BEYOND THE WEALTH TAX

Charles Delmotte

INTRODUCTION 326
I. THE RISE OF THE WEALTH TAX FROM A TAX-POLICY PERSPECTIVE 334
  A. *Income and Consumption Taxes* 334
  B. *The Rise of the Wealth Tax* 335
  C. *The Goals of Tax Policy* 337
    1. *Administrability* 337
    2. *Economic Efficiency* 340
    3. *Equity* 341
    4. *Bundling Three Overlapping Objectives* 343
II. THE WEALTH-TAX PROBLEM 344
  A. *Taxing Static Wealth* 345
  B. *The Market as a Discovery Process* 346
  C. *Evaluating Wealth Taxation* 349
    1. *Market Values as Knowledge Problems* 349
    2. *The Wealth Tax's Administrative Problem* 352
      a. *Scale of a Federal Wealth Tax* 352
      b. *Portfolios of the Wealthy* 355
      c. *Contestation, Litigation, and Correction* 356
    3. *Equity Under the Wealth-Tax Quagmire* 359
    4. *The Wealth Tax's Efficiency Problem* 361
    5. *The ULTRA Problem* 363
      a. *Identifying Taxpayers Exceeding the Threshold* 364
      b. *Applying the Progressive Rate Schedule* 365
      c. *Imposing Prepayment of ULTRAs* 367
      d. *Imposing Take-It-or-Leave-It Valuations* 367
      e. *Most Assets Are Still Taxed on an Assessed Market Value* 368
III. ALTERNATIVES FOR EQUITABLE TAXATION 369
  A. *Removal of the Capital-Gains Preference* 369
  B. *Deemed-Realization Tax* 373
    1. *Administrability* 375
    2. *Equity* 379
    3. *Efficiency* 380
CONCLUSION 381

BEYOND THE WEALTH TAX

*Charles Delmotte**

The increased emphasis on economic equality has led to an emerging popularity of a federal wealth tax. Prominent tax scholars and economists advocate imposing a 1% or 2% levy on households with assets exceeding a net worth of $50 million. A wealth tax attempts to tax capital owners on the market value of their assets and businesses in the absence of transactions determine such value. The proposal thus rests upon a dominant underlying assumption: that determining the market value of assets worth trillions of dollars is a surmountable and administrable task. Yet in reality, wealth taxes fail to satisfy the goals of tax policy, namely administrability, efficiency, and equity.

While the incorporation of distributive considerations into tax law is commendable, the existing literature lacks a comprehensive theory on wealth creation and the valuation of assets. This Article introduces a new theory—the market as a discovery process—to fill this gap. The wealth creation process takes place against the backdrop of a knowledge problem, and the outcomes of capital investments and specific business ventures are often highly unpredictable. This theory shows that the market value of many assets and business ventures is discoverable through transactions. In the absence of such a realization event, both public and private entities encounter this knowledge problem: authorities lack information to ascertain the market value of assets and calculate the wealth tax base. As a result of this valuation issue, wealth taxes fail the administrability criterion. Additionally, the wealth tax base is vulnerable to litigation and arbitrariness, and taxing it won't generate the desired equitable outcome. Regarding economic efficiency, taxing assets according to their general market value discourages innovative entrepreneurship related to those assets. This, in turn, limits the potential for the creation of new wealth.

While wealth taxes fail all three criteria for tax policy, a pragmatic alternative that enhances the equity of the tax system involves taxing unrealized gains at the time of death. Such a deemed-realization tax is administratively more feasible as it involves a one-time levy that can build on the valuations generated during transfers at death. This measure also enables the elimination of the capital-gains preference, thereby taxing labor and capital income under a unified rate schedule. These combined policies increase taxes on the wealthy while meeting the requirements of administrability and economic efficiency.

INTRODUCTION

Imagine Giselle, a successful popstar who owns residential property, a privately held business, artwork, intellectual property (IP) rights to published and unpublished music, jewelry, some publicly traded stock, and empty lots in East Los Angeles that she plans to convert into residences. Until recently, these assets and their total net worth were often irrelevant to normative tax debates. The majority of tax scholars agreed that total wealth is not a proper basis for taxation.[1] The proponents of the consumption tax argued that all wealth and

* Associate Professor of Law at Michigan State University College of Law. Thanks to Leandra Lederman, Cliff Fleming, Larry Zelenak, Andy Grewal, Ari Glogower, Siska Lyssens, the participants of the 2023 Law and Society Conference, the 2023 Junior Tax Conference, and the Faculty Workshop at Michigan State University College of Law for the helpful comments. I also thank my research assistant Ryan Voisich for his contributions.

1. To the contrary, the popular consumption tax dominated the literature. *See* Daniel N. Shaviro, *Replacing the Income Tax with a Progressive Consumption Tax*, 103 TAX NOTES 91, 112–13 (2004); *see also* Joseph Bankman & David A. Weisbach, *The Superiority of an Ideal Consumption Tax over an Ideal Income Tax*, 58 STAN. L. REV. 1413, 1448–51 (2006).

income are spent at some point,[2] and consumption is the tax base that minimizes economic distortions.[3] Hence, Giselle should be taxed every time she purchases goods and services, just like anyone else.[4] For many decades, many tax professors took no issue with extreme wealth.[5] On the contrary, on many accounts, the very point of tax law was to maximize the economic pie—not to correct for unequal slices.[6]

The commercial bestseller *Capital in the Twenty-First Century* by Thomas Piketty,[7] and more recent statistical work by Emmanuel Saez and Gabriel Zucman, revealed data on rising economic inequality.[8] Others have criticized their methods because the reality of rising inequality has proven to be less dramatic.[9] Nonetheless, a critical attitude towards "the rich" turned more

---

2. *See* Shaviro, *supra* note 1, at 113 (describing how wealth derives its value from the purchasing power it commands—this logically justifies consumption taxes); *see also* Bankman & Weisbach, *supra* note 1, at 1421, 1449 (describing wealth as future consumption that does not, independent of that future consumption, produce "security, prestige, and power").

3. *See* Bankman & Weisbach, *supra* note 1, at 1422–30 (discussing how an income tax penalizes working over leisure and current consumption over saving; a consumption tax is neutral toward both saving and current-versus-future consumption); *see also* Shaviro, *supra* note 1, at 92, 104; *infra* Section II.C.2.

4. An ideal "cash flow" consumption tax taxes individuals whenever they spend. *See* Edward J. McCaffery, *Taking Wealth Seriously*, 70 TAX L. REV. 305, 371 (2017).

5. For an acknowledgment of this claim, see Joseph Bankman & Daniel Shaviro, *Piketty in America: A Tale of Two Literatures*, 68 TAX L. REV. 453, 454 (2015) ("Concern about high-end wealth concentration . . . has been largely out of fashion until recently . . . ."). The neglect for inequality is also reflected in the argument that a consumption tax is an *ex post* way of effectively taxing all incomes—ignoring the inequities that arise at least temporally. *See* Bankman & Weisbach, *supra* note 1, at 1437 ("A consumption tax ignores the labels put on earnings because the tax is not imposed directly on earnings. Instead, the tax is imposed when the earnings are spent, and the source of the earnings is irrelevant. Therefore, to the extent that Gates's stock value reflects his labor income, it is taxed under a properly structured consumption tax.").

6. The economics-driven framework seeks to design rules to maximize a weighted measure of social welfare. *See* LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 31 n.31 (2002) (discussing both wealth maximization and the broader notion of social-welfare maximization). This Article works with a dynamic notion of efficiency: the economy is essentially an evolutionary process. Efficiency concerns finding the legal rules that enable us to coordinate, compete, and discover new wealth *over time*. *See infra* Section II.B and corresponding footnotes.

7. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Arthur Goldhammer trans., Harvard Univ. Press 2014). Prior to Piketty, much research on economic inequality was conducted, although it received less attention. Notable contributors include Simon Kuznets (study of economic growth and inequality), Jeffrey Lindert and Peter Williamson (research on the historical role of economic forces, such as trade and industrialization, in shaping income inequality), and Edward Feenberg and James Poterba (the effects of tax policy changes on household income and inequality).

8. *See* Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Tax Data*, 131 Q.J. ECON. 519, 520 (2016) [hereinafter Saez & Zucman, *Wealth Inequality*] (arguing that "the top 0.1%, whose wealth share grew from 7% in 1978 to 22% in 2012, [is] a level comparable to that of the early 20th century"). The 0.1% had "only" $12 trillion in 2019. *See* Emmanuel Saez & Gabriel Zucman, *Progressive Wealth Taxation*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2019, at 437, 439 [hereinafter Saez & Zucman, *Progressive Wealth Taxation*]. This was roughly 10.4% of the $115 trillion national wealth in 2019. *See Trends in the Distribution of Family Wealth, 1989 to 2019*, CONG. BUDGET OFF. (Sept. 2022), https://www.cbo.gov/publication/58533 [https://perma.cc/8MUY-9URT].

9. For criticisms on methodology, see Sylvain Catherine et al., *Social Security and Trends in Wealth Inequality*, J. FIN. (forthcoming) (manuscript at 1–2), https://www.ssrn.com/abstract=3546668 (discussing how transfer payments, social security benefits, and nontaxable benefits systematically vanish in the data which explains part of the rising "inequality"). Another issue concerns their method to measure inequality via

dominant in recent years.[10] When two American politicians, Elizabeth Warren and Bernie Sanders,[11] adopted Piketty's wealth-tax proposal during their 2020 presidential campaigns, it marked a significant turning point in tax literature. The wealth-maximization approach turned less dominant,[12] and influential tax professors, such as Ari Glogower;[13] Brian Galle, David Gamage, and Darien Shanske;[14] Jeremy Bearer-Friend and Veronica Williamson;[15] Clint Wallace;[16] and Jason Oh and Eric Zolt,[17] highlight that the role of tax law is to address inequality and reduce extreme wealth at the top.[18] The demise of the popular

---

tax returns. Specific increases in income and assets simply result from changing tax rules such as base broadening and incentives. *See* Gerald Auten & David Splinter, *Income Inequality in the United States: Using Tax Data to Measure Long-Term Trends*, 132 J. POL. ECON. 2179, 2181 (2024). Measures of long-term inequality are affected by social changes, in particular declining marriage, which results in more relatively low tax returns. *See id.* at 2181–82; Org. for Econ. Coop. and Dev., *The Role and Design of Net Wealth Taxes in the OECD*, 26 OECD TAX POL'Y STUD. 1, 29 (2018) [hereinafter OECD], https://doi.org/10.1787/9789264290303-en. For scholarship on the reality of rising inequality, see Matthew Smith et al., *Top Wealth in America: New Estimates and Implications for Taxing the Rich*, 113 NAT'L TAX ASS'N 1, 3 (2020) [hereinafter *Top Wealth in America*] ("The growth in top wealth shares is also less dramatic. Our approach reduces the growth in top shares since 1978 by half, leaving the recent wealth estimates above the estate tax series and closer to the SCF."); Jesse Bricker et al., *Measuring Income and Wealth at the Top Using Administrative and Survey Data*, BROOKINGS PAPERS ON ECON. ACTIVITY 261, 261, 263, 292 (2016) (concluding that top-wealth shares are lower and growing more slowly; for example, their preferred estimate is that the top 0.1 % share increased from about 11% in 1992 to about 15% in 2013); Auten & Splinter, *supra* note 9 (assessing the decrease in the data on income inequality by two-thirds compared to the unadjusted measures of market income used in Piketty and Saez); David Gamage & John R. Brooks, *Tax Now or Tax Never: Political Optionality and the Case for Current-Assessment Tax Reform*, 100 N.C. L. REV. 487, 489 n.1, 498 (2022) (nuancing co-author Saez and estimating this group owns roughly between 15 and 20% of national wealth); and PHIL GRAMM ET AL., THE MYTH OF AMERICAN INEQUALITY: HOW GOVERNMENT BIASES POLICY DEBATE 2 (2022) (confirming that the literature on income and wealth inequality exaggerates the extent of inequality by overlooking the role of taxation and noncash sources of income).

10. Maggie Astor, *Should Billionaires Exist? Sanders, Warren and Steyer Debate It*, N.Y. TIMES (Oct. 15, 2019), https://www.nytimes.com/2019/10/15/us/politics/us-billionaires.html [https://perma.cc/CK4G-SWWB].

11. Press Release, Elizabeth Warren, Senator, Warren, Jayapal, Boyle Introduce Ultra-Millionaire Tax on Fortunes over $50 Million (Mar. 1, 2021), https://www.warren.senate.gov/newsroom/press-releases/warren-jayapal-boyle-introduce-ultra-millionaire-tax-on-fortunes-over-50-million [https://perma.cc/QK4C-VHP6]; *Tax on Extreme Wealth*, BERNIESANDERS.COM, https://berniesanders.com/issues/tax-extreme-wealth/ [https://perma.cc/WNU4-SNLQ].

12. *See* Neil H. Buchanan, *Bringing Law and Policy Back from the Black Hole of Efficiency-Based Analysis: Another Important Step Toward Refocusing on Justice*, JOTWELL (July 12, 2022), https://tax.jotwell.com/bringing-law-and-policy-back-from-the-black-hole-of-efficiency-based-analysis-another-important-step-toward-refocusing-on-justice/ [https://perma.cc/6QBD-QTEP].

13. *See* Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 746, 762 (2020).

14. Brian Galle et al., *Solving the Valuation Challenge: The ULTRA Method for Taxing Extreme Wealth*, 72 DUKE L.J. 1257, 1257–58 (2023) (describing how, instead of taxing in cash, ULTRAs involve tax authorities becoming co-owners of the taxed asset, with the wealth tax paid in property interests in the held assets).

15. *See* Jeremy Bearer-Friend & Vanessa Williamson, *The Common Sense of a Wealth Tax: Thomas Paine and Taxation as Freedom from Aristocracy*, 26 FLA. TAX REV. 326, 326–27 (2022).

16. *See* Clint Wallace, *A Democratic Perspective on Tax Law*, 98 WASH. L. REV. 947, 1001–04 (2023).

17. Jason S. Oh & Eric M. Zolt, *Wealth Tax Design: Lessons from Estate Tax Avoidance*, 74 TAX L. REV. 175, 177 (2021) (While this article aligns with the stated policy goal, it also adopts highly realistic perspective by offering a critical analysis of the wealth tax, particularly addressing challenges related to valuation and wealth tax base erosion.).

18. Ari Glogower, *Taxing Inequality*, 93 N.Y.U. L. REV. 1421, 1421 (2018).

pro-consumption-tax position gave rise to the emergence of a new alternative tax base: an annual tax on total net worth.[19]

Currently, the federal government of the United States mainly taxes income, thus only taxing the influx of new wealth.[20] So, if Giselle earns $2 million by playing five concerts, that income will be taxed. Under a wealth tax, Giselle's total net worth is measured, and if the value exceeds the threshold, she pays taxes on the entire value of all assets she legally owns, year after year.[21] If Giselle's net worth turns out to be $500 million, a 2% tax transfers $10 million to the public fisc in Year One;[22] if Giselle's net worth turns out to be $490 million in Year Two, another $9.8 million is due. Wealth-tax proponents note that "the same assets may be taxed repeatedly even if they do not change in value."[23] The income tax levies new receipts once while the wealth tax taxes the same stock of wealth annually.[24]

Scholars generally evaluate tax-policy proposals in terms of three criteria[25]: administrability, efficiency,[26] and equity.[27] This Article reveals that the wealth tax fails all three. Administrability includes enforcement costs for governments, compliance costs for taxpayers,[28] and in tax law, among other things, challenges

---

19. *See supra* notes 13–17, 18 and accompanying text.

20. *See* Glogower, *supra* note 13, at 736–37.

21. *See id.* at 745–46.

22. *See generally Tax on Extreme Wealth*, *supra* note 11; Saez & Zucman, *Progressive Wealth Taxation*, *supra* note 8, at 441 (proposing a wealth tax that would impose a 2% tax on families with a net worth above $50 million).

23. BRIAN GALLE ET AL., THE CALIFORNIA TAX ON EXTREME WEALTH (ACA 8 & AB 310): REVENUE, ECONOMIC, AND CONSTITUTIONAL ANALYSIS 8 (Ind. Legal Rsch. Paper Series, Paper No. 461, 2021), https://www.ssrn.com/abstract=3924524.

24. *See* Glogower, *supra* note 13, at 746 ("An income tax measures a flow of economic resources over the taxing period. A traditional wealth tax, in contrast, measures a fixed stock of a taxpayer's wealth at a moment in the taxing period.").

25. *See generally* Joseph T. Sneed, *The Criteria of Federal Income Tax Policy*, 17 STAN. L. REV. 567, 568 (1965); Cheryl D. Block, *Pathologies at the Intersection of the Budget and Tax Legislative Processes*, 43 B.C. L. REV. 863, 865 (2002); Samuel A. Donaldson, *The Easy Case Against Tax Simplification*, 22 VA. TAX REV. 645, 732 (2003).

26. Efficiency seeks rules that maximize the creation of wealth. *See* KAPLOW & SHAVELL, *supra* note 6 and accompanying text; *see also* Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 103 (1979) (defending economic efficiency as wealth maximization); Bankman & Weisbach, *supra* note 1, at 1420 & n.10 (wealth maximization within a "deadweight loss" framework); KAPLOW & SHAVELL, *supra* note 6, at 31 n.31 (discussing both wealth maximization and the broader notion of social-welfare maximization).

27. Tax equity refers to whether the distribution of tax burdens satisfies a standard of justice. In the current literature, tax equity involves increasing taxes on the wealthy, thereby improving "vertical equity" or the tax system's "progressivity." *See infra* Section I.C.3 and accompanying footnotes. This Article adopts this prevailing interpretation of equity. Another historically dominant approach to equity concerns taxpayers paying in proportion to their consumption of public goods, an approach known as the benefit principle. *See* ANTONIO VITI DE MARCO, FIRST PRINCIPLES OF PUBLIC FINANCE 116 (Edith Pavlo Margaret trans., 1936); CHARLES DELMOTTE & DANIEL NIENTIEDT, POLITICAL PHILOSOPHY AND TAXATION: A HISTORY FROM THE ENLIGHTENMENT TO THE PRESENT 140 (Robert F. van Brederode ed., 2022).

28. Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 709–11 (2007) (contending that administrability involves the ease of government enforcement and the ease of taxpayer compliance).

associated with valuation.[29] An administrable tax is one in which both taxpayers and the government can easily calculate the tax base.[30] Glogower highlights that "[t]he wealth tax base is typically determined based on the *value of the taxpayer's assets* at the time of observation."[31] Accordingly, tax authorities will need to assess the market value of trillions of dollars in assets every year.[32] The dominant view is that the annual valuation of capital assets is a surmountable administrative challenge because "[i]n the majority of cases, market values are *easy to observe* by the IRS with proper information reporting."[33] The assumption that market values can be determined without reliance on individual transactions can be traced back to the influence of a static wealth model.[34] In that model, assets have objective values and fixed returns.[35] Hence, the tax

---

29. Imposing a tax requires assigning a value to the taxed items. *See* Leandra Lederman, *Valuation as a Challenge for Tax Administration*, 96 NOTRE DAME L. REV. 1495, 1495–99 (2021); Edward A. Zelinsky, *For Realization: Income Taxation, Sectoral Accretionism, and the Virtue of Attainable Virtues*, 19 CARDOZO L. REV. 861, 880–81 (1997).

