VOLUNTARY WEALTH REDISTRIBUTION TO THE POOR THROUGH TRANSFER TAX REFORM

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ABSTRACT

The current transfer tax system does little to incentivize direct gifts and bequests from the wealthy to the poor, and in some respects even discourages them. This Article proposes to modify federal transfer taxation to remove disincentives, and create incentives, for private transfers of wealth to unrelated persons in poverty ("qualifying individuals," or "QIs"). The proposal (1) excludes lifetime gifts to or for the benefit of QIs in a qualifying form from the definition of a taxable gift; (2) provides for a deduction from the gross estate for testamentary gifts to or for the benefit of QIs in a qualifying form; and (3) excludes from the generation-skipping transfer tax base all lifetime and testamentary transfers to or for the benefit of QIs in a qualifying form. The proposal suggests practical and strategic administrative measures, including those that protect the dignity and privacy interests of QIs. The proposal also offers an optional design feature that would create a supplemental gift and estate tax exclusion corresponding to cumulative transfers in a qualifying form to or for the benefit of QIs.

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INTRODUCTION

Can federal transfer tax law simultaneously respect the exercise of private choices over the disposition of accumulated wealth and meaningfully effectuate the redistribution of wealth to the poor? Those across the political spectrum who succumb to zero-sum thinking probably think not.[1] This Article challenges that mentality.[2] It proposes straightforward, albeit unorthodox,[3] reforms of the existing system of federal transfer taxation to incentivize the voluntary redistribution of wealth to the poor.

This proposal is grounded in reality. One reality is that the United States has an enduring but dysfunctional relationship with the federal transfer tax system, a metaphorical marriage of inconvenience.[4] A version of the modern federal estate tax has endured since 1916,[5] and the federal gift tax is just a few years shy of its centennial.[6] The golden wedding anniversary of some type of federal generation skipping transfer tax, a backstop to the estate tax, is just around the corner.[7]

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1. "Zero-sum thinking" is a perception of "limited good" under which "the gains of some are invariably the losses of others." Sahil Chinoy et al., *Zero-sum Thinking and the Roots of US Political Differences* 1 (NAT'L BUREAU OF ECON. RSCH. BER, Working Paper No. 31688, rev. 2025) http://www.nber.org/papers/w31688 (citing the hypothesis first proposed by anthropologist George Foster).

2. *Id*.

3. As Professor Mark Ascher has observed, "Conventional attempts to reform the federal wealth transfer taxes inevitably bog down in the Anglo-American tradition of freedom of testation." Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 73 (1990). The unconventional proposal of this Article does not challenge freedom of testation. Rather, the proposal depends on it. For a brief discussion of how the law protects freedom of testation, see Elizabeth R. Carter, *Tipping the Scales in Favor of Charitable Bequests: A Critique,* 34 PACE L. REV. 983, 985-91 (2014).

4. *Cf.* Paul L. Caron, *The One-Hundredth Anniversary of the Federal Estate Tax: It's Time to Renew Our Vows*, 57 B. C. L. REV. 823 (2016) ("As with many longstanding marriages, America's commitment to the estate tax has waxed and waned through the years.").

5. The modern federal estate tax was enacted in the Revenue Act of 1916, 39 Stat. 756 (1916). It has existed in some form ever since. However, for an estate of a decedent dying in 2010, its executor could elect to apply a carryover income tax basis regime for 2010 in lieu of paying the estate tax. *See* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, § 301(c), 124 Stat. 3296 (2010). This special treatment for 2010 resulted from the temporary, one-year putative repeal of the estate tax under the Economic Growth and Tax Relief Reconciliation Act of 2001. *See* Pub. L. No. 107-16, § 501, 115 Stat. 38 (2001). For an excellent summary of the historical developments in federal transfer taxation legislation from its original enactment through 2001, see Darien B. Jacobson et al., The Estate Tax: Ninety Years and Counting, 27 Stat. Income Bull. 118 (2007).

6. A federal gift tax was enacted in the Revenue Act of 1924, 43 Stat. 253 (1924), then repealed by the Revenue Act of 1926, 44 Stat. 9 (1926). The gift tax was then re-enacted in the Revenue Act of 1932, 47 Stat. 169 (1932). *See* Jacobson, *supra* note 5, at 122 and n. 17.

7. The initial GST transfer tax was enacted in the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat 1521 (1976). For a discussion, see Jacobson, *supra* note 5, at 123. The current form of the GST tax was enacted in the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085. *See* Paul L. Caron & James R. Repetti, *The Estate Tax Non-Gap: Why Repeal a "Voluntary" Tax?,* 20 STAN. L. & POL'Y REV. 153, 155 (2009).

Amidst recurring cries for divorce (i.e., repeal),[8] the transfer tax system persists. But it does not flourish.[9] Currently, transfer taxes burden only a tiny fraction of the richest estates[10] largely because of historically high exclusions and exemptions that remove most estates from the tax base.[11] By one estimate, only 4,000 estates were taxable in 2023.[12] Unsurprisingly, the transfer tax system is not a major revenue generator, although it raised in excess of $33 billion in 2023, a respectable sum that benefits the nation's cash-strapped treasury.[13] The country seems to be settling on retaining a transfer tax system that produces some meaningful revenue, but significantly less than it could were it to tax more multi-million-dollar estates.[14] This Article thus proceeds under a modest premise – that any proposal seeking to reform the transfer tax system in the foreseeable future will face difficulty gaining political traction if it necessarily and greatly expands the number of taxable estates or significantly raises taxes on gifts and bequests.

Any proposal for reforming the transfer tax system should also reflect a clear objective and awareness of the asserted purposes of wealth transfer taxation. Raising revenue in an equitable fashion – specifically, by taxing large estates with an ability to pay the tax – was

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8. *See, e.g.,* Death Tax Repeal Act, H.R. 1301, 119th Cong. (2025); Caron & Repetti, *supra* note 7, at 156 & n. 21 (noting the United States House of Representatives has voted to repeal the estate tax several times). *See* Caron & Repetti, *supra* note 7 at 156 & n. 21. For a discussion of the public campaign to undermine and eventually (temporarily) repeal the estate tax, see MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005).

9. According to one leading critic of the existing transfer tax system, "we have no meaningful estate tax for the vast majority of even wealthy individuals and families." Edward J. McCaffery, *A Progressive's Silver Linings Playbook: Repeal Stepped-up Basis*, 138 TAX NOTES 969, 969 (2013). *See also id.* ("Two decades of reform and repeal efforts have produced scores of votes, boatloads of campaign contributions and lobbying expenditures, and a tax more porous and limited than ever."). Others are not quite so pessimistic.

10. In 2019, only .07%, of estates were taxable. *See* CONGRESSIONAL RESEARCH SERVICE, THE ESTATE AND GIFT TAX: AN OVERVIEW 1 (Sept. 16, 2024) [hereinafter "CRS OVERVIEW"] at https://www.congress.gov/crs_external_products/R/PDF/R48183/R48183.1.pdf. When Congress began increasing exemptions in 2001, the portion of estates that were taxable was 2.1%. *See id.* Plainly, this reduction in taxable estates in percentage terms is dramatic.

11. As Professor Goldburn Maynard has opined, "The current version of the estate tax is a shadow of its former self." Goldburn P. Maynard, Jr., *Perpetuating Inequality by Taxing Wealth*, 84 FORDHAM L. REV. 2429 (2016). For a discussion of the transfer tax exclusions and exemptions, see *infra* Part I.A.

12. *See* TAX POLICY CENTER, *How many people pay the estate tax?* (Jan. 2024), https://taxpolicycenter.org/briefing-book/how-many-people-pay-estate-tax.

13. $33.7 billion, precisely. *See* CRS OVERVIEW, *supra* note 10, at 6 (citing data from the Joint Committee on Taxation). Since the end of World War II, the contribution of estate and gift taxes to total federal revenue has never exceeded approximately 2.5%. *See* Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L. J. 259, 269 (1983). According to the Joint Committee on Taxation, "the highest post-World War II share of total Federal revenues represented by the estate and gift tax was 2.6 percent in fiscal year 1972." JOINT COMMITTEE ON TAXATION, HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 1 (March 16, 2015) (citing a report by Darien B. Jacobson et al. [hereinafter JCT REPORT], www.jct.gov/getattachment/ab7cca94-69c3-4023-9f78-d4bc31b2c5f9/JCX-52-15-4744.pdf .

14. *Cf.* McCaffery, *supra* note 9, at 970 ("It is time to abandon the idea that we will ever see a meaningful tightening or outright repeal of the gift, estate, and generation-skipping taxes.").

the prevailing rationale for enacting the modern estate tax.[15] Advocates continue to justify the transfer tax system by appealing to its contribution to the progressivity of the federal tax system.[16] Conceding that transfer taxes have long comprised a relatively small portion of total federal revenues, proponents reason that the system compels those with the greatest ability to pay to contribute more to the public fisc than they do under the federal income tax system alone.[17]

Over time, advocates for robust transfer taxes have also appealed to wealth transfer taxation's tendency to reduce large concentrations of wealth[18] and thus abate wealth inequality.[19] Objections to wealth inequality usually stem from various roots in political theory, philosophy, sociology, or economics. One concern is that economic inequality is inconsistent with valuing each person's liberty equally, for liberty is truly meaningful only when everyone has an "equal chance to choose the life she wants to live."[20] Another concern lies in the ability of those with extreme wealth to skew the political process, thereby undermining democracy.[21] Other concerns focus on the social problems associated with societies characterized by larger wealth and income equality. These problems include lower life expectancy, reduced math skills and literacy, higher infant mortality, more crime, greater mental illness, and reduced social mobility.[22] Further, economic inequality lingers generationally; the children of those lacking economic resources

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15. *See* Joseph J. Thorndike, *The Century of the Estate Tax: Made for Revenue, Not Redistribution*, 152 TAX NOTES 1330, 1333 (2016). Most advocates for the estate tax did not espouse its purpose as wealth redistribution. *See id.* at 1331-34.

16. *See, e.g.,* Jennifer Bird-Pollan, *Why Tax Wealth Transfers? A Philosophical Analysis,* 57 B.C.L. REV. 859, 880 (2016); Caron, *supra* note 4, at 830, 835-37; Graetz, *supra* note 13, at 271-72; James R. Repetti, *The Case for the Estate and Gift Tax*, 86 TAX NOTES 1493, 1500 (2000).

17. *See, e.g.,* Graetz, *supra* note 13, at 272 (examining data for 1970 and concluding that "the estate and gift taxes — despite their low revenue yield — contributed nearly one-third as much to the progressivity of our tax structure as did rates in excess of the average individual income tax").

18. President Franklin D. Roosevelt, for example, viewed wealth transfer taxation as necessary to address the dangers of highly concentrated wealth. *See* Thorndike, *supra* note 15, at 1335. Economists do not agree on the percentage of wealth in the United States that has been inherited, but it is far from trivial. Estimates range from 20% to 80%. *See* Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255, 1276 (2013). *See also* Bird-Pollan, *supra* note 16, at 867 ("The concentration of wealth that has grown in the last hundred years has been passed down and further concentrated from one generation to the next").

19. In evaluating the conceivable purposes of wealth transfer taxation, some commentators separately identify the goal of decreasing dynastic wealth accumulation and the goal of increasing equality of opportunity. *See, e.g.,* Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax,* 60 TAX L. REV. 263, 268 (2007).

20. Anne L. Alstott, *Equal Opportunity and Inheritance Taxation,* 121 HARV. L. REV. 469, 476 (2007).

21. *See, e.g.,* Bird-Pollan, *supra* note 16, at 869; James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 840-49 (2001). Early American thinkers who feared the effect of concentrated wealth on democracy include Noah Webster, Thomas Paine, and Thomas Jefferson. *See* Ascher, *supra* note 3, at 93-95.

22. *See* Caron & Repetti, *supra* note 18, at 1260-61.

tend to have lower economic well-being themselves.[23] In addition, numerous studies indicate that over long periods of time, wealth inequality negatively affects economic growth.[24] To help address these problems, those who support significant wealth transfer taxes do not typically pursue a socialistic vision of absolute equality (i.e., equality of outcomes) but instead seek greater equality of opportunity.[25]

Critics of the current transfer tax system observe that it has failed to break up large concentrations of wealth.[26] It is certainly true that there is great wealth disparity in this country (and around the world).[27] It is also true that the current system is of limited force in reducing wealth disparity in part because of the increasingly high transfer tax exemptions and in part because of numerous provisions of law that allow the wealthy to pass on wealth to lower generations with no or only modest transfer tax consequences.[28]

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23. *See id* at 1262-64.

24. *See* Repetti, *supra* note 16, at 831-35.

25. *See, e.g.,* JOHN RAWLS, A THEORY OF JUSTICE 245 (rev. ed. 1999); Alstott, *supra* note 20, at 473 ("My goal here is simply to draw out the implications of equal opportunity for inheritance taxation."); *id.* at 474 ("We shall see that equality of opportunity and equality of wealth represent quite different goals with different legal implications."); Ascher, *supra* note 3, at 88; Lily Batchelder, *The "Silver Spoon" Tax: How to Strengthen Wealth Transfer Taxation*, WASHINGTON CENTER FOR EQUITABLE GROWTH (October 31, 2016), https://equitablegrowth.org/silver-spoon-tax/; Bird-Pollan, *supra* note 16, at 871-73 (arguing that the estate tax is consistent with equality of opportunity as embraced in the philosophy of John Rawls); Repetti, *supra* note 16, at 1497 & n. 36 (referring to Andrew Carnegie).

26. *See, e.g.,* McCaffery, *supra* note 9, at 969 ("The gift and estate tax has long since ceased to be a major part of any compelling policy objective, such as raising revenue, making the tax system more progressive, "backing up" the income tax, or breaking up large concentrations of wealth."). Professor McCaffery has long criticized the estate tax as ineffective, avoidable, and counterproductive. *See, e.g.,* Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation,* 104 YALE L. J. 283, 300-24 (1994) [hereinafter McCaffery, *Uneasy Case*]. For an insightful, critical reply to this article, see Anne L. Alstott, *The Uneasy Liberal Case Against Income and Wealth Transfer Taxation: A Response to Professor McCaffery*, 51 TAX L. REV. 363 (1996).

Even some supporters of the transfer tax system readily acknowledge its limited role in reducing wealth concentration. *See, e.g.,* Graetz, *supra* note 13, at 271.

27. *See* Caron, *supra* note 4, at 837 ("Wealth is even more concentrated than income at the high end, in the United States and around the world."); *id.* at 837-39 (discussing the work of Emmanuel Saez and Gabriel Zucman showing that the wealth share of the top .1% in America increased from 7% in 1978 to 22% in 2012). Relying on the data reported by Saez and Zucman, Matt O'Brien has observed that, since 1980, even as the wealthiest .01% of Americans captured 8.6% of total wealth gains, the bottom 90% of wealth holders suffered 10.4% of wealth losses. *See id.* at 838-39. Moreover, according to one source, as of June 3, 2025, the wealth of America's 885 billionaires exceeds $7 trillion, reflecting an increase of over 140% in less than eight years. *See* AMERICANS FOR TAX FAIRNESS, TOTAL BILLIONAIRE WEALTH TOPS $7 TRILLION AS GOP AIMS TO CUT HEALTHCARE, FOOD AID TO GIVE RICH MORE TAX CUTS (June 4, 2025), https://americansfortaxfairness.org/total-billionaire-wealth-tops-7-trillion-gop-aims-cut-healthcare-food-aid-give-rich-tax-cuts/

The French economist Thomas Piketty has prompted renewed focus on wealthy inequality. *See, e.g.,* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Athur Goldhammer trans. 2014). For a multi-dimensional critique of Piketty's claims in the cited work, see CATO INSTITUTE, ANTI-PIKETTY: CAPITAL FOR THE 21ST CENTURY (eds. Jean-Philippe Delsol et al., 2017).

28. *Cf.* Samuel D. Brunson, *Afterlife of the Death Tax*, 94 IND. L. J. 355, 362 (2019) (arguing that the estate tax fails to curb dynastic wealth "[a]s a result of the high exemption amount and the relatively low tax rate"); *id.* at 358 (arguing that "by and large, the estate tax captures decedents who failed to take proper measures to avoid it"). For a discussion of common estate planning

Still, supporters of transfer taxes correctly respond that, although wealth disparities remain, the system nonetheless curtails concentrated wealth by taxing the largest estates and encouraging charitable gifts and bequests.[29] The largest estates pay a meaningful amount of estate taxes.[30] Further, current law incentivizes gifts to charitable organizations through a deduction for charitable gifts and bequests.[31] Studies demonstrate that the wealthiest estates make significant charitable bequests.[32] A transfer to a charitable donee does indeed reduce wealth directly held by a decedent's family, thereby reducing the concentration of privately owned wealth. Moreover, charitable donees are limited in the extent to which they can engage in the political process.[33] Thus, the transfer tax system's incentives for charitable bequests help check the perceived dangers that concentrated wealth poses to democracy.

However, the redistributive effect of the deduction for charitable gifts and bequests must not be overestimated. Wealth remains intact, at least for a time, when transferred to a single charity, and it may well remain under the control of a donor or his surviving family members

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techniques to reduce transfer taxes, see William P. Streng, *Estate Planning*, Bloomberg Tax Portfolio 800-3rd (Estates, Gifts, & Trusts Portfolios) (2013). For a more comprehensive analysis of estate planning, including tax and state law considerations, see DAVID WESTFALL, GEORGE P. MAIR & JOHNNY REX BUCKLES, ESTATE PLANNING LAW AND TAXATION (5th ed. 2017).

29. *See* Caron & Repetti, *supra* note 18, at 1278 ("The evidence suggests that the current estate tax is in fact contributing to the breakup of large accumulations of wealth by encouraging charitable contributions and imposing a significant tax burden."); Repetti, *supra* note 16, at 856-58 (arguing similarly).

30. From 2002 through 2011, in the case of gross estates of $20 million or more, the effective transfer tax rate on the net estate ranged from 35.08% to 43.99%. *See* Caron & Repetti, *supra* note 18, at 1279-80.

31. *See* I.R.C. §§ 2055; 2522. For a discussion of the deduction for charitable gifts and bequests, see Part I.B.2, *infra*.

32. *See* Caron & Repetti, *supra* note 18, at 1278-79 (presenting data that "the largest estates transferred roughly one third of the gross estate to either charities or the Federal government in the 2002 to 2011 period"). For example, in 2011, in the case of estates with a gross estate of $20 million or more, 24.55% of the gross estate was contributed to charity. *See id.* at 1279. *See also* Caron & Repetti, *The Estate Tax Non-Gap, supra* note 7, at 164 ("[L]arge estates have a lower effective tax rate because, consistent with congressional intent, they make very large charitable contributions.").

33. *See* I.R.C. § 501(c)(3) (stating that an organization is described therein only if "no substantial part" of its activities "is carrying on propaganda, or otherwise attempting, to influence legislation" and if it "does not participate in, or intervene in … any political campaign on behalf of (or in opposition to) any candidate for public office").

These limitations on participation in the political process by charities are controversial. For discussions of these limitations by the author, see Johnny Rex Buckles, The Penalty of Liberty (review of Philip Hamburger, Liberal Suppression: Section 501(c)(3) And the Taxation of Speech), 25 Tex. Rev. L. & Pol. 159 (2021); Johnny Rex Buckles, Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?, 84 Ind. L. J. 447 (2009); Johnny Rex Buckles, Is the Ban on Participation in Political Campaigns by Charities Essential to their Vitality and Democracy? A Reply to Professor Tobin, 42 U. Rich. L. Rev. 1057 (2008); Johnny Rex Buckles, Not Even a Peep? The Regulation of Political Campaign Activity by Charities through Federal Tax Law, 75 U. Cin. L. Rev. 1071 (2007).

indefinitely. For example, a bequest to a private foundation[34] remains a deductible charitable gift, and the donor's family can control the charitable donee by dominating its governing board.[35] The same family can thus control philanthropic priorities and funding and wield power through the foundation's investments.[36] Moreover, though highly constrained,[37] a private foundation can contribute to public policy discourse that falls short of lobbying and political campaign intervention,[38] and a charity that escapes classification as a private foundation can engage in limited attempts to influence legislation.[39] Furthermore, federal tax law does not prevent powerful individuals who manage charitable organizations — and gain notoriety from their positions —[40] from engaging directly in the political process in their individual capacities (rather than on behalf of their charities). In addition, many "charities" do not redistribute wealth to the poor or primarily serve the poor. Donees eligible for deductible gifts and bequests may have "religious, charitable, scientific, literary, or educational purposes"[41] (among others), and the term "charitable"

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34. *See* I.R.C. § 509(a) (defining "private foundation" as an organization both described in IRC section 501(c)(3) and not described in subsections (1)-(4) of section 509(a)). The typical private foundation is a grant-making charity funded by one primary source (e.g., an individual, family, or company).

