Nozick, Libertarianism, and the Estate Tax

Jennifer Bird-Pollan*

ABSTRACT

Contemporary policy discussions of taxes in general, and of the estate tax in particular, are often dominated by arguments that start from libertarian premises. However, these libertarian views are rarely fully unpacked, and, as a result, the conclusions of these arguments often extend beyond what can be justified by those libertarian premises. With regard to the estate tax, many libertarians argue that government interference with the free transfer of assets after death is an immoral violation of the property rights of the deceased. In this Article, I work through the libertarian arguments of Robert Nozick in his seminal work, Anarchy, State, and Utopia*, with special attention to his views of property and inheritance rights. By demonstrating that libertarianism cannot justify property rights that extend beyond death, I show that, in fact, libertarianism is entirely consistent with a robust estate tax. While this does not mean that the libertarian views of property rights* require *an estate tax, those views do not, on moral grounds, preclude the imposition of the tax.*

I. Introduction.

Over the last twelve years the estate tax has been eviscerated. Evolving from a tax at 55% on all estates over $675,000 to a tax at only 35% on estates over $5.12 million per person ($10.24 million for a married couple), the estate tax now reaches only about 5,300 estates each year, as opposed to over 58,000 estates in 1999.[1] In the era of

* Assistant Professor of Law, University of Kentucky College of Law. I am grateful to participants in the Harvard Tax Policy Seminar, Junior Tax Scholars Conference, the Law, Society, and Taxation Workshop, the Victoria-Cornell Colloquium: Jurisprudential Perspectives on Taxation, and the University of Kentucky College of Law Brownbag Workshop for helpful feedback on the ideas presented in this Article. I am especially grateful for comments from Professors Daniel Halperin, Kristin Hickman and Stephen Shay.

[1] The estate tax is levied by Internal Revenue Code Section 2001. Internal Revenue Code of 1986, as amended; hereafter "Code". All citations to sections are citations to the Code. Before the passing of the Economic Growth and Tax Relief Reconciliation Act of 2001

language decrying class warfare, why this abandonment of the project of the estate tax? Is it too late to save the tax? Are there reasons to save it? Why have an estate tax in the first place?

Libertarianism has become a standard view in the United States, in particular with regard to debates around tax policy. However, the libertarian view is not always clearly articulated, and often assumptions regarding particular outcomes seem to hinge more on expectations of the libertarian view rather than rigorous arguments about the topic at hand. Libertarian arguments about the estate tax claim that this particular tax is economically inefficient and violates moral claims stemming from individual property

---

(EGTRRA), the Code provided a lifetime credit against tax of $675,000. §2010. Any transfers made, whether *inter vivos* or after death, that exceeded the credit amount were taxed at 55%. §2001. EGTRRA slowly increased the lifetime credit amount and simultaneously lowered the rate, culminating in a one year repeal of the estate tax in 2010. *See* Congressional Budget Office, "Economic and Budget Issue Brief: Estate and Gift Taxes, *available at*: http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf. The peculiarities of EGTRRA resulted in a complete sunsetting of the law on December 31, 2010. Congress and President Obama signed a two year extension of the EGTRRA provisions, including a reinstitution of the estate tax with a $5 million lifetime credit (indexed for inflation) and a 35% rate on amounts transferred above the credit amount. That extension is scheduled to expire on December 31, 2012, at which point the estate and gift tax credit and rate will revert to 2001 levels. *Id.* The Congressional Budget Office estimates that extending the EGTRRA estate and gift tax provisions that lower the transfer tax rate and increase the lifetime credit amount will cost $402 billion over the period of 2010 to 2019, as compared with the revenue that would be raised if EGTRRA were allowed to expire. Congressional Budget Office, "Budget Options, Volume 2," p. 240, *available at*: http://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/102xx/doc10294/08-06-budgetoptions.pdf; Congressional Budget Office, "An Update to the Budget and Economic Outlook: Fiscal Years 2012 to 2022," p. 64, *available at*: http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf. Leaving the 2009 rates and exemption levels in place would have raised a total of $420 billion (or 1.2% of total revenues) from 2010 to 2019. Congressional Budget Office, "Economic and Budget Issue Brief: Estate and Gift Taxes, p. 5, *available at*: http://www.cbo.gov/sites/default/files/cbofiles/attachments/43539-08-22-2012-Update_One-Col.pdf.

rights.[2] In this Article, I will examine the estate tax through a libertarian lens, and explain why a hefty estate tax is consistent with the traditional libertarian position. I will begin by articulating Robert Nozick's libertarian views on property rights, in particular the account he provides in his seminal work *Anarchy, State and Utopia*. I will then defend two lines of argument against the notion that the libertarian view of property rights is violated by an estate tax. Finally, I will explain why a society can, unrestricted by moral constraints regarding the property rights of the deceased, set a default rule for post death property rights that reflects that society's values.

As a preliminary matter, I would like to stress that this Article is *not* an attempt to respond to or critique libertarianism as a political philosophy. A central part of this project is to articulate the libertarian position, and I begin my exploration of the estate tax by adopting that view. While I will argue that certain views that are traditionally taken to be libertarian views (such as the rejection of the estate tax) are not necessarily implied by the core tenets of libertarianism, this Article is not intended to argue against libertarianism as such. In this Article I will accept the libertarian political philosophical viewpoint, and explore the estate tax from within that perspective.

I also note that my primary purpose in this Article is to dispute the post-death moral property rights claims made by libertarians when they argue against the estate tax. As I will show later in this Article, my articulation of libertarianism does not necessarily entail enacting an estate tax, nor does not require a particular level of tax. I am merely

---

[2] *See, e.g.,* Friedrich Hayek, THE CONSTITUTION OF LIBERTY; Alexander Tabarrok, "Equality and the Death Tax," 15 THE FREE MARKET: THE MISES INSTITUTE MONTHLY 9 (1997). *Available at*: http://mises.org/freemarket_detail.aspx?control=121; Laurence Vance, "A Libertarian View of the Estate Tax," FUTURE OF FREEDOM FOUNDATION (2010). *Available at*: http://fff.org/explore-freedom/article/libertarian-view-estate-tax.

trying to demonstrate that those who argue that the estate tax is an immoral violation of the private property rights of the deceased are mistaken. This is not to say that the estate of the deceased should necessarily pass to the government. It is just to say that we would need to determine as a society what rule to set, having no moral absolutes that would determine how to set the rule.

