reporting trusts in 2019 claimed fiduciary and other professional fees of about \$7.4 billion.³¹³ Again, the reported average fee for trust management is one to two percent of assets under management.³¹⁴ If so, then the reported expenses imply assets under management of \$370 to \$740 billion, and a number of times that amount, well into the trillions, when accounting for the unobserved grantor trusts reported by other researchers. But we note that for other fund managers, such as managers of private equity funds, the value of “assets under management” can be based on value when contributed to the fund, not the actual fair market value.³¹⁵ If trust management fees follow this convention and trust assets are highly appreciated, as we expect given the tax avoidance techniques we described above, then the actual value of assets in these trusts is likely much greater.

We next investigate what share of this aggregate wealth is held by trusts that are perpetually exempt from transfer taxation. Our key source of evidence is IRS aggregate data from gift tax returns.³¹⁶ We expect that donors likely underreport the value of gifts, but that they rarely fail to report the existence of sizable gifts of tangible or investment assets. As we discuss in the main text, the statute of limitations for IRS to challenge the value of a gift only begins to run on the date of a properly completed gift-tax return. Again, wealth planners imply in published materials that audits are rare, so that it is advantageous for donors to report gifts in order to foreclose future IRS

³¹⁰ Niels Johannesen et al., *The Offshore World According to FATCA: New Evidence on the Foreign Wealth of US Households*, 38 TAX POL’Y & ECON. 61, 72 (2024).

³¹¹ *Id.* at 75 Tbl. 3.

³¹² We calculate this number ourselves, based on the findings that partnerships hold \$1.3 trillion, *id.*, and that 8% of partnership interests are held by trusts, *id.* at 82. It is possible that some of these indirect holdings are via U.S. trusts that already appear in our data.

³¹³ IRS SOI 2019, *supra* note 300.

³¹⁴ See sources cited *supra* note 248.

³¹⁵ Thomas J. Brennan & Karl S. Okamoto, *Measuring the Tax Subsidy in Private Equity and Hedge Fund Compensation*, 60 HASTINGS L.J. 27, 39–40 (2008).

³¹⁶ Internal Revenue Service Statistics of Income Division, Total Gifts of Donors 2021, <https://www.irs.gov/statistics/soi-tax-stats-gift-tax-statistics> [hereinafter IRS SOI Gifts].

challenge.³¹⁷

The IRS data show that only a tiny fraction of all gifts, even those of \$1 million or more, are subject to gift tax.³¹⁸ For example, in the latest data year available, 2021, there were 29,217 reported gifts of more than \$1 million, totaling \$133.98 billion. Of these, only 1,099 were taxable, at a total value of \$13.35 billion. Recall that the lifetime gift tax credit and the GST exemption are identical amounts, and were each \$11.7 million in the 2021 tax year.³¹⁹ The lifetime gift tax credit is applied to each gift in the order it is made.³²⁰ Thus, if we observe gifts that are not subject to tax because of the lifetime gift tax credit, we can infer that the donor has not used up their GST exemption, either.³²¹ And indeed, we can see from the data that donors who made untaxed gifts of \$1 million or more in 2021 still had more than \$58 billion in aggregate lifetime gift tax credit remaining, while the donors who made taxable gifts of course had zero.

Accordingly, under some basic assumptions, at least 90% by value of the trust assets contributed in 2021 would be fully GST-exempt, because the value gifted to the trust was less than the donor's available GST exemption.³²² This ratio has ranged from 85 to 95 percent since the last round of major

³¹⁷ See *supra* text accompanying notes 104–106; see also Rader, *supra* note 63, at 15 (noting that later reporting of an appreciating asset wastes GST exemption).

³¹⁸ IRS SOI Gifts, *supra* note 316.

³¹⁹ The GST exemption was actually higher than the lifetime exemption amount between 2003 and 2010. Tax Foundation, “Federal Estate and Gift Tax Rates, Exemptions, and Exclusions, 1916-2014” (Feb. 4, 2014), <https://taxfoundation.org/federal-estate-and-gift-tax-rates-exemptions-and-exclusions-1916-2014>.