30. *See* Zelinsky, *supra* note 29 ("Under a realization regime, the tax system does not make its own independent assessment of value, with attendant expense to the public treasury. Instead, the tax system costlessly relies on the value negotiated by the taxpayer.").

31. Ari Glogower, *Comparing Capital Income and Wealth Taxes*, 48 PEPP. L. REV. 875, 886 (2021) (emphasis added); *see* OECD, *supra* note 9, at 85 ("Assets should ideally be assessed at their market value, defined as the price at which an asset *would be traded* in a competitive market." (emphasis added)); *see* Daniel Hemel, *Taxing Wealth in an Uncertain World*, 72 NAT'L TAX J. 755, 757 (2019) ("An annual wealth tax would require taxpayers to estimate the value of all of their assets each year and pay a tax equal to a percentage of that value (perhaps after subtracting the value of liabilities)."); *see also* 26 C.F.R § 20.2031-1(b) (2023) ("The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts.").

32. Concerning the annual valuation: one could also implement a wealth tax that values assets once a decade. However, to effectively address economic inequality, the tax should include capital appreciation—meaning increases in market value—as they occur. Therefore, theorizations on the wealth tax generally work with an annual valuation. *See* Hemel, *supra* note 31, at 757 ("An annual wealth tax would require taxpayers to estimate the value of all of their assets each year and pay a tax equal to a percentage of that value (perhaps after subtracting the value of liabilities)."); *salso* Oh & Zolt, *supra* note 17 at 192 (a wealth tax requires assessing wealth annually). Also, according to a conservative estimate, a wealth tax with a threshold of $50 million in 2022 would involve assessing the value of 11 trillion dollars' worth of assets. *See* Letter from Emmanuel Saez & Gabriel Zucman, Professors of Econ., Univ. of Cal., Berkeley, to Elizabeth Warren, Senator (Feb. 24, 2021), https://www.warren.senate.gov/imo/media/doc/Wealth%20Tax%20Revenue%20Estimates%20by%20Saez%20and%20Zucman%20-%20Feb%2024%2020211.pdf [https://perma.cc/LPK2-53DG].

33. Saez & Zucman, *Progressive Wealth Taxation*, *supra* note 8, at 482 (emphasis added); *see also* Emmanuel Saez & Gabriel Zucman, Response to Summers and Sarin, "A Wealth Tax Presents a Revenue Estimation Puzzle" 3 (June 25, 2019) (unpublished manuscript), https://gabriel-zucman.eu/files/saez-zucman-responseto-summers-sarin.pdf [https://perma.cc/U6Z9-BLVL] ("80% of the wealth of the top 0.1% wealthiest families is in the form of assets that are traded and have a clear market price."). This assertion—that the majority of wealthy portfolios are easily measurable—is likely incorrect. *See infra* Section II.C.2.b. Recently, a proposal was introduced to implement wealth taxes without requiring valuations, referred to as ULTRAs. This is discussed in Section II.C.5.

34. *See infra* Section II.C.2.a.

35. This is largely due to the influence of neoclassical economics on tax theory. Neoclassic economic models depict an economy in equilibrium, where the established price of an asset reflects its most efficient use. Early income-tax theory developed in tandem with these models, and the foundational Haig-Simons concept of income stands on the assumption of objective and knowable market returns that can be taxed without a realization taking place. *See infra* Section II.A.

literature asserts that the wealth tax satisfies administrability demands and will effectively promote equity.[36]

This Article introduces the theory of the market as a discovery process (Market Discovery Theory). Asset owners set up investments with uncertainty concerning the true market value of their business and assets.[37] In determining that value, investment decisions, market demand, and entrepreneurial success are part of a clarifying discovery process that culminates in transactions, or realization events.[38] Wealth taxation's practical corollary—taxing market values without a transaction—is premised on information that's often not available.[39] Concerning the valuation of many assets and business ventures, this Article reveals that, under a wealth tax, tax authorities will encounter an insurmountable *knowledge problem,* not a vincible administrative challenge.[40] Experiences with the U.S. property tax and foreign wealth taxes confirm that a lack of clear information concerning the value of assets results in disputes and legal battles and undermines administrability.[41]

---

36. *See* Galle et al., *supra* note 14, at 1269 ("[V]aluation problems are not nearly as serious for some, maybe most, assets. . . . [T]ools . . . could allow many assets to be taxed annually instead of being subject to the realization rule.").

37. Uncertainty in asset values is a core concept in financial economics. *See* Richard Roll, *A Critique of the Asset Pricing Theory's Tests*, 4 J. FIN. ECON. 129, 129–30 (1977) ("(a) No correct and unambiguous test of the theory has appeared in the literature, and (b) there is practically no possibility that such a test can be accomplished in the future."); Geert Bekaert et al., *Risk, Uncertainty, and Asset Prices*, 91 J. FIN. ECON. 59 (2009). This Article draws on dynamic economic theories to set up a specific theory of market values as part of a discovery process. *See* Marcellus S. Snow, *Competition as a Discovery Procedure*, 5 Q.J. AUSTRIAN ECON. 9, 13 (2002) (translating Friedrich A. Von Hayek, *Der Wettbewerb als Entdeckungsverfahren*, 56 KIELER VORTRÄGE (1968) (Ger.) (observing that market competition discovers the value of specific investments)); Israel M. Kirzner, *Entrepreneurial Discovery and the Competitive Market Process: An Austrian Approach*, 35 J. ECON. LITERATURE 60 (1997) (writing about a theory on the role of entrepreneurs in the market discovery of new goods and capital and their market value). Contemporary dynamic economics models account for uncertainty. For instance, in relation to investment, see Nicholas Bloom, *Observations on Uncertainty*, 50 AUSTL. ECON. REV. 79 (2017).

38. The current income-tax system mostly follows the realization principle, under which income taxes are applicable only upon the sale or disposition of an asset, generally paired with the receipt of money. Richard A. Epstein, *Realization and Recognition Under the Internal Revenue Code*, 39 SOC. PHIL. & POL'Y 11, 11 (2022). Such realization events reveal the market price. *See* I.R.C. § 1001; Zelinsky, *supra* note 29. In Moore v. United States, 144 S. Ct. 1680, 1696 (2024), the Supreme Court chose not to decide the constitutional question of whether realization is required for an income tax under the Sixteenth Amendment.

39. *See* Charles Delmotte, *The Right to Autonomy as a Moral Foundation for the Realization Principle in Income Taxation*, *in* PHILOSOPHICAL FOUNDATIONS OF TAX LAW 281, 293–98 (Monica Bhandari ed., 2017) (discussing (1) how the value of any given asset is subject to uncertainty and partially determined by subjective assessments by other individuals, and (2) how valuations are visibly revealed through *actions*, namely the exchange of assets for money); *see also* Lederman, *supra* note 29 ("As a threshold matter, it is well known that the difficulties that valuation poses for the tax system are avoided when the asset in question is sold in an arm's-length transaction. Such a sale reveals the market price for the asset."); *infra* note 214 and accompanying text. Market discovery theory best describes the assets that typically make up the portfolios of wealthy taxpayers. *See infra* Section II.C.2.b.

40. *See infra* Section II.C.

41. *See* Stewart E. Sterk & Mitchell L. Engler, *Property Tax Reassessment: Who Needs It?*, 81 NOTRE DAME L. REV. 1037, 1067 (2006); William M. Doerner & Keith R. Ihlanfeldt, *An Empirical Analysis of the Property Tax Appeals Process*, 10 J. PROP. TAX ASSESSMENT & ADMIN. 5, 6 (2014); *infra* Section II.C.

A federal wealth tax realistically also fails the equity criterion. A complex and hard-to-value tax base is more susceptible to litigation,[42] tax planning, political influence,[43] and problematic biases,[44] all of which guarantee unjust outcomes. In terms of economic efficiency, taxing capital owners on the market value of assets benefits owners with high revenues and eliminates endeavors that aren't immediately profitable early in the market process.[45] This Article argues that this has negative effects on risk-taking and innovation, meaning entrepreneurs will be incentivized to conform to dominant production processes and techniques.[46] Consequently, the wealth tax fails the efficiency criterion.

This Article suggests several alternatives that meet the demands of equity, administrability, and efficiency.[47] Rather than add an extra tax to an already overly complicated tax system, this Article proposes the closure of certain loopholes in the existing income tax. One of these is the stepped-up basis at death,[48] which permanently forgives capital gains at death and de facto eliminates the capital-gains tax for the wealthiest Americans.[49] This Article proposes a deemed-realization rule that treats death as a realization event and taxes capital appreciation at death.[50] This measure promotes equity as it forces

---

42. "Administrability" is often replaced with "simplicity." *See* Lederman, *supra* note 28, at 709; *see also infra* Section II.C.2.

43. Sterk & Engler, *supra* note 41, at 1070 (characterizing how discretionary powers under property taxes lead to corruption and "'sweetheart' assessment[s]"); *see* Simon Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507, 507–08 (2015) (discussing how OMB review is subject to interest-group lobbying); *see also* Grant Richardson, *Taxation Determinants of Fiscal Corruption: Evidence Across Countries*, 13 J. FIN. CRIME 323, 324–25 (2006) (analyzing how discretionary powers under a complex set of tax rules provide opportunity for corruption and deal-making). The affluent can use either political influence or legal action to shape the application of complex rules to their benefit. On the prevalence of lobbying in tax law, see Raquel Alexander et al., *Measuring Rates of Return for Lobbying Expenditures: An Empirical Case Study of Tax Breaks for Multinational Corporations*, 25 J.L. & POL. 401 (2009); Jennifer L. Brown et al., *The Benefits of a Relational Approach to Corporate Political Activity: Evidence from Political Contributions to Tax Policymakers*, 37 J. AM. TAX'N ASS'N 69 (2014); and Brian Kelleher Richter et al., *Lobbying and Taxes*, 53 AM. J. POL. SCI. 893 (2009).

44. Biases can and do shape bureaucratic discretion in property-tax assessments. *See* Andrew T. Hayashi, *Dynamic Property Taxes and Racial Gentrification*, 96 NOTRE DAME L. REV. 1517, 1519 (2021) (describing "conditions under which dynamic property taxes result in higher ETRs [effective tax rates] for [B]lack homeowners than [W]hite homeowners"); Doerner & Ihlanfeldt, *supra* note 41, at 5–6 (marking an escalation in assessment appeals, results of which don't generate fair corrections and are racially biased); Bernadette Atuahene, *Predatory Cities*, 108 CALIF. L. REV. 107, 111 (2020) (detailing how property-tax assessments led to systematic overvaluation of the tax base in Michigan, often in disfavored neighborhoods); *id.* at 139 (quoting Alvin Horhn).

45. *See* Faith Guvenen et al., *Use It or Lose It: Efficiency Gains from Wealth Taxation* (Nat'l Bureau of Econ. Rsch., Working Paper No. 26284, 2019), http://www.nber.org/papers/w26284; OECD, *supra* note 9, at 64 ("[A] net wealth tax penali[z]es the holders of low-return assets.").

46. *See infra* Section II.C.4.

47. *See infra* Part III.

48. Lawrence Zelenak, *Taxing Gains at Death*, 46 VAND. L. REV. 361, 363 (1993) (observing that "appreciation is never subject to income tax" because of the stepped-up basis).

49. Because the wealthy have the resources to hold onto assets, they reap the benefits of the stepped-up-basis loophole. *See infra* Section III.B.2; *see also* McCaffery, *supra* note 4, at 326.

50. *See infra* Section III.B.

the wealthiest taxpayers to contribute their fair share at the end of their life.[51] Such a deemed-realization tax generates far less administrative costs than the wealth tax and stimulates economic efficiency by reducing capital lock-in.[52] Additionally, when gains are no longer forgiven upon death, an opportunity arises to eliminate the preferential treatment of capital gains during life.[53] This proposal entails taxing both capital income (pertaining to the wealthiest individuals) and ordinary income (earned through salaries by middle and lower-income groups) at the same rate schedule.

This Article mounts a critical opposition to the emerging wealth-tax consensus in legal academia.[54] It offers novel commentary on the wealth-tax debate and the broader tax literature on two grounds. First, this Article introduces the Market Discovery Theory which demonstrates that the wealth tax is not administrable. Additional arguments further reveal the wealth tax's shortcomings in promoting both equity and economic efficiency, leading this Article to suggest more appropriate instruments to promote equity. Second, this Article is the first to critically engage with the influential proposal of taxation via unliquidated tax reserve accounts (ULTRAs),[55] the latest initiative designed to overcome the wealth tax's valuation issue.[56] This Article demonstrates that taxing via ULTRAs still requires the authorities to determine the value of assets and, therefore, doesn't facilitate feasible wealth taxation.

This Article is structured as follows: Part I provides an overview of the tax-base choices in tax theory, namely income, consumption, and wealth. It also summarizes the three primary goals of tax policy: administrability (with a specific focus on valuation), economic efficiency, and equity. Part II introduces Market Discovery Theory and dismisses the viability of wealth taxation on conceptual, administrative, equity, and efficiency grounds. Part III proposes two alternatives to enhance tax equity in an administratively feasible manner. A brief Conclusion summarizes these arguments and brings this Article to a close.

---

51. This could have raised $40.2 billion for 2022. *See* OFF. OF TAX ANALYSIS, U.S. DEP'T OF TREASURY, TAX EXPENDITURES 23 (2021), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2022.pdf [https://perma.cc/A54B-CKNU].

52. *See infra* Section III.B.1.

53. *See* Joseph M. Dodge, *A Deemed Realization Approach Is Superior to Carryover Basis (and Avoids Most of the Problems of the Estate and Gift Tax*, 54 TAX L. REV. 421, 443 (2001) ("In contrast, enactment of a deemed-realization system would reduce holding periods of investments and that, in turn, would undermine the reasons for maintaining a separate capital gains system.").

54. Alex Raskolnikov delivered a dissident, albeit unpublished, voice. Alex Raskolnikov, *Should Only the Richest Pay More?* (Columbia L. & Econ., Working Paper No. 662, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4223239. While some work does allude to constitutional issues, design or implementation of a state-apportioned wealth tax can circumvent such issues. *See* Amandeep S. Grewal, *Billionaire Taxes and the Constitution*, 58 GA. L. REV. 249 (2023).

55. Galle et al., *supra* note 14 and accompanying text.

56. Young Ran (Christine) Kim, *Taxing the Metaverse*, 112 GEO. L.J. 787, 790–98 (2024).

I. THE RISE OF THE WEALTH TAX FROM A TAX-POLICY PERSPECTIVE

Sections I.A and I.B present an overview of fundamental tax-base choices in tax theory, namely income, consumption, and wealth. Section I.C outlines the three principal objectives of tax policy: administrability (with a specific emphasis on valuation) economic efficiency, and equity.

A. Income and Consumption Taxes

Taxation is the process by which a government transfers resources (almost always money) from the private to the public sector, typically under the threat of penalties, civil and criminal.[57] In the U.S., as in most tax systems, a mix of income taxes and consumption taxes (sales at the state and local levels in the U.S.) fund the government.[58] The federal government's tax receipts overwhelmingly derive from income taxes.[59] The state government's tax receipts originate from a mix of income and sales.[60] Sales taxes are mostly flat, meaning every transaction is subject to the same tax rate.[61]

To illustrate the two main "tax bases," think of Giselle:

1. If Giselle sells the developed lots, that constitutes a taxable event, and she will be taxed on the receipts minus the costs incurred. If the developed lots are sold for $150 million and all costs amount to $45 million, that generates a taxable amount of $105 million. Our current realization-based income-tax system kicks in when an asset is sold or otherwise exchanged.[62]

2. A uniform consumption tax taxes all her spending.[63] For instance, if she earns $105 million from selling the lots and spends $10 million, the $10 million of consumption is taxed under a consumption tax. As a corollary,

---

57. JOSEPH BANKMAN ET AL., FEDERAL INCOME TAXATION 41–42 (18th ed. 2019).

58. This Article focuses on state and federal taxes because this is where most redistributive taxation occurs. Local taxes follow the benefit principle. *See* Sterk and Engler, *supra* note 41, at 1049–52.

59. CTR. FOR TAX POL'Y & ADMIN., OECD, REVENUE STATISTICS 2023 – THE UNITED STATES 2, https://www.oecd.org/tax/revenue-statistics-united-states.pdf [https://perma.cc/48EF-GPVA]; *see also* MICHAEL J. GRAETZ, THE U.S. INCOME TAX: WHAT IT IS, HOW IT GOT THAT WAY, AND WHERE WE GO FROM HERE 14–17 (1999) (describing the crucial importance of income taxation as a source of federal revenue beginning in the twentieth century).

60. Property taxes (levies on residences) play an important role at the local level.

61. *Sales Taxes and Their Impact on Low-Income Households*, NE. UNIV. (Jan. 18, 2024), https://econ.sites.northeastern.edu/wiki/microeconomics/elasticity/sales-taxes-and-their-impact-on-low-income-households-an-economic-analysis/ [https://perma.cc/249D-4CLH]; *Understanding Progressive, Regressive, and Flat Taxes*, INTUIT TURBOTAX (Aug. 28, 2024, 2:02 PM), https://turbotax.intuit.com/tax-tips/general/understanding-progressive-regressive-and-flat-taxes/L917X2gBs [https://perma.cc/6C7Y-7XFY].

62. *See* Zelinsky, *supra* note 29, at 861 and accompanying text.

63. *See* Bankman & Weisbach, *supra* note 1, at 1437; *Sales Taxes and Their Impact on Low-Income Households*, *supra* note 61; INTUIT TURBOTAX, *supra* note 61.

if she puts $95 million in the bank, these savings remain untaxed under a consumption tax until, of course, they are spent.

A crucial difference is that a consumption tax only taxes income to the extent it is spent.[64] This means that all income that is currently saved ($95 million) is left untaxed.[65] An income tax, however, taxes the entire influx of new wealth—$105 million in the example—whether this amount is spent or saved.[66]

B. The Rise of the Wealth Tax

Until recently, tax theory debated mainly whether to tax income or consumption.[67] The new third candidate for a tax base concerns the total net value of all assets.[68] Before moving on, it is integral to familiarize oneself with Giselle's assets as she will serve as a practical example of the wealth tax's defects:

1. In 2021, she purchased empty lots in East L.A. with the vision of transforming them into sustainable residences and incorporating ecologically friendly technology. Although the initial investment costs are substantial, Giselle aims for a groundbreaking approach to living—a self-sustaining building that generates its own energy. The building complex is provisionally named "Green Solar Living."

2. She owns a company called Plenty. Plenty tries to democratize high-end clothing, accessories, and footwear by cutting some production costs and aiming for a broader market, all while using Giselle's public persona as a marketing strategy.

3. She is recording a comeback album. While she was known for contemporary pop music, she now collaborates with various musicians and producers to cover, and otherwise refresh, the music of Ella Fitzgerald,

---

64. *See* Bankman & Weisbach, *supra* note 1, at 1437.