My two central arguments against the unimpeded transfer of property rights at death are as follows: first, I argue that the libertarian view of the moral establishment of property rights through mixing one's labor with the world is inconsistent with establishing property rights in the children of those labor-mixers.[3] Further, Nozick's argument about the justice of particular distributions of wealth depends upon the consent of all involved to the original distribution from which the distribution in question descends. I argue that when we discuss the justice of uneven inheritances and the concerns of intergenerational justice, we cannot assume that generations further down the line have consented to the distribution agreed to by their parents or their parents' parents. Instead, libertarian values require determining the justice of the "original distribution" anew each time.[4] Secondly, I argue that the libertarian view of morally justified property rights does not entail the right to transfer assets after death.[5] Because, for libertarians, the moral justification for property ownership stems from mixing one's labor with the world, the holder of the moral right is that individual who has mixed her labor. Once she dies, her moral rights end. She no longer has a moral claim of ownership over the good in question, as she did have during her lifetime. As a result, without a law giving her the

[3] *See infra* Part VI.
[4] *Id*.
[5] *See infra* Part VII.

right, the labor mixer cannot determine where the good will go when she dies. Because the moral claim has ended, society can now determine where to set the rule regarding distribution of post-death property without concern that such a rule would violate moral rights.

II. Why Focus on the Estate Tax and Not the Income Tax?

This Article views the estate tax through the particular lens of libertarianism. As a necessary corollary to a discussion of the estate tax, I will also address issues related to the gift tax as part of the argument.[6] However, I will not discuss the income tax in this Article. Many excellent pieces have been written on libertarianism and the income tax.[7] I have chosen to focus on the estate tax for a number of reasons, which I will articulate in this section.

Incentives

A discussion of "incentives" is often a central piece of any tax policy argument. In particular, with regard to the income tax, proposals attempt to balance fairness goals with concerns about the incentive effects of the income tax rules.[8] This discussion of the incentive effects of high tax rates or of various deductions has been central to the tax policy deductions of the 2012 presidential election.[9] Because the question of incentives is primarily an economic question, and because debates about incentives often override

---

[6] *See infra* Part ____.
[7]
[8]
[9]

questions of morality in contemporary tax policy discussions, I have chosen not to examine the income tax in this Article.

To be sure, there are incentive concerns in the estate tax, but they are much less significant than the purported incentives found in the income tax world. For instance, in discussions of the income tax, certain arguments claim that lowering tax rates increases job growth.[10] If this correlation were demonstrated, then there would be a strong reason, based on the potential incentive effects, to lower tax rates. In that case, the discussion of incentives would be central to any tax policy addressing the tax rates. By contrast, the incentives one can find in the estate tax are minor, and secondary to its primary function. When proposals to eliminate the estate tax are discussed, one central incentive function that arises is the concern that the current estate tax incentivizes charitable contributions.[11] Because the current estate tax provides a 100% charitable deduction, eliminating or reducing the estate tax would arguably reduce charitable giving.[12] Because taxpayers prefer to give their estates to the charity of their choice, rather than to the government, so the argument goes, the estate tax motivates charitable giving at death, since every dollar given to a charitable organization avoids tax.[13] Without the estate tax, taxpayers would choose between leaving their estates to their family or other preferred heirs, or leaving the assets to charities. In this alternate world with no estate tax, the worry is that charities

---

10

11 §2055 provides an unlimited deduction against the estate tax or the gift tax for amounts transferred to a charity (defined as a §501(c)(3) non-profit entity) as an *inter vivos* gift or after death. In addition, §170 provides a deduction against the income tax for the same contributions.

12

13

will not fair as well. Without the motivation provided by the tax, charitable giving would go down.

Importantly, though, the estate tax is not the only tax tool with which to motivate charitable giving. The current income tax model gives a deduction for charitable contributions as well.[14] Since any incentive concerns about the estate tax and charitable deductions can be addressed through the income tax as well, the incentive arguments are not as potent.

Another possible incentive concern raised with regard to the estate tax is the incentive the tax provides for the taxpayer to provide for a surviving spouse or surviving children. Because the estate tax provides an unlimited spousal deduction, in addition to a $5.12 million exemption amount for all other transfers, which is currently portable between spouses, some argue that the Code is creating incentives for taxpayers to care for their family members after the death of the taxpayer.[15] While the spousal exemption may provide an incentive to leave assets to one's spouse in order to defer the tax until that spouse's death, the lifetime exemption amount does not create particular incentives to

[14] §170. Granted, the deduction for charitable contributions is an itemized deduction and is therefore unavailable to taxpayers taking the standard deduction, and is structured oddly, offering a larger benefit to higher income taxpayers than to lower income taxpayers. Despite that, all of the same arguments made about charitable contributions, incentives, and the estate tax can be made about the income tax as well. For a comprehensive discussion of the charitable contribution deduction and its incentive effects, *see* _____.

[15] §§2010, 2056. Assets are eligible, under §2056, for an unlimited deduction when the decedent passes the assets to the surviving spouse. This transfer does not use any of the lifetime credit available under §2010. Since 2011, §2010 has included a portability provision, allowing spouses to "use up" the unused portion of the first-to-die's lifetime credit. Therefore, estate planning now permits the first spouse to die to bequeath the entirety of her assets to her surviving spouse, at which point the surviving spouse will have, in 2012, $10.24 million in §2010 credit to use in his estate planning.

provide for one's children. Since the exemption is available for up to $5.12 million in assets, regardless of the identity of the heir, a taxpayer could get the exemption by leaving assets to a neighbor, a lover or a trust created to protect her dogs.[16] If policymakers wished to provide incentives through the federal estate tax to care for one's children after one's death, they could create a relationship based exemption amount, such as in the model currently found in a number of state inheritance laws.[17] Under a model that values sanguinity, transfers to close relatives (siblings, children, grandchildren) could escape transfer taxation altogether, while transfers to more distant relatives or unrelated parties would be subject to the tax.

While the current estate tax does not provide many incentives to care for one's family after death, as I have demonstrated, it would be possible to create a transfer tax system that *would* have those incentives. Does that mean that incentives to care for family are an important part of an estate tax system? Not necessarily, since we could institute those rules elsewhere – as we do currently. Many states have in place a series of laws that give priority to the rights of surviving spouses, over and above the rights of a testator to determine the distribution of her assets.[18] In addition, at least one state gives priority to the rights of the surviving children, as well.[19] If there is a federal policy goal to encourage (or require) taxpayers to provide for their family members after the death of

[16] §2010. There are no restrictions in the lifetime credit restricting the use of the funds transferred tax-free under this credit. If assets are transferred to the transferor's spouse, then they are exempt from transfer tax under §2056, and if assets are transferred to a §501(c)(3) non-profit organization, then the transfer is deductible under §2055. Otherwise, the first $5.12 million in assets transferred during (or after) the transferor's lifetime are creditable under §2010.
[17] Kentucky, etc.
[18] Widow's elective share.
[19] Children's elective share in Louisiana.

the taxpayer, then there are much clearer and more straightforward ways to ensure that result than by creating exemption amounts and incentive structures through the estate tax.