35. A restrictive excise tax regime governs a private foundation and its managers (and others with a close connection to it). *See, e.g.,* I.R.C. §§ 4940-4946). However, the regime does not prohibit a private foundation's founder and her family members from serving on the foundation's governing board.

36. *See* Fleischer, *supra* note 19, at 285-88. The power associated with controlling large investments can be significant. *See* Alstott, *supra* note 26, at 371-72 (illustrating the influence that Ross Perot could wield merely through investments).

37. *See* I.R.C. §§ 4945(a)(1) (imposing an initial excise tax of 20% on the amount of a private foundation's "taxable expenditures"); 4945(d)(1) (defining "taxable expenditure" to include any amount paid "to carry on propaganda, or otherwise to attempt, to influence legislation"); 4945(d)(2) (defining "taxable expenditure" generally to include any amount paid "to influence the outcome of any specific public election, or to carry on, directly or indirectly, any voter registration drive" (except in the case of certain nonpartisan activities)).

38. *See* Fleischer, *supra* note 19, at 289. Although a private foundation cannot generally attempt to influence legislation, it is permitted (without incurring excise tax) to provide technical advice or assistance to a governmental body that requests it in writing. *See* I.R.C. § 4945(e)(2). A private foundation may also "mak[e] available the results of nonpartisan analysis, study, or research." *Id.* It may also communicate with and appear before "any legislative body with respect to a possible decision of such body which might affect the existence of the private foundation, its powers and duties, its tax-exempt status, or the deduction of contributions to such foundation." *Id.* Treasury regulations elaborate on these statutory rules and add that prohibited lobbying does not include "[e]xaminations and discussions of broad social, economic, and similar problems." Treas. Reg. 26 C.F.R. § 53.4945-2(d)(4).

39. *See* Fleischer, *supra* note 19, at 288-89. A charitable organization satisfies the basic conditions for tax-exemption even if it attempts to influence legislation as an "insubstantial part" of its operations. *See* I.R.C. § 501(c)(3) (requiring that "no substantial part" of a tax-exempt charitable organization's activities consist of attempts to influence legislation).

40. *Cf.* Fleischer, *supra* note 19, at 290 ("[C]ontrol of a nonprofit often translates into economic and political power….").

41. I.R.C. §§ 2055(a)(2); 2522(a)(2).

includes numerous purposes besides relief of poverty.[42] Thus, current law's incentives for charitable giving under the transfer tax system only partially alleviate some of the perceived problems of wealth concentration and inequality.

Not all agree that large concentrations of wealth are objectionable.[43] But surely most would agree that subsisting in poverty is a problem[44] and that the law should not hinder the voluntary relief of poverty by generous citizens. We must therefore face a second reality: Millions of Americans live in poverty notwithstanding numerous government programs designed to aid the poor. The federal government uses two methods to measure poverty: the official measure and the Supplemental Poverty Measure (SPM).[45] Under the 2023 official measure, 36.8 million Americans lived in poverty.[46] Under the 2023 SPM, the number of Americans living below the poverty line rose to $42.8 million.[47] Even using the more conservative measure of the

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42. *See infra* notes 284-288 and accompanying text. A few types of organizations created for specifically "charitable" purposes (rather than other exempt purposes) must assist the poor. *See* John Simon et al., *The Federal Tax Treatment of Charitable Organizations, in* THE NON-PROFIT SECTOR: A RESEARCH HANDBOOK 267, 277-78 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006). Many other "charitable" organizations need not primarily serve the poor. *See* Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies,* 56 B.C.L. REV. 1345, 1355-56 (2015).

43. *Cf.* Eric Rakowski, *Transferring Wealth Liberally*, 51 TAX. L. REV. 419, 425 (1996) (observing that some people "repudiate the notion that the state legitimately may tax some people's earnings or accumulated wealth to bring about greater equality of opportunity"); *see, e.g.,* Jessica Flanigan & Christopher Frieman, *Wealth Without Limits: In Defense of Billionaires,* 25 ETHICAL THEORY & MORAL PRAC. 755, 764 (2022).

44. "Most" implies not necessarily "all." A report featured on the website of the Heritage Foundation contextualizes poverty in America as follows:

> Overall, the typical American defined as poor by the government has a car, air conditioning, a refrigerator, a stove, a clothes washer and dryer, and a microwave. He has two color televisions, cable or satellite TV reception, a VCR or DVD player, and a stereo. He is able to obtain medical care. His home is in good repair and is not overcrowded. By his own report, his family is not hungry[,] and he had sufficient funds in the past year to meet his family's essential needs. While this individual's life is not opulent, it is equally far from the popular images of dire poverty conveyed by the press, liberal activists, and politicians.

Kirk Johnson & Robert Rector, Understanding Poverty in America, (The Heritage Foundation, (Jan. 5, 2004), at https://www.heritage.org/welfare/report/understanding-poverty-america?gad_source=1&gad_campaignid=10679077640&gbraid=0AAAACfelfz4JuaV3n96RStVRlY_JlzfE&gclid=Cj0KCQjwmK_CBhCEARIsAMKwcD4e7DfyauS_vC_NuYNmzmbTXR15vzVyPgRBUk0bl9NhEKU5jKBQRF4aAspeEALw_wcB. Even this report, however, concedes that, although "the majority of poor households do not experience significant material problems, roughly a third do experience at least one problem such as overcrowding, temporary hunger, or difficulty getting medical care." Id. It is unclear whether the authors of this report consider it a significant problem that one-third of the poor – still millions of Americans – apparently sometimes go to bed with hunger pains, lack medicine when ill, or cram into hovels and tenements.

45. *See* CONGRESSIONAL RESEARCH SERVICE, POVERTY IN THE UNITED STATES 2023 1 (Nov. 19, 2024), at https://www.congress.gov/crs-product/R48279. Both methods compare the resources of a family or individual against a measure of their need. However, the official poverty measure takes into account only before-tax cash income, whereas the SPM considers after-tax income, the estimated value of certain noncash benefits (i.e., food assistance), and certain expenditures that prevent families from meeting their basic needs. *See id.*

46. *See id.*

47. *See id.* In 2022, the poor numbered 40.9 million under the SPM. *See id.*

number of the poor, there were thus 9,200 Americans living in poverty for every single taxable estate in 2023.[48]

These observations bring us to a third reality. Despite the persistence of poverty in the United States, current transfer tax law does little to incentivize direct gifts and bequests from the wealthy to the poor. To the contrary, the transfer tax system effectively disincentivizes significant direct transfers to the poor by treating most gifts in excess of the annual exclusion[49] as potentially taxable. Because a donor who makes taxable transfers to the poor must reduce her unified credit against gift and estate taxes,[50] she has less credit remaining to apply towards the tax liability for gifts made to family members. Accordingly, significant gifts to the poor impede a donor's ability to maximize tax-free transfers to the natural objects of her bounty.[51] Moreover, although bequests to charitable organizations are deductible under the transfer tax system, most charitable donees need not primarily serve the poor, and no charitable deduction exists under current transfer tax law for direct transfers to the poor.[52] Thus, the very structure of the current transfer tax system tends to discourage direct, voluntary wealth redistribution to the unrelated poor among those who also wish to pass on much of their wealth to family members.

This Article seeks to change this third reality and thereby alter the second reality. It proposes to modify several features of existing federal transfer tax law to incentivize private transfers of wealth to unrelated persons in financial need. The approach seeks to accomplish wealth redistribution through the exercise of private decision-making. This Article thus relies on freedom of testation, does not seek to raise transfer tax rates, and does not require reducing exemptions and exclusions from transfer taxes. Counterintuitively, the proposal nonetheless is intended to result in meaningful redistribution of wealth to the poor. By encouraging the redistribution of wealth to the poor on a voluntary basis, this modest proposal offers the practical benefit of potentially attracting bi-partisan political support.

This Article proceeds as follows. Part I overviews the current transfer tax system and discusses special features of transfer tax law

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48. This calculation is based on the estimated 4,000 taxable estates in 2023. *See supra* note 12 and accompanying text.

49. *See* I.R.C. § 2503(b). For a discussion of the annual exclusion, see Part I.B.3, *infra*.

50. *See* I.R.C. §§ 2010 (providing for a credit against federal estate tax); 2505 (providing for a credit against federal gift tax). For a discussion of the unified credit, see *infra* notes 92-98 and accompanying text.

51. This observation realistically assumes that family members of the wealthy often are not themselves poor.

52. Similarly, an income tax deduction is not available for a direct transfer to a poor individual or for a donor-initiated "earmarked" transfer to a poor person through a charitable conduit. For a discussion, see Johnny Rex Buckles, *The Case for the Taxpaying Good Samaritan: Deducting Earmarked Transfers to Charity under Federal Income Tax Law, Theory and Policy*, 70 FORDHAM L. REV. 1243 (2002).

that figure prominently in the design of the proposal advanced in this Article. Readers who are familiar with the transfer tax system may prefer to skim or skip Part I. Part II sets forth the basic proposal and then explains and justifies central design elements of the proposal. These elements include determining eligible transferees, addressing reciprocal transfers, determining qualifying forms of transfers, establishing the time and manner for determining financial neediness of eligible transferees, communicating financial neediness to prospective transferors, and determining whether and how to limit cumulative transfers to eligible transferees. Part III offers for further consideration an optional design feature. It discusses the possible rationale for the optional feature and how it would function. Part IV concludes by summarizing the proposal and discussing several implications of the proposal and this Article.

I. OVERVIEW OF THE FEDERAL TRANSFER TAX SYSTEM AND ITS ELEMENTS RELEVANT TO THE REFORM PROPOSAL

A. Overview of Federal Transfer Taxes

The United States imposes three types of federal transfer taxes: a gift tax,[53] an estate tax,[54] and a tax on generating-skipping transfers (the "GST" tax).[55] The gift tax, as its name suggests, is imposed on most lifetime gratuitous transfers of property[56] made during the year.[57] The gift tax applies whether the gift is "in trust or otherwise," "direct or indirect," or of property "real or personal, tangible or intangible."[58] Gifts of property are valued as of the date of gift.[59] Examples of taxable gifts generally include "the creation of a trust, the forgiving of a debt, the assignment of a judgment, the assignment of the benefits of an insurance policy, or the transfer of cash, certificates of deposit, or Federal, State or municipal bonds."[60] If a donor gives less than the donor's entire interest in property, the gift tax applies only to the interest transferred (e.g., a gift of a life estate when the donor retains the remainder in the property).[61] The gift tax base does not include transfers statutorily

53. *See* I.R.C. § 2501(a)(1).
54. *See* I.R.C. § 2001(a).
55. *See* I.R.C. § 2601.
56. *See* Treas. Reg. § 25.2511-1(c)(1) ("[A]ny transaction in which an interest in property is gratuitously passed or conferred upon another, regardless of the means or device employed, constitutes a gift subject to tax.").
57. *See* I.R.C. § 2501(a)(1).
58. Treas. Reg. § 25.2511-1(a).
59. *See* I.R.C. § 2512(a).
60. Treas. Reg. § 25.2511-1(a).
61. Treas. Reg. § 25.2511-1(e).

excluded from the definition of gift[62] and transfers allowed as deductions in computing taxable gifts.[63]

With certain modifications,[64] the estate tax is imposed upon a decedent's "taxable estate,"[65] which has as its computational starting point the decedent's "gross estate."[66] The "gross estate" includes both the decedent's probate estate[67] and other property, typically that which passes by way of non-probate transfers in which the decedent has retained certain elements of control or interests (or has relinquished such elements within three years of death).[68] The "taxable estate" is determined by subtracting from the gross estate deductions allowed by law.[69] Important deductions include those allowed for the decedent's funeral expenses,[70] expenses of estate administration,[71] claims against the estate,[72] mortgages on property included in the gross estate,[73] uncompensated casualty or theft losses incurred during the settlement of the estate,[74] charitable bequests,[75] certain types of marital bequests,[76] and state death taxes paid in respect of property in the estate.[77]

The design of the GST tax is to address strategic efforts to avoid the imposition of the estate tax on one generation by bypassing that

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62. *See, e.g.,* I.R.C. §§ 2511; 2503(b) (annual exclusion), (e) (exclusion for payment of certain medical and educational expenses), (f) (exclusion for waiver of certain pension benefits), & (g) (exclusion for loan of certain works of art to certain charitable organizations).

63. *See, e.g.,* I.R.C. §§ 2522 (deduction for gifts to certain governmental bodies, charitable organizations, fraternal lodges that use the gifts for specified charitable purposes, and veteran organizations); 2523 (deduction for certain marital gifts).

64. *See* I.R.C. § 2001(b).

65. *See* I.R.C. § 2001(a).

66. *See* I.R.C. § 2051 ("For purposes of the tax imposed by section 2001, the value of the taxable estate shall be determined by deducting from the value of the gross estate the deductions provided for in this part.").

67. *See* I.R.C. § 2033 ("The value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death."). The Treasury regulations explain as follows:

> Sections 2033 and 2034 are concerned mainly with interests in property passing through the decedent's probate estate. Section 2033 includes in the decedent's gross estate any interest that the decedent had in property at the time of his death. Section 2034 provides that any interest of the decedent's surviving spouse in the decedent's property, such as dower or curtesy, does not prevent the inclusion of such property in the decedent's gross estate.

Treas. Reg. § 20.2031-1(a)(1).

68. *See* I.R.C. §§ 2035-2044.

69. *See* I.R.C. § 2051.

70. *See* I.R.C. § 2053(a)(1).

71. *See* I.R.C. § 2053(a)(2).

72. *See* I.R.C. § 2053(a)(3).

73. *See* I.R.C. § 2053(a)(4).

74. *See* I.R.C. § 2054.

75. *See* I.R.C. § 2055(a)(2). For a more detailed discussion of the treatment of charitable gifts and bequests, see Part I.B.2, *infra.*

76. *See* I.R.C. § 2056. For a more detailed discussion of the treatment of marital gifts and bequests, see Part I.B.1, *infra.*

77. *See* I.R.C. § 2058.

generation and transferring wealth to members of a still later generation. To illustrate, with the GST tax in place, a grandmother cannot economically circumvent the imposition of an estate tax on her daughter's estate by devising property directly to her granddaughter. To combat this strategy, the GST tax is imposed on a "generation-skipping transfer,"[78] defined as a "taxable distribution,"[79] a "taxable termination,"[80] and a "direct skip."[81] A taxable distribution is essentially any distribution from a trust, other than a taxable termination or a direct skip, to a skip person.[82] A "taxable termination" is, in general, the termination of any present interest in trust, if, after this termination, no non-skip person holds a present interest in the trust, but a skip person may benefit from the trust.[83] A direct skip is generally a transfer—subject to the estate or gift tax—of a property interest to a skip person.[84] A "skip person" includes "a natural person assigned to a generation which is two or more generations below the generation assignment of the transferor."[85] A skip person also includes certain trusts, including one in which all beneficial interests are held by skip persons.[86]

The federal estate tax and the gift tax have been largely unified since 1976.[87] A single rate schedule applies to both cumulative lifetime gifts and transfers upon death.[88] The gift tax is imposed on lifetime gifts,[89] and when the donor dies, the estate tax is imposed on the sum of (1) lifetime gifts and (2) the taxable estate (i.e., the gross estate, reduced by deductions).[90] To prevent double taxation, both in the case of the gift

78. I.R.C. § 2601.

79. I.R.C. § 2611(a)(1).

80. I.R.C. § 2611(a)(2).

81. I.R.C. § 2611(a)(3).

82. I.R.C. § 2612(b).

83. *See* I.R.C. § 2612(a)(1)(A)-(B). An example of a taxable termination is the expiration of a life income interest in a trust, if the children of the former income beneficiary then become the sole income beneficiaries of the trust for their lives.

84. *See* I.R.C. § 2612(c)(1).

85. I.R.C. § 2613(a)(1).

86. I.R.C. § 2613(a)(2)(A).

87. The Tax Reform Act of 1976 created this unity. *See* Pub. L. No. 94-455, 90 Stat. 1521 (1976). As observed by the Joint Committee on Taxation, "The 1976 Act unified the estate and gift taxes…." JCT REPORT, *supra* note 13, at 7.

88. *See* I.R.C. §§ 2001(b)–(c), 2502(a). The nominal rate schedule is progressive. *See* I.R.C. § 2001(c). For example, if a donor makes a gift in year 1, the gift is subject to tax at a specified rate. If the donor makes another gift in year 2, the tax due is calculated by using the rate applicable to the combined year 1 and year 2 gifts, which rate may very well be higher than that applicable to the year 1 gift which was imposed in year 1. Notwithstanding the nominally progressive transfer tax rates, because the unified credit against gift tax and estate tax is applied automatically, thereby offsetting the tax otherwise due, the real effect of the progressive rate structure is merely to accelerate the using up of the unified credit. Once the unified credit is fully absorbed, all additional transfers are effectively taxed at the same rate. (The unified credit is discussed in the textual paragraph immediately following the text accompanying this note.) Thus, if an estate is actually taxable, the taxable portion is subject to the highest estate tax rate.

89. I.R.C. § 2501(a)(1).

90. *See* I.R.C. § 2001(b)(1)-(2).

tax and the estate tax, the amount of tax due for the relevant transfer tax return will not (in general) include any amount of gift tax payable for taxable gifts made in previous years.[91]

A central feature unifying the gift and estate tax is the unified credit against gift and estate tax, which operates to remove wealth transfers by the vast majority of donors and their estates from transfer taxation.[92] Ignoring (briefly) the potential doubling effect on the credit from becoming a surviving spouse, the amount of the credit is equal to the tentative estate tax (per the statutory rate schedule), which would be assessed upon a taxable estate equal to the "basic exclusion amount" (hereafter often referred to for simplicity as the "exclusion amount").[93] The effect of the credit is to shield from estate and gift taxation the sum of lifetime gifts and the taxable estate to the extent that the sum is less than or equal to the exclusion amount. Beginning in 2018 and extending through 2025, the exclusion amount corresponding to the unified credit has been $10 million,[94] indexed for inflation.[95] Accordingly, the exclusion amount for 2025 is $13.99 million.[96] Under the recently enacted One Big Beautiful Bill Act ("OBBBA"),[97] effective for decedents dying and gifts made after December 31, 2025, the basic exclusion amount has been raised to $15 million, again indexed for inflation.[98] Thus, as of January 1, 2026, a person can transfer during life and at death a total of $15 million without paying a penny of transfer taxes.

The ability to transfer significant wealth free of transfer taxes is even greater for those who are married. A surviving spouse may use the portion of a predeceasing spouse's estate tax exclusion amount that was not applied to eliminate the transfer tax liability of the latter or his estate,[99] a feature commonly referred to as the "portability" of the exclusion amount.[100] Thus, after OBBBA, for 2026 (and beyond) the surviving spouse can supplement her own $15 million cumulative gift and estate tax exclusion amount with the predeceasing spouse's unused portion of his exclusion amount. Consequently, a wealthy couple can now transfer $30 million free of transfer taxation, and even more in future years with inflation adjustments.

There is correlation between the GST tax system and the gift and estate tax, although the GST tax is not "unified" with them in the same

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91. *See* I.R.C. §§ 2001(b)(2); 2502(a)(2).
92. *See* I.R.C. §§ 2010(a), (c); 2505(a).
93. *See* I.R.C. § 2010(a), (c)(1)-(3).
94. *See* I.R.C. § 2010(c)(3)(C) (prior to enactment of OBBBA).
95. *See* I.R.C. § 2010(c)(3)(B).
96. *See* Rev. Proc. 2024-40, 2024-45 I.R.B. 1100.
97. OBBBA, Pub. L. No. 119-21 139 Stat. 72 (2025).
98. *Id.* at § 70106.
99. *See* I.R.C. § 2010(c)(2)(B), (c)(4).
100. *See, e.g.,* Jean Gordon Carter & Stephen W. Murphy, *What is Portability for Estate and Gift Tax?*, ACTEC., (Sept. 24, 2025, 3:53 PM), https://www.actec.org/resource-center/video/what-is-portability-for-estate-and-gift-tax/.

sense that the gift and estate tax are unified. The GST tax rate is statutorily set at the highest federal estate tax rate,[101] 40% under current law.[102] A taxpayer also receives an exemption from the GST tax for generation-skipping transfers.[103] The GST exemption corresponds to the gift and estate tax exclusion amount,[104] adjusted for inflation.[105] That means that the exemption is $13.99 million for 2025[106] and, under OBBBA, $15 million in 2026 (again, adjusted for inflation).[107] There is no portability of the GST exemption amount from a predeceasing spouse to a surviving spouse, however.

B. Special Features of the Federal Transfer Tax System Relevant to the Proposal

Several exclusions and deductions that reduce the transfer tax base under current law are especially relevant to the proposal advanced in this article. Certain other provisions of transfer taxation are also important to the proposal. This section discusses those exclusions, deductions, and special rules.