65. *Id.*; *see* Bankman & Shaviro, *supra* note 5.

66. *See* Bankman & Shaviro, *supra* note 5, at 459.

67. *Id.* at 459, 487.

68. Glogower, *supra* note 18, at 1454 (explaining that a wealth tax requires the valuation of one's net wealth each year); *see* Bankman & Shaviro, *supra* note 5, at 487 (introducing the concept of the wealth tax as distinct from the income tax and consumption tax); *id.* at 473 (explaining that the wealth tax would target one's corporate assets, in addition to one's other financial assets); *id.* at 488 (explaining that a wealth tax differs from a capital income tax because a wealth tax taxes one's wealth, not just the return to their wealth); *id.* at 489 (explaining that while a wealth tax is similar to a property tax, it is broader); *id.* at 509 (explaining that a wealth tax would exert a long reach, reaching wealth "held in the form of publicly traded securities"); *id.* at 510 (comparing the wealth tax to an estate tax, explaining that it targets both financial property and other forms of property, and providing an example about how a wealth tax would operate).

Billie Holiday, and Frank Sinatra. She holds all IP rights to the new album as she does to all her solo work.

4. In 2021, she made a crucial decision to liquidate most of her stock investments and instead invested $20 million in postmodern conceptual art pieces.[69] While her affection for the artist Yiki Ini is genuine, this investment was primarily a commercial endeavor. Planned exhibitions in 2027 and 2029 intend to facilitate the sale of some of the art pieces, and preparations for these events will commence this year.

5. She also owns residential property, jewelry, and publicly traded stock.

A wealth tax proceeds in three steps. First, the levy on everything Giselle owns requires the valuation of the entire "stock of net financial wealth each period."[70] Every year, a tax official will need to determine the market value of *all* the above-mentioned assets.[71] Second, whether the total market value of her assets exceeds the wealth-tax threshold, which is $50 million in the current proposal, requires verification.[72] If Giselle's net worth is estimated at $50 million, the wealth tax applies; if her net worth is estimated at $49 million, she is exempt from the wealth tax.[73] Third, the wealth-tax liability requires calculation. Some wealth-tax proposals utilize a progressive schedule.[74] The current proposal includes a tax of 1% on wealth that exceeds $50 million per taxpayer and 1.5% on wealth that exceeds $1 billion per taxpayer.[75] So, if Giselle's net wealth under the wealth tax is estimated at $500 million, she will owe $4.5 million in wealth taxes.[76]

Whereas the income tax impacts the influx of new wealth, the wealth tax affects net wealth held.[77] This suggests that a wealth tax essentially contains an income tax.[78] That is, the wealth tax taxes the most recent influx of wealth (in the example under Section I.A, $105 million), together with the value of the

69. Artwork concerns an important asset of the wealthy and should be included in net worth. *See* OECD, *supra* note 9, at 49.

70. Glogower, *supra* note 18, at 1454.

71. McCaffery, *supra* note 4, at 369 (discussing how an efficient and equitable wealth tax includes all assets especially closely held and nonlisted companies); *see* CONG. RSCH. SERV., IF11823, AN ECONOMIC PERSPECTIVE ON WEALTH TAXES (2022) ("Determining the value of assets is a crucial aspect of implementing a wealth tax."); *see also supra* note 32 (on less frequent valuations).

72. *See id*; *see also* GALLE ET AL., *supra* note 23.

73. *See* GALLE ET AL., *supra* note 23.

74. *See* OECD, *supra* note 9, at 87; PIKETTY, *supra* note 7, at 528 (advocating for a proposal with a 1% tax for net worth between €1 million and €5 million and 2% for net worth above €5 million).

75. *See* GALLE ET AL., *supra* note 23.

76. *See id.*

77. *See* Glogower, *supra* note 18, at 1427, 1454.

78. Hemel, *supra* note 31, at 759–60, 760 n.6.

entire stock of wealth (say, $395 million).[79] This also implies that the income tax levies new receipts once, and the wealth tax taxes the same stock of wealth, all over again, each consecutive year.[80]

C. *The Goals of Tax Policy*

1. *Administrability*

Ideally, tax law raises tax revenue while minimizing the costs of doing so.[81] Administrability crucially depends on whether the burden of enforcing and monitoring compliance warrants the amount of tax generated under a specific set of tax rules.[82] There are various aspects to administrability, namely valuation, liquidity,[83] and the administration's ability to detect the tax base.[84]

This Article focuses mainly on valuation, an often-cited administrability criterion for wealth taxes.[85] If the government levies a tax—generally expressed in a percentage of a value—it must be able to identify and quantify that value.[86] A wealth tax taxes individuals on the market value of their jewelry every year, but observing and calculating the value of jewelry without a sale is costly.[87] Both the income tax and consumption tax utilize the convenience of market exchanges, which decreases valuation costs.[88] Because of the realization principle, a tax official doesn't need to assess market values under an income

79. *See id.*

80. Rates are typically lower under the wealth tax. *See id.* at 755, 759–60, 760 n.6. However, the tax applies irrespective of earned income which has consequences for economic efficiency. *See infra* Section II.C.5.

81. Sneed, *supra* note 25, at 568 (promoting "a practical and workable income tax system" as one of the most important criteria for tax policy (emphasis omitted)); MICHAEL J. GRAETZ & ANNE L. ALSTOTT, FEDERAL INCOME TAXATION: PRINCIPLES AND POLICIES 26 (9th ed. 2022).

82. Administrability accounts for the costs and benefits on the side of the government, yet it also accounts for compliance costs on behalf of taxpayers. *See* Lederman, *supra* note 28, at 709–11, 742 (describing how administrability involves "the ease of government enforcement and the ease of taxpayer compliance").

83. Liquidity entails that, upon a tax's imposition, taxpayers should have the money to pay off their tax liability. *See* Sterk & Engler, *supra* note 41, at 1072 ("[I]f a taxpayer is required to pay tax on gains before the taxpayer sells the asset, the taxpayer may be forced to sell the asset in order to pay the tax."). For a critical approach, see Jeremy Bearer-Friend, *Tax Without Cash*, 106 MINN. L. REV. 953 (2021).

84. *See* Leandra Lederman, *Reducing Information Gaps to Reduce the Tax Gap: When Is Information Reporting Warranted?*, 78 FORDHAM L. REV. 1733, 1748–51 (2010) (describing how the administration's ability to detect the tax base often implies or requires third-party reporting).

85. Liquidity, or the advent of very wealthy taxpayers needing to sell assets or borrow money to pay tax liabilities, is a less pressing issue than large-scale valuation problems.

86. *See* David M. Schizer, *Realization as Subsidy*, 73 N.Y.U. L. REV. 1549, 1594 (1998); Deborah H. Schenk, *A Positive Account of the Realization Rule*, 57 TAX L. REV. 355, 365–70 (2004) (describing the role of realization as a solution to this valuation issue).

87. GALLE ET AL., *supra* note 23 (explaining that jewelry may be included in an annual wealth tax); Schizer, *supra* note 86, at 1594 (explaining the use of appraisals for determining the value of property, such as jewelry); Schenk, *supra* note 86, at 367 (addressing the difficulty of valuing assets, such as jewelry, that are not regularly traded).

88. GRAETZ & ALSTOTT, *supra* note 81, at 144; *see also supra* note 38.

tax as the market transaction delivers the valuation.[89] When a taxpayer sells jewelry, the tax is tethered to the sale price: a sale for $1,000 minus the initial cost (e.g., $400) equals $600 in taxable gain.[90] Consumption and realization-based income taxes rely on the prices that taxpayers agree to.[91] A notable exception concerns bartering.[92] The lack of a cash exchange makes the quantification of individual gains difficult in, for example, a mutual swap of two properties.[93] This explains both why nonrecognition rules will delay taxation of some like-kind exchanges,[94] and why barter transactions score low on administrability as they often go unreported or unenforced.[95]

Valuation challenges, as a measure of administrability, explain why we successfully tax (mainly for cash) transactions on realized income: the sale generally delivers a price, which solves valuation issues.[96] Conversely, wealth taxation immediately raises valuation concerns.[97] Absent an actual receipt, tax administrators need to assess—and prove—the value of all assets every year.[98] In the proposal, tax authorities determine the tax base by using "the value of the taxpayer's assets at the time of observation."[99] Specifically, the Organization for Economic Cooperation and Development (OECD) notes: "Assets should ideally be assessed at their *market value*, defined as the price at which an asset would be traded in a competitive market."[100] A tax official is vested with the task of "observing" the market value of such things as residential property,

89. *See* Zelinsky, *supra* note 29, at 880; Richard A. Epstein, *Valuation Blunders in the Law of Eminent Domain*, 96 NOTRE DAME L. REV. 1441, 1441 (2021) ("In market exchanges, public bodies do not have to resolve these difficult matters of valuation because they need only observe the price (typically in money) that the parties set for a particular asset.").

90. *See id.*

91. Zelinsky, *supra* note 29, at 880 ("Under a realization regime, the tax system does not make its own independent assessment of value, with attendant expense to the public treasury. Instead, the tax system costlessly relies on the value negotiated by the taxpayer.").

92. *See* Bryan T. Camp, *The Play's the Thing: A Theory of Taxing Virtual Worlds*, 59 HASTINGS L.J. 1, 32 (2007).

93. *See id.*

94. *See* I.R.C. § 1031. The nonrecognition rules were significantly narrowed since 2018, and now only apply to real property. Another reason behind the nonrecognition rules is to resolve liquidity issues or mobilize capital assets.

95. *See* Camp, *supra* note 92, at 30, 40–41.

96. *See* Zelinsky, *supra* note 29, at 883.

97. *See id.* at 876 (explaining that the appraisal process for taxing unrealized appreciation, without cash or traded property, is expensive and prone to litigation); GALLE ET AL., *supra* note 23 (explaining that jewelry may be included in an annual wealth tax); Schizer, *supra* note 86, at 1594 (explaining the use of appraisals for determining the value of property, such as jewelry); Schenk, *supra* note 86, at 367 (addressing the difficulty of valuing assets, such as jewelry, that are not regularly traded).

98. *See* McCaffery, *supra* note 4, at 369 ("First, we could 'simply' repeal the realization requirement and force taxpayers to 'mark to market' their holdings every year. . . . It is fairly easy to countenance such a reform for assets with readily ascertainable market values, such as publicly traded stocks. But other assets, such as land or real estate, would be difficult to value without a sale."); OECD, *supra* note 9, at 16; Helvering v. Horst, 311 U.S. 112, 116 (1940); Schenk, *supra* note 86, at 357–58; *see also supra* note 32 (on less frequent valuations).

99. Glogower, *supra* note 31, at 886.

100. OECD, *supra* note 9, at 85 (emphasis added).

nonlisted businesses, artwork, IP rights, copyrights to an unpublished book, jewelry, and empty lots that will be converted into residences.[101]

Standard tax theory presents the wealth tax's valuation issue as an "administrative barrier,"[102] meaning that ascertaining market values is theoretically possible but too costly in practice.[103] For several decades, tax scholars such as Repetti, Kamin, McCaffery, and Schizer highlighted that a wide array of assets are difficult to value, consequently leading to disputes with the tax authorities.[104] Yet, more recently, some wealth-tax proponents have argued that valuation challenges for wealth taxes are surmountable.[105] Tax professors Galle, Gamage, and Shanske (Galle et al.) argue for new valuation tools that allow for taxation on the observed market value rather than a realization event.[106] The economists Saez and Zucman confirm general scholarly optimism that "[i]n the majority of cases, market values are *easy to observe* by the IRS," suggesting that calculating the wealth tax base may be feasible.[107] This administrability optimism explains why wealth-tax proponents mostly circumvent the valuation issue.[108] This Article shows that this optimism is mistaken. The Market Discovery Theory will show that, for many assets, only individual transactions will reveal market values. And the wealth tax is, therefore, not satisfactorily administrable.

101. Glogower, *supra* note 31, at 886. See, for instance, 26 C.F.R. § 20.2031-1(b) (2023) (on estate taxation): "The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." One could also imagine a wealth tax on the purchase price of assets instead of the current exchange value. Excluding all appreciation from the tax base would fall short of the goal of reaching extreme wealth, so this isn't a satisfying amendment for wealth taxation.

102. On the valuation problem of wealth taxes, see David Kamin, *How to Tax the Rich*, 146 TAX NOTES 119, 124 (2015): "I mean to emphasize that proposals like those from Piketty face a major, and potentially fatal, administrative barrier because a large proportion of wealth, at least in this country, is not easy to value."

103. James R. Repetti, *It's All About Valuation*, 53 TAX L. REV. 607, 607 (2000) (explaining that valuation issues undermine the implementation of wealth tax); OECD, *supra* note 9, at 49 (describing how taxation on market values requires annual updates on the market value to work); Schizer, *supra* note 86, at 1594–95; *see also* McCaffery, *supra* note 4, at 369; Kamin, *supra* note 102 ("[A]ttacking the realization problem through annual wealth taxes or mark-to-market income taxes faces a major administrative hurdle . . . .").

104. *See supra* note 103 and accompanying text.

105. Kim, *supra* note 56, at 790–98; Galle et al., *supra* note 14, at 1257–58 (offering new approaches to overcome issues of valuation in taxation); Saez & Zucman, *Progressive Wealth Taxation*, *supra* note 8, at 482 (illustrating various ways to assess the value of abstract wealth in assessing tax value).

106. *See* Galle et al., *supra* note 14, at 1269.

107. Saez & Zucman, *Progressive Wealth Taxation*, *supra* note 8, at 482 (emphasis added).

108. *See* Wallace, *supra* note 16, at 968 (relegating mention of the valuation issue to footnotes); Bearer-Friend & Williamson, *supra* note 15, at 326–27 (lacking discussion on the valuation issue); Jeremy Bearer-Friend et al., *Taxation and Law and Political Economy*, 83 OHIO STATE L.J. 471, 482 (2022) (discussing the distributive concerns that undergird taxing the rich more but without any valuation considerations); Glogower, *supra* note 18 (focusing primarily on his own theory of economic power). Recently, a proposal was introduced to implement wealth taxes without requiring valuations, referred to as ULTRAs. This is discussed in Section II.C.5.

2. *Economic Efficiency*

The efficiency criterion aims to design the tax rules in ways that encourage individuals to maximize wealth creation.[109] Economic literature traditionally favors taxing consumption over income, hence the exclusion of returns from savings from taxation.[110] The income tax—and thus the taxation of saving—entails a labor-to-leisure and consumption-to-saving distortion,[111] whereas the consumption tax is neutral toward saving and contains only one distortion.[112] Additionally, by taxing savings, the income tax involves a tax on all future consumption and thus discriminates between current and future consumption.[113] Another argument for taxing consumption (over income) and de facto zero-taxation on capital and capital income is that doing so stimulates capital formation and investment.[114] In other words, a consumption tax is more economically efficient than an income tax because it creates fewer distortions in wealth creation. Because it involves a tax on all savings (of the wealthy), a wealth tax runs against some of the arguments mentioned, especially in comparison with the consumption tax.[115] A wealth tax on Giselle penalizes her for working rather than leisure, for saving rather than spending, and it involves a tax on all her future consumption. More generally, a wealth tax's negative effect on capital formation constitutes an additional efficiency concern.[116] Thus, traditional efficiency analysis justifies taxing at the point of spending (i.e., consumption), rather than earning (i.e., income), and dismisses a tax on all

---

109. Broader notions of efficacy are possible. *See supra* note 6 (introducing the argument that more dynamic notions of economic efficiency are possible); *see also* Kent W. Smith, *Reciprocity and Fairness: Positive Incentives for Tax Compliance*, *in* WHY PEOPLE PAY TAXES: TAX COMPLIANCE AND ENFORCEMENT 223, 242–47 (Joel Slemrod ed., 1992); KAPLOW & SHAVELL, *supra* note 6, at 35.

110. *See* Christophe Chamley, *Optimal Taxation of Capital Income in General Equilibrium with Infinite Lives*, 54 ECONOMETRICA 607, 614 (1986); Robert E. Lucas, Jr., *Supply-Side Economics: An Analytical Review*, 42 OXFORD ECON. PAPERS 293, 295 (1990); A.B. Atkinson & J.E. Stiglitz, *The Design of Tax Structure: Direct Versus Indirect Taxation*, 6 J. PUB. ECON. 55, 56 (1976).

111. In the context of an income tax, the labor-to-leisure distortion arises from the fact that working generates tax liabilities while leisure does not. Consequently, individuals may opt for leisure over working due to the tax consequences. This distortion persists in consumption taxes which also reduces the benefits of working (because income is taxed upon spending), yet leisure remains untaxed. As a result, both income and consumption taxes introduce the labor-to-leisure distortion. In the context of income tax, once income has been earned, saving that income generates tax liabilities, but consuming the income doesn't. Consequently, individuals may opt for consumption today over saving for later due to the tax consequences. The consumption tax resolves this distortion between consuming today (untaxed) and saving (returns are taxed); income is taxed whenever spent, and there is no tax on returns from savings. *See* Bankman & Weisbach, *supra* note 1, at 1422, 1441.

112. *See id.* at 1422 ("Thus, the income tax has the same effect on work as a consumption tax, but it also distorts savings decisions."); Shaviro, *supra* note 1, at 1425.

113. *See supra* note 112 and accompanying text; Bankman & Weisbach, *supra* note 1, at 1424–27 (contending that a tax on savings is a hidden tax on future consumption and an indirect tax on labor today).

114. Lucas, Jr., *supra* note 110, at 314; ROBERT E. HALL & ALVIN RABUSHKA, THE FLAT TAX 52, 79 (2d ed. 2007).

115. Glogower, *supra* note 18, at 1425 ("[A] wealth tax penalizes the saver, who is taxed more heavily just because she decided to defer her consumption.").

116. Åsa Hansson, *Is the Wealth Tax Harmful to Economic Growth?*, 2 WORLD TAX J. 19 (2010).

savings (i.e., wealth).[117] In short, a wealth tax is a wholly inefficient vehicle to promote the creation of new wealth.

3. Equity

In addition to administrability and efficiency concerns, an evaluation of tax policy also entails an assessment of equitable considerations. This, broadly conceived, means that the distribution of tax burdens aligns with a requirement of justice.[118] An often-observed inequity involves rent-seeking whereby wealthy or influential taxpayers exert political and administrative influence which "results in tax policy as [favorable] as possible to those who have the resources to shape it."[119] This "interplay between private groups and policymakers" generates "fiscal exceptionalism and the complexity of the system"[120] and tends to frustrate vertical equity—the idea that those better off should pay more taxes.[121] Gamage and Brooks rightly point out that vertical equity means tax rates "should be progressive or, at a minimum, proportional."[122] Proportional taxes mean an equal or flat rate;[123] "[u]nder a progressive tax the average rate of tax increases with the amount of the taxable base."[124] Our current federal tax system integrates vertical equity.[125] High earners pay more taxes through the progressive federal income tax.[126] While the tax system features some

117. For a dissenting view, see James Banks & Peter Diamond, *The Base for Direct Taxation*, *in* DIMENSIONS OF TAX DESIGN: THE MIRRLEES REVIEW 548, 548–648 (James Mirrlees et al. eds., 2010) (asserting that the assumptions behind zero-capital taxation models are highly stylized—including infinite time horizons, altruistic dynasties, or the separability of preferences, for instance—and have often been questioned).