Finally, one might argue that estate tax policy must concern itself with the incentive effects the tax has on the lifetime earning power of the potential taxpayer, or with the negative effects that the absence of a tax would have on the potential heirs. If the estate tax is too high, an individual taxpayer might have significantly less incentive to work, accumulate, and save over her lifetime, since she would know that, upon her death, a large portion of her wealth would be taken by the government. By contrast, with no estate tax in place, the potential heir has less of an incentive to work, accumulate, and save over her lifetime, as she expects to inherit a large sum (undiminished by tax) when her benefactor dies. In each case, the existence of an estate tax will play some role in changing the incentives felt by each of these individuals. However, again, I argue that these incentives (or lack of incentives) are not the central aim of the estate tax, but are secondary elements that must be considered when crafting the actual rule (or when deciding not to have a rule at all).

Property Rights

Another central theme in most discussions of income taxation, in particular when the discussion involves libertarian arguments, is the absolute property rights of the taxpayer. On this argument, property rights are inviolate. Therefore, in the words of the star of this Article, Robert Nozick, "[t]axation of earnings from labor is on a par with

forced labor."[20] There are a variety of libertarian theories of property rights, which I discuss later in this Article.[21] Regardless of the theory invoked, once one holds that strong property rights are an argument against taxation, then the discussion of the appropriate tax has to balance respect for that property right with the needs of the state or the cost of the services provided, in order to determine the appropriate level of the tax.

However, strong theories of property rights become much more difficult to defend in the context of the estate tax, since the property in question can no longer properly be said to "belong" to the taxpayer. The taxpayer is dead. We do have examples of respecting the property rights of the dead[22], but in each case the law reserves to itself the ability to violate that property right if it determines that doing so is in the best interest of the state.[23] The same libertarian-Lockean arguments about the moral authority of a property right in the owner who mixes her labor with the item in order to claim ownership is much harder to defend when that labor-mixer is no longer alive to claim the right herself. In this way, a discussion of the estate tax, as opposed to the income tax, goes some way towards minimizing the property rights claims that invade discussions of the legitimacy of the tax.

Revenue Raising

One central rationale for the existence of any tax regime is the satisfaction of the government's revenue needs. Currently, the United States government raises

[20] Nozick, ANARCHY, STATE, AND UTOPIA at 169.
[21] *Infra* section ___.
[22] Storrow Dr., foundations, trusts, wills, etc.
[23] *Cy pres* doctrine, widow's elective share, children's elective share.

approximately $2.3 trillion annually through the collection of all taxes.[24] The individual income tax raises approximately $1.1 trillion annually.[25] By contrast, the estate tax is estimated to raise only about $40 billion in 2011.[26] The amount raised by the estate tax has decreased dramatically in the past decade, as the phased-in tax provisions enacted as part of EGGTRA (the so-called "Bush tax cuts") have taken effect.[27] However, even back in 2000, before the enactment of the Bush tax cuts, the estate tax represented only about 3% of all revenues collected by the federal government.

Clearly, the individual income tax is a central element of the United States' government's annual revenue raising. Given that there are minimum amounts the government needs to operate annually, there is only so much flexibility that Congress has to amend the income tax code. Obviously, changes to the revenue collection powers of the income tax are part of a larger discussion about government spending and the budgeting plans of federal administration.[28] However, discussions of the estate tax are

---

[24] CBO, "An Update to the Budget and Economic Outlook: Fiscal Years 2012 to 2022", *available at:* http://www.cbo.gov/sites/default/files/cbofiles/attachments/08-22-2012-Update_to_Outlook.pdf.

[25] *Id*. Importantly, the individual income tax revenues include the collection of taxes on all partnerships and sole proprietorships, since the United States income tax regime treats those entities as generating income that passes through to the individual partners of the entity, and therefore that income is reported on the returns of the individual taxpayers.

[26] *Id.*

[27] EGTRRA was enacted in 2001, raising the exemption amount from ___ to ____ and lowering the rate from ____ to _____. For the final year of the statute, 2010, there was no estate tax. The original bill was scheduled to sunset on December 31, 2010, at which time the law would have rolled back to what it had been in 2001. However, a bill was passed on ____ to extend the tax cuts for another two years, until December 31, 2012. Congress no faces a similar problem, and must act before that date, or face having the exemption level and rates return to 2001 levels, a more significant change now given that the exemption level is even higher and the rate even lower than they were in 2009.

[28] Presidential proposals, debates, etc., which center on the issue of the size of tax collection and the spending plans of the candidates.

able to sidestep those issues, at least to some degree. Because revenues collected from the estate tax represent such a relatively small amount of total revenues, discussions of the estate tax can happen without the threat that eliminating the tax would hamstring the entire operation of the government. Given the current size of the revenues collected via the individual income tax, it is entirely unfeasible to talk in terms of the elimination of the tax altogether, without simultaneously talking about radical shifts in the federal budget. However, one could make a legitimate argument in favor of eliminating the estate tax, without the concern that the budget as we have known it would fall entirely apart.

It is noteworthy, however, that opponents and proponents of the estate tax view this issue of the relative size of the estate tax through very different lenses. Opponents of the tax argue that, given the miniscule amount of federal revenue raised annually through the estate tax, there is no coherent reason for maintaining the tax, and we could (and should) very easily eliminate it.[29] On the contrary, estate tax proponents argue that, given the importance of the estate tax as a philosophical political matter, and given its unique role in the tax code, we should maintain the tax, given that it affects so few people.[30] In

[29] This argument is regularly made in the context of arguments to reduce the size of government more generally, or reduce taxes more generally. It is sometimes part of a larger "starve the beast" approach to tax policy. But it is also an argument made by those who have other philosophical reasons for opposing the estate tax. If the estate tax is morally unpalatable (the argument goes) *and* it doesn't raise very much revenue, then why in the world should we keep it around?

[30] Again, those who make this argument see it is as the natural conclusion of an argument in favor of the estate tax on other grounds (that is serves a redistributive function, that it curtails the amassing of large estates based on inherited wealth, that it encourages the circulation of assets). Since the tax is so important, proponents argue, and since it is so unobtrusive in the lives of most U.S. taxpayers, we should clearly maintain the tax as part of the Code.

either case, the size of the revenue generated by the estate tax is not entirely determinative of whether or not to maintain the tax, given that there is such widespread disagreement about what the size means.

As a side note, in a time of diminishing federal revenues coming from all forms of U.S. tax, it is important to proceed with caution when proposing to eliminate one source of that revenue. While the amounts raised through the estate tax are small, both in absolute and relative numbers,[31] they do represent dollars that help to fund the annual federal budget.