1. The Deduction for Marital Gifts

Gratuitous transfers in a qualifying form to or for the benefit of a spouse of the donor or a surviving spouse of the testator are deductible in computing taxable gifts[108] and the taxable estate,[109] respectively. For ease of discussion and citation, this section focuses on the federal estate tax marital deduction for qualifying testamentary gifts to or for the benefit of a surviving spouse, but the same requirements for claiming a marital deduction for a lifetime gift to or for the benefit of a spouse of the donor generally apply in most contexts of the federal gift tax.[110]

A transfer to a surviving spouse qualifies for the marital deduction only if several conditions are satisfied. First, the surviving spouse[111] generally must have been a United States citizen at the decedent's death.[112] In addition, the value of the interest transferred to the

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101. *See* I.R.C. § 2641(a)(1), (b).
102. *See* I.R.C. § 2001(c).
103. *See* I.R.C. § 2631(a).
104. *See* I.R.C. § 2631(c).
105. *See* I.R.C. § 2010(c)(3)(B).
106. *See* Rev. Proc. 2024-40, 2024-45 I.R.B. 1100.
107. OBBBA, Pub. L. No. 119-21, § 70106, 139 Stat. 162, (2025) (amending I.R.C. § 2010(c)(3)).
108. *See generally* I.R.C. § 2523.
109. *See generally* I.R.C. § 2056.
110. *Compare, e.g.,* I.R.C. § 2056(a) *with* I.R.C. § 2523(a); I.R.C. § 2056(b)(5) *with* I.R.C. § 2523(e); I.R.C. §2056(b)(7) *with* I.R.C. § 2523(f).
111. The executor of the decedent's estate must establish that the spouse did in fact survive the decedent. *See* Treas. Reg. § 20.2056(a)-1(b)(1)(i) (1994).
112. *See* I.R.C. § 2056(d)(1).

surviving spouse must be includible in the gross estate of the decedent.[113] Further, the interest must "pass" from the decedent to the surviving spouse.[114] Moreover, as a general rule, the interest passing to the surviving spouse must not be a "nondeductible terminable interest."[115]

The last general requirement — that the surviving spouse's interest not be terminable — requires elaboration, in part because it is subject to a few important exceptions. The gist of the general requirement is that no marital deduction is available for a transfer of any interest to a surviving spouse if that interest will terminate after a set time or upon the occurrence (or nonoccurrence) of a contingency,[116] and if an interest in the property transferred passes to another person who may then possess or enjoy the property.[117] An example of a non-deductible terminable interest is the bequest of a mere life estate to the surviving spouse, coupled with a bequest of the remainder to the testator's children, with no other interest or power given to the surviving spouse.

The most straightforward example of a deductible marital transfer is an outright bequest or devise of a fee simple interest in property. But there are other transfers which also qualify for the deduction,[118] including those that are exceptions to the general denial of a deduction for terminable interests. Probably the most popular of these in current estate planning practice is a transfer in trust of "qualified terminable interest property,[119] a transfer to a trustee of a so-called "QTIP" trust.[120]

However, more important for purposes of the proposal advanced in this Article is the availability of the marital deduction for a transfer in trust in which the testator's surviving spouse receives the right to all

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113. *See* I.R.C. § 2056(a).

114. *See* I.R.C. § 2056(a). "Passing" includes transfers by will, inheritance, right of survivorship, dower, elective share, life insurance policy beneficiary designation, and the exercise (or non-exercise) of a POA held by the decedent. *See* I.R.C. § 2056(c)(1)-(7).

115. *See* I.R.C. § 2056(b)(1).

116. *See id.*

117. *See* I.R.C. § 2056(b)(1)(A) &- (B). A deduction is also disallowed when the terminable interest "is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust." I.R.C. § 2056(b)(1)(C).

118. Not all deductible marital gifts are summarized in this Article. Rather, the discussion explains deductible gifts with a form similar to the types of transfers that take center stage in the proposal advanced in this Article.

119. I.R.C. § 2056(b)(7)(A) &– (B).

120. In a QTIP trust, all trust income is paid to the surviving spouse at least annually for life, *see* I.R.C. § 2056(b)(7)(B)(i)(II) &– (ii)(I), and during the surviving spouse's lifetime, no other person can benefit from a distribution from the trust. *See* I.R.C. 2056(b)(7)(B)(ii)(I) &– (II). The deduction from the pre-deceasing spouse's gross estate is available only if his or her executor elects to have the interest treated as "qualified terminable interest property." *See* I.R.C. § 2056(b)(7)(B)(i)(III), (b)(7)(B)(v). The effect of the election is to include the corpus of the trust in the surviving spouse's gross estate on his or her subsequent death, notwithstanding that they he or she received only a life estate. *See* I.R.C. § 2044.

income for life[121] and the power to appoint trust principal to herself or her their estate.[122] A power of appointment ("POA") is "a power that enables a powerholder acting in a nonfiduciary capacity to designate a recipient of an ownership interest in or another [POA] over the appointive property."[123] The surviving spouse's power to appoint to herself or her estate renders it a general POA.[124] A transfer to a trustee of such a "marital general POA trust" can qualify for an exception to the general denial of a deduction for terminable spousal interests.[125] To so qualify, the mandatory payment of income to the surviving spouse must occur at least annually,[126] and her POA must be exercisable by her "alone and in all events."[127] The surviving spouse's POA may be testamentary or inter vivos,[128] but nobody else may have the power to appoint trust assets to anyone but the surviving spouse.[129]

Another exception to the general denial of a marital deduction for a transfer of a terminable interest is a transfer to a trustee of a charitable remainder unitrust ("CRUT") or a charitable remainder annuity trust ("CRAT") described in IRC section 664.[130] A CRAT is a trust meeting the following requirements:

> (1) A certain amount, not less than five percent nor exceeding fifty percent of the initial net fair market value of property transferred in trust, must be paid at least annually to at least one person who is not an organization described in IRC section 170(c).[131] If any such beneficiary is a natural person (which is typical), she must be alive at the CRAT's formation, and she must receive payments for a term of not more than twenty years or for her life.[132] (This Article refers to this annually required payment as the "Annuity.")
>
> (2) No amount other than the Annuity or so-called "qualified gratuitous transfers" (as defined in IRC section 664(g)) may be paid to or for the use of anyone or any entity other than an organization described in IRC section 170(c).[133] This requirement ensures that the remainderman, usually

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121. *See* I.R.C. § 2056(b)(5).
122. *See id.*
123. Unif. Powers of Appointment Act § 102(13) (Nat'l Conference of Comm'rs of Unif. State Laws 2013).
124. *See infra* Part I.B.5 (discussing the general POA).
125. *See* I.R.C. § 2056(b)(5).
126. *See id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *See* I.R.C. § 2056(b)(8).
131. *See* I.R.C. § 664(d)(1)(A).
132. *See* I.R.C. § 664(d)(1)(A).
133. *See* I.R.C. § 664(d)(1)(B).

a charity, will receive its due once the Annuity has been fully paid.

(3) Once the Annuity payments have terminated, the remainder interest in the trust must be transferred to or for the use of an organization described in IRC section 170(c) (commonly, a charity) or retained in trust for that type of use.[134]

(4) The value of the remainder interest must be at least ten percent of the initial net fair market value of the property transferred in trust.[135] This value must be established in accordance with IRC section 7520.[136]

The marital deduction is available for the value of the surviving spouse's Annuity only if the sole noncharitable (or non-ESOP) beneficiary of the CRAT is the surviving spouse.[137] A CRUT is a trust meeting the following requirements:

(1) A fixed percentage, not less than five percent nor more than 50 percent, of the net fair market value of assets held in trust, valued annually, must be paid at least annually to at least one person who is not an organization described in IRC section 170(c).[138] If any such beneficiary is a natural person, she must be alive at the CRUT's formation, and she must receive payments for a term of not more than twenty years or for her life.[139] The key difference between the CRUT and the CRAT is that the annual payments under a CRUT are based on the value of trust assets as determined annually, rather than at the creation of the trust.[140] (This Article refers to this annually required payment as the "Unitrust Payment.")

(2) No amount other than the Unitrust Payment or so-called "qualified gratuitous transfers" (as defined in IRC section 664(g)) may be paid to or for the use of anyone or any entity other than an organization described in IRC section 170(c).[141]

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134. *See* I.R.C. § 664(d)(1)(C). Alternatively, to the extent that the remainder interest is in qualified employer securities (as defined in IRC section 664(g)(4)), all or part of the securities must be transferred to an employee stock ownership plan (as defined in IRC section 4975(e)(7), an "ESOP") in a transfer that meets numerous requirements under IRC section 664(g). *See id.*

135. *See* I.R.C. § 664(d)(1)(D).

136. *See* I.R.C. § 664(d)(1)(D).

137. *See* I.R.C. § 2056(b)(8)(A).

138. *See* I.R.C. § 664(d)(2)(A).

139. *See* I.R.C. § 664(d)(2)(A).

140. *See* I.R.C. § 664(d)(2)(A).

141. *See* I.R.C. § 664(d)(2)(B). Under a special rule, the CRUT's instrument may provide that the beneficiary's annual payments consist of (1) the amount of the trust income, if such amount is less than the Unitrust Payment, and (2) any amount of trust income which is in excess of the Unitrust Payment, to the extent that, by reason of the ability of the trustee to pay the lesser of trust

(3) Once the Unitrust Payments have terminated, the remainder interest in the trust must be transferred to or for the use of an organization described in IRC section 170(c) (commonly, a charity) or retained in trust for that type of use.[142]

(4) With respect to each transfer in trust, the value of the remainder interest must be at least ten percent of the net fair market value of the property transferred in trust as of the date of such transfer.[143] This value must be established in accordance with IRC section 7520.[144]

As in the case of a CRAT, the marital deduction is available for the value of the surviving spouse's right to the Unitrust Payment only if the sole noncharitable (or non-ESOP) beneficiary of the CRUT is the surviving spouse.[145]

2. The Deduction for Charitable Bequests

Under IRC section 2055, a deduction from the gross estate is authorized for testamentary transfers to (or, in some cases, for the use of) specified governmental entities,[146] fraternal lodges (if used for specified purposes corresponding to those described in IRC section 501(c)(3)),[147] federally chartered veterans' organizations,[148] ESOPs (in the case of certain transfers of qualified employer securities),[149] trustees (if used for specified purposes corresponding to those described in IRC section 501(c)(3)),[150] and corporations satisfying requirements corresponding to IRC section 501(c)(3).[151] Special limitations apply to a

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income or the Unitrust Payment in any single year, the aggregate of the amounts paid in prior years was less than the aggregate of the Unitrust Payments. *See* I.R.C. § 664(d)(3)(A) &-(B). Under Treasury regulations, it is also permissible for the trust instrument simply to provide for payment of the lesser of income or the Unitrust Payment in any year (i.e., without a "make-up" provision for distributions in prior years in which income was less than the Unitrust Payment). *See* Treas. Reg. § 1.664-3(a)(1)(i)(b)(1) (2023). As a further option for a CRUT, the Treasury regulations authorize a trust instrument to provide for annual payments of net income and then switch to annual payments of the Unitrust Amount on a certain date or upon the occurrence of an event. *See* Treas. Reg. § 1.664-3(a)(1)(i)(c)(1) (2023).

142. *See* I.R.C. § 664(d)(2)(C). Alternatively, to the extent that the remainder interest is in qualified employer securities (as defined in IRC section 664(g)(4)), all or part of the securities must be transferred to an ESOP in a transfer that meets numerous requirements under IRC section 664(g). *See id.*

143. *See* I.R.C. § 664(d)(2)(D).

144. *See id.*

145. *See* I.R.C. § 2056(b)(8)(A).

146. *See* I.R.C. § 2055(a)(1).

147. *See* I.R.C. § 2055(a)(3).

148. *See* I.R.C. § 2055(a)(4).

149. *See* I.R.C. § 2055(a)(5).

150. *See* I.R.C. § 2055(a)(3).

151. *See* I.R.C. § 2055(a)(2). More precisely, the deduction is available for transfers "to or for the use of" the following:

bequest to a donor advised fund (as defined in IRC section 4966(d)(2)).[152] The remainder of this section focuses on transfers to charitable entities.

As with the estate tax, a deduction is allowable in computing taxable gifts for certain charitable and other specified purposes.[153] Most relevant for present purposes is the deduction for charitable gifts.[154] Like the deduction from the gross estate, the deduction allowable for gift tax purposes is not limited to a percentage of total transfers. A gift to a charitable corporation that is deductible for gift tax purposes must meet essentially the same statutory requirements for deducting a bequest to a charitable corporation for estate tax purposes.[155] However, unlike the requirements for deducting a charitable bequest in trust from the gross estate,[156] the requirements for deducting a charitable gift from taxable gifts specify that the trust itself be "organized and operated exclusively for" the designated charitable purposes (i.e., not simply that the trustee use the gift for such purposes).[157]

A deduction for split-interest charitable gifts and bequests (i.e., a gift in which interests are divided between charitable and noncharitable

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> any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, including the encouragement of art, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual, which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Id.

152. *See* I.R.C. § 2055(e)(5).

153. *See* I.R.C. § 2522(a) (allowing a deduction in computing the taxable gifts of a citizen or resident for gifts "to or for the use of" certain governmental entities (for exclusively public purposes), charitable entities, fraternal lodges (for exclusively religious, charitable, educational, and similar purposes), and certain domestic veterans' organizations).

154. The deduction is allowable for gifts made by a United States citizen or resident "to or for the use of" the following:

> a corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), including the encouragement of art and the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, which is not disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

I.R.C. § 2522(a)(2).

155. *Compare* I.R.C. § 2522(a)(2) (permitting gift-tax deductions for transfers to charitable organizations), *with* I.R.C. § 2055(a)(2) (permitting estate-tax deductions for charitable bequests to comparable organizations).

156. *See* I.R.C. § 2055(a)(3).

157. I.R.C. § 2522(a)(2).

donees or beneficiaries) is available for both estate tax and gift tax purposes in limited circumstances. The general rule is that no deduction is available for an interest passing to a charitable donee or beneficiary when an interest in the same property passes to (or is retained by) a noncharitable entity.[158] However, there are a few exceptions to this general disallowance rule.[159] Most relevant for present purposes, a deduction is allowed for gift and estate tax purposes for a charitable bequest of a remainder interest if that interest is in a CRUT or a CRAT.[160] When Congress enacted the general prohibition against a deduction for split-interest charitable gifts, it allowed the deduction for gifts of remainder interests in a CRAT or CRUT under the rationale that the terms of such a gift confer a benefit on charity that corresponds to the deduction because the charitable remainder is not easily undermined through a manipulative investment strategy.[161]

3. The Annual Exclusion for Gifts of Present Interests

A donor receives an annual exclusion from taxable gifts for the first $10,000 given to any (and each) donee during the calendar year.[162] The annual exclusion is indexed for inflation.[163] The current annual exclusion, adjusted for inflation, is $19,000.[164] The annual exclusion is generally available only for gifts of present interests (e.g., an outright gift to the donee, or transfers of a mandatory current income interest in trust); gifts of future interests (such as remainder interests in trust) generally do not qualify.[165]

A relaxation of the general "present interest" requirement for qualifying a transfer for the annual exclusion appears in section 2503(c), which classifies certain gifts in trust for the benefit of minors as present interests, even though they would not otherwise so qualify.[166] Under this special provision, to qualify a transfer in trust as one of a present interest, the trustee must have the power to expend all principal and income for the benefit of the minor prior to his reaching age 21,[167] and

158. *See* I.R.C. §§ 2055(e)(2); 2522(c)(2).

159. For example, a deduction is available for the transfer of "an undivided portion, not in trust, of the decedent's entire interest in property." Treas. Reg. § 20.2055-2(e)(2)(i) (2023).

160. *See* I.R.C. §§ 2055(e)(2)(A); 2522(c)(2)(A). A deduction is also available when a charity has a remainder interest in a "pooled income fund" (within the meaning of section 642(c)(5). of the Internal Revenue Code). *See* I.R.C. §§ 2055(e)(2)(A); 2522(c)(2)(A). Further, a deduction is allowed when the interest transferred to charity in a split-interest gift is "in the form of a guaranteed annuity or is a fixed percentage distributed yearly of the fair market value of the property (to be determined yearly)." I.R.C. §§ 2055(e)(2)(B); 2522(c)(2)(B).

161. *See* S. Rep. No. 91-552, at 218-19 (1969), 1969 IRB LEXIS 2452, *reprinted in* 1969-3 C.B. 423.

162. *See* I.R.C. § 2503(b)(1).

163. *See* I.R.C. § 2503(b)(2).

164. *See* Rev. Proc. 2024-40, 2024-45 I.R.B. 1100.

165. *See* I.R.C. § 2503(b)(1).

166. *See* I.R.C. § 2503(c)(1).

167. *See* I.R.C. § 2503(c)(1).

the trustee must transfer all unexpended funds to the beneficiary when he reaches age 21.[168] If the beneficiary dies before reaching that age, the trustee must then transfer the unexpended funds to the beneficiary's estate or as the beneficiary may have appointed under a general POA.[169]

A gift that both qualifies for the annual exclusion and takes the form of a "direct skip" to an individual (or even, under certain conditions, takes the form of a transfer in trust constituting a "direct skip") is not subject to GST tax.[170] The terms of a section 2503(c) trust remove the transfer in trust from the GST tax base (through an assignment to the transfer of an inclusion ratio of zero)[171] when the trust would be includible in the gross estate of the beneficiary should she die before the trust terminates.[172]

4. The Exclusion for Payments of Certain Educational and Medical Expenses

An unlimited exclusion from taxable gifts for payments of tuition and medical expenses is available.[173] For purposes of the federal gift tax, a "qualified transfer" is not treated as a gift.[174] A "qualified transfer" is defined as "any amount paid on behalf of an individual" in two cases.[175] In the first case, the amount must be paid "as tuition to an educational organization described in section 170(b)(1)(A)(ii) [i.e., a school or college] for the education or training of such individual."[176] In the second case, the amount must be paid "to any person who provides medical care . . . with respect to such individual as payment for such medical care."[177] Thus, the exclusion applies only to payments made directly to the provider of the medical or educational services (not to reimbursements of expenses).[178]

A "qualified transfer" excludable from taxable gifts is also not treated as a generation-skipping transfer under the GST tax.[179]

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168. *See* I.R.C. § 2503(c)(2)(A).
169. *See* I.R.C. § 2503(c)(2)(B).
170. *See* I.R.C. § 2642(c)(1)-(3).
171. *See id*.
172. *See* I.R.C. § 2642(c)(2)(B).
173. *See* I.R.C. § 2503(e).
174. *See* I.R.C. § 2503(e)(1).
175. I.R.C. § 2503(e)(2).
176. I.R.C. § 2503(e)(2)(A). The referenced entity is defined as "an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on." I.R.C. § 170(b)(1)(A)(ii).
177. I.R.C. § 2503(e)(2)(B). For these purposes, "medical care" is defined as under section 213(d).
178. *See* Treas. Reg. § 25.2503-6(c), *Example (4)* (1984*)*.
179. *See* I.R.C. § 2611(b)(1).

5. The Treatment of General Powers of Appointment

A decedent's gross estate includes property over which the decedent held at death a general POA.[180] Subject to certain exceptions that are quite important in estate planning practice but not especially relevant to the proposal in this Article,[181] a general POA is defined as a power that is exercisable in favor of the decedent, her estate, or the creditors of either.[182] The gross estate inclusion rule applies to the donee of a general POA regardless of whether she ever exercises it.

The exercise or release of a general POA during life is taxed as a gift for gift tax purposes.[183]

6. The Treatment of Contributions to Section 529 Educational Plans

IRC section 529 has prompted a proliferation of plans enabling tax-favored saving for future education. This statutory section generally exempts from federal income tax a "qualified tuition program" ("QTP")[184] that satisfies several statutory conditions.[185] A QTP refers to two types of plans. One type is a program established and maintained by a state (or its instrumentality) or certain institutions of higher education that enables a person to purchase tuition credits for a designated beneficiary.[186] The other type of QTP is a program established and maintained by a state (or its instrumentality) that enables a person to "make contributions to an account which is established for the purpose of meeting the qualified higher education expenses of the designated beneficiary of the account."[187] QTP contributors and QTP beneficiaries generally may exclude from gross income both distributions and earnings (e.g., investment returns on an account established under the second type of QTP) resulting from participation in the program.[188]

For gift tax and GST tax purposes, a contribution to a QTP account on behalf of a designated beneficiary is deemed a completed gift of a present interest to the designated beneficiary[189] but not a qualified transfer for payment of tuition under IRC section 2503(e).[190]

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180. *See* I.R.C. § 2041(a)(2).

181. *See generally* I.R.C. § 2041(b)(1)(A)-(C) (setting forth exceptions to the definition of a general POA).

182. *See* I.R.C. § 2041(b)(1). The same definition holds for purposes of the federal gift tax. *See* I.R.C. § 2514(c).

183. *See* I.R.C. § 2514(b).