118. *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 3 (2002) ("[Taxes] are also the most important instrument by which the political system puts into practice a conception of economic or distributive justice.").

119. Allison Christians, *Trust in the Tax System: The Problem of Lobbying*, *in* BUILDING TRUST IN TAXATION 151, 152 (Bruno Peeters et al. eds., 2017).

120. Charles Delmotte, *Tax Uniformity as a Requirement of Justice*, 33 CANADIAN J.L. & JURIS. 59, 60 (2020).

121. *See* Gamage & Brooks, *supra* note 9, at 508. Equity crucially depends on whether the tax system imposes more taxes on those with more income. Horizontal equity means that taxpayers with the same income should pay equal amounts of taxes. Vertical equity means that taxpayers with more income should pay more taxes.

122. *Id.*; *see* MURPHY & NAGEL, *supra* note 118, at 30 ("[F]air taxation imposes greater real burdens on those who are better off, but the exact rate of increase in the burdens is a matter to be settled by intuitive political judgment.").

123. *See* Delmotte, *supra* note 120, at 74.

124. Glogower, *supra* note 18, at 1425. n.19.

125. *See* Thomas Coleman & David A. Weisbach, *How Progressive Is the U.S. Tax System?* 33 (Univ. of Chi. Coase-Sandor Inst. for L. & Econ. Rsch., Working Paper No. 991, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4647122 ("[T]he tax and transfer system has become more progressive and more redistributive over the last half century, with much of that increase occurring in the last several decades.").

126. The federal income tax is progressive: the first $11,000 is taxed at 0%, and for income earned above $231,250, the tax rate is 35%, increasing to 37% for income exceeding $578,125. *Federal Income Tax Rates and Brackets*, IRS, https://www.irs.gov/filing/federal-income-tax-rates-and-brackets [https://perma.cc/5KUQ-Q4LT].

problematic loopholes,[127] the Tax Policy Center found that, for 2019, the top quintile paid 67.7% of all federal income taxes and the top 1% carried 25.6% of the federal tax burden.[128]

The statistical work of Piketty, Saez, and Zucman on rising inequality challenges the maximization approach in tax law and, consequently, the dominance of the consumption tax.[129] Neil Buchanan has stated that tax law is currently "back from the black hole of efficiency-based analysis . . . toward refocusing on justice."[130] In a recent article, tax professors Bearer-Friend, Glogower, Kleiman, and Wallace illustrate this *nouvelle vague* in the literature, and they call out the efficiency lens for "leaving economic inequality beyond the scope of problems that should be corrected by law and government policy."[131] New tax scholarship focuses on increasing the progressivity of tax law, not on maximizing the economic pie.[132] Wealth-tax scholars typically perceive income taxation, which taxes savings,[133] as insufficient to tax the wealthy.[134] In the new literature, equity requires what Alex Raskolnikov terms "separate law[s] for the rich."[135] The wealth tax achieves progressivity by designing a tax that targets *only* the very wealthy.[136]

---

127. One of these, stepped-up basis at death, is dealt with in Part III. Another is carried interest. *See* Young Ran (Christine) Kim, *Carried Interest and Beyond: The Nature of Private Equity Investment and Its International Tax Implications*, 37 VA. TAX REV. 421 (2018). Given the fact that less progressive sales taxes and property taxes also affect individuals, the redistributive nature of the U.S. tax system cannot be deduced from federal income taxes alone.

128. URBAN-BROOKINGS TAX POL'Y CTR., BRIEFING BOOK (2020), https://www.taxpolicycenter.org/sites/default/files/briefing-book/tpc_briefing_book-may2022.pdf [https://perma.cc/BK9B-KPQN] (table entitled, "Proposal to Reduce All Federal Individual Income Tax Rates by One Percentage Point" for 2019). Other sources report that the top 1% shoulders 42.3% of the income-tax revenue for the IRS. *See* Erica York, *Summary of the Latest Federal Income Tax Data, 2023 Update*, TAX FOUND. (Jan. 26, 2023), https://taxfoundation.org/data/all/federal/summary-latest-federal-income-tax-data-2023-update/ [https://perma.cc/8NHB-ETGP].

129. The lower taxation of capital is one of the reasons for inequality according to *Capital in the Twenty-First Century*. *See* PIKETTY, *supra* note 7, at 536.

130. Buchanan, *supra* note 12.

131. Bearer-Friend et al., *supra* note 108, at 482.

132. *Id.* at 498 (criticizing tax literature's earlier calls for relying "exclusively on efficiency or wealth maximization").

133. Income taxes apply to a broad range of taxpayers and achieve progressivity by applying higher rates to higher incomes; the strategy for progressivity typically pertains to taxing capital income. *See* Edward D. Kleinbard, *The Right Tax at the Right Time*, 21 FLA. TAX REV. 208, 212 (2017); McCaffery, *supra* note 4; Deborah H. Schenk, *Saving the Income Tax with a Wealth Tax*, 53 TAX L. REV. 423, 424 (2000).

134. *See* Glogower, *supra* note 18, at 1453–54; McCaffery, *supra* note 4, at 310 ("This reliance on income taxation to carry the weight of redistribution has proven to be a disastrous mistake. The income tax's century has been a century of rising, not diminishing, inequality. The income tax, as is, is a highly limited tool for addressing social and political concerns over economic inequality . . . .").

135. *See* Paul Caron, *University of Cambridge Hosts Conference Today on* Tax, Public Finance, and the Rule of Law, TAXPROF BLOG (July 4, 2023), https://taxprof.typepad.com/taxprof_blog/2023/07/university-of-cambridge-host-conference-today-on-tax-public-finance-and-the-rule-of-law.html [https://perma.cc/42GQ-KA97] (referring to Alex Raskolnikov's work).

136. This is often stressed in the political realm. *See Tax on Extreme Wealth*, *supra* note 11 ("[A]nyone who has a net worth of less than $32 million[] would not see their taxes go up at all under this plan.").

Released from the proverbial black hole of economics, some recent scholarship has transformed the equity of the wealth tax into its central claim. Ari Glogower, for example, has developed a concept of economic power that argues for a tax base that accounts for both income and wealth.[137] Johnsen and Dellinger have constructed arguments asserting the constitutionality of a wealth tax.[138] Conversely, other scholars, such as Hemel, have identified possible constitutional problems with a wealth tax; nevertheless, Hemel has also discussed the relative political strength of a wealth tax despite its valuation problem.[139] Oh and Zolt conceive of an effective wealth tax based on an analysis of the estate tax.[140] Wallace investigates three democratic values, all of them supporting a wealth tax.[141] Galle et al. introduce ULTRAs in an effort to implement a wealth tax in seven states and, they hope, federally.[142] Bearer-Friend and Williamson build on Thomas Paine's work to defend a wealth tax that "entirely taxes away the return to extreme wealth."[143] Whereas the dominant aim of tax law used to be economic efficiency and maximizing wealth, its renewed goal—as much of the referenced scholarship suggests—is to emphasize equitable outcomes and cut back on extreme wealth at the top.[144]

4. *Bundling Three Overlapping Objectives*

Tax law isn't a matter of either-or—all three goals of tax policy carry importance. If tax rules promote wealth creation but neglect equitable distributions of the tax burden among different groups, they lose moral justifiability toward those treated unfairly.[145] Equity without efficiency is self-defeating: redistributive tax schemes that involve substantial wealth destruction can also impede the interests of other groups, including the state's interests.[146] Justice-driven considerations favor institutions oriented toward economic prosperity.[147] Efficiency and equity are not merely a trade-off where we must

137. *See* Glogower, *supra* note 18, at 1464–67.

138. This explains the bulk of research on a constitutional wealth tax. *See, e.g.*, Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L.J. 111 (2018); Glogower, *supra* note 13.

139. Hemel, *supra* note 31, at 768.

140. *See* Oh & Zolt, *supra* note 17.

141. *See* Wallace, *supra* note 16.

142. *See* Galle et al., *supra* note 14.

143. Bearer-Friend & Williamson, *supra* note 15, at 336.

144. Related justice goals, such as equality of opportunity and protecting democracy, also motivate wealth taxation. *See* Glogower, *supra* note 18, at 1445–47. This Article will focus on the administrability-efficiency-equity triangle.

145. *See* Delmotte, *supra* note 120, at 78–79.

146. An example of this approach is limitarianism, which involves implementing a 100% tax above certain levels of income or wealth. Such measures directly impact individuals with lower income levels while also affecting public revenue. *See* Ingrid Robeyns, *Having Too Much*, 58 NOMOS: AM. SOC'Y FOR POL. & LEGAL PHIL. 1 (2017).

147. JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999) (arguing that justice entails maximizing economic outcomes with a specific focus on the prosperity of the least well-off); JOHN TOMASI, FREE

choose between economic gains or more equitable outcomes. The normative justifiability of the tax system depends on its alignment with generalized criteria of equity *and* efficiency.[148] The objective is to establish tax rules that foster the creation and maintenance of a prosperous society while distributing tax burdens in ways that are "'broadly acceptable' and appear beneficial to all prospective" stakeholders.[149] The administration of the tax system involves practical constraints.[150] Nobel laureate Amartya Sen famously argued that theorizing about justice needs to focus on how institutions actually work, not on how we imagine they work in thought experiments.[151] This means that administrability isn't a separate goal but a test to find out which equitable policies are practically attainable.[152] A tax system aimed at promoting equity is not equitable "if it is not enforceable in a manner that reaches equitable results."[153]

To put the cards on the table, this Article intends to hit three birds with one stone and satisfy the overlapping demands of administrability, equity, and economic efficiency. Equity generally involves a tax system that is justifiable to all taxpayers.[154] This Article operates under the assumption that the current tax system frustrates vertical equity, and the Article investigates amendments to ensure that everyone, including the wealthy, pays their fair share. Administrability means designing simple rules that are manageable in practice. Administrative constraints, such as valuation challenges, serve as a filter to distinguish between realistic and impractical approaches to equitable taxation. Tax rules that are economically efficient stimulate the discovery and creation of new economic wealth.[155]

II. THE WEALTH-TAX PROBLEM

This Part proceeds as follows. Section II.A discusses the static model of wealth, which dominates standard tax theory. Section II.B reveals that wealth is

---

MARKET FAIRNESS (2012) (arguing that justice requires the material betterment of the poor, which requires some form of market economy).

148. Delmotte, *supra* note 120, at 76.

149. *Id.* at 83.

150. Sneed, *supra* note 25, at 568 (referring to administrability as "[p]racticality").

151. *See* AMARTYA SEN, THE IDEA OF JUSTICE 67, 86 (2009).

152. *See* Milka Casanegra de Jantscher, *Administering the VAT*, *in* VALUE ADDED TAXATION IN DEVELOPING COUNTRIES 179 (Malcolm Gillis et al. eds., 1990) ("[T]ax administration *is* tax policy."); *see also* David Gamage, *The Case for Taxing (All of) Labor Income, Consumption, Capital Income, and Wealth*, 68 TAX L. REV. 355, 400–01 (warning that "ideal" conceptions of tax systems which ignore "tax-gaming distortions" and issues with administrability "should be regarded with suspicion"); Lederman, *supra* note 28, at 709–10.

153. Lederman, *supra* note 28, at 710; *see supra* note 152 and accompanying text.

154. *See supra* Section I.C.3.

155. This Article works with a dynamic notion of efficiency. The economy is essentially an evolutionary process; efficiency concerns finding the legal rules that enable us to coordinate, compete, and discover new wealth *over time*. *See infra* Section II.B.

dynamic, and its value is subject to a discovery process. And Section II.C evaluates the wealth tax.

A. Taxing Static Wealth

Under the static model of wealth, capital owners make investments in a world with access to perfect information on the value of assets and their annual returns.[156] In the tradition of neoclassical economics, the universal forces of the market mechanically provide profits on capital investments.[157] Modern tax theory developed in tandem with these economic models, and the assumption of *stable and objective* market values for assets is still the dominant paradigm.[158] In this view, taxpayers are passive profit recipients who pick a specific investment under objective and fixed rates of return.[159] And wealth isn't created; rather, it naturally and predictably grows in the hands of those who have it already.[160] To illustrate with an example:

> Suppose that . . . Jane . . . hold[s] a stock worth $1 million with no basis . . . . She borrows $600,000 . . . . [I]magine that the *rate of return* on Jane's $1 million asset is 10%. Jane will earn $100,000 a year in real income. If the $600,000 loan bears interest at 5%, she will pay $30,000 in interest. Jane will be making, in real income, $70,000 a year ($100,000 – $30,000)—potentially forever . . . .[161]

The static model of wealth presents investment decisions as occurring under a known set of economic parameters.[162] Modeling asset values and their annual returns as objective and predictable renders the annual taxation of market values a surmountable administrative task.[163]

---

156. *See* Schizer, *supra* note 71, at 1594 (surmising that the focal point is the market value, the fact that existing income-tax systems defer taxation until some exchange occurs, i.e., realization is perceived as a subsidy); Schenk, *supra* note 71 (sketching the view in the literature that the income tax should tax changes in wealth as they accrue rather than as realized). For an example of tax analysis under the static wealth model, see Schizer, *supra* note 86, at 1555–63.

157. See McCaffery, *supra* note 4, at 322–23, for an illustration.

158. For instance, the so-called Haig-Simons concept of income which taxes annual increases in market value stands on this assumption and is showcased in most casebooks on the income tax. *See* Jeff Strnad, *Tax Timing and the Haig-Simons Ideal*, 62 IND. L.J. 73, 75–81 (1986). Interestingly, Henry Simons himself didn't support this concept and held that unrealized gains and losses had to be excluded from the base of a practical income tax. *See* HENRY C. SIMONS, PERSONAL INCOME TAXATION: THE DEFINITION OF INCOME AS A PROBLEM OF FISCAL POLICY 100, 207–08 (1938).

159. For a critical discussion of neoclassical economics, see Donald Boudreaux, *Schumpeter and Kirzner on Competition and Equilibrium*, *in* THE MARKET PROCESS: ESSAYS IN CONTEMPORARY AUSTRIAN ECONOMICS 52, 54 (Peter J. Boettke & David L. Prychitko eds., 1994) (writing about economic agents as respondents to mechanical forces).

160. *See id.*

161. McCaffrey, *supra* note 4, at 322–23 (emphasis adjusted).

162. For an illustration, see David Hasen, *A Partnership Mark-to-Market Tax Election*, 71 TAX LAW. 93, 124–28 (2017).

163. *Cf.* Galle et al., *supra* note 14, at 1298–99 (modeling how an ULTRA wealth tax would function, based on a given amount of assets and assumed rate of return); Kim, *supra* note 56, at 826–34 (discussing the

While the tax literature hints at static, dynastic wealth at the top,[164] growing wealth inequality is, in reality, often a statistical representation of *dynamic* wealth.[165] The capitalists of the twenty-first century aren't mainly heirs or passive recipients of capital gains; private business and entrepreneurship are the primary sources of wealth at the top.[166] Empirical data reveals that wealth at the top derives from skills, entrepreneurship, and risk-taking rather than inherited wealth.[167] The economic literature corrects tax law's static wealth model, reveals that wealth is dynamic, and emphasizes that modeling wealth at the top should allow for entrepreneurship and idiosyncratic returns.[168]

B. *The Market as a Discovery Process*

"The essential point to grasp[,]" the political economist Joseph Schumpeter once said, "is that in dealing with capitalism we are dealing with an *evolutionary process*."[169] Backed by rules of contract and property, competitive conditions set markets in ceaseless motion.[170] Because of the lure for profit, new hedge funds,

---

imposition of a mark-to-market tax regime that bypasses the valuation problem on hard-to-value, volatile assets like cryptocurrency by giving the government a percentage stake in the returns on the asset).

164. *See* McCaffery, *supra* note 4, at 372–74.

165. OECD, *supra* note 9, at 41 ("The net wealth of households varies over time. The within-decile distribution of net wealth is a snapshot in time."); Vincenzo Quadrini, *Entrepreneurship, Saving, and Social Mobility*, 3 REV. ECON. DYNAMICS 1, 2–4 (2000) (describing a model of entrepreneurship as the driver of wealth inequality).

166. *See* Quadrini, *supra* note 165, at 5–8.

167. *See* Smith et al., *supra* note 9, at 6 ("A larger role for pass-through business wealth, lower concentration of financial wealth, and a less rapid rise in recent years in financial wealth and capital shares at the top all point to a larger role for human capital and a smaller role for nonhuman capital in top income growth."); Matthew Smith et al., *Capitalists in the Twenty-First Century*, 134 Q.J. ECON. 1675, 1740 (2019) ("Overall, top earners are predominantly human-capital rich, and the majority of top income accrues to the human capital of wage earners and entrepreneurs, not financial capital.").

168. *See, e.g.*, Andreas Fagereng et al., *Heterogeneity and Persistence in Returns to Wealth*, 88 ECONOMETRICA 115, 116 (2020) ("[A] large majority of individuals at the top of the wealth distribution are entrepreneurs, a group that is more often associated with higher risk tolerance and idiosyncratic risk rather than with lower than average discount rates."); Andrew G. Atkeson & Magnus Irie, *Rapid Dynamics of Top Wealth Shares and Self-Made Fortunes: What Is the Role of Family Firms?*, 4 AM. ECON. REV.: INSIGHTS 409, 409 (2022) (remarking that increased wealth inequality stems from the rapid upward mobility of families within the market economy); Steven N. Kaplan & Joshua Rauh, *It's the Market: The Broad-Based Rise in the Return to Top Talent*, 27 J. ECON. PERSPS. 35, 46, 50 (2013) (observing that, in 2011, approximately 68% of the top wealthy didn't grow up particularly rich, and approximately 20% came from poor households).

169. JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 82 (Routledge 2003) (1943) (emphasis added). Schumpeter is one of the main contributors to market-process theory: the economic theory that models markets as dynamic. *See id.* at 82–83 ("Capitalism, then, is by nature a form or method of economic change and not only never is but never can be stationary. . . . The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumers' goods, the new methods of production or transportation, the new markets, the new forms of industrial organization that capitalist enterprise creates.").

170. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 524 (1945) ("The continuous flow of goods and services is maintained by constant deliberate adjustments, by new dispositions made every day in the light of circumstances not known the day before . . . .").

startups, and real-estate projects are set up every day.[171] The dynamic purpose of competition is the creation of new wealth.[172] This economic game, led by property and exchange, creates new capital.[173]

Not only is the market a process rather than a state, it is a process driven by uncertainty.[174] In tax-law exercises, individuals own capital with full information about the market value and the annual returns.[175] In these static models, the outcome is confused with the process that leads to the outcome.[176] On a dynamic account, it is because we do *not* know the social value of capital investments that we create competition among property-holding individuals to engage in exchanges with other businesses and with end consumers.[177] The market is a discovery process that gradually resolves the knowledge problem concerning the specific value of capital investments.[178] Circling back to the example of Giselle, the market value of her real estate, fashion company, music, and artwork is hard to ascertain in the absence of a realization.[179] Under competitive conditions, the lure for profit drives entrepreneurs and other market participants to discover market values.[180] This information reveals itself gradually through experiments with new price structures, new forms of capital, cheaper production techniques, and alternative ways to employ a specific capital

---

171. *See* DAVID A. HARPER, FOUNDATIONS OF ENTREPRENEURSHIP AND ECONOMIC DEVELOPMENT 1–2 (Mario J. Rizzo et al. eds., 2003).