Redistribution

At the heart of it, my interest in exploring the estate tax rather than the individual income tax in this Article stems from the primarily redistributive nature of the estate tax. While the individual income tax serves many different purposes (as discussed above the income tax is used to create incentives and raise revenue, among other things), as I have shown in this section, the estate tax does not primarily serve any of those roles. As an example of the federal government using the tax system as a tool for redistribution, there is nothing finer than the estate tax. At its heart, this tax serves the purpose (or, at least, is intended to serve the purpose) of breaking up large concentrations of intergenerational inherited wealth, and consequently using those funds (along with other funds) to support federal government programs, including welfare programs, such as the EITC, AFDC and

[31] Small, of course, is a relative term here. The $40 billion raised annually by the estate tax is clearly not small compared to most taxpayers' annual salaries, or to the gross national product of a small nation.

food stamps.[32] If one wishes to have a conversation about the merits of federally facilitated redistribution, there is no better example.

For all of these reasons, this Article is concerned with the estate tax. It may, in fact, be the case that many of the conclusions drawn in the Article will have broader consequences, including with regard to the individual income tax. However, in order to avoid these issues, this Article will focus only on the particular matter of redistribution in the context of the estate tax.[33]

III. The Libertarian View of Private Property Rights.

One cannot discuss the philosophical, political, or moral legitimacy of taxation without first discussing property rights. Because this Article is concerned with a libertarian view of the estate tax, we must begin with the libertarian view of private property rights. In this Article, I am primarily exploring the views of Robert Nozick on taxation as he articulates them in *Anarchy, State and Utopia*. However, Nozick's views on property rights are, at best, unclear. Because he regularly appeals to John Locke in his discussions of property rights, I will use both Locke and Nozick to lay out the libertarian view of property rights that I will adopt for purposes of this Article.

In *Anarchy, State, and Utopia*, Nozick identifies his views on property rights in Chapter 7. In his argument, Nozick identifies three stages of property rights, and three

[32] The Earned Income Tax Credit (cite to section) Aid to Families and Dependent Children (cite to authorizing statute) and the federal food stamps program (cite to statute) are just three examples of ways the federal government offers financial support to the lowest income members of society.
[33] One section of the paper will tackle the issue of the gift tax, but only as it relates pragmatically to the issues raised and addressed with regard to the gift tax.

forms of justice in relation to those rights: justice in acquisition, justice in holdings, and justice in transfer.[34] I will address each of these in turn.

Justice in Acquisition

For Nozick, justice in acquisition is the criteria by which we evaluate the moral fairness of the original creation of property rights in an object.[35] It is that original establishing of property rights that creates the moral basis for justice in holdings and justice in transfer, so justice in acquisition is clearly an essential part of the argument for Nozick. He explicitly recognizes that the justice of holding property is contingent on the acquisition of that property. "Justice in holdings is historical, it depends on what actually happened."[36] Further, Nozick recognizes that, in order to prove one's entitlement to a particular piece of property, one must be able to establish the justice of one's acquisition of that property. As Nozick famously writes, "whatever arises from a just situation by just steps is itself just."[37] One might expect, then, that Nozick would lay out a careful argument for his view of justice in original acquisition, however he resists making that argument.[38] Although Nozick resists making an argument about justice in holdings, he does seem to endorse a natural rights version of justice in holdings, writing "things come

[34] Nozick, p. 151.
[35] *Id.*
[36] Nozick, 152.
[37] *Id.* at 151.
[38] In Chapter 7 of *Anarchy, State, and Utopia*, Nozick sets himself the task of identifying justice in acquisition, justice in holdings, and justice in transfer. However, he writes "[t]o turn these general outlines into a specific theory we would have to specify the details of each of the three principles of justice in holdings: the principle of acquisition of holdings, the principle of transfer of holdings, and the principle of rectification of violations of the first two principles. I shall not attempt that task here." Robert Nozick, ANARCHY, STATE, AND UTOPIA at 153.

into the world already attached to people having entitlements over them."[39] Beyond that relatively ambiguous claim, however, Nozick's only reference to justice in acquisition refers to the Lockean arguments regarding personal property rights.[40]

On Locke's view, the original moral claim of ownership, essential to a coherent theory of property rights, is established through the mixing of one's labor with things in the world.[41] Once an individual has mixed her labor with the world by, say, tilling an acre of land, she can lay claim to that land, and her ownership claim will carry the weight of moral authority. However, Locke included in his theory an important proviso: one can only claim ownership in a thing if one leaves "as much and as good for others."[42] Much has been written about what this proviso means, and an extensive examination of the Lockean proviso is outside of the scope of this Article. However, it is at least relevant to note that there is a great difference of opinion regarding whether Locke's proviso relates only to the truly *original* acquisition of property rights, or whether it can continue to apply going forward. In other words, Locke's requirement that claiming an ownership right over land must leave as much and as good for others clearly would have prohibited the first European explorers to reach the New World from claiming all of North America for themselves.[43] However, if, four hundred years later, all of the land in North America is already claimed, so that an individual with no money, but plenty of labor available for mixing will have no chance of claiming property rights in that way, does *that* violate the

[39] *Id*. at 160.
[40] *Id*. at 174.
[41] John Locke. *The Second Treatise of Government*, chapter 5 "Of Property".
[42] *Id.*
[43] This is, of course, leaving aside that there were already people present in the land the explorers called North America who had been mixing their labor with the land for centuries.

Lockean proviso? And, further, how much labor mixing is required to claim property rights in land? It seems clearly insufficient to run a fence around a 300 acre piece of property and claim that one has mixed one's labor with it, but is paying someone else to till the land sufficient for Locke's purposes? Is tilling once enough, or must the owner mix her labor with the land regularly? Again, these questions are outside the scope of this Article, but because so much of Nozick's central arguments will hinge on accepting this theory of justice in acquisition, it is at least worth raising them.