184. I.R.C. § 529(a).

185. *See* I.R.C. § 529(b)(2)-(6).

186. *See* I.R.C. § 529(b)(1)(A)(i), (e)(5).

187. I.R.C. § 529(b)(1)(A)(ii).

188. *See* I.R.C. § 529(c)(1).

189. *See* I.R.C. § 529(c)(2)(A)(i).

190. *See* I.R.C. § 529(c)(2)(A)(ii).

Accordingly, a contribution to a QTP account is generally a taxable gift, but it also qualifies for the annual exclusion from taxable gifts (to the extent that the contribution does not exceed the annual exclusion).[191] Because a gift that both qualifies for the annual exclusion and takes the form of a "direct skip" to an individual is not subject to GST tax,[192] a contribution to a QTP account should likewise escape GST taxation to the extent that it does not exceed the annual exclusion[193] (although any excess is likely subject to the GST tax when the designated beneficiary is a skip person). For gift tax and GST tax purposes, a distribution from a QTP to the originally designated beneficiary is not a taxable gift.[194]

A person's interest in a QTP is not alone sufficient to cause inclusion in her gross estate for purposes of the estate tax.[195] Thus, the gross estate of a contributor to a QTP account generally should not include amounts held in the account, a result suggested by the structure of the statute[196] and confirmed by proposed regulations.[197] However, amounts distributed on account of the death of a beneficiary are included in the gross estate, a rule that proposed regulations interpret to result in inclusion in the gross estate of a designated beneficiary[198] (presumably under the assumption that her estate will receive a distribution in liquidation of the account held on her behalf).

II. A PROPOSAL FOR WEALTH TRANSFER TAX REFORM

A. The Basic Proposal

The essence of the proposal is to remove from the transfer tax base (i.e., transfers subject to the federal gift tax, estate tax, and GST tax) all gratuitous transfers in a qualifying form to "qualifying individuals," a new statutory term. A qualifying individual ("QI") is a natural person who (1) is unrelated to the donor, and (2) satisfies pre-determined criteria of financial neediness as measured by income and net assets (taking into account appropriate family attribution of both).

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191. *See* Prop. Treas. Reg. § 1.529-5(b)(1), 63 Fed. Reg. 45031 (Aug. 24, 1998); I.R.C. § 2503(b) (providing for the annual exclusion from taxable gifts). If contributions to a QTP for a designated beneficiary during the year by one donor exceed the amount of the annual exclusion for that year, the donor can elect to treat the contributions for that year as ratably contributed over a 5-year period for purposes of the annual exclusion. *See* I.R.C. § 529(c)(2)(B).

192. *See* I.R.C. § 2642(c)(1)-(3). The GST tax is not imposed on the transfer because it is assigned an inclusion ratio of zero. *See* I.R.C. § 2642(c)(1).

193. *See* Prop. Treas. Reg. § 1.529-5(b)(1), 63 Fed. Reg. 45019 (Aug. 24, 1998).

194. *See* I.R.C. § 529(c)(5)(A).

195. *See* I.R.C. § 529(c)(4)(A).

196. *See, e.g.*, I.R.C. § 529(c)(4)(C) (including in a contributor's gross estate such portion of any contribution allocated to future periods under the contributor's prior election to allocate QTP contributions over a 5-year period; stating that this rule of inclusion applies "notwithstanding subparagraph (A)").

197. *See* Prop. Treas. Reg. § 1.529-5(d)(1), 63 Fed. Reg. 45019 (Aug. 24, 1998).

198. *See* I.R.C. § 529(c)(4)(B); Prop. Treas. Reg. § 1.529-5(d)(3), 63 Fed. Reg. 45019 (Aug. 24, 1998).

The proposal excludes lifetime gifts to or on behalf of QIs in a qualifying form from the definition of a taxable gift in applying the cumulative gift tax and estate tax. The determination of whether a donee satisfies the definition of QI is made at the beginning of the year of transfer; prior transfers that qualified for the new exclusion would not be retroactively disqualified if the donee later does not meet the definition of QI.

The proposal also provides for a deduction from the gross estate for bequests and devises to or on behalf of QIs in a qualifying form. Similarly, the proposal excludes from the definition of a generation-skipping transfer all gifts, devises, and bequests to or on behalf of QIs in a qualifying form (or, in some cases, assigns an inclusion ratio of zero to such transfers).

The proposal obviously requires the adoption of many details beyond these basic features. Several details depend upon design choices. The following subpart explores several of these finer points.

B. Essential Details and Design Choices

1. Determining QI Status.

A QI must (1) be unrelated to the donor, and (2) meet a test of financial neediness. There are several reasons for the first requirement. One is the natural tendency of people to favor their kindred in transferring wealth; most donors hardly need an incentive to pass on wealth to their spouses, children, grandchildren, and other kindred with whom they have emotional bonds. Further, incentivizing intra-family gifts does not break up large concentrations of dynastic wealth – a concern of many estate tax proponents.[199] The main task for implementing the first requirement is settling on a test of relationship that is sufficiently remote between donor and donee.

One logical approach is to require simply that a QI not be a member of the donor's "family." Various IRC provisions define "family" for myriad purposes of law,[200] and one could simply require that a QI not be a member of the donor's "family" under one of these definitions. However, that approach probably does not sufficiently encourage the redistribution of dynastic wealth; nieces, nephews, and first cousins, for example, typically do not fall within the definition of "family" under these provisions.[201] Incentivizing gifts to these kindred who fall outside

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199. *See supra* notes 18-25 and accompanying text.

200. *See, e.g.*, I.R.C. §§ 2701(e)(1) (defining "member of the family" for purposes of the anti-estate-freeze rules of section 2701); I.R.C. § 2704(c)(2) (defining "member of the family" under deemed transfer rules on the lapse of certain voting or liquidation rights and rules disregarding certain restrictions on liquidation of business entities for valuation purposes); I.R.C. § 4946(d) (defining "family" under the private foundation excise tax rules).

201. *See* I.R.C. §§ 2701(e)(1); 2704(c)(2); 4946(d).

the definition of "family" under existing IRC sections would likely achieve less meaningful wealth redistribution than in the case of gifts to totally unrelated persons in poverty.

I propose that, for purposes of determining that a QI is unrelated to a donor, the QI must not (1) bear a relationship to the donor described in IRC section 152(d)(2)(A)-(G); (2) be a descendant of the donor's spouse, grandparent or step-parent (if not already described IRC section 152(d)(2)(A)-(G)); and (3) be a spouse of any of the foregoing (if not already described IRC section 152(d)(2)(A)-(G)) or of the donor. Of course, adopted children should be treated as descendants for these purposes. This approach would prevent spouses, immediate family members and their descendants (along with their spouses), grandparents, aunts, uncles, nieces, nephews, first cousins, and close step-family members from being QIs. By defining a QI to exclude the donor's immediate and many extended family members, the proposal encourages gifts that do not perpetuate dynastic wealth.

The second defining characteristic of a QI is financial neediness. Financial neediness is far from self-defining, and various benchmarks of neediness are within the range of plausibility. One approach is to rely on the measurement of poverty determined under the United States Department of Health and Human Services under its poverty guidelines (HHS Poverty Guidelines).[202] The HHS Poverty Guidelines are a simplified version of the poverty thresholds published by the United States Census Bureau for purposes of statistically measuring poverty.[203] Under the HHS Poverty Guidelines, poverty is determined by membership in a household with income at or below a stated level (depending on household size).[204] For example, in 2026, a member of a household with four people living in the contiguous United States is living in poverty if household income does not exceed $33,000.[205]

The federal government applies the income thresholds under the HHS Poverty Guidelines, or percentage multiples thereof (e.g., 125%, 150%, or 185%), to determine eligibility for benefits under various federal programs.[206] Examples of federal programs that determine benefits eligibility based on the guidelines include Head Start, the Children's Health Insurance Program (CHIP), the Supplemental Nutrition Assistance Program (SNAP, formerly known as the foods

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202. For an explanation of the poverty guidelines, see U.S. Dept. Health & Human Servs., Office of the Assist. Sec'y for Planning and Evaluation, *Poverty Guidelines*, https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines (last visited April 9, 2026).

203. *Id.*

204. *Id.*

205. *Id.*

206. *See* U.S. Dept. Health & Human Servs., Office of the Assist. Sec'y for Planning and Evaluation, *Frequently Asked Questions Related to the Poverty Guidelines and Poverty*, https://aspe.hhs.gov/topics/poverty-economic-mobility/poverty-guidelines/frequently-asked-questions-related-poverty-guidelines-poverty (last visited April 9, 2026).

stamps program), the Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), and National School Lunch Program (for free and reduced-price meals).[207]

The proposal advanced in this Article tentatively adopts the operating premise that an individual qualifies as financially needy if she (1) is a member of a household with income (as determined under the HHS Poverty Guidelines) at or below 150% of the poverty level under the HHS Poverty Guidelines and (2) owns total net assets (excluding one's primary residence and one vehicle) valued at no more than $20,000.[208] To minimize the risk of understating the value of owned assets through strategic behavior (e.g., transferring assets to a relative the day before a specified valuation date), assets should be valued on an average basis for a specified period.[209] Although this dual income and asset test is only tentatively adopted, there are reasons that it is a sensible approach to determine financial neediness.

As to the income test, a member of any household at or below the 150% income threshold of the HHS Poverty Guidelines should qualify for most benefits under federal anti-poverty programs.[210] The justification for employing a 150% threshold in the income test, rather than simply 100%, is that there is no obvious reason to limit incentives for voluntary wealth redistribution only in favor of the poorest of the poor; after all, federal programs remain in place to benefit the neediest Americans, and those who are only modestly above the poverty level could readily slip into poverty though various common misfortunes. Thus, they should count as financially needy under the proposal.

Some type of asset test is appropriate to ensure that people with sufficient wealth are not treated as poor just because they have little current income. One could certainly justify an asset threshold higher or lower than $20,000.[211] The number tentatively selected allows the poor to save to some degree without being penalized by disqualifying themselves from QI status while simultaneously encouraging voluntary wealth transfers to people who have limited resources. For purposes of applying the asset test, the proposal considers a person to own not only

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207. *Id.*

208. The thresholds under the income test and the assets test should be indexed for inflation.

209. For example, cash held in a financial account could be valued at its average monthly balance over the previous year.

210. For a summary of federal anti-poverty programs and the income-based eligibility tests under them, see Federal Safety Net, *U.S. Welfare Programs: Antipoverty Programs*, https://federalsafetynet.com/welfare-programs/ (last visited Oct. 9, 2025).

211. Analysts with the Urban Institute have recommended a universal asset limit for receiving public assistance of $10,000 for individuals and $20,000 for families. *See* Chantel Boyens, et al., URBAN INSTITUTE, *Why a Universal Asset Limit for Public Assistance Programs Would Benefit Both Participants and the Government* (Mar. 20, 2024), https://www.urban.org/urban-wire/why-universal-asset-limit-public-assistance-programs-would-benefit-both-participants-and-government. The proposal advanced in this Article adopts the higher number of $20,000 even in the case of an individual. Because government resources are not directly being expended, there is little need to limit the proposed incentives to gifts made only to the poorest of the poor.

assets that she owns outright, but also assets over which she has a presently exercisable POA in favor of herself or her creditors (i.e., a presently exercisable general POA).[212]

The relationship test of QI status should be applied at the time of transfer; one who is related to the donor (under the terms of the proposal described above) at the time of transfer is thus not a QI. Deciding how and when to determine the financial neediness of the donee is more complex because of the administrative challenges the determination presents. Further discussion of this issue is reserved for Part II.B.4, *infra*.

2. Denying Exclusions and Deductions for Reciprocal Transfers to QIs.

An anti-abuse rule is necessary to disqualify reciprocal transfers among unrelated donors from preferential treatment. For example, consider donor Ritchie Rich, whose grandson is Ricky, and donor Wanda Wealthy, whose granddaughter is Wilma. The two families are unrelated. Obviously, a gift from Ritchie to Ricky (or from Wanda to Wilma) would not qualify for the exclusion under the proposal because a grandchild is not a QI with respect to his or her grandparent. But a gift from Wanda to Ricky would qualify if Ricky satisfies the criteria for neediness, as would a gift from Ritchie to Wilma if Wilma is needy.

If Ritchie gives to Wilma only after Wanda gives to Ricky, or vice versa, the two transfers are almost surely reciprocal. It appears that each grandparent has given to a non-relative only because the other has done, or will do, likewise. The question is whether, to the extent of mutuality, the transfers should be treated as gifts between related persons in a manner analogous to how current law treats reciprocal gifts and transfers in trusts.[213]

The argument that the gifts should qualify for the proposed exclusion would rely on the neediness of each donee (assuming the donee otherwise meets the definition of QI). The transfer of wealth to a needy person is redistributive, and thus, the argument goes, the system should authorize an exclusion in these circumstances. Further, administrative simplicity is enhanced if the government need not identify reciprocal transfers.

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212. For a discussion of general powers of appointment, see *supra* Part I.B.5.

213. *See, e.g.,* United States v. Grace, 395 U.S. 316, 323 (1969) (including the value of a trust created by a decedent's wife in the decedent's estate where the decedent had also created an interrelated trust and, to the extent of mutual value, the transfers in trust left them in approximately the same economic position that they would have enjoyed had each created a trust naming that same settlor as the life income beneficiary); Schultz v. United States, 493 F.2d 1225, 1226 (4th Cir. 1974) (per curiam) (disallowing an annual exclusion for gifts to a taxpayer's nieces and nephews when his brother made matching gifts to the taxpayer's children; holding that "a reasonable jury could have concluded . . . that the taxpayer intended to benefit his children, rather than those of his brother, by the gifts in question").

Rejecting these arguments, the proposal does not allow a new transfer tax exclusion for reciprocal transfers. Although each grandchild may meet the criteria of neediness at the moment of transfer, the natural inclination of wealthy donors to enrich their family likely obviates the need to incentivize those transfers through the tax system, whether the transfers are direct or indirect. Excluding reciprocal transfers from the transfer tax base would enable the wealthy to accomplish indirectly what their natural inclination would often lead them to do directly in the absence of the proposal's limitations. Even worse, allowing a transfer tax exclusion for reciprocal transfers would perversely tend to perpetuate dynastic wealth to an even greater degree than under current law by incentivizing the wealthy to make indirect gifts to needy family members that exceed their direct gifts to them under current law. Finally, because current law requires the government to identify reciprocal transfers in various contexts,[214] the burden on administration from requiring a similar approach under the proposal does not seem excessive.

3. Determining Qualifying Forms of Transfers

An extremely important design issue is to specify the forms of wealth transfers that qualify for the proposed deduction from the gross estate and the exclusions from taxable gifts and generation-skipping transfers. This Article refers to these favored forms under the proposal as "qualifying forms of transfer," or "QFT."[215] In determining QFT, the proposal seeks to remain faithful to its underlying purpose: to incentive the voluntary redistribution of wealth to or on behalf of those in financial need so that they can experience the benefits of additional monetary resources.

To accomplish voluntary *redistribution*, the proposal should ensure that transfers taking the form of QFT do not revert to the donor, her estate, her family members, or other natural persons who are not financially needy. To accomplish the goal of redistributing wealth *to or on behalf of* the financially needy so that they truly benefit from the transfers, the proposal should ensure that beneficiaries have an interest in qualifying transfers sufficient to improve their lives.

a. Outright Transfers

The type of transfer to a QI that should most clearly constitute a QFT is an outright gift, bequest, or devise of cash or marketable securities. An outright transfer of cash and other highly liquid assets

214. *See supra* note 213.

215. The discussion employs "QFT" to refer both to a single qualifying transfer (i.e., "a" QFT) and to multiple qualifying transfers (i.e., qualifying "forms" of transfer or a qualifying form of "transfers") alike, with the precise numerical sense intended discernable by the context of the discussion.

immediately redistributes wealth and provides the donee with current enjoyment of all transferred funds. Further, accounting for transfers of these assets is simple.

If the QI is a minor, a transfer to her parent on her behalf or her other legal guardian should also be a QFT.[216] The proposal also treats transfers to a custodian for a QI under the relevant state's Uniform Transfers to Minor's Act[217] as a QFT. Such gifts currently qualify for the annual exclusion,[218] a sensible result insofar as a custodian under this uniform act may transfer to the minor or expend on her behalf "so much of the custodial property as the custodian considers advisable"[219] for her use and benefit and must transfer all remaining custodial property to her upon her reaching a specified age of majority (or to her estate if she dies earlier than that).[220] Thus, the terms of custodianship under the uniform act ensure that a QI who is a minor can benefit currently, and will benefit upon reaching the age of majority, from transferred property.

The proposal treats an outright transfer of assets other than cash or marketable securities as a QFT if there are no contractual or other restrictions on the QI's use of the assets that would prevent the donee-QI from immediately enjoying the assets so as to disqualify the transfer from the annual exclusion from taxable gifts.[221] In other words, the outright transfer of other assets must truly be a transfer of a present interest that qualifies for the annual exclusion (or, in the case of a bequest, would so qualify were the transfer made during life). For example, a transfer of a closely held business interest (e.g., an LLC interest, an interest in a limited partnership, or family-controlled corporate stock) would not be a QFT if the interest is subject to material transfer restrictions and the donee cannot force significant distributions on its equity interests or withdraw her capital.[222] As another example, a gift of land or art would qualify as a QFT, assuming the existence of no transfer restrictions or other features that would deny the donee present enjoyment of the transferred asset.

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216. *See* Ross v. United States, 348 F.2d 577, 579 (5th Cir. 1955) ("An outright gift by a donor to the guardian of a minor is considered a gift of a present and not a future interest under section 2503(b) . . .").

217. *See* Unif. Transfers to Minors Act § 22 (amended 1986) (Nat'l Conf. of Comm'r on Unif. State L. 1983); *see, e.g.*, TEX. PROP. CODE §§ 141.001-141.025 (West, 1997).

218. *See* Rev. Rul. 59-357, 1959-2 C.B. 212 (ruling that a gift to a minor under either the Uniform Gifts to Minors Act or the Model Gifts of Securities to Minors Act qualifies for the annual gift tax exclusion). The rationale for this ruling applies equally under the more modern Uniform Transfers to Minors Act.

219. Unif. Transfers to Minors Act § 14(a) (amended 1986) (Nat'l Conf. of Comm'r on Unif. State L. 1983).

220. *Id.* § 20.

221. *See* I.R.C. § 2503(b).

222. *See* Rev. Rul. 76-360, 1976-2 C.B. 298 (ruling that gifts of non-income-producing stock subject to significant transfer restrictions for two years do not transfer the immediate use, possession, or enjoyment to the donees and thus do not qualify for the gift tax annual exclusion).

The rationale for including gifts of illiquid assets in QFT only if they confer present enjoyment on the donee-QI is to ensure that QIs meaningfully benefit from transfers. The proposal seeks to encourage voluntary redistribution of wealth that is real, not merely illusory. Further, under the design option that features a supplemental exclusion amount that depends on cumulative transfers to QIs,[223] ensuring the bona fides of such transfers and their accurate valuation is essential to prevent taxpayers from overstating their supplemental exclusion.

It is true that a gift of illiquid assets subject to no transfer restrictions may still present valuation challenges, but this feature inheres in the current wealth transfer tax system. The proposal presents no unique problems for valuation. Moreover, much wealth is owned in the form of illiquid assets. A proposal designed to encourage the voluntary redistribution of wealth to benefit the financially needy should not disqualify transfers of land, art, intangible property, and other assets merely because they are not cash-equivalents. To limit QFT to cash or publicly traded securities would require prospective donors to QIs of appreciated illiquid assets to sell them, forcing a realization event that would often require the recognition of gain for federal income tax purposes.[224] Such a system would greatly increase the after-tax cost of giving, thereby removing an incentive for voluntary wealth redistribution.

b. Exercise of a General POA

The proposal treats the exercise (not in trust) of a general POA in the same manner as an outright gift or bequest. Thus, for example, consider a donee of an inter vivos general power who appoints the corpus of a trust holding marketable securities. If the donee exercises his power in favor of a QI, not in trust, the donee may exclude the value of appointed securities from both taxable gifts and transfers subject to the GST tax. Similarly, under the proposal, the exercise of a testamentary general POA in favor of a QI gives rise to a deduction from the gross estate of the donee-decedent equal to the estate tax value of appointed assets.

The exercise of a general POA in trust should be governed by the same rules applicable to direct transfers in trust.[225] Accordingly, the proposal allows a donee of a general POA to exercise it in trust, but the exercise would be a QFT only if the terms of such a trust are such that a transfer to the trustee of the trust would constitute a QFT.