172. *Id.* at 182 ("The competitive market is a dynamic process of entrepreneurial discovery rather than a state of equilibrium in which there is no need and no opportunity to compete."). For more on dynamic competition, see RICHARD R. NELSON & SIDNEY G. WINTER, AN EVOLUTIONARY THEORY OF ECONOMIC CHANGE 275–308 (1982).

173. *See* Charles J. Delmotte, *The Case Against Tax Subsidies in Innovation Policy*, 48 FLA. STATE U. L. REV. 285, 300 (2021) (discussing the role of law in facilitating the market process).

174. *See* David A. Harper & Anthony M. Endres, *Innovation, Recombinant Capital and Public Policy*, 23 SUP. CT. ECON. REV. 193, 200 (2015) ("Entrepreneurs have to cope with the uncertainty connected with their interpretations of market situations. Their assessments of information are error-prone, so that their expectations of capital-forming opportunities are frequently falsified, as manifested by loss-making investments in innovation projects.").

175. *See supra* Section II.A.

176. *See supra* Section II.A.

177. *See* Snow, *supra* note 37, at 13 ("Which goods are scarce, however, or which things are goods, or how scarce or valuable they are, is precisely one of the conditions that competition should discover: in each case it is the preliminary outcomes of the market process that inform individuals where it is worthwhile to search.").

178. *See id.*; *see also* Hayek, *supra* note 170, at 519 ("What is the problem we wish to solve when we try to construct a rational economic order? On certain familiar assumptions the answer is simple enough. *If* we possess all the relevant information, *if* we can start out from a given system of preferences and *if* we command complete knowledge of available means, the problem which remains is purely one of logic. That is, the answer to the question of what is the best use of the available means is implicit in our assumptions."). Recent economic contributions analyze the impact of uncertainty on business cycles, as well as individual and firm behavior. *See generally* Bloom, *supra* note 37, at 79; Nicholas Bloom et al., *Really Uncertain Business Cycles,* 86 ECONOMETRICA 1031, 1031–34 (2018); Scott R. Baker et al., *Measuring Economic Policy Uncertainty*, 131 Q.J. ECON. 1593, 1593–98 (2016).

179. *See* Delmotte, *supra* note 39, at 293–98.

180. *See generally* Hayek, *supra* note 170, at 526 (discussing how prices help coordinate the actions of economic actors, such as entrepreneurs).

asset.[181] Rather than static "end-states" that we can capture through fixed market values, the market is a dynamic space for discovery.[182]

The theory of the market as a discovery process, or Market Discovery Theory, is comparable to contemporary real-business-cycle analysis, which incorporates uncertainty into its analysis of macroeconomic forces.[183] Driven by the positive belief that new value can be uncovered, market initiatives involve a speculative effort to create new wealth.[184] More so than not, experiments fail and lead to wealth destruction. Data from the U.S. Bureau of Labor Statistics (BLS) shows that approximately 20% of new businesses fail in the first two years, 45% fail in the first five years, and 65% fail in the first ten years.[185] Only around 25% of new businesses make it to fifteen years or more.[186] An overwhelming majority of start-ups die fast, and only a tiny fraction become success stories like Uber or Airbnb.[187]

What "capital" is, how it should be employed, and what its value is are continuously redefined within a competitive setting.[188] Currently, there is a surplus of office buildings that have become vacant due to changes in work patterns.[189] This creates opportunities for entrepreneurs to convert vacant office space into residences or vertical farms.[190] The motive for profit steers the production of new capital and, potentially, new wealth.[191] Correctly modeling

---

181. *See* Paul M. Romer, *Endogenous Technological Change*, 98 J. POL. ECON. S71, S89 (1990) ("Yet it is still the case that private, profit-maximizing agents make investments in the creation of new knowledge and that they earn a return on these investments by charging a price for the resulting goods that is greater than the marginal cost of producing the goods.").

182. *See* ISRAEL M. KIRZNER, DISCOVERY AND THE CAPITALIST PROCESS 93–111 (1985).

183. Well-established in this regard is Bloom et al., *supra* note 178. *See also* Roll, *supra* note 37; Anthony M. Endres & David A. Harper, *The Kinetics of Capital Formation and Economic Organisation*, 36 CAMBRIDGE J. ECON. 963, 973–74 (2012) ("Past price signals are only a starting point, however, *since future prices* for capital goods and for the outputs of capital combinations *cannot be deduced with certainty*, though they may be speculatively anticipated." (emphasis added)); *cf.* Kirzner, *supra* note 37, at 70; Nicholas Bloom, *Fluctuations in Uncertainty*, 28 J. ECON. PERSPECTIVES 153 (2014).

184. Endres & Harper, *supra* note 183, at 968.

185. *Total Private: Table 7. Survival of Private Sector Establishments by Opening Year*, U.S. BUREAU LAB. STAT., https://www.bls.gov/bdm/us_age_naics_00_table7.txt [https://perma.cc/LXX3-7CNZ].

186. *Id.*

187. Tom Eisenmann, *Why Start-ups Fail: It's Not Always the Horse or the Jockey*, HARV. BUS. REV., May–June 2021, at 76.

188. *See* Endres & Harper, *supra* note 183, at 977 ("Capital is fundamentally the kinetic organisation of materials—it is always still in motion and constantly in the process of being formed and adjusted. Just as capital structures occur at different levels and are dynamic entities, associated economic organisation occurs in different forms, at different levels and is also dynamic.").

189. John Weigand, *Cities with Empty Commercial Space and Housing Shortages Are Converting Office Buildings into Apartments – Here's What They're Learning*, THE CONVERSATION (June 13, 2024, 8:35 AM), https://theconversation.com/cities-with-empty-commercial-space-and-housing-shortages-are-converting-office-buildings-into-apartments-heres-what-theyre-learning-226459 [https://perma.cc/4RCW-NMEY].

190. *Id.*; Ciara O'Brien, *Empty Office Buildings Are Being Turned into Vertical Farms*, SMITHSONIAN MAG. (July 11, 2023), https://www.smithsonianmag.com/innovation/empty-office-buildings-are-being-turned-into-vertical-farms-180982502/ [https://perma.cc/23KV-6MAU].

191. ISRAEL M. KIRZNER, MARKET THEORY AND THE PRICE SYSTEM 44 (Peter J. Boettke & Frederic Sautet eds., 2011).

the market as an open-ended, dynamic, and competitive process entails an understanding that wealth isn't static.[192] The formation, recombination, and commercialization of capital is a dynamic process and is subject to market discovery.[193]

C. *Evaluating Wealth Taxation*

Market Discovery Theory presents five distinct challenges to the implementation of wealth taxation. Section II.C.1 shows that the practical foundation of wealth taxation, namely the taxation of market values without a transaction, relies on information that's often unavailable. The valuation challenge for tax authorities is properly understood as a knowledge problem rather than merely an administrative issue. Section II.C.2 illustrates how this knowledge problem concerning the value of assets generates contestation and litigation on the ground, thereby undermining administrability. Section II.C.3 reveals that a complex and hard-to-measure tax base leads to inequities. Section II.C.4 conveys that taxing assets on market values hinders the discovery of new wealth and will hamper economic efficiency. Section II.C.5 demonstrates that ULTRAs don't solve the administrability and equity issues of wealth taxation.

1. *Market Values as Knowledge Problems*

Let's go back to Giselle.[194] Green Solar Living is located in a transforming neighborhood where Amazon recently moved its main offices. Market leader AvalonBay Communities is setting up traditional housing nearby. Green Solar Living is a capital innovator. This project contests the current market by setting up a self-sustaining building that makes use of innovative solar-panel technology. The market value of this business is subject to discovery; it depends on actions that have not yet occurred and on information that is not yet revealed.[195] Specifically, market demand for this new type of sustainable living is unknown.[196] Droves of consumers might purchase these condos at triple their

---

192. KIRZNER, *supra* note 182, at 93–111.

193. DAVID J. TEECE, DYNAMIC CAPABILITIES AND STRATEGIC MANAGEMENT 189–94 (2009) (describing how new wealth is created under changing technological conditions); Harper & Endres, *supra* note 174 (describing a theory of entrepreneurship driving the creation of new wealth).

194. For Giselle's investments, see *supra* Section I.B.

195. An assessment of the current fair market value of any given asset needs to consider *future* events and *possible* uses of the asset. *See* Olson v. United States, 292 U.S. 246, 255 (1934) ("The sum required to be paid the owner does not depend upon the uses to which he has devoted his land but is to be arrived at upon just consideration of all the uses for which it is suitable. The highest and most profitable use for which the property is adaptable and needed or likely to be needed in the *reasonably near future* is to be considered, not necessarily as the measure of value, but to the full extent that the prospect of demand for such use affects the market value while the property is privately held." (emphasis added)).

196. Harper & Endres, *supra* note 174, at 203 ("New capital combinations must ultimately have a causal connection to the satisfaction of *human needs*; otherwise, they are just things and not capital goods (resources)." (emphasis added)).

production cost, or they might prefer Avalon's traditional housing inventory. Additionally, the cost of adaptive reuse is uncertain: technological hurdles may appear when implementing the new solar-panel technology. A few other risk factors involve pending loan applications, building permits, and two subsidy applications, all of which are still awaiting decisions. Asking a government to know the market value of Green Solar Living at the time of investment requires information on the aggregate demand schedule for sustainable condos, the cost of production, the supply of alternative housing, and regulatory and financial decisions.[197] At this stage, no venture capitalist, real-estate specialist, or investor can "observe" the market value of the project.[198] Giselle herself, even under oath, cannot ascertain the price at which Green Solar Living would be sold today.

This example illustrates that taxing market values absent realization conflicts with Market Discovery Theory.[199] Market values are *outcomes* of the discovery process.[200] Competition between Amazon (building offices), Avalon (traditional housing), and Green Solar Living will produce prices for these specific assets.[201] Economic theory confirms that previous price signals do not give certainty over the current market value of capital goods and the outputs of new capital combinations.[202] Beyond the realm of tax-law articles, which rely on predictable returns and objective, stable market prices, market values for capital goods will often be subject to a knowledge problem; that is, the IRS lacks information to systematically value specific capital investments.[203] The current value of the Yiki Ini artwork, or the shares in Plenty—Giselle's privately held company[204]—depends on market demand, competition, and ultimately the subjective valuations of potential buyers.[205] Market Discovery Theory and the

197. Determining fair market value requires taking into account all factors at stake. *See* United States v. 100 Acres of Land, 468 F.2d 1261, 1266–67 (9th Cir. 1972) ("[V]arious appraisal methods are admissible for determining just compensation or market value. All facts which would influence a person of ordinary prudence, desiring to purchase the property, are admissible.").

198. *See* Glogower, *supra* note 31, at 884 ("Other methods would tax annual changes in asset values each year, based on the *observed changes* in values in that year, regardless of the presence or absence of a realization event. For example, a 'mark-to-market' system would tax asset gain or loss each period, based on the asset's change in value in the period." (emphasis added)).

199. *See* McCaffery, *supra* note 4, at 369 ("First, we could 'simply' repeal the realization requirement and force taxpayers to 'mark to market' their holdings every year . . . . It is fairly easy to countenance such a reform for assets with readily ascertainable market values . . . . But other assets, such as land or real estate, would be difficult to value without a sale.").

200. The inputs, to be correct, are the cost basis.

201. *See* Endres & Harper, *supra* note 183, at 973–74.

202. *Id.* at 973–74 ("Past price signals are only a starting point, however, *since future prices* for capital goods and for the outputs of capital combinations *cannot be deduced with certainty* . . . ." (emphasis added)).

203. *See* Roll, *supra* note 37.

204. More than 99% of companies in the U.S. are privately held, which means ownership is not available for purchase through public stock exchanges. *See* David R. Francis, *Changing Business Volatility*, NBER DIGEST (Apr. 2007), https://www.nber.org/sites/default/files/2019-08/apr07.pdf [https://perma.cc/CS97-KPXY].

205. *See supra* note 39.

corresponding knowledge problem regarding the valuation of assets illuminates the finding in financial economics that there is no feasible test for asset pricing.[206] The mathematically driven "capital asset pricing models,"[207] once used to determine asset prices, rely on certain assumptions that may not hold in real-world financial markets.[208] In reality, there is uncertainty concerning the risk-free rate and the relationship between an asset's risk and expected return—and thus its market value.[209]

When conceptualizing the market as a discovery process, it becomes apparent that the government lacks information to calculate the wealth tax base across all types of assets. Ed McCaffery succinctly mentions that "[d]irectly taxing wealth . . . runs the risk of taxing the wrong thing, *at the wrong time*."[210] Timing is indeed the problem: wealth taxes kick in when the discovery process is still ongoing—when authorities, taxpayers, or third parties lack secure information concerning the value of businesses and assets.[211] In this Article's dynamic model, what is an appropriate point in time for taxation? When conceiving of the market as a discovery process, the relevant target is not the theoretical value for assets but the realized value of individual investments.[212] In the dynamic model, market values are revealed through realizations.[213] Whether the government intends to tax gains minus costs (an income tax) or the gross value (a wealth tax), the sale of assets and businesses is the decisive *finishing line* in the discovery process, the point in time when buyers reveal to entrepreneurs whether they've beaten the market and created new wealth.[214] In

206. *See* Roll, *supra* note 37.

207. *See* Fischer Black, *Capital Market Equilibrium with Restricted Borrowing*, 45 J. BUS. 444, 444 (1972); Fischer Black et al., *The Capital Asset Pricing Model: Some Empirical Tests*, *in* STUDIES IN THE THEORY OF CAPITAL MARKETS 79 (Michael Jensen ed., 1972).

208. Roll, *supra* note 37.

209. On the models that enable asset pricing, see *id.* at 155 ("Naturally, such possibilities are mere conjectures. They are not testable hypotheses, again for the simple reason that the true market portfolio has an unknown composition.").

210. McCaffery, *supra* note 4, at 371 (emphasis added).

211. The valuation of the current value of assets also accounts for future cashflows. *See* Miranda Perry Fleischer, *Not So Fast: The Hidden Difficulties of Taxing Wealth*, 58 NOMOS: AM. SOC'Y POL. & LEGAL PHIL. 261, 278 (2017) (arguing that the valuation of the current value of assets accounts for future cashflows and then estimates the present value of that income stream); Epstein, *supra* note 89, at 1499.

212. This provides foundation to an earlier observation. *See* Zelinsky, *supra* note 29, at 880 ("[T]he transactions cost justification for the rule of realization is strong when the taxpayer receives cash or easily-valued property (e.g., actively marketed stock) and thereby provides the fisc with a virtually costless valuation as an automatic by-product of the realization event.").

213. *See* ISRAEL M. KIRZNER, THE MEANING OF MARKET PROCESS: ESSAYS IN THE DEVELOPMENT OF MODERN AUSTRIAN ECONOMICS 12 (1992). For a similar observation within tax law, see Lederman, *supra* note 29, at 1510 ("As a threshold matter, it is well known that the difficulties that valuation poses for the tax system are avoided when the asset in question is sold in an arm's-length transaction. Such a sale reveals the market price for the asset.").

214. The value of any given asset is subject to uncertainty and partially determined by subjective assessments by other individuals. *See* KIRZNER, *supra* note 213, at 13–14. Valuations are visibly revealed through *actions*, namely the exchange of assets for money. *See* Lederman, *supra* note 29, at 1510. These types of exchanges serve as observable benchmarks for taxation, as capital holders receive measurable benefits. *See*

the dynamic economic model, "the *price system is not 'automatic'*; it functions only as the expression of *human actions*. In particular the price system is an expression of entrepreneurial decisions consciously planned and executed. Entrepreneurial decisions are made with the purpose of winning profits."[215]

Whether Giselle was wise to invest in new capital goods—whether the market value of the projects exceeds their cost—will reveal itself through human actions.[216] Indeed, realization events, such as a sale, signal whether the new forms of capital (e.g., the Green Solar Living residences) are in demand and whether cheaper production techniques (e.g., the shoes and accessories by Plenty) are genuine "discoveries."[217] When investments are sold at market prices that exceed their cost, profits are made and new wealth is created.

2. *The Wealth Tax's Administrative Problem*

This Section explores how the lack of information for valuing capital assets affects the practical implementation of the wealth tax. Recall that administrability considers the cost of enforcement and compliance under specific sets of tax rules.[218] Section II.C.2.a sketches out more context concerning the scale of the knowledge problem, Section II.C.2.b discusses the portfolios of the rich, and Section II.C.2.c analyzes the administrative costs of a federal wealth tax.

a. *Scale of a Federal Wealth Tax*

To tax inequality, the wealth tax is ideally imposed at the federal level rather than at the state level.[219] In the U.S., this means taxing around 100,000

Delmotte, *supra* note 39; ISRAEL M. KIRZNER, AUSTRIAN SUBJECTIVISM AND THE EMERGENCE OF ENTREPRENEURSHIP THEORY *passim* (Peter J. Boettke & Frederic Sautet eds., 2015).

215. KIRZNER, *supra* note 191 (emphasis added).

216. This account of income, generated through realization, is distinguishable from the neoclassical perspective, which views income as independent of individual transactions. *See generally* THE MARKET PROCESS: ESSAYS IN CONTEMPORARY AUSTRIAN ECONOMICS (Peter J. Boettke & David L. Prychitko eds., 1994); KIRZNER, *supra* note 213. Realization, in this context, is a deferral wherein one effectuates one's prior economic income. *See* Brown, Drake & Wellman, *supra* note 43; Jeffrey L. Kwall, *When Should Asset Appreciation Be Taxed?: The Case for a Disposition Standard of Realization*, 86 IND. L.J. 77, 80 (2011); Gamage & Brooks, *supra* note 9.

217. The Market Discovery Theory advises upholding the realization principle, at least to maintain the income-tax system's administrability. *Cf.* Moore v. United States, 36 F.4th 930, 935 (9th Cir. 2022) (holding that repatriation tax on persons owning at least 10% of a controlled foreign corporation, even where the corporation has not distributed its earnings, and thus have not been realized, is constitutional), *aff'd*, 144 S. Ct. 1680 (2024). This Article doesn't comment on the constitutionality of the realization principle. Market exchanges offer an additional relevance for tax purposes, namely that payees can be required to file a report—which enhances tax compliance. *See* Lederman, *supra* note 84, at 1743–44.

218. *See* Lederman, *supra* note 28 and accompanying text.