Justice in Holdings

Nozick's conception of justice in holdings is classically libertarian. Once one has justly acquired a property right, one's rights in holding that property are absolute.[44] Property rights are inviolable, on Nozick's model, although, like his arguments for justice in acquisition, Nozick does not make much of an argument for this view. Primarily, Nozick's position stems from a natural rights theory of property, arguing that property rights are absolute, and that violating or curtailing property rights, without explicit consent from the property holder, is an immoral and impermissible taking of those rights.[45]

Justice in Transfer

Because of Nozick's belief that the holder of a property right has an absolute and inviolate right over that property, it is unsurprising that he argues that a property holder

44

45

has an absolute right of transfer as well. Justice in transfer means that the property holder has the right to dispose of her property as she wishes, unfettered by restrictions imposed by the government or other third parties. These transfers may include both a sale in a market transaction, or a gift or bequest, given freely and without the expectation of compensation. Although he does not explicitly make the argument for it, Nozick's vision of justice in transfer includes the right to transfer one's good after death, which I will address later in this Article.[46]

Criticisms of Nozick's Views on Property Rights

While my primary purpose in this Article is not to provide a response to Nozick's version of libertarianism, but instead to adopt his libertarian position, and examine the estate tax through that lens, nonetheless I will pause briefly here to explore some of the most serious criticism's of Nozick's views on property rights. As I have explained already, much of what Nozick does say about private property rights, he says without argument, adopting a natural rights view of those rights, without defending his expansive view of them. Interestingly, though, at least one critic argues that Nozick has *no* coherent view on property rights, ultimately conflating a variety of positions, and finally coming out as a utilitarian, rather than a pure libertarian.[47] Barbara Fried's argument traces the way that Nozick's view evolves throughout the three parts of *Anarchy, State, and Utopia*. In particular, she points to the fact that, although he insists on the importance of obtaining

[46] *Infra* Part ____.
[47] Barbara Fried, "Does Nozick have a theory of property rights?" *in* THE CAMBRIDGE COMPANION TO NOZICK'S *ANARCHY, STATE, AND UTOPIA*. Eds. Ralf M. Bader and John Meadowcroft, Cambridge University Press, Cambridge (2011).

explicit consent from property owners before collecting from them (in the context of taxation) Nozick ultimately accepts that property owners can have their property rights limited, as long as they receive compensation for the curtailment of their naturally held unlimited rights.[48] But the argument, that, in the interest of all, the interest of a few (property owners) could have their rights violated, with compensation paid to them, is a utilitarian argument, not a libertarian one.[49] Traditionally, utilitarians (John Stuart Mill, foremost among them), have held that, in order to determine the most moral action in any particular circumstance, one must calculate which action will maximize total happiness.[50] Since any particular action may cause both some unhappiness and some happiness, utilitarians advocate using their calculus to weigh the respective advantages of any decision. One famous articulation of this calculus is the trolley example, introduced by Phillipa Foot.[51] In this example, a trolley driver is at the helm of an out of control trolley, which he cannot stop.[52] He sees a split in the rails ahead, and on one of the rails there is one workman working, while there are five workmen on the other rail.[53] He must instantaneously choose which path he will take. The utilitarian calculus compares the loss of one life with the loss of five lives, and determines that the moral choice of the

---

[48] *Id.* at 240-241.
[49] The utilitarianism of Jeremy Bentham, John Stuart Mill and others requires the calculation of the rights and interests of the various members of a society in order to determine the morally right action. Morality is defined as the action that provides the greatest benefit to the greatest number of people. *See* John Stuart Mill, "Utilitarianism." Edited by John Gray, ON LIBERTY AND OTHER ESSAYS. Oxford: Oxford University Press (1998); Jeremy Bentham, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION. New York: Hafner (1948).
[50] Mill, "Utilitarianism".
[51] Philippa Foot, "The Problem of Abortion and the Doctrine of the Double Effect," *in* VIRTUES AND VICES. Oxford: Basil Blackwell (1974).
[52] *Id*.
[53] *Id*.

trolley driver is to steer the trolley down the path with only one worker.[54] Similarly, a utilitarian would argue that limiting one individual's private property right for a significant increase in the happiness of many other people would be a morally appropriate action. This kind of moral reasoning would allow utilitarians to see a government taking or a zoning restriction as morally justifiable. However these types of infringements on the absolute rights of individual citizens would be anathema to the moral feeling of libertarians. While Nozick explicitly rejects the utilitarian calculus, certain of his arguments do have a definite utilitarian feel.[55]

IV. Tax Structures Traditionally Accepted by Libertarians

Even the pure libertarian view of property rights, endorsing an inviolable set of rights that cannot be breached without consent, has historically been viewed as consistent with some kinds of taxation. Libertarians have disagreed about the level of consent required in order to legitimately tax property owners, with Nozick requiring explicit consent received from every individual subject to the tax, to others who argue that remaining within the society or accepting government-provided benefits are sufficient forms of implicit consent to legitimate the tax.[56] Regardless of these differences on the required form of consent, libertarians have generally agreed that taxation as payment for services received is a legitimate form of taxation by the government.[57] This kind of tax, sometimes called the benefit principle of taxation, argues that the government is merely a

---

[54] *Id*.
[55]
[56]
[57]

provider of services, collecting payment for those services as part of a market transaction. On this argument, citizens could argue that the government should limit the kinds of services it provides to those that *only* the government could provide, or to services where there is a significant increase in the efficacy of the service, or a lowering of the cost of the service, when the service is provided by the government. The kinds of services for which the government could provide fees, through the collection of taxes, might include the maintenance of roads and sewers or the provision of security (both local and national). In a more expansive state, services might include public education, the regulation of markets, or the provision of public healthcare. While a classic libertarian might balk at the second set of services, the libertarian position merely requires that the citizens receiving (and paying for, through taxes) the services in question *consent* to have the government provide the services.[58]

For purposes of this Article, which is centrally concerned with the estate tax, it is important to note that the payment for services benefit principle model of taxation seems to fit most naturally with an income tax, rather than an estate tax or other transfer tax. Because the services in question would be provided regularly, an annual accounting of the cost of the services, and the amount of that cost allocable to any particular taxpayer,

[58] There is a tradition known as Left Libertarianism, in which a more expansive state, such as one that might provide the second set of services listed above, is more likely to be endorsed. What Left Libertarianism shares with the tradition of Right Libertarianism is the insistence on the importance of consent in providing moral legitimacy to the government and its curtailing of property rights. For examples of Left Libertarianism, *see, e.g.,* Michael Otsuka, LIBERTARIANISM WITHOUT INEQUALITY. Oxford: Oxford University Press (2003); Peter Vallentyne and Hillel Steiner THE ORIGINS OF LEFT-LIBERTARIANISM: AN ANTHOLOGY OF HISTORICAL WRITINGS, London: MacMillan (2001).

would be easiest to administer. In addition to the ease of administration, the income tax seems to fit the payment for services model better, since it charges the taxpayer for the services in the general time period in which the services were received, rather than waiting until the end of the taxpayer's life to calculate the amount due.

Unsurprisingly, an estate tax justified as a method of redistributing wealth from the richest taxpayers to the rest of society is anathema to the libertarian moral view. Because it violates the principle of taking from the taxpayer only with her (implicit or explicit) consent, government-facilitated redistribution through the tax code is immoral, on the libertarian view. I note this in order to emphasize that there is not necessarily a fundamental libertarian objection to the estate tax. As a logistical matter, libertarian-sanctioned benefit principle taxation is likely easiest to administer through the income tax. However, an estate tax could be permitted on libertarian grounds, as long as the justification for the tax were limited to benefit principle grounds. Redistribution through the code, whether done via income or estate tax, violates libertarian moral views about property rights.