223. *See infra* Part III.
224. *See* I.R.C. §§ 61(a)(3); 1001(c).
225. *See infra* Part II.B.3.e.

c. Payment of Certain Educational and Medical Expenses

The proposal treats as a QFT any "qualified transfer"[226] for the payment of a QI's tuition or medical care directly to the service provider.[227] Any such payment under current law is simply not treated as a transfer of property by gift[228] or a generation-skipping transfer.[229] To fail to include such payments on behalf of QIs as QFT would leave them out of account. The rationale for defining such a transfer as a QFT, rather than simply leaving it out of the transfer tax system (as under current law), is that the proposal offers as a design option a supplemental exclusion that depends on the cumulative transfers to QIs satisfying the definition of QFT.[230] It thus is important to account for wealth transfers to QIs that accomplish goals of redistribution to the poor.

Expanding medical care and educational opportunities for the poor is important to combatting poverty. There is a strong correlation between poverty and deficient educational opportunities and adverse educational and employment outcomes.[231] Although the specific causal connections are open to interpretation, a link between money and educational opportunities (and resulting job prospects) is obvious.[232] Further, one can hardly perform well educationally or vocationally when ill. And having limited resources impacts generations. "The inability to invest in human capital traps many families in intergenerational poverty," as some have surmised.[233] It is thus reasonable to conclude that expenditures for a beneficiary's health and education will help them escape poverty over time; they are meaningful, potentially life-changing, investments in human capital.[234] These expenditures also provide a social good.[235] A system that seeks to incentivize transfers to QIs should likewise incentivize the payment of their essential medical and educational expenses.

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226. I.R.C. § 2503(e)(1)-(2).

227. I.R.C. § 2503(e)(2)(A)–(B).

228. *See* I.R.C. § 2503(e)(1).

229. *See* I.R.C. § 2611(b)(1).

230. *See infra* Part III.

231. *See* BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 160 (John Covell ed., 1999).

232. *Id.*

233. Repetti, *supra* note 16, at 839.

234. *See* Alstott, *supra* note 20, at 477 ("An adequate education and sufficient care would equip every child with the intellectual and emotional capability to choose how to use her share of material goods to shape a life."); Alstott, *supra* note 26, at 378 ("More generally, virtually any consumption expenditure that benefits people (food, clothing, education, leisure) could be treated as an investment in the human capital of workers or potential workers or citizens."); *cf.* Ascher, *supra* note 3, at 71 ("[T]here are vast differences in the educations parents can afford for their children.").

235. *See* Ascher, *supra* note 3, at 142 ("Society as a whole benefits when any of its members is educated or provided with medical care.").

d. Contributions to Section 529 Plans

The rationale for favorably treating the direct payment of a QI's tuition applies in the case of contributions to educational savings plans benefiting QIs. Funding a QI's education can help elevate her out of poverty for life. Further, section 529 QTPs are extraordinarily popular because of their income tax advantages. People of means are quite aware of their benefits. Incentivizing transfers to QTP accounts for the benefit of a QI is thus an excellent way to encourage voluntary wealth redistribution for significant impact. Of course, only those transfers to QTP accounts that assuredly benefit QIs should count as QFT.

Thus, the proposal treats as a QFT any contribution to a section 529 QTP account (1) of which only a QI is or can be the designated beneficiary[236] and (2) from which only distributions in payment of "qualified higher education expenses"[237] of a QI can be made. The proposal requires a QI to be named the original designated beneficiary of the account. The proposal allows for a change of designated beneficiary and a rollover for the benefit of another designated beneficiary of funds unexpended for the original designated beneficiary, as long as any new designated beneficiary is a QI. Under the proposal, no portion of a contribution to a QTP is a QFT if funds held in the QTP account can be returned to the contributor (or any other private entity or person). Any unexpended funds remaining on termination of the QTP account must be distributed to an organization described in section 501(c)(3).[238]

The proposal incentivizes the use of QTPs for QIs well beyond current law's generous incentives to establish college savings plan accounts. Under the proposal, if a contribution to a QTP account established for a QI meets the proposed conditions of a QFT set forth in the preceding paragraph, the entire amount contributed to the QTP account is excluded from the definitions of "taxable gift" and "generation-skipping transfer." The proposal does not limit excluded amounts to the annual exclusion. Further, the proposal retains current law's exclusion of the QTP account balance from the contributor's gross estate. Thus, under the proposal, if the contributions to a QTP account for a QI satisfy the requirements described in this section, the contributions both constitute QFT and completely escape transfer taxation.

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236. *See* I.R.C. § 529(e)(1).

237. *See* I.R.C. § 529(e)(3)(A).

238. The rationale for not permitting a terminating distribution to a QI is that the premise of allowing an unlimited exclusion or deduction for contributions to a section 529 QTP account established for a QI is that the funds cannot be used directly to enhance material wealth.

e. Transfers in Trust

i. General Considerations

Another design issue is whether, and if so what, transfers in trust should be QFT. A good argument exists for defining QFT to include some transfers in trust. A prospective donor may have legitimate reasons for believing that a QI's outright receipt of a gift is imprudent. For example, a minor lacks legal capacity to enter many types of contracts,[239] whereas a trustee, including the trustee of a trust created for the benefit of a minor, is empowered under modern law to transact business on behalf of a beneficiary broadly.[240] Moreover, adult QIs may not possess financial skills sufficient to manage a sizeable donation; at a minimum, many QIs will never have had the opportunity to learn how to manage wealth responsibly. A trustee with financial expertise may be a sound choice to manage a QI-beneficiary's assets, at least for some period of time.

However, transfers in trust present unique issues. First, when a trustee is given discretion over distributions, a QI-beneficiary may not significantly benefit when the trustee exercises discretion not to distribute funds. Although a trustee's discretion is not absolute, the judgment of a trustee is typically respected as long as the trustee acts in accordance with the purposes of the trust, in good faith, and in the interests of the beneficiaries (the precise standard varying with state law).[241] Consequently, a beneficiary whose rights to distributions depend on the exercise of trustee discretion does not hold economic interests anything like outright ownership of the trust corpus.

If distributions are tied to a standard (e.g., health, education, maintenance, or support), a beneficiary in theory can enforce her rights to distributions in court because the distribution standard is ascertainable and thus subject to judicial review.[242] However, litigation is costly, and a QI may not have the resources, knowledge, or practical

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239. A contract with a minor is voidable by the minor. *See* RESTATEMENT (SECOND) OF CONTRACTS § 14 (1979).

240. *See, e.g.,* TEX. PROP. CODE § 113.002 (West 2024) ("[A] trustee may exercise any powers in addition to the powers authorized by this subchapter that are necessary or appropriate to carry out the purposes of the trust."); UNIF. TRUST CODE § 815(a)(2 (2010) (authorizing a trustee to exercise not only powers specified elsewhere in the code but also "all powers over the trust property which an unmarried competent owner has over individually owned property" and "any other powers appropriate to achieve the proper investment, management, and distribution of the trust property" unless the terms of trust provide otherwise).

241. *See, e.g.*, TEX. PROP. CODE § 113.029(a) (West 2024) ("Notwithstanding the breadth of discretion granted to a trustee in the terms of the trust, including the use of terms such as 'absolute,' 'sole,' or 'uncontrolled,' the trustee shall exercise a discretionary power in good faith and in accordance with the terms and purposes of the trust and the interests of the beneficiaries."); UNIF. TRUST CODE § 814(a) (2010) (imposing essentially the same rule of law).

242. *See, e.g.*, State v. Rubion, 158 Tex. 43, 52, 308 S.W.2d 4, 9 (Tex. 1957) (holding that the trustee of a support trust abused his discretion in refusing to invade principal for the care of the beneficiary).

experience to enforce her legal rights effectively. Further, the limitation on distributions in the case of such a support trust restricts the beneficiary's enjoyment of trust income and principal. Once again, her interest is certainly less valuable than outright ownership of trust assets, even though more substantial than the beneficial interest in a purely discretionary trust.

A beneficiary with a mandatory distribution right, such as a mandatory income right or the right to receive an annual unitrust percentage or an annuity payment, has a right that is enforceable because her interest in distributions is ascertainable.[243] A trustee who fails to distribute such a quantifiable sum cannot defend her actions with plausibility as in the case of a discretionary or support trust. Still, a trust requiring mandatory distributions of income can be drafted to enable a trustee to adopt an investment strategy that favors remaindermen over current income beneficiaries by (i) investing in assets that are likely to appreciate but not generate current income, and (ii) limiting or eliminating the trustee's default power to adjust principal and income to ensure that the income beneficiary is not disfavored.[244] If a mandatory income trust is so drafted, a QI-income beneficiary would be disadvantaged relative to her position under a trust providing for more impartially among beneficiaries with different temporal interests.

Further, even if a mandatory income trust is not drafted in such a way as to empower the trustee to favor a non-QI-remainderman over a QI-income beneficiary, a trustee who in fact adopts an investment strategy so as to favor a non-QI-remainderman over a QI-income beneficiary would harm the QI-beneficiary's interests. In that case, a QI-income beneficiary in theory could establish a breach of the duty of impartiality in a lawsuit against the trustee.[245] However, a QI who lacks

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243. *See* RESTATEMENT (THIRD) OF TRUSTS § 49 cmt. (c)(1) (2012) ("Where a trustee is directed to pay the trust's income to a beneficiary for life or a designated period, in the absence of other direction the trustee is under a duty to pay the beneficiary the net income of the trust property at reasonable intervals, normally monthly or quarter-annually, but at least annually, whether or not the beneficiary needs the income."); *id.* at § 49 cmt. e ("The terms of the trust may provide that a beneficiary is to receive periodically a stated sum (an annuity) or a sum to be determined by some mathematical formula, such as a stated percentage of the trust estate's value determined annually (a unitrust).").

244. *See, e.g.*, TEX. PROP. CODE §§ 116.004(b) (West 2024) ("In exercising the power to adjust under Section 116.005(a) or a discretionary power of administration regarding a matter within the scope of this chapter . . . a fiduciary shall administer a trust or estate impartially, based on what is fair and reasonable to all of the beneficiaries, *except to the extent that the terms of the trust or the will clearly manifest an intention that the fiduciary shall or may favor one or more of the beneficiaries*.") (emphasis added); *id.* at § 116.005(a) (West 2024) ("A trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor, the terms of the trust describe the amount that may or must be distributed to a beneficiary by referring to the trust's income, and the trustee determines, after applying the rules in Section 116.004(a), that the trustee is unable to comply with Section 116.004(b).").

245. *See* TEX. PROP. CODE § 117.008 (West 2024) ("If a trust has two or more beneficiaries, the trustee shall act impartially in investing and managing the trust assets, taking into account any differing interests of the beneficiaries."); UNIF. TRUST CODE § 803 (2010) ("If a trust has two or more

resources and experience in trust litigation may be reluctant to enforce her rights. Indeed, such a QI may feel some social pressure not to sue the trustee in a case like this — perhaps because of some sense of gratitude or loyalty — if the non-QI-remainderman is related to the settlor.

These considerations are relevant in determining whether, and to what extent, transfers in trust in which a QI is a beneficiary should constitute QFT. Transfers in trust should so qualify only when the beneficiary has a significant, ascertainable interest in trust, and one that cannot easily be devalued in favor of other beneficiaries related to the settlor. More precisely, the QI-beneficiary's interest should be quantifiable, substantial, and not easily diminished. Whether beneficial interests meet these characteristics depends on numerous trust terms.

To reduce the likelihood that a QI-beneficiary will be disfavored relative to another private beneficiary (such as a relative of the settlor), the proposal posits that a QI should be the only beneficiary who is a natural person. Further, to remove the risk of overcompensating a trustee-settlor or trustee related to the settlor, the proposal does not allow the settlor or any member of the settlor's family to serve as trustee of a trust receiving QFT unless the trustee serves without compensation. A settlor or her family member is free to serve as trustee without compensation, and an unrelated trustee may serve for reasonable compensation. Moreover, to ensure that a QI's interest in trust is fixed, any transfer in trust must be irrevocable and unalterable.

Because transfers in trust must currently benefit a QI-beneficiary, the same requirements governing outright gifts of illiquid assets should apply to property transfers in trust.[246] There is no problem when trust assets consist of cash or marketable securities. But a QI might not truly benefit from a trust of closely held restricted stock or other assets with restrictions on transfer. Accordingly, the assets that can be transferred in trust as QFT must be of a type that, were they transferred outright and inter vivos to the QI, would constitute a present interest that qualifies for the annual exclusion from taxable gifts.[247]

When a QI has sufficient rights to, or powers over, income and principal, federal transfer tax law treats her in some cases as having what is tantamount to outright ownership of assets held in trust (such as when she holds a presently exercisable general POA).[248] A transfer in trust for the benefit of a QI in such a case should be treated under the proposal in the same way that an outright gift or bequest to her is treated.

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beneficiaries, the trustee shall act impartially in investing, managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests.").

246. *See supra* Part II.B.3.a.

247. *See* I.R.C. § 2503(b)(1).

248. *See* I.R.C. §§ 2041(a)(2); 2514(b).

Realistically, though, not all prospective donors, who want to benefit QIs substantially, may be comfortable conveying in trust such extensive powers and interests to a QI. They may be happy to convey a right to current distributions to a QI but fret over the possibility that a QI will imprudently spend principal distributions or unwisely exercise a general POA. To recognize these conceivably legitimate concerns, the proposal should offer these donors a trust alternative that benefits QIs meaningfully without giving them powers over, or interests in, trust principal. Because of the risk that a QI might be harmed through improper trust administration when other private persons (such as the settlor's relatives) are also beneficiaries, the proposal insists that a QI be the sole private beneficiary of a trust funded through QFT. However, the risk that a trustee would administer the trust to the detriment of a QI seems low when there is little incentive to do so. To accommodate a gift in trust of something less than what is tantamount to outright ownership by a QI, but which nonetheless does not pose a significant risk that the trust will be administered adversely to the interest of the QI, an appealing solution is a split-interest charitable trust (i.e., a CRAT or CRUT)[249] in which the QI is the sole beneficiary of an annuity or unitrust payment.

ii. Specific QFT in Trust

These general considerations point to limited types of transfers in trust that should constitute QFT under the proposal. In each case, the trust must be funded with assets that would qualify as present interests with a measurable value were they transferred free of trust. Moreover, in each case the trustee must not be the settlor or a member of the settlor's family (unless the trustee serves without compensation). In addition, in each case the trust must be irrevocable and unalterable.

The three types of transfers in trust that the proposal treats as QFT are the following: (1) a transfer to the trustee of a minor's trust meeting the terms of IRC section 2503(c); (2) a transfer to the trustee of a trust meeting the terms of IRC section 2056(b)(5), substituting a QI for the decedent's surviving spouse (or meeting the terms of section 2523(e) in the case of a lifetime gift, substituting a QI for the transferor's spouse);[250] and (3) a transfer to the trustee of a CRUT or CRAT meeting the terms of IRC section 664(d)(1) or (d)(2), provided that the non-charitable beneficiary of the trust is one (and only one) QI. The following section explains the precise terms and tax consequences of these transfers under the proposal, as well as the justification for including them in QFT.

249. For a discussion of these trusts, see *supra* notes 130-145 and accompanying text.

250. Under current law, transfers in trust meeting the terms of IRC section 2056(b)(5) or section 2523(e) qualify for the marital deduction for estate tax or gift tax purposes, respectively.

Section 2503(c) Trust for Minors. The first type of transfer in trust treated as a QFT under the proposal is a transfer for the benefit of a minor QI in trust that meets the conditions of section 2503(c). Under current law, the entire amount of such a transfer in trust is considered a gift of a present interest,[251] and the terms of such a trust are also sufficient to remove the transfer from the GST tax base (through an assignment to the transfer of an inclusion ratio of zero),[252] as long as the trust would be includible in the gross estate of the beneficiary if she dies before the trust terminates.[253] The assets of a section 2503(c) trust still in existence at the time of the QI's death would be so included in her gross estate under current law[254] unless the settlor is also the trustee, for in that case the power of the settlor-trustee to control the timing of beneficial enjoyment of trust income and principal would cause the property in trust to be included in the settlor's gross estate.[255]

Under the proposal, the entire transfer in trust meeting the terms of section 2503(c) qualifies for the proposed gift tax exclusion and the proposed GST tax exclusion. Unlike current law, the transfer in trust under the proposal would be excludable from the GST tax base even if the settlor serves as trustee of the section 2503(c) trust and dies during the trust term. Similarly, should the settlor serve as trustee but then die before distributing all assets to the QI, the proposal (unlike current law) does not include the value of the trust assets in the settlor-trustee's gross estate.

If a trust meeting the terms of section 2503(c) is created for the benefit of a QI by testamentary disposition, the proposal provides for a

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251. *See* I.R.C. § 2503(c)(1)-(2).

252. *See* I.R.C. § 2642(c)(1)-(3).

253. *See* I.R.C. § 2642(c)(2)(B).

254. If a beneficiary of a section 2503(c) trust dies before reaching the age of 21, the assets must pass to her estate or according to the beneficiary's general POA. *See* I.R.C. § 2503(c)(2)(B). If payable to her estate, the trust assets would be in her gross estate under IRC section 2033. *See* Treas. Reg. § 20.2041-1(b)(2) (1961) ("[I]f a trust created by S provides for payment of the income to A for life with power in A to appoint the remainder by will and, in default of such appointment for payment of the income to A's widow, W, for her life and for payment of the remainder to A's estate, the value of A's interest in the remainder is includable in his gross estate under section 2033 regardless of its includibility under section 2041."); Rev. Rul. 75-553, 1975-2 C.B. 477 (ruling that property payable to a transferor-decedent's estate is includible in the gross estate under IRC section 2033). If subject to a general POA held by the beneficiary, the trust assets would be included in the beneficiary's gross estate under IRC section 2041. *See* I.R.C. § 2041(a)(2).

255. *See* I.R.C. § 2038. The relevant Treasury regulations state as follows:

> Section 2038 is applicable to any power affecting the time or manner of enjoyment of property or its income, even though the identity of the beneficiary is not affected. For example, section 2038 is applicable to a power reserved by the grantor of a trust to accumulate income or distribute it to A, and to distribute corpus to A, even though the remainder is vested in A or his estate, and no other person has any beneficial interest in the trust.

Treas. Reg. § 20.2038-1(a) (1962). *See also* Lober v. United States, 346 U.S. 335, 337 (1953) (holding that a settlor's gross estate included the value of trust assets which were distributable by the settlor-trustee entirely in his discretion during the trust's term under the predecessor to IRC section 2038).

deduction from the gross estate equal to the amount transferred in trust. For GST tax purposes, the proposal assigns an inclusion ratio of zero to such a testamentary transfer in trust for the benefit of a minor QI who is a skip-person.

Under the proposal, as under current gift tax law, all of the income and principal held in a qualifying minor's trust must be expendable (but not necessarily expended) on behalf of the QI prior to her reaching age 21.[256] Moreover, all income and principal that remains in trust (i.e., the accumulated income and principal that the trustee decided not to expend on behalf of the QI during the trust term) must be distributed to the QI when she turns 21.[257] If the QI dies before reaching that age, the proposal, like current law, requires the remaining principal and income to pass to the QI's estate or pursuant to her exercise of a general POA.[258]

The justification for excluding transfers in trust that satisfy the terms of IRC section 2503(c) from the transfer tax base is that such transfers clearly benefit QI-beneficiaries within a relatively brief time frame, even though they defer ultimate control over trust funds by the QI until she has at least some natural opportunity to mature. That the QI might benefit immediately upon the transfer in trust is a reality because of the requirement that the trustee have the discretion to distribute all trust assets to or on behalf of the QI at any time. The exercise of such discretion should be welcomed, for benefiting people in their formative years surely has positive long-term effects.[259] Moreover, the QI's ultimate enjoyment of trust property is required, at the latest, upon her reaching the age of 21, thereby ensuring that she will not have to wait long for outright control. Because only the minor will ultimately benefit from trust distributions, and a settlor or her family member can serve as trustee only without compensation, there is reduced risk that the trust will be administered in a manner adverse to the interests of the QI relative to many other trust arrangements. Further, the proposal's innovation of excluding trust assets from the gross estate of a settlor who both serves as trustee and then dies during the trust term removes a disincentive under current law to serve as a trustee of a minor's trust created by the same person. Under the proposal, settlors who favor the

256. *See* I.R.C. § 2503(c)(1).

257. *See* I.R.C. § 2503(c)(2)(A).

258. *See* I.R.C. § 2503(c)(2)(B). Under Treasury regulations, a transfer to a trustee of a minor's trust does not fail to qualify under IRC section 2503(c) merely because the trust instrument "contains a disposition of the property or income not expended during the donee's minority to persons other than the donee's estate in the event of the default of appointment by the donee." Treas. Reg. § 25.2503-4(b)(3) (1958). A QFT should not include any transfer to a trustee of a minor's trust if a natural person who is not a QI can directly take in default of appointment. Accordingly, under the proposal, if the QI fails to exercise any general power given to her, the property must pass in default to the minor's estate.

259. *Cf.* Alstott, *supra* note 20, at 486 ("Childhood is taken to be a time for nurture and education for the development of the capacities one needs to make choices about one's vision of the good - and the equality of resources ideal suggests that every child should receive an equal investment.").

option of personally managing a minor's trust for the benefit of a QI can do so without assuming adverse transfer consequences for dying before the QI reaches age 21.