219. The wealth tax aims to have the broadest possible application to alleviate societal inequality and thwart attempts at wealth-tax avoidance. *See* Johnsen & Dellinger, *supra* note 138, at 111. This rationale underlies the research dedicated to a constitutional wealth tax. *See, e.g.*, *id.*; Glogower, *supra* note 13. Piketty's

individuals like Giselle, each with a vast array of assets.[220] Dominant proposals by tax scholars and politicians have set a high threshold[221]: an annual tax of 2% on extreme wealth, defined as wealth over $50 million per taxpayer.[222] This rate can rise as net wealth increases, reaching either 3% or 8%.[223] Wealth taxes are typically aimed at the 0.1% of the wealthiest individuals.[224] The $50 million threshold is a pragmatic cut-off point that intends to tax a significant part of the wealth of the 0.1%. Saez and Zucman argue:

> In 2022, there would be around 100,000 households liable to the wealth tax . . . . [T]his would [be] about .05% of the 185 million US families in 2022. The tax base above $50 million would be $11.0 trillion. A two percent tax on this base would raise $219 billion (paid in 2023).[225]

Accordingly, levying a wealth tax above $50 million comes down to annually assessing the market value of $11 trillion in assets—nearly as much as the total net wealth of Canada.[226] However, operating with a $50 million threshold means that the tax authorities must distinguish between those with a $45 million net worth and those with a $55 million net worth.[227] To identify whom the wealth tax applies to and whom to punish with exit taxes,[228] the government needs to make a long list of all households and individuals that *might* have a net worth above $50 million.[229]

In an optimistic scenario, assume tax authorities can successfully list the top 0.1% wealthiest taxpayers and assess their wealth. They will still need to identify who is above and below the threshold in any given year and calculate

---

initial wealth-tax proposal urged to implement wealth taxes at the global level. *See* PIKETTY, *supra* note 7, at 517.

220. Saez and Zucman estimate that there are around 100,000 households above the $50 million threshold. *See* Letter from Emmanuel Saez & Gabriel Zucman, *supra* note 32.

221. The original wealth-tax proposals suggested a low threshold of $1 million. *See* PIKETTY, *supra* note 7, at 528.

222. Sometimes this is reduced to 1%. *See* GALLE ET AL., *supra* note 23. This Article focuses on a 2% federal wealth tax on a net worth of $50 million or more and 3% above $1 billion. *See* Saez & Zucman, *Progressive Wealth Taxation*, *supra* note 8.

223. *See supra* note 11.

224. The higher share of wealth claimed by the top 0.1% of households in the country is what drives the wealth-tax proposal. *See, e.g.*, Saez & Zucman, *Progressive Wealth Taxation*, *supra* note 8, at 439 ("Meanwhile, wealth has become more concentrated. The share of wealth owned by the top 0.1 percent has doubled, from less than 10 percent in 1980 to almost 20 percent today."); Smith et al., *supra* note 9, at 26, 53 (observing that, for 2015, the richest 0.1% accounted for 15% of all wealth in the U.S.); Gamage & Brooks, *supra* note 9, at 489 n.1 (nuancing his co-author Saez and estimates this group owns roughly between 15% and 20% of national wealth).

225. *See* Letter from Emmanuel Saez & Gabriel Zucman, *supra* note 32; *see also* Press Release, *supra* note 11 (announcing a proposal for an annual wealth tax on those households with net worths over $50 million).

226. CREDIT SUISSE RSCH. INST., GLOBAL WEALTH REPORT 2022, at 44 (2022).

227. *See supra* note 11; Fleischer, *supra* note 211.

228. Wealth-tax proponents recognize that wealthy taxpayers don't necessarily cooperate, hence the proposed 40% exit tax for anyone leaving the jurisdiction to avoid the wealth tax. *See* Saez & Zucman, *Progressive Wealth Taxation*, *supra* note 8, at 474.

229. *See supra* note 11; Fleischer, *supra* note 212.

the individuals' wealth-tax liabilities. Commenting on the unequal concentration of wealth in the United States, Saez and Zucman argue that, in 2012, the top 0.1% owned 22% of all wealth in the U.S.[230] While this data is likely overstated,[231] building on it is useful to give an idea of the scale of a federal wealth tax. Twenty-two percent of all wealth in the U.S. amounts to assets worth approximately $32.7 trillion for 2023.[232] So even if authorities only have to scrutinize the 0.1%, the wealth tax still involves assessing more than 20% of all wealth in the U.S. annually.

Wealth taxes aren't simply subject to a knowledge problem. The second point is the *massive scale* of the knowledge problem: the wealth tax involves mapping and measuring, on a hit-or-miss basis, trillions of dollars' worth of businesses, boats, artwork, IP and trademarks, closely held businesses, and real estate.[233] To put things in perspective, a federal wealth tax on $32.7 trillion equals a determination on the value of nearly as much wealth as Germany and the U.K. combined annually.[234] This valuation exercise by far surpasses any wealth-tax operation any country has ever undertaken. In Norway, which adopted a wealth tax, the top 1% (a larger proportion than 0.1% for the U.S.) own around 20% of national wealth,[235] amounting to just $0.3 trillion.[236] In other words, the richest 1% in Norway are 300 times less wealthy than the richest 0.1% in the U.S.[237] The OECD notes that the potential success of a wealth tax will depend on "broader economic and social circumstances."[238] Economic knowledge concerning the value of assets is decentralized, and central administrations in larger countries face augmented challenges when aggregating all this information.[239] An important insight is that the only successful wealth tax, the Swiss one, occurs in a very small country and is administered at the local level.[240]

230. Saez & Zucman, *Wealth Inequality*, *supra* note 8, at 520.

231. *See supra* note 9 and accompanying text.

232. The Federal Reserve estimates there was $148.8 trillion of household wealth in the U.S. for the first quarter of 2023. BD. OF GOVERNORS OF THE FED. RSRV. SYS., FINANCIAL ACCOUNTS OF THE UNITED STATES: FLOW OF FUNDS, BALANCE SHEETS, AND INTEGRATED MACROECONOMIC ACCOUNTS FIRST QUARTER 2023 (2023); *Financial Accounts of the United States – Z.1, Recent Developments*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (June 8, 2023), https://www.federalreserve.gov/releases/z1/20230608/html/recent_developments.htm [https://perma.cc/K868-ESJB].

233. *See* Lederman, supra note 84, at 1734–35.

234. Germany ($17.5 trillion) and UK ($16.3 trillion) amount for $33.8 trillion. CREDIT SUISSE RSCH. INST., *supra* note 226, at 48, 50.

235. Lars Bevanger, *Norway's Richest Are Richer than We Thought*, NORDIC LABOUR J. (Oct. 7, 2020), http://www.nordiclabourjournal.org/nyheter/news-2020/article.2020-09-29.4934496755 [https://perma.cc/D875-UQ3U].

236. *See* CREDIT SUISSE RSCH. INST., *supra* note 226, at 52 (observing that total wealth in Norway is circa $1.4 trillion for 2021).

237. *See supra* notes 235–36; *supra* notes 230 and 232.

238. OECD, *supra* note 9, at 12.

239. *See id.* at 67, 69.

240. *Id.* at 18 (suggesting that wealth taxes generate very little revenue).

In conclusion, while the Saez and Zucman numbers aren't perfect, they help envision the scale of the knowledge issue at stake. The U.S. is so large, wealthy, and economically unequal that a federal wealth tax will burden the IRS with pricing dozens of trillions of dollars' worth of assets every year.

b. Portfolios of the Wealthy

Section II.C.2.a showed a quantitative aspect of the knowledge problem. Another issue pertains to the nature of assets: what types of assets will the future wealth tax assess? In practice, the wealthy often possess assets that align with Market Discovery Theory and are extremely difficult to value according to tax experts.[241] The earlier example involved real property and corporate shares—yet the valuation problems increase even more with other holdings. The wealthy mostly invest in high-risk assets such as private equity, hedge funds, and other financial investments subject to idiosyncratic volatility.[242] Notably, IP is crucial in the modern economy yet extremely hard to value.[243] Specifically, copyrights, patents, and trademarks are inherently unique; otherwise, they wouldn't warrant IP protection.[244] Consequently, there is no close substitute good that can serve as a reference point for accurately determining the market value of these properties.[245]

Generally, tax scholars know that the wealthy typically own "not publicly traded securities or even expensive homes, but instead complex assets, such as IP rights or stakes in private businesses,"[246] and high-risk assets, such as private equity.[247] David Kamin notes that the rich hold only 19% of their wealth in publicly traded stock and another 18% in bonds and retirement assets.[248] About half are hard-to-value assets like noncorporate business assets,[249] private equity, hedge funds, and real estate.[250] A recent article found that hard-to-value assets

---

241. *See* Kamin, *supra* note 102, at 122; Galle et al., *supra* note 14, at 1261; *see also* Fleischer, *supra* note 211, at 277 ("The portfolios of the wealthy, however, often contain assets that are either unique (art, some real estate) or not publicly traded (closely held stock). In these cases, a variety of techniques—each potentially yielding different results—could be used.").

242. *See* Fleischer, *supra* note 211, at 276; Laurent Bach et al., *Rich Pickings? Risk, Return, and Skill in Household Wealth*, 110 AM. ECON. REV. 2703 *passim* (2020); Tom Aabo et al., *Idiosyncratic Volatility: An Indicator of Noise Trading?*, 75 J. BANKING & FIN. 136, 136 (2017) ("[I]diosyncratic volatility measures the part of the variation in returns that cannot be explained by the particular asset-pricing model used.").

243. *See* Galle et al., *supra* note 14, at 1261.

244. For instance, with patents, the non-obviousness and novelty of the invention are conditions for eligibility, as outlined in 35 U.S.C. §§ 102–03.

245. Christopher Buccafusco & Christopher Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1, 11 (2010); *see also* Orly Mazur, *Transfer Pricing Challenges in the Cloud*, 57 B.C. L. REV. 643, 688 (2016).

246. Galle et al., *supra* note 14, at 1261.

247. *See* Kamin, *supra* note 102, at 123.

248. *Id.*

249. *Id.* The market value of an asset or a business as such doesn't respond to its book value. *See* Fleischer, *supra* note 211, at 277.

250. *See* Kamin, *supra* note 102, at 123.

comprise 60–80% of portfolios of taxpayers who reported more than $50 million in assets.[251]

So, the wealth tax necessitates valuation, yet it targets difficult-to-value assets. One response is to impose a wealth tax on easy-to-value assets, notably publicly traded stock, but this doesn't solve the issue. As the OECD notes, "To ensure horizontal equity, valuation rules should be similar *across assets* and based on market values . . . ."[252] A wealth tax levied on easy-to-value assets will simply encourage massive investments in hard-to-value assets.[253] As Galle et al. note in their 2023 article, this approach isn't good enough as taxpayers will shift their assets to those assets where valuation is weak and contestation is easy.[254] In the example involving Giselle, a federal wealth tax may shift her choice of investments from publicly traded stock to closely held businesses and artwork.[255]

c. Contestation, Litigation, and Correction

Ed McCaffery investigates how the tax system can reach the extremely wealthy more effectively.[256] The U.S. Treasury's former Assistant Secretary for Tax Analysis briefly mentions—and dismisses—the wealth tax: "Initiating a new tax on wealth, directly, would raise large questions of *valuation and administration*, and would invoke massive planning opportunities to *escape, evade, or mitigate its burdens*."[257] Which issues will be encountered when authorities lack information to calculate the wealth tax base?

An assessment-based tax, the property tax, illustrates this conundrum. This local tax targets the market value of real-estate properties and is a miniature version of a federal wealth tax.[258] For various reasons, the existing property tax mitigates valuation issues compared to a wealth tax. Whereas portfolios of the rich are generally hard to value, as explained in Section II.C.2.b, homes might be theoretically easier to value, and proponents often point at property-tax assessments to argue in favor of the wealth tax.[259] A property tax's radically decentralized organization further alleviates the knowledge problem.[260] Unlike

---

251. Robin Morgan, Valuation: Measuring Wealth Under a Wealth Tax 4 (Aug. 30, 2023) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4556256.

252. OECD, *supra* note 9, at 85 (emphasis added).

253. *See* Galle et al., *supra* note 14, at 1274–75.

254. *See id.* at 1263–64.

255. *See id.*

256. *See generally* McCaffery, *supra* note 4.

257. *Id.* at 363–64 (emphasis added).

258. *See* Sterk & Engler, *supra* note 41, at 1048.

259. *See* Saez & Zucman, *Progressive Wealth Taxation*, *supra* note 8, at 485 (noting that technology to systematically obtain real-estate values that are reliable exists, as shown by commercial websites like Zillow).

260. *See* Nick Cowen & Charles Delmotte, *Ostrom, Floods and Mismatched Property Rights*, 14 INT'L J. COMMONS 583, 586 (2020) (observing that issues subject to informational problems are easier solved at the local level).

with a federal wealth tax, tax officials in Washington D.C. aren't assessing trillions of dollars' worth of assets for millions of taxpayers. Every county in the U.S.—as opposed to a central agency—aggregates its own local information on the value of its residents' properties.[261]

Yet, even appraisals in property taxation are subject to significant errors and continuous contestation.[262] As Alvin Horhn, Detroit's highest ranking official in the Assessment Division for property taxation, testified, "Determining market values is *an art* and a science, so two appraisers can look at the same property and come to different results."[263] While the type of asset and decentralization reduce the valuation issue, research on the property tax observes that "even trained appraisers seeking to determine market value" for easy-to-value homes are "ultimately doomed to significant inaccuracy."[264]

Not only does the government lack information to ascertain the tax base but the issue also pertains to opposing incentives between the taxpayer and the agency.[265] When taxing assets on their presumed market value, valuation battles arise because taxpayers benefit from undervaluation while the government's revenue increases with higher valuation.[266] In the theoretically easier-to-administer property tax, already one-third to one-fourth of homeowners contest new valuations.[267] Given that market valuations are subject to a knowledge problem,[268] the massive scale of a federal wealth tax—and the fact that the wealthy tend to own hard-to-value assets—due-process protections will lead to continuous disputes and adjustments.[269] Although wealth taxes are politically portrayed for their high revenue potential, an administrability calculus

---

261. Nikhita Airi et al., *Tax Policy Center's Briefing Book: How Do State and Local Property Taxes Work?*, TAX POL'Y CTR. (Jan. 2024), https://www.taxpolicycenter.org/briefing-book/how-do-state-and-local-property-taxes-work [https://perma.cc/XBB2-35H3] ("Taxpayers in all 50 states and the District of Columbia pay property taxes, but the tax on real property is primarily levied by local governments (cities, counties, and school districts) rather than state governments.").

262. Lederman, *supra* note 29, at 1502 ("Local assessments have serious problems, including variance in quality and systematic biases. Real estate valuations can already be contentious."); Sterk & Engler, *supra* note 41, at 1070; Zelinsky, *supra* note 29, at 880–81; Doerner & Ihlanfeldt, *supra* note 41, at 5–6 (marking an escalation in assessment appeals, results of which don't generate fair corrections and are even racially biased).

263. Atuahene, *supra* note 44, at 139 (emphasis added).

264. *See* Sterk & Engler, *supra* note 41, at 1070.

265. *See* Lederman, *supra* note 29, at 1497.

266. *Id.* This is not necessarily applicable to the alternative measure proposed in this Article—specifically, the deemed-realization tax. *See infra* Section III.B.1.

267. *See* Sterk & Engler, *supra* note 41, at 1076; *see also* Doerner & Ihlanfeldt, *supra* note 41; Olivia Young, *1 in 4 Douglas County Homeowners File Property Value Appeals*, CBS NEWS (Sept. 6, 2023), https://www.cbsnews.com/colorado/news/1-in-4-douglas-county-homeowners-file-property-value-appeals/ [https://perma.cc/BC3Z-5UYR].

268. *See, e.g.*, John A. Townsend, *Burden of Proof in Tax Cases: Valuation and Ranges—An Update*, 73 TAX LAW. 389, 393–94 (2020).

269. *See* James R. Repetti, *It's All About Valuation*, 53 TAX L. REV. 607, 610 (2000) (identifying that taxpayers have a strong incentive to challenge valuations under a wealth tax); Richard M. Lipton, *Procedural Due Process in Tax Collection: An Opportunity for a Prompt Postdeprivation Hearing*, 44 U. CHI. L. REV. 594, 594 (1977); Galle et al., *supra* note 14, at 1268.

advises against them.[270] After researching the only assessment-based tax, i.e., the property tax, tax professors Sterk and Engler concluded that "valuation attempts prior to sale raise significant difficulties: they are costly, unreliable, and beset by political problems."[271] Even if taxpayers are cooperative, the knowledge problem surrounding assessments is likely to surface later.[272] This will necessitate annual adjustments for previous tax years.[273] For instance, suppose officials tax Giselle on her Green Solar Living asset, valuing it at $50 million in 2024, $60 million in 2025, and $65 million in 2026. But the project never realizes its potential, and the business is eventually sold for $40 million in 2030. As a result, Giselle will likely seek to recover the excess wealth taxes that were previously levied.[274]

The battles around valuation explain why European countries have experienced both huge administrative costs and limited and declining wealth-tax revenues.[275] From a governmental viewpoint, a wealth tax leads to significant overhead and is unlikely to raise much revenue.[276]

270. Larry Summers and Natasha Sarin argue that the wealth tax would generate $25 billion, around 10% of what Saez and Zucman argue. *See* Lawrence H. Summers & Natasha Sarin, Opinion, *A 'Wealth Tax' Presents a Revenue Estimation Puzzle*, WASH. POST (Apr. 4, 2019), https://www.washingtonpost.com/opinions/2019/04/04/wealth-tax-presents-revenue-estimation-puzzle/ [https://perma.cc/Q4NG-4YLV] ("If our suspicion is correct, such a wealth tax will not yield the revenue that its proponents hope for, and that when actual scorekeepers score actual proposals, their estimates will disappoint advocates.").

271. Sterk & Engler, *supra* note 41, at 1078.

272. In eminent-domain cases, the true market value is often revealed later, at the time when the future events that need to be factored in the price actually materialize. *See* Epstein, *supra* note 89, at 1443 ("[E]ven if we put all these difficulties aside, the valuation of real estate cases is fraught with gratuitous complexities that arise even after courts settle on the right abstract standard for just compensation . . . .").

273. *See* Sterk & Engler, *supra* note 41, at 1040, 1074.

274. *See id.* at 1070–71 (identifying that, in property tax, the challenge of valuation is mitigated through the option of reassessment and corrections).

275. *See* OECD, *supra* note 9, at 16–17 (noting that economic efficiency costs, declining wealth-tax revenues, and high administrative and compliance costs explain why net wealth taxes are far less popular than they used to be—with the number of OECD countries levying wealth taxes dropping from 12 in 1990 to only 4 in 2017); *see also* Wojciech Kopczuk, *Taxation of Intergenerational Transfers and Wealth*, *in* 5 HANDBOOK OF PUBLIC ECONOMICS 329, 333 (Alan J. Auerbach et al. eds., 2013); STUART ADAM ET AL., TAX BY DESIGN 347 (2011) ("But many forms of wealth are difficult or impractical to value, from personal effects and durable goods to future pension rights—not to mention 'human capital'. These are very serious practical difficulties. And where attempts have been made to levy a tax on a measure of current wealth—in France, Greece, Norway, and Switzerland, for example—practical experience has not been encouraging."); ARUN ADVANI ET AL., WEALTH TAX COMM'N, FINAL REPORT: A WEALTH TAX FOR THE UK 106–07 (2020) (advising against a recurring wealth tax because of valuation and administrative issues but supporting a one-time wealth tax to cover the budget gaps caused by COVID-19).