V. Libertarian Views on Inheritance

In order to explore Nozick's libertarian position on the estate tax, one must first examine the libertarian position on the rights of inheritance and bequest.[59] To clarify, a

[59] In this section I reference a number of state statutes addressing the laws of inheritance intestacy. It is important to note, though, that Nozick, Locke and other libertarians believe that the rights in question here are natural rights, not positive rights. That is to say, the rights to inherit or leave the bequests one wishes exist regardless of the statutory schemes in place in any particular state. On this model, the statute is merely a codification of the right, not a creation of that right.

right of inheritance lies squarely with the heir. If an heir has a right to inherit, then the heir has some version of a property right in the assets held by the testator, although the right cannot be exercised until after the testator dies. A right of inheritance might be held by an individual explicitly named in the will of a testator, but rights of inheritance can be found elsewhere as well.[60] For instance, state intestacy laws create rights in individuals that the state has determined are the most likely to have been named beneficiaries of the deceased, if she had, in fact, created a will.[61] However, some states move beyond mere intestacy laws, and create a right in the surviving spouse, or, in one case, the surviving children, to inherit from the assets of the deceased, *even though the deceased explicitly disinherited them*.[62] Such laws value the rights of the survivors to inherit above the rights of the deceased to determine the distribution of her assets after she dies.

By contrast with the right to inherit, held and exercised by the heir, the right of bequest is a right held by the deceased, the testator, in the case of an individual who executes a will.[63] The right of bequest is defended by libertarians as one of the rights contained in the inviolate absolute ownership of private property.[64] In Nozick's model, the right of bequest is evaluated as moral matter within the purview of justice in transfer.[65] If the asset is one that was acquired justly by the testator, and is transferred

---

[60] Cite to state laws giving rights to named heirs.
[61] State intestacy laws most commonly identify the spouse and children as the individuals who inherit from the deceased in the absence of a will. However, if the deceased had no spouse or children, the statutes create schema that identify who inherits the assets of the deceased. In certain circumstances, if no living relatives are found, the assets of the deceased escheat to the state. (Cite to example). Cite to state intestacy laws.
[62] Cite to spousal election rules.
[63] Cite to definition of "testator".
[64] *Infra,* Part ____.
[65]

justly by her, then the bequest must be respected as morally permitted. State statutory schemes regarding rights of bequest track these libertarian principles, respecting and enforcing most testator's wishes through the probate process.[66]

Locke on Inheritance Rights

Since Nozick identifies himself as adopting Locke's theory of property rights, and since Nozick himself does not explicitly address the issue of inheritance rights, I will turn now to a brief examination of Locke's views of inheritance rights. This requires examining both the right of a descendant to leave a bequest, and the right of an heir to claim an inheritance. As I demonstrate in this section, these rights are often (perhaps even always) in conflict, and cannot simultaneously be enforced.

Locke's belief in the absolute right of ownership in goods stems from his view that mixing one's labor with the world creates a property right that cannot be extinguished by a third party. This absolute right of ownership includes an unfettered right of transfer. Locke takes the right of transfer to include an unfettered right of transfer at death as well.[67] In other words, an individual who holds property may choose to bequest that property as she wishes. If society respects this right, then any decision made by the deceased with respect to the disbursement of her assets must be honored. This may include a choice by the deceased to disinherit her children or her surviving spouse.

---

[66] Again, many states privilege the inheritance rights of the surviving spouse over the bequest rights of the decedent. *See, e.g.,* spousal election statutes.
[67] Jeremy Waldron, "Locke's Account of Inheritance and Bequest" at 44.

However, alongside this view that the wishes of the deceased must be respected, since the right of private property includes the right of bequest, Locke simultaneously holds the view that children and surviving spouses have a right of inheritance as well.[68] At various points in his writing on inheritance, Locke states that a surviving spouse or surviving children who are disinherited by the testator's will should nonetheless be awarded an amount sufficient to allow them to survive comfortably.[69] The familial relationship between the surviving family members and the testator creates a moral claim in those survivors that should be enforced by the society, Locke thinks.[70] In particular, Locke focuses on the "surplus" that may exist in the estate of the deceased, arguing that surplus can be disposed of as the testator wishes, while the essential part, required to care for the survivors, should be passed to the children under their right of inheritance.[71]

So how can a property holder have an unmitigated right of bequest while a surviving family member simultaneously holds a right of inheritance? In instances where these two rights conflict (the testator leaves all of his property to his friends, while his surviving children wish to claim an inheritance right in some of the property), what action should society take? Must society enforce the wishes of the now deceased testator or of the surviving children? Commentators disagree about whether or not Locke's view is incoherent.[72]

---

[68] Cite to Waldron and Kendrick.
[69] Cite to Locke, Waldron, Kendrick.
[70] Locke.
[71] Cite to Locke.
[72] Waldron (saying these are incompatible views); Kendrick (saying the views are compatible).

Ultimately, Locke's view on the rights of bequest and inheritance appears utilitarian, rather than libertarian. The role of society in allocating the goods of the deceased requires a balancing of the wishes of the deceased with the needs of the survivors and other social goals.

VI. Wilt Chamberlain and Patterns of Justice

In his argument concerning distributive justice, Nozick seeks to distinguish his work from theories that try to establish patterns of distributive justice.[73] On Nozick's model, patterned principles of distributive justice identify a desired distribution of goods, either an end-goal or a goal evaluated at any particular moment in time, and then evaluate the current distribution by comparison to the desired pattern.[74] Nozick is critical of patterned principles of justice, since he thinks they will inevitably lead to a restriction on the right of individuals to freely contract to exchange goods. In order to demonstrate this result, Nozick introduces his famous Wilt Chamberlain example.