Mandatory Income with General POA Trust. The second type of transfer in trust that the proposal considers a QFT is a transfer that would qualify for the estate tax marital deduction under IRC section 2056(b)(5) (or the gift tax marital deduction under IRC section 2523(e) in the case of a lifetime gift) were the QI a surviving spouse of the transferor (or simply her spouse, in the case of a lifetime gift). Thus, the transfer in trust must confer on the QI for life the right to receive "all the income from the entire interest" transferred, or "all the income from a specific portion thereof," and the income must be "payable annually or at more frequent intervals."[260] Additionally, the QI must be the donee of a power to appoint such assets held in trust to herself or her estate (whether or not she may also exercise her power in favor of other objects of the power).[261] Of course, this requirement under current law and the proposal means that the QI must hold a general POA. Moreover, no person other than the QI may hold the power to appoint any part of the transfer in trust to an object other than the QI.[262] The QI's general POA can be testamentary or inter vivos,[263] and it must be exercisable by the QI "alone and in all events."[264]

The proposal excludes from the definition of taxable gift a transfer in trust for the benefit of a QI that satisfies all of these requirements. If the transfer in trust is by bequest, the value of the transfer is deductible from the testator's gross estate under the proposal. The proposal similarly excludes a transfer in this form of trust from the GST tax base by assigning to the transfer an inclusion ratio of zero, similar to the treatment of certain nontaxable transfers under current law.[265]

These requirements for claiming a marital deduction under current law plausibly justify the deduction for transfers in trust that confer upon a transferor's spouse extensive rights and powers that approximate outright ownership. The same analysis applies to justify a deduction or exclusion from the transfer tax base for a transfer in trust for the benefit of a QI when she enjoys rights and powers approximating outright ownership. The requirement that the QI possess a mandatory right to all income for life confers meaningful present enjoyment of assets held in trust, and the permissibility of granting her a present right to appoint principal to herself during her life means that her present

260. I.R.C. §§ 2056(b)(5); 2523(e).
261. *See id.*
262. *See id.*
263. *See id.*
264. *Id.*
265. *See* I.R.C. § 2642(c)(1)-(3).

enjoyment of trust assets can even extend beyond receiving income. The requirement that the QI receive all income, and that nobody (other than the QI) have the power to appoint principal to someone other than the QI, protects the QI's interest against dissipation.

If the QI's power is merely testamentary, it is true that she cannot appoint principal to herself for her lifetime enjoyment. Nonetheless, the requirement that the QI have the power to appoint to her estate (if she cannot appoint to herself) enables the QI to transmit generational wealth; whatever remains in trust would pass to her estate, the disposition of which the QI can control by her last will and testament. One would expect the donee-QI to exercise her testamentary power in favor of her descendants. Because poverty is often generational, the QI's testamentary power would still serve the goal of voluntarily redistributing the wealth of the donor in a manner likely to benefit future generations that might otherwise struggle with poverty. Consequently, the proposal incentivizes gifts in trust that are likely to alleviate poverty both now and in future generations.

Charitable Remainder Trusts. The third form of transfer in trust that the proposal recognizes as a QFT is a transfer to a trustee of a CRUT[266] or CRAT,[267] provided that a QI is the sole beneficiary of the term or life interest in the trust. For a lifetime gift, the value of the QI's present interest in the CRUT or CRAT is excluded from the definition of a taxable gift under the proposal. Likewise, for a bequest in trust, the proposal is to deduct from the gross estate the value of the QI's interest in trust.[268]

The conveyance of the QI's interest in trust also should not trigger the GST tax. Under current law, the initial transfer in trust would not be a "direct skip" because of the charitable remainderman's interest in the trust.[269] However, unitrust or annuity distributions to a QI who is a "skip person" would be subject to the GST tax under current law.[270] To avoid this result, the proposal assigns an inclusion ratio of zero to a transfer to the trustee of a CRUT or CRAT in which the sole non-charitable beneficiary is a QI. This treatment effectively removes such transfers from the GST tax base.

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266. *See* I.R.C. § 664(d)(2).

267. *See* I.R.C. § 664(d)(1).

268. The value of the remainder interest would be treated as under current law (i.e., deductible as a charitable gift or bequest). *See* I.R.C. §§ 2055(a)(2) & -(3), -(e)(2)(A); 2522(a)(2), (c)(2)(A).

269. *See* I.R.C. §§ 2613(a)(2)(A), (B) (defining a trust as a "skip person" only if (A) other "skip persons" hold all of the "interests" in trust, or (B) nobody holds an "interest" in trust and no future trust distributions can be made to a "non-skip person"); 2652(c)(1)(C)(i), (ii) (providing that a charitable remainderman in a CRUT or a CRAT has an interest in property held in trust for purposes of the GST tax). Since the charitable remainderman in a CRAT or CRUT, a non-skip person, holds an interest in trust, the initial transfer in trust is not subject to the GST tax.

270. *See* I.R.C. §§ 2611(a)(1) (defining a generation-skipping transfer to include a taxable distribution); 2612(b) (defining a taxable distribution as any trust distribution to a skip person that is not a taxable termination or direct skip).

Transfers to the trustee of a CRUT or CRAT making payments to a QI for life or for a term of years obviously provide a QI with some meaningful present enjoyment of assets held in trust. Just as obviously, such transfers do not enable the QI to pass on trust assets to her descendants, as do the other two transfers in trust that the proposal treats as QFT. So why does the proposal incentivize transfers in trust to a trustee of a CRAT or CRUT?

The justification for including the value of the present interest in a CRUT or CRAT as a QFT is fourfold. First, the unitrust or annuity payment is readily valued and not easily manipulated, and thus the QI's present interest is very meaningful. Possessing the interest can make a positive difference in the QI's life. Secondly, some donors may hesitate to transfer vast sums in trust without knowing the QI's descendants (or other natural objects of her bounty) who stand to benefit eventually from transferred funds. Such donors may be pleased to benefit the QI, about whom they have some knowledge, but would prefer that the remainderman be a charitable organization that they already trust. Indeed, this form of transfer in trust might be the only type of transfer in trust benefiting a QI that some donors would even consider. In the case of such donors, treating transfers in the form of a CRAT or CRUT as QFT accomplishes at least some degree of voluntary wealth redistribution to the poor, simultaneously benefiting a presumably worthy charitable remainderman. Third, this option should appeal to a donor who disfavors being forced to choose between a deductible gift to a QI and a deductible gift to a charitable donee. A donor who prefers her transfer to benefit both a person in poverty and a charity, rather than one or the other, should find this gift strategy attractive. Finally, and related to the third point, the availability of this option incentivizes the charitable sector to promote split-interest gifts in which QIs benefit. Charities that solicit gifts of remainder interests in a CRAT or CRUT might be able to tap into a new donor class consisting of those who otherwise might not make a charitable gift to them. These donors might be more inclined to support the charity if they know that their gifts will also directly benefit the poor, especially if the charitable remainderman agrees to serve as trustee of the CRAT or CRUT for little or no compensation. This form of QFT thereby incentivizes the charitable sector to garner support for gifts to QIs from which charitable remaindermen will eventually benefit.

4. Establishing the Time and Manner of Determining Financial Neediness

Reasonable minds may differ on the point at which to apply the financial neediness tests of QI status. The simplest approach is to determine financial neediness at some administrable point in time proximate to the year of transfer, ignoring the effect of the transfer (and

other transfers) on the donee's financial condition for that year. Thus, if a prospective donee (who is unrelated to the prospective donor and thus potentially a QI) has established her financial neediness as of the beginning of year 1 (based on some recently filed financial document), transfers to the donee made during year 1 would not disqualify her from QI status for purposes of other year 1 transfers. However, if the year 1 transfer increases the value of the donee's assets for purposes of the asset test of financial neediness, the transfer may affect her QI status for year 2 and subsequent years.[271]

The proposal offers the following as a plausible system. The Department of the Treasury would be assigned to operate a program (for ease of reference, the "Transfer Tax Reduction Program") to implement the proposal of this Article. Under the Transfer Tax Reduction Program, Treasury would maintain a database of financial information supplied by voluntary participants. The financial information would be considered current if supplied within 90 days prior to the beginning of the year in question.[272]

Financially needy persons interested in receiving transfers as QIs under the proposal for the following year would complete a form establishing that they meet the income test and asset test of the proposal and then submit that form to the government. To facilitate this process, every federal agency administering anti-poverty benefit programs would be required to inform recipients about the Transfer Tax Reduction Program, distribute the form (or a link to an electronic form) to recipients of aid, and instruct them how to complete the form. The agencies should provide this notice prior to October 1, thereby ensuring that each aid recipient has time to complete the form within the 90 days prior to the beginning of the year in which he or she might choose to be considered a QI-recipient of transfers. Alternatively, at the election of the aid recipient, the agency itself could be required to collect the relevant information (if the agency did not already have it) and submit it to the Treasury Department during the last quarter of the year. Further, the proposal requires the IRS each year to inform every taxpayer who filed in the previous year a federal income tax return showing gross income at or below the level used for the income test under the proposal, and every taxpayer claiming the earned income tax credit in the previous year,[273] about the Transfer Tax Reduction

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271. Alternatively, a donee's QI status for purposes of the asset test theoretically could be determined at the time of transfer. This approach would enable a more precise determination of neediness at the time of transfer, thereby ensuring that the donee is truly within the class of people that the proposal intends to benefit. However, determining financial neediness in "real time" at the moment of transfer would present significant administrative challenges.

272. For example, in order to determine a potential donee's QI status for transfers to her in 2026, she must submit the relevant financial information to the Treasury Department in the last quarter of 2025.

273. *See* I.R.C. § 32.

Program and how to complete and submit the relevant form for establishing QI status under the income test and asset test.

It will also be necessary to select the relevant period or periods for determining financial neediness. In other words, when a person desires to file a form to establish her QI status for purposes of receiving transfers in year X, should the law consider only information on the person's income and assets for the 12-month period ending on the filing date in the last quarter of year X-1, or should financial information for earlier periods also be considered? Tentatively, the proposal suggests that a person be deemed to satisfy the income and assets tests for year X transfers if she satisfies those tests for *either* (i) the 12-month period ending on the date she files the relevant form in year X-1; *or* (ii) the preceding 12-month period. The justification for this tentative proposal is that a taxpayer in poverty may be subject to slight yearly fluctuations in financial condition that move her in and out of poverty, and she should not be disqualified from QI status just because her financial condition has minimally improved recently.[274]

I propose this time and manner of establishing financial neediness through the filing of financial forms under the Transfer Tax Reduction Program as a safe harbor, not as an exclusive determinant of neediness. Thus, if a prospective donor transfers assets in a QFT to an unrelated donee who has not submitted the required form under the Transfer Tax Reduction Program, the transferor would nonetheless be free to establish that the donee is a QI because she satisfies the tests of financial neediness under the proposal.[275]

5. Communicating Financial Neediness to Prospective Transferors

The practical effectiveness of this Article's proposal requires it to meet a major administrative challenge: providing certainty to prospective donors that their contemplated transfers will be excludable or deductible for transfer tax purposes without violating the privacy interests of QIs. True, a prospective donor may know that a prospective donee currently receives SNAP payments, for example, and would thus likely be a QI under the proposal. But donors seeking transfer tax advantages for gifts to financially needy, unrelated persons will often likely require certainty that their gifts will qualify for special treatment. Ideally, the Transfer Tax Reduction Program would facilitate the non-intrusive communication of a person's financial status as a potential QI.

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274. If a person's financial condition has dramatically improved in the subsequent year, it would not be sensible to allow her to establish QI-status based on her destitution in the prior year. Thus, the proposal's use of two test years should not apply when the prospective QI's income or assets in the subsequent test year surpass some pre-determined thresholds.

275. Obviously, obtaining this financial information would require the cooperation of the donee.

As one element, once the financial neediness of a voluntary participant in the Transfer Tax Reduction Program is established, I propose that the Treasury Department maintain a website featuring anonymous information profiles of voluntary participants. The content of each participant's profile would be whatever information the voluntary participant chooses to share, as long as it does not reveal the participant's identity. Information in the profile might include, for example, the person's housing needs, medical issues, educational goals, life goals, work experience, military service, volunteer activities, personal achievements, etc. By featuring these anonymous information profiles, voluntary participants could inform prospective donors about themselves (without disclosing their identities) and why they should be considered as potential transferees. Donors who want to give to a participant based on her profile could do so under a special procedure.[276]

I further propose that the Treasury Department issue to each voluntary participant in the Transfer Tax Reduction Program a Certificate of Eligibility for the relevant year. People who want to encourage benefactors to give to them can verify their QI-status by showing prospective donors their certificates. Donors who are interested in supporting QIs could make their interest known and then verify the status of a QI holding a Certificate of Eligibility.

Perhaps the greatest potential impact of the proposal is achievable with the cooperation of the charitable sector. Charities that seek to elevate lower-income people could leverage the Transfer Tax Reduction Program in their own operations. A charity, for example, could actively seek out voluntary participants in the program and promote them to prospective donors in their philanthropic circles. The judgment of a reputable charitable organization – perhaps a school, church, or community youth organization – that a voluntary participant in the Transfer Tax Reduction Program is a worthy donee could be just what a prospective donor needs to hear. Participants who do not mind sharing their personal identities might even choose to meet prospective donors in small social gatherings sponsored by charities, for in this context the privacy concerns are not the same as in the case of a governmentally operated website.

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276. The procedure proposed is to require the prospective donor to (1) inform the Treasury of the donor's intent to make a transfer to the QI with the identified profile; (2) verify to the satisfaction of the government that the donor owns the cash or property to be transferred; and (3) deposit $5,000 with the Treasury, to be refunded upon completion of the gift within the year, or forfeited upon failure to complete the gift to the voluntary participant. Once the Treasury has received the deposit from the prospective donor and verified her ownership of the property to be donated, the voluntary participant will be informed of the identity of the prospective donor. If the participant consents, her name will be given to the prospective donor so that she may complete the gift and receive a refund of her deposit. If the donor fails to complete the gift within the year, her forfeited deposit will be transferred to the voluntary participant.

6. Determining Whether and How to Limit Cumulative Transfers to QIs

a. Considering a Cumulative Per-Donee Limit

Another design issue is whether (and if so, how) to limit the amount of cumulative transfers to a single QI (from all donors) that qualify for the exclusion or deduction otherwise available under the proposal (i.e., a per-donee-QI limit). One rationale for imposing such a limit[277] is that a QI who begins the year poor could become very wealthy if, in lottery-like fashion, she receives gifts and bequests from numerous wealthy benefactors. Granted, over time, one would expect the asset test of financial neediness to cause this highly fortunate donee to lose her QI status. But the financial tests tentatively adopted by the proposal "lag" (i.e., are not applied immediately at transfer), so it is possible that a QI herself could become affluent by amassing gifts over a year or two. This should give one pause, for the purpose of the proposal is not to incentivize transfers to one who is becoming increasingly affluent.

QFT that might justify a cumulative per-donee-QI limit are outright transfers and transfers of assets subject to a QI's presently exercisable general POA. The latter transfers confer what is tantamount to outright ownership, so if the former should be subject to a limit, so should the latter.

Other QFT do not necessarily pose the problem that a QI may be enriched beyond the rationale of the basic proposal. There is no obvious reason to limit the exclusion or deduction for transfers that pay for a QI's expenses of receiving an education or medical care. These payments indeed augment a donee's human capital, but they do not increase her material wealth immediately, and they are inherently limited to fees that a service provider charges. Accordingly, QFT consisting of "qualified transfers" under IRC section 2503(e) should not be subject to any limit. Nor should transfers to section 529 QTP accounts established for QIs that qualify for the exclusion under the proposal. Because the proposal requires that distributions from such plans on behalf of a QI be made only for her qualified higher education expenses, there is no real need for a limit.

The proposal recommends not imposing a per-donee-QI limit on excludability/deductibility for the other transfers to QIs constituting QFT that fall short of conferring on the QI outright ownership or its equivalent. If a QI cannot unilaterally currently access funds intended to benefit her, she is simply not in the same material position as one who can. Thus, the proposal exempts from any limit on excludability/deductibility any transfer to the trustee of the following:

277. I emphasize that I am speaking only of a yearly limit on the cumulative transfers to a QI that are excludable or deductible for transfer tax purposes, not a limit on the amount of transfers that a QI can actually receive.

a "minors trust" under IRC section 2503(c); a trust in which the QI has a mandatory income interest but only a testamentary GPA; and a CRUT or CRAT. To one who raises the objection that a QI who benefits from these transfers is better off than one who does not, I concede the point. But I further respond that if the QI's material wealth is enhanced by these transfers (i.e., through periodic distributions), in time they will render her other than a QI and thus ineligible for future incentivized gifts. Moreover, each of these forms of transfer offers much promise in combatting generational poverty because of their unique structure. Further, these forms of transfer are likely to appeal to benefactors who would not make outright gifts to QIs. CRUTs and CRATs feature the additional advantage of eventually benefitting the public through the operations of the charitable remaindermen.

Thus, the only clear candidates for a per-donee-QI limit on excludability/deductibility are outright gifts and those transfers conferring on a QI a presently exercisable GPA. Imposing a limit on the excludability/deductibility of these transfers is supported by the idea that there hardly seems any reason to incentivize gifts to QIs who are thereby placed in the middle class or upper class more than gifts to any other person unrelated to the donor. The cost of imposing such a limit is administrative complexity.

Setting the amount of a cumulative per-donee-QI limit on excludability and deductibility for gifts to the QI is strictly a policy preference. On the one hand, a limit set too low may do little to alleviate generational poverty. On the other hand, a limit set too high will incentivize gifts to someone who, after receiving a certain amount, will need no more to have a comfortable, secure life. For purposes of illustration, but not recommendation, assume that Congress sets a cumulative per-donee-QI limit on excludability and deductibility for gifts to a single QI of $200,000.

Establishing such a cumulative per-donee-QI limit on excludability/deductibility requires a system for tracking gifts and bequests to each QI. Thus, the policy rationale for imposing a limitation must justify the administrative burden associated with enforcing the limitation. One idea is to impose a reporting obligation on transferors to QIs that conditions the excludability/deductibility of their gifts upon timely reporting it to the IRS, which would maintain a current record of how much of the cumulative per-donee-QI limit has been availed of at any point in time. The remaining issue is how to enable prospective donors to access and act upon this information.

Under one approach, the IRS would maintain a publicly available database that displays what portion of any future gift to a QI would be excludable/deductible from the transfer tax base. To ensure a QI's privacy is respected, such information would rely on numbers assigned to QIs on their Certificates of Eligibility. A donor could then contact the

IRS and reserve her right to exclude/deduct her transfer to the donee to the extent of the remaining per-donee-QI limit if the donor completes her gift within a brief period of time. The strength of this approach is its precision in ensuring that the cumulative per-donee limit for excludability/deductibility is observed. The drawback is its reliance on a system of reserving deductibility/excludability.

An alternative approach is to treat every gift from a single donor as deductible/excludible as long as it does not exceed the remaining per-donee-QI limit disclosed publicly in the IRS database. Prospective donors would not need to "reserve" the excludability/deductibility of their contemplated gifts. The Treasury Department would revoke QI status once a QI has received gifts meeting or exceeding the statutory threshold of gifts excludable or deductible under the proposal. For example, if the cumulative per-donee limit is $200,000, once a QI has received $200,000 in transfers, she would no longer be a QI (for some length of time). Prospective donors would then be on notice that their gifts to former-QIs are no longer excludable or deductible under the proposal.

A disadvantage of this latter approach is that what it gains in administrative simplicity it forfeits in precision. The approach could, in effect, multiply the amount of transfers to QIs that escape transfer taxation; for example, a donee theoretically could receive multiple $200,000 gifts before any is reported to the IRS and her QI status is revoked. However, Congress might decide that precisely tracking the outstanding balance of each QI's per-donee limit is unnecessary. While multiple gifts in a very brief span of time might indeed result in "overfunding" a single QI, it remains true that the system would still generally accomplish voluntary wealth redistribution to the poor. Further, it is not necessarily objectionable that a person who once lived in poverty suddenly is worth, say, half a million dollars. She and her family would likely escape generations of poverty in that scenario.

b. Considering a Per-Donor Limit

A separate issue is whether the system should limit the cumulative transfers to all QIs that any one donor (in conjunction with her estate) may exclude/deduct for transfer tax purposes (and if so, for which QFT). Current law's basic exclusion amount (in the case of the estate tax and gift tax) and GST exemption (in the case of the GST transfer tax) shield only a certain amount of wealth transfers from any one taxpayer from the transfer tax system. Should the proposal limit the removal of transfers to QIs from the transfer tax base through a similar mechanism, referred to herein as a "Qualified Transfers Exclusion Ceiling?"