276. *See* McCaffery, *supra* note 4, at 364 ("Taxing wealth will be practically difficult, and may not in the end raise much revenue."); *see also id.* at 370 ("[T]axing wealth directly, whether under the income tax or in a separate complementary tax, is not the best approach to the challenges of taxing wealth seriously." (emphasis omitted)).

3. *Equity Under the Wealth-Tax Quagmire*

It is conventional wisdom in tax law that "complexity is inequitable" because "ambiguity and uncertainty also have a tendency to reward the most aggressive adversaries," and generally, "wealthier citizens are better able to turn tax ambiguities and complicated rules to their advantage in minimizing tax."[277] Going after the wealthy with a difficult-to-value tax base induces them to contest assessments or minimize their tax burdens via planning strategies such as dummy corporations that deflate valuation for tax purposes.[278] It is hard to underestimate the sprawl of contestations, litigation, and planning that taxing trillions of dollars' worth of hard-to-value assets will cause.[279] Tax professors Schenk and Cunningham have argued that "[a]ny system requiring appraisals is likely to be a loss for the government because it does not have the resources to win."[280] Assessment contestations and appeals are widespread but rarely lead to more accuracy.[281] The literature documents systematic abuse surrounding the valuation of assets and warns that wealthy taxpayers generally win the disputes and litigations regarding the valuation of assets.[282] The tax liabilities under a hard-to-calculate wealth tax base won't be an objective corollary of net worth; taxpayers with astute legal assistance will win assessment battles or decrease liability through avoidance strategies to deflate value.[283] As Sterk and Engler have long observed, taxpayers who contest assessment are seldom those treated

277. GRAETZ & ALSTOTT, *supra* note 81, at 27. For a similar view, see Lederman, *supra* note 28, at 709 (referring to "administrability" as "simplicity").

278. *See* Fleischer *supra* note 211, at 279 (noting that taxpayers can deflate the value of assets by placing them in partnerships with a minority stake or limited marketability); *see also* Repetti, *supra* note 269, at 612–13.

279. *See* Kamin, *supra* note 102, at 122–24; *see also* Kopczuk, *supra* note 275, at 336 ("Defining base in a comprehensive manner is difficult—it requires costly and sometimes impractical valuation, especially in the case of business assets.").

280. Noel B. Cunningham & Deborah H. Schenk, *Taxation Without Realization: A "Revolutionary" Approach to Ownership*, 47 TAX L. REV. 725, 743 n.78 (1992).

281. *See* Doerner & Ihlanfeldt, *supra* note 41, at 4, 12, 17–18 (analyzing the outcomes of increased assessment appeals, finding that the results of these appeals generate unfair corrections and are even racially biased).

282. *See* Sterk & Engler, *supra* note 41, at 1070 (discussing corruption on behalf of assessors as well as the pressure on local politicians to enable reassessments); *see also* Michael W. Maizels & William E. Foster, *The Gallerist's Gambit: Financial Innovation, Tax Law, and the Making of the Contemporary Art Market*, 42 COLUM. J.L. & ARTS 479, 480, 489 (2019) (regarding abuse in appraisals of artwork); Lederman, *supra* note 29, at 1507 (describing abuse that occurs when appraisals aren't done within transactions at arm's length). On warnings to wealthy taxpayers, see Schenk, *supra* note 133, at 445 ("[T]he government almost always loses valuation skirmishes."); Lederman, *supra* note 29, at 1499; Zelinsky, *supra* note 29, at 881 ("In some respects, modern technologies make these problems worse by increasing the complexity and cost of appraisals and valuation litigation.").

283. *See* Repetti, *supra* note 269, at 612–13 (discussing various avoidance strategies that could be used to limit tax liability under a wealth tax); *see also* Sterk & Engler, *supra* note 41, at 1071 (noting that informed taxpayers can use the assessment process to reduce their tax burden).

unfairly.[284] Hence, the wealth tax isn't the panacea for vertical equity—to the contrary, it empowers the resourceful to bring down their tax liabilities.[285]

An appeal to yet-undiscovered market values creates discretionary powers and risks arbitrary outcomes.[286] This generates a second set of inequities under a wealth tax. When officials execute tasks that exceed their expertise, they are more susceptible to external influence or specific biases.[287] The discretion to assign tax liabilities in the absence of an objective, measurable tax base allows officials to act favorably toward some taxpayers or respond to specific biases concerning others.[288] Valuations under a wealth tax will often involve million-dollar deals,[289] and without any secure, impartial ground, political pressures may influence the outcome.[290] The fact that the wealth tax is annual, and the wealthy and tax officials have to interact year after year, increases the expectation that

284. Sterk & Engler, *supra* note 41, at 1071 ("[T]axpayers who challenge their assessments are disproportionately those who have the savvy to understand that they have little to lose; review processes rarely provide for the possibility of *increased* assessment." (emphasis added)).

285. Once above a certain threshold, wealth taxes may become regressive: taxpayers with a net worth of $200–300 million have more resources to reduce their wealth-tax liability compared to a taxpayer with "only" $60 million.

286. *See* Epstein, *supra* note 89, at 1442 ("Any appeal to market prices conceals a lurking uncertainty in valuation that looms larger when voluntary transactions are not available to set pricing benchmarks.").

287. Generally, because of the direct effect that tax rules exert on profits of individuals and corporations, tax policy is highly vulnerable to capture. *See* Alexander et al., *supra* note 43, at 402–05; Brown et al., *supra* note 43, at 70; Bearer-Friend et al., *supra* note 108, at 486–87 (mapping elitist control over tax policy); *see also* Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 591–96 (1999) (describing the influence of White middle-class voters on policy—and the incompetence of state and local government concerning equitable fiscal policy).

288. *See* Sterk & Engler, *supra* note 41, at 1070 (describing the discretionary powers under property taxes that lead to corruption and "'sweetheart'" assessments); *see also* Hayashi, *supra* note 44, at 1519, 1521–24 (describing "conditions under which dynamic property taxes result in higher ETRs [effective tax rates] for black homeowners than white homeowners"); Doerner & Ihlanfeldt, *supra* note 41, at 4, 12, 17–18 (marking an escalation in assessment appeals, results of which don't generate fair corrections and are racially biased); Atuahene, *supra* note 44, at 112–15 (documenting how property-tax assessments led to systematic overvaluation of the tax base in Michigan, often in disfavored neighborhoods).

289. At the proposed 2% rate, each valuation of $50 million incurs $1 million in wealth-tax liability.

290. Political science documents that political and industry pressures may sometimes be exerted on tax administration. *See* William J. Hunter & Michael A. Nelson, *Tax Enforcement: A Public Choice Perspective*, 82 PUB. CHOICE 53, 64 (1995) (explaining variation in interstate audit activity by senators sitting on the Finance Committee); Marilyn Young et al., *The Political Economy of the IRS*, 13 ECON. & POL. 201, 203–04 (2001) (finding that individuals in elected offices can influence the intensity of auditing in districts electorally favorable to the elected official); Simon Haeder & Susan Webb Yackee, *Influence and the Administrative Process: Lobbying the U.S. President's Office of Management and Budget*, 109 AM. POL. SCI. REV. 507, 507–08 (2015) (discussing how OMB review is subject to interest group lobbying); *see also* Grant Richardson, *Taxation Determinants of Fiscal Corruption: Evidence Across Countries*, 13 J. FIN. CRIME 323, 323 (2006) (analyzing how discretionary powers under a complex set of tax rules provide opportunity for corruption and deal-making). The tax literature warns that the extremely wealthy tend to exert influence on administrative and legislative bodies. *See* Bearer-Friend et al., *supra* note 108, at 507; *see also* Charles Delmotte, *Redistribution Without Romance*, 66 B.C. L. REV. (forthcoming Apr. 2025) (examining redistributive tax rules and their susceptibility to capture).

taxpayers will invest in political and administrative influence to bring down valuations.[291]

To conclude, one of the wealth tax's proponents, David Gamage, influentially argued that "ideal" conceptions of tax systems which ignore "tax-gaming distortions" and issues with administrability "should be regarded with suspicion."[292] This realistic take on equitable tax policy implicates the wealth tax. Complex tax rules that are hard to enforce benefit those with the legal or political resources to manipulate their application.[293] At bottom, such tax rules aren't strong levers to strengthen the vertical equity of the tax system.

4. *The Wealth Tax's Efficiency Problem*

The costs of (non)compliance under an ill-defined tax and the paired expansion of the tax industry are truly *economic*.[294] The hundreds of billions of dollars that taxpayers (and their tax lawyers, accountants, and tax personnel) devote to the tax obligations are resources that could alternatively be invested in the productive economy.[295] The costs of tax complexity aren't simply administrative costs; they are economic losses as well.

Abstracting away from the administrability issue, the focus in this Section is the efficiency component of wealth taxation.[296] Importantly, the argument here is oriented not toward the scenario in which the market price is unobservable but rather toward scenarios where tax officials may rely on a market price. More succinctly, the question here is: how does wealth taxation affect the discovery of new wealth? Imagine that the federal government imposes a wealth tax on Giselle. One of her assets is Green Solar Living. An annual wealth tax involves taxing the entire value of this business. Green Solar Living is currently hard to value, yet its main asset is a building in East L.A. With the arrival of Amazon in the area and the presence of AvalonBay Communities' traditional housing, the market price for real estate in the area has been skyrocketing. While Green Solar Living purchased the asset for $20 million in 2021, expert estimates project a value of $60 million for 2024 given the rising profitability of East L.A. housing and offices. If the IRS taxes on

291. *See* Repetti, *supra* note 269, at 612–13; Sterk & Engler, *supra* note 41, at 1070–71; Bearer-Friend et al., *supra* note 108, at 507.

292. Gamage, *supra* note 152, at 400–01.

293. *See* Repetti, *supra* note 269, at 612–13; Sterk & Engler, *supra* note 41, at 1070–71; Bearer-Friend et al., *supra* note 108, at 507.

294. *See* Scott A. Hodge, *The Compliance Costs of IRS Regulations*, TAX FOUND. (June 15, 2016), https://taxfoundation.org/research/all/federal/compliance-costs-irs-regulations/ [https://perma.cc/7LE9-F58U] (noting that data-compliance costs in the United States totaled $409 billion in 2016); *see also* Jonathan H. Choi & Ariel Jurow Kleiman, *Subjective Costs of Tax Compliance*, 108 MINN. L. REV. 1255, 1267 (2024) (detailing how objective compliance costs total hundreds of billions of dollars).

295. Hemel, *supra* note 31, at 765 (noting that administrative costs are added to an economic analysis of a wealth tax).

296. *See supra* Section I.C.2.

general market values, Green Solar Living generates a $1.2 million wealth-tax liability in 2024. Assuming the value will go up by 10% annually, this results in a liability of $1.32 million for 2025 and $1.45 million for 2026.

Wealth taxes generate two negative effects on the process of wealth discovery.[297] This example illustrates why. First, new businesses and investments will generate low or negative profits in their first few years of operation yet still face a wealth-tax liability.[298] The taxation during periods of transition and investment hinders businesses in their early phases, such as Green Solar Living, and can hamper entrepreneurship and the creation of new businesses.[299] Second, past the business's mature phase, an income tax with perfect loss offset is less discouraging to entrepreneurship and innovation compared to a net wealth tax that is not tied to income.[300] Tax liability is positive under a wealth tax even if income is zero or negative.[301] Suppose that in 2029–2030, Green Solar Living (value $100 million) generates $2 million of profit, and AvalonBay (value $100 million) generates $5 million. A 2% wealth tax on both equals a 100% income tax for Green Solar Living; the same levy taxes 40% of AvalonBay's revenue.[302] Accordingly, wealth taxes have the potential to be regressive income taxes: they penalize holders with low returns and benefit the current winners in the market.[303] In this context, the economist Stuart Adam and his co-authors describe wealth taxes as "exactly the wrong policy."[304] Given the changing conditions of entrepreneurship, simply owning capital assets doesn't guarantee any current or future profits.[305] On a dynamic account, wealth taxes discourage the discovery of *potentially* highly profitable investments by eliminating not yet profitable businesses early on in the market process.[306] When the authorities impose $2 million in wealth-tax liabilities on Giselle based on her asset's rising market value, she has an incentive to employ those assets in a conventional way that limits the entrepreneurial discovery process.[307] This

297. For a general discussion of the impact a wealth tax would have on entrepreneurship and risk-taking, see OECD, *supra* note 9, at 63.

298. *Id.* ("[N]ew entrepreneurs which tend to generate low, or even negative, profits in their first few years of operation would still face a wealth tax liability.").

299. *Id.*

300. *Id.* ("[N]et wealth tax which is unlinked to income might discourage entrepreneurship relative to an income tax with (perfect) loss offset.").

301. *Id.*

302. *See* ADAM ET AL., *supra* note 275, at 348 ("[S]uppose that I save £100 and the normal rate of return is 5%. A tax of 20% on the normal return is equivalent to a tax of 1% on the stock of wealth . . . . ").

303. *See* Guvenen et al., *supra* note 45, at 52; OECD, *supra* note 9, at 64 ("From an equity perspective, a net wealth tax penali[z]es the holders of low-return assets.").

304. ADAM ET AL., *supra* note 275, at 348.

305. *See* Geoffrey Brennan, *Striving for the Middle Ground*, *in* TAXATION: PHILOSOPHICAL PERSPECTIVES 60, 66–67 (Martin O'Neill & Shepley Orr eds., 2018).

306. OECD, *supra* note 9, at 55 ("Favouring high returns may also discourage potentially highly profitable investments . . . .").

307. *See* Dodge, *supra* note 53, at 489 (noting that market values are calculated on what is currently the most profitable use). On the standard neoclassical account, since the most productive use of an asset is

second negative effect on risk-taking and the discovery of new wealth thus concerns the observation that taxing entrepreneurs based on general market values *en gros* motivates them to follow conventional production processes and techniques.[308]

5. The ULTRA Problem

The latest proposal to salvage the administrability and equity of wealth taxation concerns taxing in unliquidated tax reserve accounts, or ULTRAs.[309] ULTRAs' background problems (discussed in Section II.C.2) are that market valuations by authorities are "highly gameable," and taxpayers can find ways to "either reject or challenge the valuations" based on due-process requirements.[310] These issues generate much of the disputes and litigation surrounding the valuation of assets. Galle et al. argue that ULTRAs "present[] a way out of this dilemma."[311] "ULTRAs" are unliquidated tax reserve accounts that grant the government a claim on a portion of a business's stock and on wealth assets more generally.[312] By taking a percentage stake in a taxed asset, the government presumably resolves the valuation problem: "[T]he ULTRA can be used as one component of a larger valuation system to implement a feasible tax on extreme wealth . . . ."[313]

Galle et al. do not ignore, and even acknowledge, that authorities often do not know the value of an asset without a realization.[314] Yet, in Galle et al.'s view, ULTRAs solve this valuation challenge by not requiring valuation; instead, tax authorities turn into co-owners of the taxed asset.[315] The wealth tax is paid in *property interests* in the assets held, not cash.[316] For example, assume that Giselle is subject to a 2% wealth tax. It is hard for the authorities to ascertain the value of her company, Plenty. Galle et al. argue that "the ULTRA solution can be

---

objective information known to all economic players, a wealth tax can be said to incentivize toward more efficient use of assets. However, in this Article's discovery account, what constitutes "efficiency" is not known ex ante: innovations that aren't immediately profitable might turn out to be genuine discoveries in the long turn. Wealth taxes, then, undermine the process of entrepreneurship, experimentation, and contestation by steering investment toward what is *currently* profitable in the marketplace. For a standard neoclassical treatise, see JOHN HICKS, VALUE AND CAPITAL (2d ed. 1946).

308. Taxing market values comes down to a special tax on the opportunity cost of nonconformity; taxes are calculated based on values that are not monetized because alternative routes are taken. *See* OECD, *supra* note 9, at 59.

309. Galle et al., *supra* note 14, at 1264.

310. *Id.* at 1305.

311. *Id.* at 1306.

312. *Id.* at 1297.

313. *Id.* at 1267.

314. *Id.* at 1261 ("The difficulty is that a modest but important portion of the wealth held by the world's richest individuals is not publicly traded securities or even expensive homes, but instead complex assets, such as intellectual property rights or stakes in private businesses.").

315. *Id.* at 1264.

316. *Id.* at 1265.

used as a plug for tax valuation holes."[317] Without knowing its economic value, the government takes 2% equity in Plenty in Year One, while in Year Two, the remaining 98% of the asset is subject to a 2% charge (leaving 96.04% for Giselle); in Year Three, another 2% ULTRA tax leaves Giselle with 94.12% of the original asset's value. After twenty years of wealth taxes, this leaves Giselle with 66.4% equity in Plenty, and the tax authorities now own 33.6% of the company's value. Under ULTRAs, there is no current cash tax payment, but when Giselle sells her shares in Plenty after 20 years, 33.6% of whatever the sales price turns out to be goes to the tax authorities.

While the title of Galle et al.'s article captures the essence of the wealth-tax problem, "Solving the Valuation Challenge" is not a true reflection of what ULTRAs can realistically accomplish.[318] ULTRAs do not replace market valuations.[319] If tax authorities implement the wealth tax by taking equity interests, they need to ascertain the market value of assets in at least the following five distinct scenarios. As a result, the ULTRA solution for taxing wealth also fails the administrability criterion.

a. Identifying Taxpayers Exceeding the Threshold

Galle et al. claim that governments that utilize ULTRAs solve the valuation problem, allowing them to administer the wealth tax effectively.[320] But how do the authorities determine who qualifies for the wealth tax in the first place? Wealth taxes work with thresholds: with a $50 million threshold, the authorities cannot apply ULTRAs to taxpayers with a net worth of $49 million, but they should apply ULTRAs to taxpayers with a net worth of anything above $50 million.[321] It follows that even ULTRAs require systematic assessments of all the assets of many wealthy taxpayers every year.

Tax officials and third-party appraisers lack the knowledge to measure the market value of assets, so taxpayers will be placed on either side of the threshold on a discretionary basis.[322] Say Giselle owns only $10 million in easy-to-value stock indices alongside her Yiki Ini artwork. She bought the artwork for $20 million in 2021. An appraiser who is a firm believer in conceptual art could find artwork of similar merit that was recently auctioned for $40 million. In this case, Giselle passes the $50 million wealth-tax threshold and faces a 2% wealth-tax liability. Another appraiser might simply employ an annual accrual of 4% on the acquisition price, meaning its value increases to $22.4 million for 2024. This sets Giselle's net worth at $32.4 million—well below the $50 million threshold.

317. *Id.* at 1299.
318. *Id.* at 1257.
319. *See id.* at 1313.
320. *Id.* at 1316.
321. *Id.* at 1266, 1314.
322. *See id.* at 1261; Atuahene, *supra* note 44, at 139.