Nozick asks the reader to imagine an initial distribution of wealth that the reader believes is just. Because Nozick does not want to preclude any particular distribution, he identifies this initially just (on the reader's terms) distribution as D1. Then, he says, imagine that there is an individual, call him Wilt Chamberlain, who has an incredible

[73] David Schmidtz, "The Right to Distribute," *in* THE CAMBRIDGE COMPANION TO NOZICK'S *ANARCHY, STATE, AND UTOPIA*. Edited by Ralf M. Bader and John Meadowcroft, Cambridge: Cambridge University Press (2011).
[74] *Id.* at 204. Nozick identifes Rawls' difference principle (permitting inequalities in the distribution of goods only if the inequalities benefit the least well-off in a society) as a patterned principle with regard to distributive justice.

talent at playing basketball.[75] People love to watch him play basketball, and so many people agree to pay him 25 cents for the privilege of watching him play. Say, then, that ultimately one million people pay a quarter to Wilt Chamberlain to watch him play basketball. Each of these people has freely chosen to enter a contract with Chamberlain, wherein each of them pays 25 cents, and Chamberlain allows the individual to watch him play. At the end of these million transactions, Chamberlain will have $250,000 above what he was entitled to in D1, and each of the one million people will 25 cents less than he or she was entitled to in D1. Nozick calls this second distribution D2. We have, as a result of one million freely made transfers, radically shifted the original distribution. However, Nozick says, we cannot complain that D2, which does not match the distribution we originally believed was a just distribution, is *un*just. Nothing unjust has occurred. Each of Wilt Chamberlain and the one million fans freely agreed to the transfers. Indeed, Nozick argues, it would be unjust for someone (the government?) to

[75] Barbara Fried identifies what she views as a critically important flaw in the Wilt Chamberlain example. While Nozick allows for the just distribution of goods and wealth in D1, he does not account for Chamberlain's talent at playing basketball as a good that has been unevenly distributed. It is this uneven distribution of talents, and the scarcity of the talent of basketball playing, that makes Chamberlain able to demand 25 cents from each individual for the privilege of watching him play. If basketball playing talents were distributed more evenly, or were not in such short supply, then Chamberlain's fans would have been able to watch other players instead, and the price Chamberlain could command would likely fall. Fried likens Chamberlain's talents to an individual holding a large amount of land. When the landholder exchanges that land for $250,000 we do not say that he is $250,000 richer. We merely say that he has liquidated the asset he previously held in illiquid form. One could make the same argument about Chamberlain's basketball talents. *See* Barbara Fried, "Wilt Chamberlain Revisited: Nozick's 'Justice in Transfer' and the Problem of Market-Based Distribution." 24 PHILOSOPHY AND PUBLIC AFFAIRS 3 (1995).

enter D2 and try to make it match D1 by reallocating some or all of Chamberlain's newly acquired $250,000 away from him, since he acquired that wealth justly.[76]

Nozick's conclusion, then, is that patterned principles of distributive justice necessarily violate individual freedom and property rights. In addition, he believes they are ultimately unattainable, given the constant exchanging of goods that happens within a society. Because Nozick's position is that "whatever arises from a just situation by just steps is itself just, "[77] the Wilt Chamberlain model demonstrates that justice will result in radically different actual distributions, over time. Because D1 was a just distribution (based on the reader's own conception of justice), and because the transfers from fans to Wilt Chamberlain were all made freely (the very definition of just steps on Nozick's libertarian model) then the end result, with Chamberlain holding significantly more wealth than his fans, must also be just.

Combining this view of distributive justice with Nozick's view of private property rights, it becomes clear why Nozick believes in unfettered bequest rights. Because property rights include the unrestricted absolute ownership of the property in question, and because distributive justice must concern itself only with the free transfer of goods, rather than with the pattern of justice that results from those transfers, individuals must be allowed to transfer their assets as they wish, including after death.

VII. Chamberlain's Children and the Libertarian Problem of Inheritance

[76] Indeed, Nozick disputes the idea that there would be any individual or entity with the authority or even the ability to do that redistributive work. "There is no *central* distribution, no person or group entitled to control all the resources, jointly deciding how they are to be doled out." Robert Nozick, ANARCHY, STATE, AND UTOPIA, at 149.
[77] ANARCHY, STATE, AND UTOPIA at 151.

I have two arguments against the model of inheritance rights Nozick sees as necessarily following from his views of property rights and distributive justice. I will address each of those concerns in this section.

Future Generations and the Original Distribution

Nozick begins his discussion of the Wilt Chamberlain example by introducing a distribution, D1, that he says the reader should imagine is whatever distribution the reader believes is most just. The end distribution, D2, must be just, Nozick argues, because it was arrived at justly, in a way freely agreed to by all parties involved. Moving from here, assume that Wilt Chamberlain and all of his fans (call them the first generation, or G1) then pass their respective wealth on to their children. Now the second generation, call it G2, begins life with D2, rather than with D1. But G2 did not agree to the justness of D2. Indeed, G2 did not agree to the justness of D1 either! And G2 does not include the members of G1 who freely engaged in the transfers that created D2. So how can we expect the members of G2 to accept as just the distribution created by others, in which they had no say, either with regard to the original distribution or to the "free transfers" entered into by their forebears?

Further, Nozick's (and Locke's) emphasis on the importance of mixing one's labor with the world in order to generate property rights results in significantly less (or no?) moral claims in G2 for rights over the property that they inherit from G1. Nozick's argument for the rights of the heir stems from a combination of justice in acquisition and justice in transfer. Because G1 (presumably) mixed their labor with the world in order to generate morally meaningful ownership over their goods, they acquired the right to freely

transfer those goods. Because G2 receives the goods as a result of a freely made (post-death) transfer by G1, then they have justly acquired the goods, and may hold them with the same moral authority with which G1 held them. This may be true with regard to *inter vivos* transfers, but it does not address what I see as the second libertarian problem of inheritance.

The Problem with Post-Death Property Rights

In order to make, as Nozick does, the claim that property ownership rights included an unmitigated right of transfer, one must first establish that the individual making the transfer has the kind of moral claim over the property that I have identified as arising from the libertarian theory of property rights. In other words, the right to transfer is one of the rights held by a property owner, but that right, like all property rights, is contingent on owning the property in the first place. This is where one encounters the problem of bequest and post-death property rights. While a property owner may write a will and have the intention to make a post-death transfer during her lifetime, the effectuation of that will happens only after her death. But in what sense does she continue to have the property right after her death, such that she has the authority to transfer that property?

In order to have a moral claim, or to have a right that is recognizable by society, there must be an individual, a subject, who can exert that right, or that claim. After death, the individual ceases to exist.[78] There is no subject available to claim the property right,

[78] There is, of course, great theological debate about the continuation of the soul (or the subject) after death. In most Western countries, we do not create legislation on the basis

and there is no subject available to enact the transfer. As a result, it violates the libertarian notion of property rights to authorize an individual to transfer an asset after her death. Enforcing the will is the equivalent of allowing the individual to transfer her neighbor's property, since she has no legitimate claim of ownership over either her neighbor's property or the property she claims to be transferring by will. By the time the transfer effectuated by the will takes place, the testator will no longer have the morally legitimate property right that would allow her to effect a just transfer, unfettered by third party intervention. Her moral rights cease with her life.

In what sense could it be meaningful to say that a deceased person continues to hold property after her death? To the extent that our current rules enforce the choices made by a testator in her will, they do so out of respect for the choices the testator made when she was alive, not because the document can be enforced by the drafter of the will. Indeed, our system creates a new legal entity, the "estate", which absorbs the rights and responsibilities of the person whose life (and, by extension, rights and responsibilities) has ended with her death.[79] Because there is no subject or moral right holder present to claim the right of transfer, a rule that establishes a default, which may or may not respect the wishes of the decedent, need not concern itself with potential violations of that subject's moral claims.