³²⁰ McCouch, *supra* note 115, at 172.

³²¹ It is possible for some donors to use up the GST exemption before they exhaust their lifetime gift exclusion, but this would have almost no effect on our analysis. In order to achieve a 0% inclusion ratio, a transferor must usually assign a GST exemption amount to all transfers to trust, even those that would be below the annual gift exclusion amount (i.e., the \$19,000 threshold for a reportable gift). I.R.C. § 2642(c). Planners sometimes use so-called *Crummey* powers to multiply this exclusion for gifts to trusts. Even so, it is unlikely that a donor's aggregate of these *de minimis* gifts would add up to a meaningful fraction of the lifetime exemption, but they might help to establish the seed funding for an IDGT transaction.

³²² 90.03%, to be exact: $((133.98-13.35)/133.98)$. The result is almost 100% by *number* of trusts: just 1,813/250,827, or .7%, were taxable. We also assume that donors chose to allocate available GST exemption amounts to their gifts. But presumably a donor who opts not to do so would make that choice mostly because they expect to enjoy some even greater tax savings available from allocating the GST exemption to a subsequent gift. We discuss one specific scenario where this might be the case *infra*.

transfer-tax changes in 2010. In 2013, for example, it was 92%.³²³ The ratio of untaxed gifts to all gifts was a bit lower before 2010 when the lifetime gift credit and GST exemption amounts were lower. Between 2003 and 2010, the average hovered around 80%.

We thus can estimate that some 80% to 90% of the funds in newer trusts are likely perpetually exempt from transfer tax. Because the IRS reports data for all gifts, not only gifts to trusts, the main assumption we make here is that gifts to trusts are the same, on average, as gifts to other donees. It is of course possible that donors to trusts were disproportionately those who had already exhausted their GST exemption, but there is no reason to expect that to be so. If anything, given the tax benefits of using the GST exemption for transfers to a trust, we expect that donors to trusts are disproportionately those with an available exemption.³²⁴

An earlier study suggested to the contrary that many bank-administered trusts were likely to be at least partly taxable under the GST, because the average trust account balance exceeded the then-prevailing GST exemption amount.³²⁵ This is not correct. Again, the inclusion ratio is determined at the date of contribution, so that the current account balance tells us little about whether a trust is taxable or not.³²⁶

Although most trust dollars are perpetually exempt, not all trusts rely on the GST exemption to escape transfer taxes. Many trusts are likely small enough that their beneficiaries would hold less than \$15 million in assets at death, even including non-trust assets. We do not have direct information about the size of individual trusts (or the total wealth of beneficiaries) in the aggregate data, but can infer the distribution of trust-held wealth based on the distribution of reported trust income. Depending on our assumptions about

³²³ Detailed calculations are available in the supplementary materials on the University of Pennsylvania Law Review web site.

³²⁴ Indeed our method likely undercounts GST-exempt transfers. Most transfers to humans will use up lifetime gift exemption but not GST exemption (except in the case of a rare “direct skip” gift to grandchildren or more remote descendants, which uses both). Thus some taxable gifts to trusts we observe may be made by transferors who have a GST exemption amount remaining.

³²⁵ Schanzenbach & Sitkoff, *supra* note 115, at 356, 407, 411.

³²⁶ The study authors acknowledge that exemption is determined according to initial value and appear to presume that there is a close connection between initial and subsequent value. *Id.* at 396. We have argued that is rarely the case, because of the vast tax savings available to planners who contribute assets that are likely to appreciate or can be undervalued at contribution.

the rates of return that trusts earned, we estimate that in 2019 between 66.8% and 80.4% of trust assets were held in trusts that were large enough to by themselves exceed the estate-tax threshold.³²⁷

This figure allows us to further approximate the value of perpetually-exempt wealth in trusts that would otherwise likely face transfer-tax liability. By definition, all of the 10% of trust wealth that we estimated would be subject to GST is in this group of trusts. That leaves between 56.8% and 70.4% of total trust wealth that would be taxable but is not because of the GST exemption.