The answer to this question is more elusive than it might at first appear. One argument that the proposal should limit the excludability and deductibility of cumulative transfers to QIs from any one taxpayer

is that, without such a limit, the transfer tax base could be completely eroded. Wealthy persons seeking to avoid transfer taxes could, in the absence of a Qualified Transfers Exclusion Ceiling, simply give to QIs all of their wealth in excess of current law's exclusion amount and thereby receive a full deduction/exclusion for transfer tax purposes. As a result, the government could, in theory, generate no revenue from the transfer tax system. The system as currently operated may not raise a great deal of revenue, but it does generate in excess of 30 billion dollars annually.[278] Implementing the proposal with no Qualified Transfers Exclusion Ceiling could remove this source of revenue from the already cash-strapped, deficit-plagued federal treasury.

This argument is of limited force. First, if one of the goals of the transfer tax system is redistribution of wealth to increase equal opportunity, complaining that the proposal provides less tax dollars for the government to redistribute rings hollow if the proposal effectively incentivizes voluntary redistribution to the poor. If the proposal accomplishes redistribution apart from imposing transfer taxes, there is no obvious need to generate transfer taxes to subsidize the same redistribution that occurs under the proposal. True, the government does not serve as a redistributing intermediary under the proposal, but it is hardly fatal to the proposal's appeal that it partially removes the hand of Uncle Sam in redistributing wealth. His hands are not necessarily superior to those of his nieces and nephews (i.e., American taxpayers). Indeed, accomplishing wealth redistribution through private choice may be superior to the traditional tax-and-spend model. Governmental redistribution of transfer tax dollars may not aid the poor as significantly, quickly, or efficiently as do private transfers under the proposal. To illustrate, ignoring transaction costs, for every deductible/excludable $1.00 privately redistributed to the poor, the government loses only $.40 (assuming the current, highest estate tax rate of 40%). Thus, even were the government to spend the entire $.40 on redistribution to the poor in the tax-and-spend world, the poor receive a benefit 2 ½ times that amount through the voluntary wealth redistribution under the proposal.[279]

Further, it is possible that the proposal would enlarge the pool of wealth available for redistribution. By enabling those who amass wealth to select QIs as objects of their bounty without incurring transfer tax, a disincentive to work, save, and invest that some critics perceive to

278. *See* CRS OVERVIEW, *supra* note 10, at 6.

279. This example assumes that, in the tax-and-spend world, most individual donees of wealth transfers are not themselves poor. This assumption is realistic if one takes seriously the concern that the wealthiest members of society are prone to enriching their familial heirs through bequests. One who does not accept this assumption should not be concerned with dynastic wealth in the first place.

characterize the current transfer tax system[280] is to some degree mitigated.[281] In the absence of a Qualified Transfers Exclusion Ceiling, people who amass wealth to give away to individuals whom they select as objects of their bounty[282] can do so without incurring taxes as long as their donees are QIs.

Moreover, the worry over base erosion is something of a red herring. Those who are so inclined can already deprive the Treasury of transfer tax revenue under current law. Besides utilizing well-known techniques for reducing the value of wealth transfers subject to tax, donors face no limit on the transfer tax system's deductions available for charitable gifts and bequests. The theoretical ability to eliminate transfer tax liability through philanthropic giving is thus a feature of current law, not a feature unique to the proposal in the absence of any ceiling. Moreover, because individual donors and estates continue to transfer wealth to private donees subject to the transfer tax system notwithstanding the existence of the unlimited deduction for charitable gifts and bequests, one should expect that not every wealthy person will reduce her transfer taxes to zero should Congress enact the proposal without imposing a Qualified Transfers Exclusion Ceiling.

Nonetheless, the goal of the proposal is to incentivize transfers to QIs, so it is hoped that it would prompt voluntary wealth redistribution to such a degree that the government might well collect substantially lower transfer tax revenue. This result should be welcomed, especially if, as argued above, voluntary transfers are probably an efficient method of redistributing wealth to the poor. Further, to the extent that the proposal successfully reduces generation poverty, the long-term benefits to the government should be obvious (e.g., reduced future payments under social welfare programs, increased tax revenues from

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280. *See, e.g.,* McCaffery, *Uneasy Case*, *supra* note 26, at 320 ("For the very wealthy, the economic effects of any estate tax regime favor consumption over savings, and leisure (which can be considered the consumption of nonwork) over work.").

281. The assertion that the overall effect of the transfer tax system is to discourage work and savings is highly contested. *See*, e.g., Alstott, *supra* note 26, at 386 ("Professor McCaffery claims that the estate tax also discourages work, but again both the theoretical prediction and the empirical evidence are uncertain."); *id.* (arguing that the income effect might encourage workers subject to estate taxes to work harder or might prompt heirs to work more); *id.* at 387-88 (arguing that the income effect might prompt additional savings by those subject to the estate tax and that there is little evidence on how the estate tax affects savings); Ascher, *supra* note 3, at 100-02 (discussing reasons that high estate taxes do not likely disincentivize work); *id.* at 102-06 (differentiating reasons that people save and arguing that transfer taxes are not likely to adversely affect savings on balance); Caron & Repetti, *supra* note 18, at 1280-89 (arguing that, during their productive years, most taxpayers do not likely factor death into account and that expected effective transfer tax rates are low).

282. This type of savings is known as "bequest savings" in the literature examining the reasons that people save. Other reasons for saving commonly cited are providing for the education of the saver's children, subsidizing retirement, and funding emergencies. *See* Ascher, *supra* note 3, at 104-05. Professor Lily Batchelder identifies six possible reasons that people accumulate wealth. *See* Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 8-9 (2009).

successfully employed workers,[283] lower costs of addressing the negative externalities of poverty, etc.). That the proposal may well reduce transfer taxes collected by the federal government is thus not a reason to impose a Qualified Transfers Exclusion Ceiling.

A second argument for imposing a Qualified Transfers Exclusion Ceiling is that, without it, donors and their estates might significantly reduce their charitable gifts and bequests. Transfers to the poor might "crowd out" charitable transfers to some degree. Although this concern is not trivial, there are reasons suggesting that it is not sufficient to justify a Qualified Transfers Exclusion Ceiling.

First, many charitable organizations do not focus on redistributing wealth to the poor.[284] The term "charitable" is broad,[285] and although it includes the relief of poverty,[286] it is not so limited.[287] Further, donees eligible to receive transfers deductible for transfer tax purposes can operate for educational, religious, scientific, and other purposes,[288] not just those defined specifically as "charitable." A local art museum, a prestigious private, nonprofit university, a symphony association, a grant-making private foundation, and a local church are all eligible to receive transfers deductible under the current transfer tax system. Moreover, even those charities that operate to relieve the burdens of poverty often provide services (e.g., meals, lodging, or health care) to the poor rather than directly transferring wealth to them. Those who are inclined to support these many types of "charitable, etc." donees obviously believe in the good that these organizations produce, although many are not highly redistributive. It is thus likely that donors who support such nonprofit organizations under current law will

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283. By augmenting human capital and facilitating entrepreneurship, private gifts may result in an increase to donees' future taxable earnings, thereby improving the public fisc. *See* Louis Kaplow, *On the Taxation of Private Transfers,* 63 TAX L. REV. 159, 170-71 (2009).

284. *See* Miranda Perry Fleischer, *Charitable Giving and Utilitarianism: Problems and Priorities*, 89 IND. L. J. 1485, 1497 (2014).

285. *See, e.g.,* Treas. Reg. § 1.501(c)(3)-1(d)(2) (1960) (defining "charitable" under IRC section 501(c)(3)). Under these regulations,

> The term charitable is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of charity as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.

Id.

286. *Id.*

287. *Id.*

288. *See* I.R.C. §§ 2055(a)(2) — & -(3); 2522(a)(2). The same is true of those eligible to receive contributions deductible for federal income tax purposes. *See* I.R.C. § 170(c)(2)(B).

continue to do so if the proposal is enacted. If so, a great number of charitable donees likely would not compete with QIs for support.

Secondly, the proposal aligns the interests of QIs and charitable organizations in several types of QFT. Tax-exempt schools and universities should welcome the proposal's treatment of transfers to section 529 QTP accounts, as well as the proposal's treatment of payments under section 2503(e). These transfers pay for services provided by educational institutions. Moreover, with respect to a transfer to a section 529 QTP account held for the benefit of a QI, the proposal requires that any terminating distribution of unexpended funds previously held for a QI be made to a charitable donee. Tax-exempt hospitals, like schools, should welcome the treatment proposed for payments under IRC section 2503(e) for services that they provide. Perhaps most importantly, the charitable sector broadly should welcome transfers to trustees of CRATs and CRUTs in which QIs are current beneficiaries, for upon their deaths (or upon the expiration of a stated term), charities receive the remainder of assets held in trust. Indeed, the remainder beneficiaries of CRATs and CRUTs stand to benefit enormously, perhaps benefiting from the largess of some donors who otherwise would not support them. Admittedly, these arguments suggest only that there is alignment between charities and QIs for the specific QFT identified in this paragraph, not all types of transfers to QIs (such as outright gifts). However, the point remains that, on balance, the charitable sector does stand to gain under several features of the proposal. Much of the proposal should not be framed as creating competition between QIs and charitable donees in the market for philanthropy.

Finally, an unlimited deduction/exclusion for transfers to QIs would not necessarily even reduce gifts to charitable donees that serve the poor. Some wealthy donors likely have in mind a portion of their estate (or future estate) that they would like to pass on to such charities. For such donors, the deductibility/excludability of gifts to QIs might motivate them to reduce their more heavily taxed gifts and bequests to family members, rather than their charitable transfers. And even if they reduce their charitable transfers, the fact remains that the charitable class served by the charitable organizations has been benefitted by the transfers to QIs. Indeed, relief of the poor through transfers to QIs tends to reduce the operating strain on charities that directly serve the poor (by reducing the number of persons needing their services).

A third argument for imposing a Qualified Transfers Exclusion Ceiling is that without it, the proposal bestows on wealthy benefactors unchecked power to arbitrarily, whimsically, or perhaps even prejudicially select the beneficiaries of wealth redistribution. The objection basically reduces to the idea that wealthy people should not have such a strong say in how their wealth will benefit individuals in

poverty. From one perspective, this objection is little more than a petty grievance over any system of taxation that declines to undermine freedom of testation and inter vivos giving. Viewed more charitably, the objection expresses the concern that government may more neutrally, rationally, and capably determine the best candidates for support among the poor than wealthy private donors.

It is true that the absence of a Qualified Transfers Exclusion Ceiling incentivizes more wealth redistribution from private decisionmakers who may (or may not) select beneficiaries in a way that differs from how government would redistribute wealth among a pool of recipients through taxing and spending. However, for reasons discussed previously, it is also quite possible that implementing the proposal with no overall ceiling in place will accomplish more wealth redistribution than what occurs under current law. Although many donors may choose to support certain QIs at a level that government would not, it does not follow that QIs whom government would support under a tax-and-spend model necessarily will receive less under the proposal. It is possible that the net redistribution of wealth to a majority of QIs under the proposal will exceed that which obtains under current law.

Further, as long as the financial tests for establishing QI status are sensible, all QI recipients are worthy candidates for receiving wealth transfers on the basis of their need. The degree to which one would expect private donors eccentrically to redistribute wealth in the absence of a Qualified Transfers Exclusion Ceiling is thus limited. A congressional decision to impose a per-donee-QI limit on excludability/deductibility would further disincentivize gross imbalances of wealth redistribution among QI class members. On the whole, it is doubtful that this concern justifies a Qualified Transfers Exclusion Ceiling under the proposal.

III. OPTIONAL DESIGN FEATURE: TYING A SUPPLEMENTAL EXCLUSION AMOUNT TO TRANSFERS TO QIS

The essential details of the proposal explained and discussed in Part II do not exhaust the potential horizons of the proposal. In this Part, I offer an optional feature of the proposal for consideration. The optional design feature incentivizes voluntary wealth redistribution to the poor beyond the basic proposal by granting a taxpayer a supplemental exclusion from the transfer tax base that is quantitatively dependent on her cumulative transfers to QIs that are deductible or excludable under the basic proposal.

A. The Rationale for the Optional Design Feature

By removing transfers to QIs that are QFT from the transfer tax base in the form of exclusions and deductions, the proposal reduces the

after-tax cost of redistributing wealth to the poor. Just as charitable transfers do not result in imposition of transfer tax costs on charitable transferors because of the unlimited deduction for charitable gifts and bequests, so will transfers to QIs that are QFT under the proposal (within any per-donee-QI limit adopted) not cause donors to incur transfer taxes. This feature removes a disincentive to give to the poor that exists under current law; because gifts to the poor that are not subject to a special exclusion are taxable, they count towards the basic exclusion amount used to compute the unified credit against gift and estate taxes[289] (and the GST exemption amount in the case of generation-skipping transfers).[290] Under current law, a donor's taxable transfers to the unrelated poor thus increase the after-tax cost of giving to the donor's family when her estate (combined with taxable lifetime gifts) exceeds the exclusion amount.

A skeptic may respond to the basic proposal by objecting that it relies on quixotic assumptions of how wealthy people would behave under the proposal. The proposal does indeed rest on a premise that some wealthy people will likely give more to QIs if their gifts do not generate transfer tax costs. However, for some wealthy individuals, removing a disincentive to give to the poor may not suffice to encourage them to give to the poor. After all, there are likely thousands of wealthy people who do not make significant gifts to the poor that fall within the annual exclusion from taxable gifts or that are exempt from taxation under IRC section 2503(e) as payments for tuition or medical care. A skeptic of the basic proposal could credibly press the point that there is no guaranty that many wealthy people would voluntarily redistribute their wealth to the poor just because the proposal eliminates the transfer tax cost of such gifts when such people currently refuse to make tax-free transfers to the poor.

One response to the skeptic is that the proposal expands the extent and types of tax-favored gifts to the poor well beyond those currently available. Expanding tax-favored gifts to bequests that are QFT is especially important, for major exclusions available under current law for transfers to, on behalf of, or for the benefit of unrelated indigents apply only to lifetime gifts;[291] donors who are risk-averse and therefore, cling to wealth during life would prefer to wait until death to give away their fortunes.[292] By offering such an expanded variety of tax-favored gifts to the poor, more wealthy donors may be inclined to take

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289. *See* I.R.C. § 2010(c)(1), (2)(A).

290. I.R.C. § 2631(c).

291. *See, e.g.,* I.R.C. §§ 2503(b) (gifts of present interests); 2503(c) (certain transfers for the benefit of minors); 2503(e) (transfers to educational institutions in payment of tuition and to providers of medical care in payment for such care).

292. *See* Ascher, *supra* note 3, at 103-04 (arguing that people may rationally retain wealth because of the unknown costs of future illness and long-term care).

advantage of them when they realize the impact that they can have in combatting generational poverty.

Another response to the skeptic is that the proposal opens up an entirely new world of philanthropic possibilities for the wealthy. The proposal implements a system for identifying and facilitating transfers to needy people through the financial tests establishing QI status, the creation and operation of the Transfer Tax Reduction Program, and the issuing of Certificates of Eligibility. Further, it is likely that the charitable sector will respond to the proposal by participating in the effort to garner support for QIs. The proposal therefore does much, directly and indirectly, to raise awareness of the opportunities for tax-free voluntary wealth redistribution and facilitate it.

To summarize these responses to the skeptic, relative to current law, the proposal makes it easier for wealthy individuals to identify worthy donees and make impactful, tax-free transfers to them. There are grounds for optimism that many donors will respond to the proposal by increasing their gifts to the poor. But precisely what donors are likely to respond favorably to the proposal, and how might additional donors be incentivized to give to the poor?

One way to approach these questions is to consider the utility of giving. Donors as a class surely receive utility from giving to their family members.[293] Indeed, that donors receive utility from giving to family members is evident because they are willing to pay a price for it – transfer taxes. Because of an unlimited deduction for charitable gifts and bequests, there is no transfer tax cost of giving to charity. That many donors choose to give something (often, much!) to their family members instead of giving their wealth exclusively to charitable donees implies that their utility from making family gifts exceeds the sum of their disutility from paying transfer taxes on their private gifts[294] and whatever utility they would have derived from making charitable gifts (which are not taxable). Were this conclusion untrue, a utility-maximizing donor would simply make tax-free gifts to charity.[295] The issue that must be faced in responding to the skeptic of the proposal is

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293. *See* Kaplow, *supra* note 283, at 169 ("No matter how large the donor's benefit, altruistic or otherwise, from giving to a donee, that benefit to the donor is, well, a benefit to the donor and thus is part of the donor's utility.").

294. It is reasonable to assume that paying transfer taxes generates disutility for many transferors—notwithstanding the famous quote attributed to Oliver Wendell Holmes, Jr: "I like to pay taxes. With them, I buy civilization." Robert L. Holloway, Jr., *The Price of Civilization*, 20 MASS BAR ASS'N JOURNAL 1, 1 (March 2013).

295. A basic algebraic equation illustrates this point. Let U_c represent the donor's utility derived from charitable transfers, U_f represent the utility of giving to the donor's family and friends, and U_t represent the disutility from paying transfer taxes on gifts and bequests to these family members and friends. If a donor rationally chooses to make taxable transfers to family and friends instead of nontaxable transfers to charitable donees, presumably the utility that she receives from the former exceeds that from the latter. Hence, for such donors,

Uc < Uf – Ut, which means Uc + Ut < Uf

how the utilitarian calculus applies to transfers to QIs under the proposal.

For some donors, the proposal may facilitate transfers to the poor that generate utility exceeding the difference between the utility derived from transfers to family members and the disutility from paying transfer taxes imposed on them. This conjecture implies that, for some class of donors, a tax-free transfer to a QI might generate more utility under the proposal than does a tax-free charitable transfer.[296] Why might a transfer to a QI generate more utility than a transfer to a charitable donee for some donors? One explanation lies in a sense of acquaintance. Some donors may derive utility from knowing that their transfers to the poor will benefit an individual whom they have identified, or perhaps even met or known personally. The human bonds of affection that generate utility from gifts to family members and friends may well operate, at some level, to generate utility in direct gifts to the poor. Another possible explanation is that donors may feel that the utility that a QI-donee receives from a direct transfer is greater than the utility that indirect gifts to charity will confer on members of its charitable class; in that case, altruistic donors, who themselves experience utility from the utility of donees,[297] would prefer direct gifts to the poor. In either case, the tax-free nature of transfers to QIs that are QFT may be enough, coupled with the utility generated by such gifts, to motivate donors to give.

For donors who derive great utility from giving to their family members, the proposal's exclusion/deduction for transfers to QIs that are QFT may not suffice to incentivize voluntary wealth redistribution. These donors would require some other type of transfer tax incentive to engage in voluntary wealth redistribution. The following section offers an optional design feature as a possible solution.

B. The Optional Design Feature: A Supplemental Exclusion Amount Tied to Qualified Transfers

An optional design feature of the proposal further incentivizes voluntary wealth redistribution to the poor by supplementing the "basic exclusion amount"[298] and the "deceased spousal unused exclusion amount"[299] used to calculate the unified credit against estate tax and gift tax under current law with a third exclusion. This "Supplemental Exclusion" would depend on the amount of cumulative transfers to QIs made by a donor that are excludible or deductible for transfer tax purposes under the proposal. The Supplemental Exclusion would be

296. This possibility is an implicit premise under the proposal. Otherwise, there would be no reason to expect some donors to favor a transfer to a QI over a charitable gift or bequest.

297. *See* Kaplow, *supra* note 283, at 176.

298. I.R.C. § 2010(c)(2)(A).

299. I.R.C. § 2010(c)(2)(B).

available in computing federal estate tax and gift tax liability but not federal GST tax liability.[300]

To illustrate, assume that the basic exclusion amount is $15 million, and that a taxpayer who has made transfers to QIs that are deductible or excludable under the proposal would receive a dollar-for-dollar Supplemental Exclusion for these transfers to QIs up to $5 million. Also assume no deceased spousal unused exclusion amount is available. Accordingly, this taxpayer could transfer to family members $20 million (the sum of the basic exclusion and the maximum possible Supplemental Exclusion) completely free of transfer tax.

To evaluate the strengths and weaknesses of the optional design feature, consider the implications of alternative courses of action available to the taxpayer on the facts of this example. The example assumes a taxpayer who dies with $25 million in assets. Assume that the taxpayer made no lifetime taxable gifts. For simplicity, also assume that she desires to maximize her testamentary gifts to her family, and none are subject to the GST tax. If she gives nothing to QIs, she can give $15 million free of estate tax under the basic exclusion, with the remaining $10 million available for taxable bequests and the payment of estate taxes. At a tax-inclusive rate of 40%, of this taxable $10 million she can bequeath $6 million to family, with the government receiving $4 million in tax revenues (40% multiplied by a taxable estate of $10 million). The end result is the transfer of $21 million to family and $4 million to the government.