VIII. Establishing a Default Rule

---

of the religious beliefs of even the majority of citizens. In any case, allowing physical property rights to extend into the afterlife is not the central claim of any traditionally practiced Western religion.
[79]

In the previous section I attempted to demonstrate that the existence of the individual claiming a property right ends at that individual's death, and therefore the property right must end then as well. Therefore, I argue, there is no moral authority to the assumption that the decedent has the unfettered right to transfer her property as she wishes after her death. Does that then mean that the government has a moral claim to the property? Not necessarily. At the moment of death of the person with the property right recognized as morally meaningful on the libertarian model, there is no one with a property claim that is morally defensible, from a libertarian perspective.

This leaves us in an interesting position. If, as Nozick and many other libertarians have assumed, moral claims of ownership extended beyond death, then their arguments that the estate tax (along with other forms of *inter vivos* taxation) is theft would be convincing. However, I have demonstrated that the libertarian argument does not actually entail that result. With no individual or entity that has a libertarian moral claim over the property, we are left in the position of deciding what rule to choose.

At this point, we can bring back into our consideration all of the various tax policy concerns I bracketed at the beginning of this Article. We might consider incentive effects and revenue raising concerns when deciding what to do with the assets of a deceased member of society. We might decide that, as a matter of administrative ease, we will let the deceased draft a will telling us how she wishes the assets to be distributed, and we will distribute the assets according to that document. But we might decide that we have other goals that trump the goal of administrative ease in determining the best tax policy. We might decide that the goal of allowing for a more or less equal distribution of financial goods in each generation (a new D1, in the Wilt Chamberlain example) is a goal

that takes priority in our tax policy, and therefore we might enact a 100% estate tax, allowing the government to claim assets that have no owner, due to the death of the previous owner.[80]

The likely result is somewhere in the middle. The goal of this Article, however, has been to demonstrate that each of these results is consistent with the moral view of property rights espoused by libertarians, in particular by Nozick. Because there is no moral compulsion to act on the wishes of the deceased, or to treat the government has having morally deserving property rights in the assets, we can create a rule that bests reflects the needs and values of the society in question, while not violating the moral rights of any individual.

IX. What about Gifts?

I have, thus far, remained silent on the issue of gifts. Our current tax regime incorporates a gift tax with the estate tax, allowing a lifetime credit against *inter vivos* or post-death transfers.[81] Because this is a lifetime credit, once a taxpayer exceeds the credit, transfers effected during her lifetime will be subject to gift tax, currently imposed at a rate of 35% on all transfers over the $5.12 million exemption equivalent credit.[82] While the estate and gift tax are currently unified, that has not always been the case.

---

[80] One comment I received on this paper suggested that the Lockean/Nozickian result would be to allow assets that are freed up upon the death of the property holder to revert to nature. The true Lockean result, this commenter suggested, would be to allow individuals to come forward to mix their labor with these goods, and thereby establish new moral claims over the assets. This suggestion sounds more like a Hobbesian state of nature than a libertarian society, and I do not believe that Locke's view of property rights requires this result.

[81] §2010.

[82] §§2501, 2502, 2503, 2505.

Between 1916 and 1932, the United States had an estate tax, but no gift tax. This meant that transfers made during the transferor's lifetime would escape taxation, while assets held until death and then transferred post-death would be subject to the estate tax. This lead, unsurprisingly, to an increase in lifetime transfers as individuals sought to escape the transfer tax regime. As a result, in 1932, Congress enacted the gift tax as a backstop to the estate tax, ensuring that transfers would be subject to the tax regardless of timing. However, the gift and estate taxes were not unified until 1976. At that point the two tax regimes were partially unified, but the taxes were not fully unified until 2010, meaning that for almost seventy years the rates and exemption levels varied between the two credits.

I have demonstrated that the libertarian moral view of property rights is consistent with a 100% estate tax. But does this necessarily entail a gift tax as well? Because of the libertarian arguments about the absolute nature of the moral claim of private property rights, the libertarian model counts a gift tax as an immoral violation of the rights of the property holder. On the libertarian view, a property holder must be able to transfer her property as she wishes, with no limits on that transfer imposed by third parties. The imposition of a tax on the transfer, as occurs when the government taxes a gift, is a fetter to transfer imposed by the government. This makes the gift tax impermissible, on the libertarian model.

If, then, a society opted to impose an estate tax on assets that had been held by its citizens at their death, would the tax become meaningless, because all citizens would transfer their assets during their lives? I think there is at least some chance that the answer to that question is no. The estate and gift taxes have not always been unified, and,

even in years when they were not fully integrated, the estate tax did take in revenue. Further, individuals often have reasons to hold on to their assets, not wanting to spend their wealth down to nothing before they die. There are a variety of reasons for this (wanting children and other relatives to remain dependant, wanting the safety net provided by accumulated wealth, not trusting that others will spend the money wisely) that would likely continue to exist, even in the face of a robust estate tax.

Regardless of the logistical concerns of enacting an estate tax without a backstop gift tax, arguing for the moral legitimacy of a gift tax on libertarian grounds is impossible. The robust libertarian view of personal property rights makes the gift tax immoral. While it might make an estate tax easier to enforce, a libertarian would argue that instituting a gift tax will violate the property rights of potential taxpayers. Therefore, the estate tax is consistent with libertarian views, but the gift tax is not.

X. Conclusions

In this Article I have demonstrated that, contrary to much popular political rhetoric, the libertarian position on property rights (often viewed as the strongest argument for property rights) is consistent with a robust estate tax, reaching even 100%. Because the death of the individual property owner ends the moral ownership right of that individual, the estate tax is not "theft," as libertarians have often called all taxation. Instead, in the absence of any moral claims over the property, society is in the unique position of being able to design a post-death property regime that reflects the needs and wants of that society. This may mean that society decides to enact a 100% estate tax, claiming all assets left by individuals upon their death. This seems unlikely, but the point

of this Article is to demonstrate that such a plan would not violate the moral claims of either the deceased or any of that individual's potential heirs.

My hope is that the work of this Article will give us a place to start thinking about the estate tax that allows us to consider the variety of important tax policy considerations the tax could address. Rather than thinking of the estate tax as a violation of the moral claims of any individual, the estate tax can be used as a tool to help us achieve desired social ends. Society can move forward with its deliberations on the tax without fear that it is trampling on the rights of any of its citizens. Indeed, on the libertarian view, the estate tax is in a unique position, allowing the government to collect revenue without the risk of taking from those who do not consent to the tax. While Nozick did not recognize it, the estate tax should be the model of a libertarian tax.