Our estimate of the share of GST-exempt trusts might be overstated if a significant share of gifts were executed using a GRAT, and GRATs are less apt to be perpetually exempt. If the net value of contributed property in a GRAT, less the discounted present value of the stream of payments, is zero, then arguably no gift tax return need be filed.³²⁸ Accordingly, it is possible that GRAT transactions have a different ratio of nontaxable contributions than what we observe. Once more, however, tax advisors recommend filing gift tax returns, so that a “zeroed-out” GRAT often will intentionally report a token gift amount in order to trigger the statute of limitations.³²⁹ We therefore think that our data include many GRATs, and thus that most GRATs have an inclusion ration of 0%. Admittedly, however, we are aware that some tax preparers prefer “invisibility” to filing a return where that is possible.³³⁰

Even assuming that some GRATs are missing from our data, it is unclear whether the share of these missing GRAT transfers that are

³²⁷ For the low-end estimate, we use a default rate of return of 8%, while for the high-end estimate, we use the ZPS returns. For simplicity, we assume that trust income is evenly distributed among trusts in the \$100,000 to \$1 million income band that the IRS reports. Thus, when we determine that under the ZPS method the lowest income needed to produce wealth in excess of the estate-tax exemption amount would be \$380,000, we count 68.89% of the wealth in the \$100,000 to \$1 million band as above the exemption amount. In fact, trust income is highly rightward skewed, so this method undercounts trust wealth. In addition, researchers generally find that trusts have realized income rates of far lower than 8%, so the best estimate is probably towards the high end of this range.

³²⁸ Bramwell, *supra* note 106, at 32.

³²⁹ Ronald Aucutt, McGuire Woods, *GRATs and Sales to Grantor Trusts* 16 (Mar. 2019), <https://media.mcguirewoods.com/publications/grats.pdf>; Lan, *supra* note 106, at 3; see Cooper & Deringer, *supra* note 106, at LL-18. Others suggest zeroing out the GRAT but filing a gift-tax return anyway. Bramwell, *supra* note 106, at 32; see 26 C.F.R. § 301.6501-1(f)(4).

³³⁰ Bramwell, *supra* note 106, at 32.

perpetually exempt differs from the 57 to 70% share in our data (we assume only households facing transfer-tax liability would use GRATs). Some wealth planners reportedly prefer not to allocate GST exemption amounts to assets contributed via a GRAT because they view the use of the exemption for assets that have earned two years of appreciation to be inefficient.³³¹ That is, in a typical GRAT transaction, the transferor receives back a stream of in-kind payments, over two years, at a relatively low rate of interest.³³² If the transferred asset increases in value, then the amount by which this increase exceeds the interest rate will remain inside the trust.³³³ Only at that point is GST exemption assigned.³³⁴ But if the value at the end of the two-year term is ultimately a small share of what the donor expects the asset to be worth—say, if the transaction happens at a date when the transferor claims the value is \$15 million but they expect it to rise to \$1 billion—it would still be well worth their while to assign their GST exemption amount to the transaction. Still, some planners might opt for a GRAT because they do not have sufficient GST exemption to achieve full exemption. These trusts might also prefer to avoid filing a return in order to take more aggressive valuation positions, but we can also see an argument that the most aggressive claims should be more apt to file in order to start the audit clock.

While we lack gift-tax data for trusts funded before 1997, we expect that most trusts funded before the effective date of the GST in late 1985 have an inclusion ratio of zero, because the 1986 Act generally grandfathers pre-GST trusts from paying any GST.³³⁵ Trusts established in this era may not be *perpetually* exempt, however, because nearly all states had some version of the rule against perpetuities at that time.³³⁶ Trusts with a grandfathered exemption cannot generally transfer their assets to a new, perpetual, trust without losing the exemption.³³⁷ When these grandfathered trusts expire, eligible beneficiaries could use the distributed assets to form a perpetual (but likely not GST-exempt) trust. Distributions from such trusts would not be subject to GST for two more generations.