But what if, instead, the taxpayer makes bequests to QIs sufficient to maximize her usable Supplemental Exclusion? If she makes qualifying bequests to QIs (i.e., those that are deductible for transfer tax purposes because they are QFT) equal to $5 million, her estate would (1) claim a $5 million deduction for transfers to QIs, and (2) receive a Supplemental Exclusion of $5 million. Thus, her estate would be entirely shielded from the estate tax. Of her $25 million gross estate, the bequest of $5 million to QIs generates a deduction of the same amount, as well as a Supplemental Exclusion of $5 million. When combined with the basic exclusion of $15 million, these tax benefits reduce the taxable estate to zero. The end result is the transfer of $5 million to QIs, with the rest—$20 million—available for tax-free bequests to family. The government receives no tax dollars, but the redistributive efficiency of the proposal holds true because the $5 million redistributed to the poor exceeds the

300. The reason for not extending the Supplemental Exclusion to the GST tax system is that doing so would likely greatly accelerate the size and use of dynastic trusts to the detriment of the public fisc. GST-transfers are generally subject to two levels of taxation under current law. First, either the gift tax or estate tax is imposed on the transfer, and then the GST tax is imposed. The effective combined transfer tax rate on taxable GST transfers is thus quite high. Applying the Supplemental Exclusion under the GST tax system would enable taxpayers to escape significant transfer taxes (on gifts covered by the Supplemental Exclusion) and deprive the government of considerable revenue.

lost revenue of $4 million when the taxpayer gives nothing to QIs. In other words, even if the government were to redistribute all of its tax revenue to the poor in a world where all bequests exceeding the available exclusions are made to the wealthy donor's family (who most likely are not poor) and subject to transfer taxation, the proposal's optional design feature accomplishes wealth redistribution to the poor that is 25% higher than that under a perfectly operating tax-and-spend system.[301]

Under the optional design feature, a taxpayer presumably would choose (A) to give $20 million to family and $5 million to QIs, rather than (B) to give $21 million to family and pay $4 million to the government in taxes, as long as the utility of option (A) exceeds the net utility of option (B). It is possible that, for some taxpayers, the utility generated from the additional $1 million given to family under option (B) is worth the extra $4 million in transfer taxes and foregone utility from not giving anything to QIs. But it is entirely reasonable to suspect that many taxpayers will have a different utility function and instead prefer option (A). Or they might choose a middle path, one that features at least some bequests to the poor and some taxable bequests to family members.

Under this optional design feature, it is not even obvious that there should be any ceiling on the Supplemental Exclusion, especially under the current estate tax rate of 40%. To illustrate, let us again assume a basic exclusion of $15 million and no available deceased spousal unused exclusion amount, but now a taxpayer whose gross estate is $100 million. For simplicity, again assume that no transfers are generation-skipping. Now assume that there is no ceiling on the Supplemental Exclusion. If the testator maximizes her testamentary gifts to family (Option 1), she will pay estate tax equaling 40% of the portion of her gross estate exceeding the basic exclusion amount: 40% x ($100 million - $15 million), or $34 million. The government receives this $34 million, leaving $66 million for family members.

If instead the taxpayer decides to avail herself fully of the unlimited, dollar-for-dollar Supplemental Exclusion based on excludable/deductible transfers to QIs (Option 2),[302] a taxpayer who bequeaths $42.5 million to QIs would receive both a $42.5 million deduction from the gross estate and a $42.5 million Supplemental Exclusion. Coupled with the basic exclusion of $15 million, she would have a taxable estate of zero. She could thus transfer tax-free $57.5 million to her family, in addition to $42.5 million to QIs.

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301. This example illustrates the potential of the Supplemental Exclusion to enhance social welfare. On grounds of maximizing social welfare, a theoretical case exists for subsidizing voluntary gifts from the wealthy to those who would otherwise be objects of public redistribution. *See* Batchelder, *supra* note 282, at 32-33.

302. By availing herself "fully" of the Supplemental Exclusion, she would transfer the minimum amount to QIs that would result in a taxable estate of zero.

The taxpayer would choose this Option 2 if the utility that she derives from giving $42.5 million to QIs and $57.5 million to family exceeds the utility derived from Option 1 – the utility of giving $66 million to family minus the disutility of paying $34 million in taxes. It would not be surprising if most taxpayers would prefer Option 2. Option 1 offers the utility of an additional $8.5 million in gifts to family. But it comes with the disutility of paying $34 million in taxes, and no utility from gifts to QIs. Option 2 sacrifices the utility from an additional $8.5 million in gifts to family, but it comes with the additional utility generated from giving $42.5 million to QIs, and it avoids the disutility of paying $34 million in taxes. Option 2 will be preferred if the utility of giving $42.5 million to QIs is greater than the *difference between* the utility of giving an additional $8.5 million to family and the disutility of paying $34 million in taxes.

Under Option 2, the government would receive nothing, but the redistribution accomplished by the transfer of $42.5 million to QIs significantly exceeds the tax revenue generated under the tax-and-spend model of current law ($34 million) when the taxpayer gives only to family in taxable transfers. Because of the redistributive efficiency of the dollar-for-dollar Supplemental Exclusion, it is plausible that it should not be capped.

But it is also plausible that a cap is appropriate. One argument for capping the Supplemental Exclusion is that without doing so, charitable bequests will decline to an unacceptable level. There is evidence that decedents leaving the largest estates bequeath approximately 25% of the gross estate to charitable recipients.[303] Presumably, they do so because the utility that they derive from these charitable bequests exceeds the utility that they would derive from substituting private bequests (reduced by the disutility from paying transfer taxes on the substituted private gifts). However, the Supplemental Exclusion shields private gifts from taxation (to the extent of the exclusion), thereby eliminating the disutility of paying taxes on the private gifts. Moreover, gifts to QIs might generate more utility to donors than gifts to charities. It is conceivable, therefore, that an unlimited Supplemental Exclusion would significantly reduce charitable bequests.

Policymakers might conclude that the benefits of the redistribution to the poor resulting from an unlimited Supplemental Exclusion justify any such reduction in charitable bequests. However, if policymakers believe that an uncapped Supplemental Exclusion would unjustifiably eviscerate charitable giving, there are numerous reasonable solutions. For example, the Supplemental Exclusion could be capped at some multiple of the basic exclusion amount (e.g., 100% or 150%). Alternatively, the Supplemental Exclusion could be capped at some

303. *See* Caron & Repetti, *supra* note 18, at 1279.

fraction of the gross estate, the taxable estate (before taking into account the Supplemental Exclusion), or some other portion of the estate. Under yet another alternative, the Supplemental Exclusion could have tiered caps. To illustrate, there could be an initial Supplemental Exclusion limited to the basic exclusion amount. Thus, $15 million of transfers to QIs that take the form of QFT would generate an initial Supplemental Exclusion of $15 million. For any additional Supplemental Exclusion, there must be a dollar of charitable bequests for each dollar of qualifying transfers to QIs. Thus, charitable bequests of $10 million, coupled with additional qualifying transfers to QIs of $10 million, would generate an additional Supplemental Exclusion of $10 million (i.e., beyond the initial $15 million Supplemental Exclusion resulting from the first $15 million transferred to QIs).

The design options for limiting the Supplemental Exclusion are limited only by the imagination of policymakers. The essential point is that there is no obvious reason to reject the optional design feature of the Supplemental Exclusion out of fear that it might inappropriately dampen charitable bequests. Plausible solutions abound.

IV. SUMMARY AND IMPLICATIONS

This Article proposes reforms to the current transfer tax system that encourage voluntary wealth redistribution to the poor (specifically, QIs)[304] by removing from the transfer tax base those transfers that take a specified form (i.e., QFT).[305] The proposal removes these transfers from the transfer tax base through the mechanisms of exclusions and deductions (and, as appropriate in the case of certain transfers otherwise subject to the GST tax, an assignment of an inclusion ratio of zero). To further encourage transfers to the poor, the proposal submits for consideration an optional design feature. Under the optional design feature, a taxpayer and her estate would receive a Supplemental Exclusion corresponding to her cumulative transfers to QIs that take the form of QFT. The Supplemental Exclusion is distinct from current law's basic exclusion amount. An otherwise taxable estate that does not exceed the sum of the basic exclusion amount, any deceased spousal unused exclusion amount, and the Supplemental Exclusion would not be subject to estate or gift tax. Although transfers in the form of QFT to QIs would still be excluded from the GST tax base under the basic proposal, the optional design feature does not apply the Supplemental Exclusion to generation-skipping transfers.

The proposal requires administration to identify QIs and communicate their eligibility as transferees to prospective donors and their estates. Privacy and dignity concerns undergird the proposal's

304. *See supra* Part II.B.1.
305. *See supra* Part II.B.3.

reliance on voluntary participation by QIs, who would report their financial qualifications to the government. Although the proposal's creation and operation of the Transfer Tax Reduction Program would entail costs of administration, it is far from obvious that adding this system of voluntary redistribution to the poor would result in a transfer tax collection system that is significantly costlier than the one that we already have (with its presumably larger budget based on higher government revenues and greater government spending than what one would expect under the proposal). Moreover, the costs of administration must be weighed against long-term public savings. If the wealthy respond to the proposal by transferring significant wealth to the poor, the government would surely reap financial benefits, for those who are no longer poor would not require the same governmental support upon which they once depended.[306]

The proposal is offered independently of policy decisions about the appropriate level of the basic exclusion amount and the deceased spousal unused exclusion amount, for it removes qualifying transfers to the poor from the transfer tax base regardless of the amount of existing exclusions. Although the proposal would not directly incentivize gifts to the poor by estates with a value below the exclusion amounts under current law, the system for identifying eligible QIs might nonetheless facilitate and prompt gifts to the poor even by philanthropically minded donors and testators whose estates are not taxable. Further, the proposal's expansion of transfers that reduce the taxable estate, coupled with the optional design feature's Supplemental Exclusion, might well prompt Congress to rethink the appropriate level of the basic exclusion amount. The OBBBA has raised the basic exclusion amount to historically high levels ($15 million beginning in 2026, adjusted for inflation). It is unclear whether this historically elevated exclusion is politically sustainable. A potential bi-partisan path forward might involve an agreement to lower the basic exclusion amount in exchange for adopting the expanded exclusions and deductions that the proposal offers. Indeed, the Supplemental Exclusion of the optional design feature would allow the largest taxable estates to make tax-free bequests to a testator's family members that exceed even the historically high exemptions under current law. Those who typically favor more robust transfer taxes for redistributive reasons might agree to this optional design feature because of the significant voluntary redistribution to the poor that it offers. In other words, the proposal offers something both

306. Poverty also is associated with externalities that adversely affect the community. *See* Galster et al., *The Social Costs of Concentrated Poverty: Externalities to Neighboring Households and Property Owners and the Dynamics of Decline,* JOINT CENTER FOR HOUSING STUDIES OF HARVARD UNIVERSITY (March 1, 2007), https://www.jchs.harvard.edu/research-areas/working-papers/social-costs-concentrated-poverty-externalities-neighboring. The government often incurs costs to address these negative externalities. Reducing poverty thus tends to reduce such costs of government over time.

for redistributionists and those who generally disfavor wealth transfer taxes – an unusual coincidence of preferences.

This Article submits and explains a proposal for transfer tax reform that removes current law's disincentives and creates new incentives for voluntary wealth transfers to the poor. It assumes the continued existence of our current, somewhat anemic, transfer tax system; it does not explore how transfers to the poor should be treated under alternative systems of taxing wealth, such as an inheritance tax[307] or an accessions tax.[308] Alternative approaches to taxing wealth may be superior to the current gift, estate, and GST-tax system, but the proposal operates within the general framework of the current system because it is assumed that this framework is reality for the foreseeable future.

Sensitive to this reality, and to the reality that any reform of the transfer tax system requires governmental action, the proposal primarily justifies its design choices at an intuitive, pragmatic level. Although this Article incorporates theoretical concepts in explaining and justifying the proposal, it does not attempt to advance a thoroughly theoretical case for the basic proposal or the optional design feature. More theoretically focused assessments of the proposal must await another day.

Nonetheless, my preliminary (and thus tentative) assessment of the proposal is that it has a decent theoretical footing. Philosophical perspectives on the transfer tax system vary.[309] However, the proposal in several respects should appeal to adherents of different philosophical schools, especially when compared to existing law. Libertarians should welcome the proposal's reliance on voluntary action (by both potential donors and donees) and the optional design feature's effect of expanding the portion of large estates that can escape transfer taxation.[310] Rawlsian political liberals should appreciate the proposal's design to reduce concentrations of wealth (albeit voluntarily) and to benefit the least financially well-off in society, those whose poverty currently prevents them from experiencing anything approaching

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307. For a thoughtful proposal for, and sophisticated analysis of, an inheritance tax, see Batchelder, *supra* note 282.

308. For an excellent analysis of the case for an accessions tax and its essential features, see Joseph M. Dodge, *Replacing the Estate Tax with a Reimagined Accessions Tax*, 60 HASTINGS L.J. 997 (2009).

309. *See* Bird-Pollan, *supra* note 16, at 870.

310. Libertarians object to forced redistribution, not redistribution coupled with consent. *See id.* at 876. Further, libertarianism generally rejects all taxation that is not the cost of services provided by government to taxpayers. *See id.* at 875-76. Libertarians who believe that they do not receive governmental services for their payment of transfer taxes should thus consider the Supplemental Exclusion under the optional design feature of the proposal a vast improvement of current law, for it enables more estate assets to pass free from transfer taxation to whomever testators choose as donees (i.e., they can "match" their gifts to QIs with tax-free gifts to whomever they choose). For an extended libertarian analysis of estate taxes, see Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 ME. L. REV. 1 (2013).

equality of opportunity.[311] A utilitarian analysis of the proposal would no doubt be complex.[312] However, the loss in public goods resulting from reduced transfer tax revenues, along with the proposal's administrative costs may be more than offset by efficiency gains from the proposal, which (1) encourages a kind of "market" for direct philanthropy for the poor; (2) incentivizes the transfer of wealth to those who need it (and likely value it) most; (3) probably reduces the negative externalities of poverty; and (4) likely creates positive externalities from investments in human capital.[313]

It is also worth observing that the design of the proposal operates bi-directionally, consistently with what Professor Ann Alstott has called the "leveling up" function of a public inheritance and the "leveling down" function of inheritance taxation[314] – albeit through mechanisms that she was not discussing when she advanced these concepts. The proposal "levels down," on a voluntary basis, by encouraging gifts from the wealthy to those who are not members of their families. The proposal reduces wealth concentration not coercively – through efforts to limit testation, to confiscate wealth, or to tax wealth transfers at high rates – but by encouraging the wealthy to choose to give to the poor. The primary proposal relies in part on tapping into the nobler motives of the wealthy, whereas the optional design feature – which grants a Supplemental Exclusion linked to cumulative transfers to QIs – also

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311. Political liberalism, as advanced by John Rawls, seeks equality of opportunity and endorses a redistributive tax design. *See* Bird-Pollan, *supra* note 16, at 871. *See generally* RAWLS, *supra* note 25, at 245-47 (arguing for wealth transfer taxation to redistribute wealth and enhance equality of opportunity). For an extended analysis of estate taxes under Rawlsian political liberalism, *see* Jennifer Bird-Pollan, *Unseating Privilege: Rawls, Equality of Opportunity, and Wealth Transfer Taxation*, 59 WAYNE L. REV. 713 (2013).

312. Classic utilitarianism evaluates the ethical optimality of actions by determining which produces the greatest net utility (or net happiness). *See* Bird-Pollan, *supra* note 16, at 877. *See generally* JOHN STUART MILL, UTILITARIANISM (Roger Crisp ed., 1998). Modern theories of welfare economics are influenced by utilitarianism. *See* Bird-Pollan, *supra* note 16, at 877. *See, e.g.,* Kaplow, *supra* note 283 (employing a welfarist framework to analyze the taxation of private gifts).

313. Admittedly, some among the working poor who receive certain transfers that qualify as QFT under the proposal might work less after receiving gifts. *See* Kaplow, *supra* note 283, at 170 (discussing that the income effect of receiving gifts might decrease labor supply). Any such reduction in work would negatively affect tax revenue if the recipient would have had compensation income sufficiently high to be taxable (had she continued to work). However, many QIs among the working poor, who lack basic goods that have become commonplace in America, would likely continue to work because they would value additional goods and services more than leisure.

One potential income tax-induced distortion of continued work by QIs receiving certain tax-favored gifts under the proposal could follow from the denial of the earned income tax credit to taxpayers receiving various forms of investment income exceeding $10,000, as adjusted for inflation. See I.R.C. § 32(i), (j). Policymakers should consider whether, and to what extent (if any), income derived from transfers in the form of QFT under the proposal should be governed by special rules in applying the earned income tax credit. A plausible argument exists for making this credit available to QIs receiving investment income from transfers taking the form of QFT, at least for some level of investment income exceeding current ceilings. Otherwise, a QI who accepts a transfer under the proposal could face severe disincentives to continued employment.

314. Alstott, *supra* note 20, at 492.

appeals strategically to the self-interest of those among the wealthy who desire to pass on much wealth to their family. Under either approach, there is a "leveling down" effect, and one that springs from choice.

The proposal also "levels up." Indeed, "leveling up" is the major motivation for the proposal. Poverty is real, and its effects are debilitating, chronic, and dispersed well beyond the individual poor. The types of transfers that the proposal recognizes as QFT have the potential to make life-changing differences for destitute people. These include outright gifts, transfers in trust for the benefit of people during their formative years, transfers that pay for a person's education or medical care, and transfers in trust that provide a stream of income for life or a term of years (in some cases, with charities receiving the remainder).

A comprehensive defense of the proposal should also include an analysis of the theoretically correct transfer tax base. Any such analysis should examine the normativity of transfer tax exclusions and deductions.[315] The proposal recommends exclusions and deductions for specified transfers to the poor. Certain rationales that have been advanced for the normativity of the deduction for at least some charitable gifts and bequests would likewise justify exclusions and deductions for transfers to QIs.[316] The theoretical case for excluding transfers to QIs from the transfer tax base is likely similar to the case for deducting charitable bequests from the gross estate.

Finally, I believe that good theological support for the proposal exists, although it, too, will just be sketched. Biblical morality compels generous private giving to the poor.[317] The theological role of government is largely to ensure a just, lawful society[318] — broadly, to

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315. *Cf.* Fleischer, *supra* note 19, at 274-76 (arguing that justifying a deduction for charitable bequests requires an analysis of why wealth transfers are subject to taxation in the first place).

316. *Cf. id.* at 295 (arguing that charitable transfers which develop and nurture the non-wealthy, but not the wealthy, should be excluded from the transfer tax base if it is designed to enhance equality of opportunity); *id.* at 296 n.134 ("Technically, of course, a bequest directly to an underprivileged individual satisfies these criteria.").

317. *See, e.g., Proverbs* 14:31 (NIV) ("Whoever oppresses the poor shows contempt for their Maker, but whoever is kind to the needy honors God."); *Matthew* 25:35-36, 40 (NIV) ("For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me.'. . . . 'Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me.'"); *Galatians* 2:10 (NIV) ("All they asked was that we should continue to remember the poor, the very thing I had been eager to do all along."); 1 *Timothy* 6:18 (NIV) ("Command them to do good, to be rich in good deeds, and to be generous and willing to share."); *James* 1:27 (NIV) (" Religion that God our Father accepts as pure and faultless is this: to look after orphans and widows in their distress and to keep oneself from being polluted by the world.").

318. *See Amos* 5:15a (NIV) ("Hate evil, love good; maintain justice in the courts…."); *Romans* 13:3 (NIV) (" For rulers hold no terror for those who do right, but for those who do wrong…."); 1 *Peter* 2:13-14 (NIV) ("Submit yourselves for the Lord's sake to every human authority: whether to the emperor, as the supreme authority, or to governors, who are sent by him to punish those who do wrong and to commend those who do right."). *See generally Psalm* 72 (NIV) (praying for a just king, who has special regard for the needy).

promote the common good.[319] A government that hinders private support of the poor is working against a biblical ethic by impeding moral action. In contrast, a government that encourages such giving is not simply promoting private moral action, it is also furthering the common good in accordance with its biblical purpose. The protections for the poor, immigrants, and other vulnerable members of society in ancient Israel under the Mosaic law[320] can be understood as specific applications of these general principles.

If the wealthy are willing and able to aid the poor directly and meaningfully, the transfer tax system should not hinder them. To the contrary, government – "good government" – should facilitate their generosity. I urge consideration of this proposal by all who agree that a good government should encourage, or at least not discourage, the private transfer of wealth to the poor.

319. *See Romans* 13:4a (NIV) ("For the one in authority is God's servant for your good….").

320. *See, e.g., Deuteronomy* 24:12-15, 17-22 (NIV). For a good discussion of these protections, see Michael A. Harbin, *Social Justice and Social Outliers in Ancient Israel, Part 2: Provision for Widows, Orphans, and Resident Aliens*, 64 JETS 681 (2021).