We also do not have data on testamentary bequests to trusts—that is, on transfers to trust made in the transferor’s will—but we doubt these are

³³¹ See *supra* note 102.

³³² Ottley, *supra* note 79, at 1390.

³³³ *Id.* at 1378.

³³⁴ See I.R.C. 2642(f).

³³⁵ Tax Reform Act of 1986, Pub. L. No. 99-514, § 1433(a)-(b); see 26 C.F.R. 1.2601-1.

³³⁶ Nenko, *supra* note 78, at 387.

³³⁷ 26 C.F.R. 1.2601-1(b)(4); McCouch, *supra* note 115, at 196–99.

empirically significant for dynasty trusts. As we explain in Parts I and II, minimizing transfer tax usually involves careful control of the timing of the transfer, so that well-advised taxpayers do not wait until the date fate decrees as their final day to make transfers. Further, a trust established in the grantor's will is subject to the state probate process, and most well-advised grantors establish trusts in part in order to avoid exactly that result.³³⁸ Assets subject to probate are publicly disclosed, and again many wealth advisors suggest non-testamentary trusts to avoid this outcome.³³⁹

In sum, though the exact dollar value of perpetually exempt or generationally deferred trusts is highly uncertain, it is also likely to be extremely large. A lower-end estimate, for example, taking the 80% share of trust assets funded through exempt gifts times our estimate of total trust assets of about \$7.7 trillion, yields about \$6.16 trillion currently in trusts that will never be subject to estate, gift, or GST tax. \$4.39 trillion (57% times \$7.7T) is in trusts that should have faced transfer-tax liability but escape through the GST loophole.

Trusts also control a meaningful share of U.S. wealth, especially at the top of the wealth distribution. The Federal Reserve estimates total U.S. private wealth at about \$170 trillion. That implies that perpetually-exempt trusts hold at least 4.1% of all U.S. assets. At the top, the Fed's Survey of Consumer Finances estimates that the richest .1% of households (those worth at least \$46 million) own about \$23 trillion in assets.³⁴⁰ Our data suggest this is an undercount. The SCF omits wealth owned by non-grantor trusts, which are the trusts we observe in the IRS aggregate data.³⁴¹ Assuming again for simplicity that trust assets are evenly distributed within the observed income bands in the IRS data, we estimate that an additional \$5.45 trillion is owned by trusts that by themselves would be large enough to fall within the top .1% of wealth, ignoring any other wealth held by their beneficiaries.³⁴² Taking

³³⁸ David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 620–24 (2015).

³³⁹ Frances H. Foster, *Trust Privacy*, 93 CORNELL L. REV. 555, 559–60 (2008).

³⁴⁰ FRED, Net Worth Held by the Top .1%, https://fred.stlouisfed.org/series/WFRBLTP1246#:~:text=Table_title:%20Net%20Worth%20Held%20by%20the%20Top,2025::%20Q2%202024:%20%7C%2023%2C325%2C123:%2021%2C400%2C187%20%7C (last visited Nov. 11, 2025).

³⁴¹ <https://www.federalreserve.gov/econres/files/codebk2022.txt> (“Do not include funds in irrevocable trusts....”). A revocable trust would be a grantor trust and thus would not file a Form 1041.

³⁴² That is, we assign 91.93% of the second-highest income band and all of the top income band to this group, as these are the trusts with imputed wealth in excess of \$46m.

these added dollars into account in the numerator and denominator would increase the share of wealth held by the top .1% by 20%, from about 13.5% to more than 16.3%.

$(91.93\% * 19\% * \$8.66T) + (45.55\% * \$8.66T) = \$1.51T + 3.94T = \$5.45T$. We assume that no estates appear in this range, despite the possibility that some wealthy “morons” may have failed to plan around the estate tax. The average estate in the most recent IRS data has imputed wealth of only about \$1.2 million. See Internal Revenue Service, *Fiduciary Income Tax Returns by Type of Entity, Filing Year 2014* (reporting average income of about \$41,000).