The reality that "[d]etermining market values" is "an art" more than "a science" will prove disconcertingly accurate when attempting to implement the wealth tax.[323]

Some taxpayers are wealthy enough that they certainly pass the threshold (think of Elon Musk). Yet a considerable number of millionaires, say taxpayers with a net worth between $35 million and $65 million, will require asset-value assessments.[324] This is a substantial number of taxpayers: based on data by the Federal Reserve, there are about 110,529 households in the U.S. with a net worth between $35 million and $65 million.[325] In comparison, there are "only" *73,105* households that rank above $65 million.[326] As wealth increases, the share of extremely wealthy taxpayers steeply declines.[327] The wealth tax mainly targets taxpayers close to the threshold (i.e., between $35 million and $65 million). Most targeted taxpayers will be in a strong position to argue that their net worth is below the threshold, mounting challenges that can easily make use of the knowledge problem concerning wealth assessments.[328]

The question of whether taxpayers sit above or below the threshold is exactly where disputes and litigation will arise. And so, the assessment dilemma that the ULTRAs set out to solve—that is, valuation-dispute proceedings between administrations on the one hand and taxpayers on the other—will rear its head again here.[329] Threshold battles will take place as taxpayers contest their net-worth tax bill by arguing their assets are worth, for example, $48 million. Galle et al.'s general prediction that "sophisticated taxpayers will often bring much greater resources to litigation or other valuation-dispute proceedings as compared to the resources available to the tax authority" implies a strategic inclination among taxpayers to avoid passing the $50 million threshold.[330] Tax lawyers will also employ a variety of valuation vehicles and strategies to deflate values and help their clients avoid exceeding the net worth threshold.[331]

b. Applying the Progressive Rate Schedule

Moving on to taxpayers who are wealthy enough to pass the threshold with certainty (think of Elon Musk), even in their case, ULTRAs require the

323. Atuahene, *supra* note 44, at 139.

324. *See* Galle et al., *supra* note 14, at 1314–15.

325. Bd. of Governors of the Fed. Rsrv. Sys., *2022 Survey of Consumer Finances*, FED. RSRV. (2023), https://www.federalreserve.gov/econres/scfindex.htm [https://perma.cc/PF5N-UERN] (referring to the "SDA analysis tool" where data for specific groups of millionaires within wealth ranges is available).

326. *Id.*

327. *Id.*

328. Galle et al., *supra* note 14, at 1305–06.

329. *Id.* at 1306.

330. *Id.*; Lipton, *supra* note 269; Schenk, *supra* note 133, at 445 ("[T]he government almost always loses valuation skirmishes."); Lederman, *supra* note 29, at 1498.

331. Fleischer, *supra* note 211, at 281 (discussing ways to deflate value such as minority discounts, lack of control discounts, and lack of marketability discounts).

valuation of assets. Though wealth taxes have the effect of a regressive income tax (discussed in Section II.C.4), they are designed with a progressive rate schedule.[332] This means that different percentages of ULTRAs will attach to different brackets of wealth. For example, Bernie Sanders's wealth-tax proposal makes use of eight different wealth brackets,[333] whereas Saez and Zucman's proposal[334] and the current California bill[335] make use of two, with the second bracket starting above $1 billion. Thus, even if the authorities implement ULTRAs, market valuations of various assets are required to reveal the percentage of ULTRAs that should be imposed under the applicable rate schedule.

To underscore this point, note that the Sanders wealth tax imposes 2% on a taxpayer's net worth between $50 million and $250 million, 3% between $250 million and $500 million, 4% from $500 million to $1 billion, 5% from $1 billion to $2.5 billion, 6% from $2.5 billion to $5 billion, 7% from $5 billion to $10 billion, and 8% on wealth over $10 billion.[336] The application of different rates for different brackets requires repeated assessments of the precise values of the taxpayer's wealth.[337] If Giselle owns Green Solar Living, Plenty, Yiki Ini artwork, and the IP rights to her music, a net-worth assessment of $550 million puts her in the 4% bracket, and an assessment of $490 million places her in the 3% bracket. Tax officials cannot identify whether to apply 3% or 4% in ULTRAs to these assets without market valuations.

Additionally, to apply the progressive rate schedule, authorities must ascertain the extent to which the taxpayer's net worth surpasses each breakpoint.[338] If Giselle's wealth is worth $510 million, it only surpasses the $500 million breakpoint by $10 million, meaning this $10 million is subject to a 4% ULTRA. If Giselle's wealth is worth $650 million, $150 million is subject to a 4% ULTRA.

For reasons discussed in Section II.C.2, tax officials will often lack the knowledge to determine the specific tax bracket, meaning taxpayers will be taxed under the different rate schedules on a discretionary basis.[339] The valuation battles and contestations between taxpayers and the authorities that ULTRAs set out to solve are bound to resurface when determining the wealth

332. OECD, *supra* note 9, at 12.

333. Bernie Sanders, *Tax on Extreme Wealth*, FRIENDS OF BERNIE SANDERS, https://berniesanders.com/issues/tax-extreme-wealth/ [https://perma.cc/VQA2-S4KJ].

334. Saez & Zucman, *Progressive Wealth Taxation*, *supra* note 8, at 438.

335. GALLE ET AL., *supra* note 23.

336. Sanders, *supra* note 333.

337. *Id.*

338. *See id.*

339. *See* discussion *supra* Section II.C.2.

bracket and applicable tax rates.[340] As always, tax lawyers can set up vehicles and strategies so their clients remain within the lowest possible bracket.[341]

c. Imposing Prepayment of ULTRAs

When authorities tax with ULTRAs, the proposal might generate "political optionality problems,"[342] i.e., taxpayers deferring taxes in cash by not selling assets. "[F]or taxpayers not facing major liquidity issues,"[343] authorities will therefore require "taxpayers to make prepayments of some of what they will eventually owe."[344] Galle et al. assure that "prepayment requirements are targeted just at the extremely wealthy and relatively sophisticated taxpayers who generate most of the problems related to political optionality."[345] This constitutes a third instance of ULTRAs requiring, and not circumventing, assessments of the market value of assets. First, prepayments in cash will need to be calculated on the market value of the underlying asset, or what Galle et al. call the "initial valuation."[346] If the government owns 3.96% of the Yiki Ini artwork after two years of imposing ULTRAs, then prepayment depends on the market valuation of the underlying asset.[347] Second, whether Giselle belongs to the group of "extremely wealthy" to which prepayments apply again requires market valuations of her assets.[348] These valuations run into the problems mentioned in Section II.C—that is, they will be challenging and provoke disputes and litigation.

d. Imposing Take-It-or-Leave-It Valuations

Fourth, taxpayers can refuse ULTRAs in favor of "take-it-or-leave-it valuation[s]."[349] Indeed, for hard-to-value assets, "taxpayers would have the option of either attaching an ULTRA to those assets or else accepting the alternative take-it-or-leave-it valuation."[350] When a taxpayer refuses the ULTRAs in favor of take-it-or-leave-it appraisals, cash payments will be due

340. *See, e.g.*, Lipton, *supra* note 269; Schenk, *supra* note 133, at 445 ("[T]he government almost always loses valuation skirmishes."); Lederman, *supra* note 29.

341. *See supra* note 278 and accompanying text.

342. *See* Galle et al., *supra* note 14, at 1311.

343. *Id.*

344. *Id.* at 1299.

345. *Id.* at 1311.

346. *Id.* at 1298, 1300.

347. Arguably, a random prepayment, say $1 million, can be imposed and credited when the asset is sold. However, whether this prepayment amounts to 1% or 10% will only become evident as the market discovery process unfolds. This could create impractical uncertainties for both the taxpayer and the government.

348. *See* Galle et al., *supra* note 14, at 1261, 1300.

349. *Id.* at 1315–16.

350. *Id.*

based on assessments that cannot be contested.[351] Although the proposal thoughtfully allows taxpayers to gamble based on whether they believe the assets will appreciate, the reality remains that taxing hard-to-value assets will often trigger market valuations nonetheless.

Granted, this take-it-or-leave-it aspect solves all procedural issues by not allowing for contestation. But this merely solves legal issues, not the knowledge problem—meaning that the taxes will be calculated on arbitrary values.[352] If Giselle does not want ULTRAs attached to her artwork (she intends to sell it at a 2029 art fair), she will pay wealth taxes in cash annually until then. These taxes will be calculated on what the fisc, or some appraiser, guesses the artwork could be sold for.

e. Most Assets Are Still Taxed on an Assessed Market Value

Only when the market price for an asset is the hardest to observe will ULTRAs be applicable. As Galle et al. state: "In circumstances wherein taxing authorities would like to tax an asset today but cannot because its value is uncertain, the taxpayer pays with an ULTRA rather than cash."[353] Most assets will be taxed according to the assessed market value,[354] and "the ULTRA solution can be used . . . when the background valuation rules of the tax system would be inadequate."[355] Since Galle et al. propose to tax most assets on their market value, the double critique spelled out in Section II.C remains endemic.[356] First, the issues concerning valuation should be understood as knowledge problems, and such problems are much larger than acknowledged in the literature.[357] This will cause administrative and legal problems when assessors and tax officials gauge the value of nonlisted stock, homes, boats, etc. Second, taxing assets on their presumed market values undermines market discovery concerning those assets.[358] In essence, Galle et al.'s new proposal implies that the assessed market value will continue to be the basis of the tax levied on most assets. Accordingly, this approach retains the general drawbacks associated with wealth taxation.

* * *

351. *Id.* at 1306.

352. *See* discussion *supra* Section II.C.

353. Galle et al., *supra* note 14, at 1264.

354. *Id.* at 1267 ("[W]e explain how the ULTRA can be used as one component of a larger valuation system to implement a feasible tax on extreme wealth . . . .").

355. *Id.* at 1299.

356. *See id.* at 1303; *see supra* Section II.C.

357. *See supra* Sections II.C.1 & II.C.2.

358. *See supra* Section II.C.4.

At the outset, the market value of investments, businesses, or the recombination of specific capital is not objectively measurable. The resulting uncertainty involves factors such as market demand, the success of competing endeavors, regulatory and financial decisions, and subjective assessments by (potential) buyers. The market is a discovery process that gradually resolves this knowledge problem concerning the market value of assets. Before transactions or realization events—which result in a sale price—authorities will lack information to calculate the wealth tax base. This means that tax liabilities will generate contestation and litigation on the ground, thereby undermining administrability. A hard-to-measure tax base will also fail to serve equity as it empowers the resourceful to litigate down their tax liabilities. The appeal to yet-undiscovered market values creates discretionary powers that enable favoritism or reliance on biases. Additionally, taxing assets on market values hinders innovative entrepreneurship associated with these assets and will hamper economic efficiency.

III. ALTERNATIVES FOR EQUITABLE TAXATION

Market Discovery Theory uncovers a knowledge problem for assessing and taxing wealth, which translates into administrative, equity, and efficiency issues. Considering the prevailing belief that the current tax system frustrates vertical equity, this Article proposes alternative methods for increasing taxes on the wealthy that do not undermine the cardinal criteria of administrability, equity, and economic efficiency.[359] Notably, Sections III.A and III.B explore two policies that are both equitable and administrable and serve economic efficiency.

A. Removal of the Capital-Gains Preference

The U.S. income-tax system draws a fundamental distinction between two categories. The first is ordinary income, such as wages and business profits, which are subject to progressive tax rates reaching up to 37%.[360] The other category consists of gains that arise from the sale of stocks, bonds, real estate, and similar assets that qualify for the capital-gains preference.[361] These capital

359. One alternative is the mark-to-market income tax, which taxes capital assets as they accrue rather than at realization. For example, if Giselle owns real estate valued at $4 million in 2024 and it increases to $5 million in 2025, a mark-to-market income tax would be applied to the accrued $1 million. A popular proposal for this approach is the Biden Billionaire Tax, which can be reviewed here: *Billionaire Minimum Income Tax*, CONGRESSMAN STEVE COHEN (July 25, 2022), https://cohen.house.gov/sites/evo-subsites/cohen-evo.house.gov/files/BMIT%20One%20Pager.pdf [https://perma.cc/BF3G-SB6P]. However, this tax faces similar issues as the wealth tax and will not be discussed further.

360. Based on the income-tax rates and brackets for 2024. *See Federal Income Tax Rates and Brackets*, IRS, https://www.irs.gov/filing/federal-income-tax-rates-and-brackets [https://perma.cc/UGR7-RFD5].

361. *See* I.R.C. § 1221.

gains are subject to tax rates of 0%, 15%, and a maximum of 20%.[362] Imagine Daisy, Giselle's childhood friend. Daisy works as a nurse and earns a taxable income of $55,000 after deductions. Daisy's marginal income-tax rate will be 22%.[363] Now, let us consider Giselle, who decides to sell shares from one of her companies. This sale results in a net gain of $2 million. Absent any ordinary income, Giselle's capital gain will be subject to tax rates of 0%, 15%, and 20%.[364] Surprisingly, Giselle's multimillion-dollar income will be taxed at a lower marginal rate than the few tens of thousands of dollars that Daisy earns.[365]

The capital-gains preference is sometimes justified as a response to the bunching problem, which arises when gains are taxed at the point of sale.[366] Because gains accrue over time, this may result in a higher marginal rate than would have otherwise applied with annually reported gains.[367] So, the "bunching" of gains can result in higher marginal taxes. However, the capital-gains preference is much more generous than the bunching issue.[368] The capital-gains preference is better understood as a move toward a consumption tax driven by considerations of economic efficiency. Traditional applications of the efficiency criterion recommend zero taxation on capital income, which effectively equates to a consumption tax.[369] Therefore, any reduction in the rate on capital income and favorable treatment of savings approximate the ideal of a consumption tax.[370]

From an equity perspective, the capital-gains preference effectively favors capital owners over workers. The bias toward capital investment over ordinary income may be seen as a subsidy for the wealthy—and thus hampers vertical equity. According to *A Joint CBO/JCT Report*, the data for 2010 showed that only 2% of the lowest income group (with incomes equal to or below $50,000) reported capital gains in contrast to 46% for the highest income group (with

362. *See id.* § 1(h) (imposing preferential tax rates for net capital gain). Assets must typically be held for more than a year to benefit from the capital-gains preference.

363. Based on the income-tax rates and brackets for 2023. *See IRS Provides Tax Inflation Adjustments for Tax Year 2023*, IRS (Oct. 23, 2023), https://www.irs.gov/newsroom/irs-provides-tax-inflation-adjustments-for-tax-year-2023 [https://perma.cc/EL4R-T47D].

364. *See* I.R.C. § 1(h).

365. *See id.* § 1(h); *IRS Provides Tax Inflation Adjustments for Tax Year 2023*, *supra* note 363.

366. *See* Burnet v. Harmel, 287 U.S. 103, 106 (1932).

367. GRAETZ & ALSTOTT, *supra* note 81, at 543.

368. The holding-period rule (a year and a day) gives the preference a vastly larger scope than is required by concern over the bunching problem. *See Topic No. 409, Capital Gains and Losses*, IRS (Jan. 30, 2024), https://www.irs.gov/taxtopics/tc409 [https://perma.cc/V7EM-KZE6]. Also, generally, an accrued-based mark-to-market tax results in higher overall taxation than a realization-based system under the same rates. *See* Noel B. Cunningham & Deborah H. Schenk, *The Case for a Capital Gains Preference*, 48 TAX L. REV. 319, 328–30 (1993).

369. *See supra* Section I.C.2.

370. *See supra* Section I.C.2; *see also* McCaffery, *supra* note 4, at 315 ("So the income tax, as is, is riddled with exceptions like preferential provisions for retirement savings that move it far from a pure 'income' tax and into a mish-mosh . . . .").

incomes exceeding $1 million).[371] Moreover, a 2013 study presents a strikingly skewed picture: the top income quintile claims a staggering 93% of the benefits from the capital-gains preference.[372] And within this group, the tax advantages disproportionately continue to skew in favor of those with higher incomes: 14% accrues to the top 96th–99th percentile income bracket while a substantial 68% is attributed to the top 1%.[373]

An old saying holds: two wrongs don't make a right. "[S]eparate law[s] for the rich"[374]—i.e., wealth taxes—to offset their beneficial tax treatment is not an effective means of rectifying the tax system's shortcomings.[375] The proper course of action is to stop exempting certain classes of capital owners from paying rates equal to those of ordinary citizens.[376] By eliminating the capital-gains preference and adopting a uniform rate schedule that applies equally to both workers and capital owners, the tax system can achieve more vertical equity.[377] In addition, it is worth noting that, unlike with wealth taxes, taxpayers are less likely to oppose increased capital-gains taxation.[378] Research by Liscow and Fox shows that 80% of respondents oppose the taxation of "unsold gains" involved in wealth taxes, and respondents largely prefer higher capital-gains rates, applicable upon sale.[379]

Unlike the wealth tax, the elimination of the capital-gains preference does not require herculean efforts from the IRS. Capital-gains taxes kick in at the time of realization which generally resolves all valuation issues.[380] Moreover, by adding simplicity to the tax system, this measure *decreases* administrative costs.[381] A uniform schedule on all realized income reduces the wasted time, energy, and

371. *A Joint CBO/JCT Report: The Distribution of Asset Holdings and Capital Gains*, CONG. BUDGET OFF. 31 (Aug. 4, 2016), https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/reports/51831-capitalgains.pdf [https://perma.cc/4LN3-4WVL] (referring to Exhibit 17).

372. *The Distribution of Major Tax Expenditures in the Individual Income Tax System*, CONG. BUDGET OFF. 36 (May 29, 2013), https://www.cbo.gov/sites/default/files/113th-congress-2013-2014/reports/taxexpenditureson e-column.pdf [https://perma.cc/3V73-9P9A].

373. *See id.*

374. *See* Caron, *supra* note 135 (referring to Alex Raskolnikov's work).

375. Hence, the motivation to create an equitable tax system should translate into removing loopholes and exceptions in the existing income system, not adding a new layer of hard-to-administer complexity.

376. *See* Orly Mazur, *Taxing the Robots*, 46 PEPP. L. REV. 277, 313 n.270 (2019).

377. Scholars who care for the progressivity of the tax code have been skeptical of removing the capital-gains preference during the era of the consumption-tax consensus. *See* Cunningham & Schenk, *supra* note 368, at 328–30; Eric M. Zolt, *The Uneasy Case for Uniform Taxation*, 16 VA. TAX REV. 39 (1996).

378. Zachary Liscow & Edward Fox, *The Psychology of Taxing Capital Income: Evidence from a Survey Experiment on the Realization Rule*, 213 J. PUB. ECON. 1, 1, 6 (2022).

379. *Id.* at 6, 10 n.11 ("Respondents are asked to choose between two ways of adding a given amount of new revenue: (a) a new tax only on sold stock gains at rates higher than the current ones, or (b) a new tax on unsold stock gains with rates equal to the current rate for stock sales. For this, only 32 % of respondents favored taxing unsold stock versus 68 % opposed.").

380. *See supra* Section I.C.1.

381. Dodge, *supra* note 53, at 443 (confirming that the capital-gains preference produces massive complexity).

tax dollars—for governments and taxpayers alike—spent on finding out when, whether, and how beneficial rates are applicable.[382]

The high revenue potential under this proposal is particularly noteworthy: the capital-gains preference cost the government $107.71 billion in 2022.[383] It is possible that the repeal of the capital-gains preference will not generate this full amount. Higher capital-gains rates might create an incentive not to sell.[384] The prevailing stepped-up-basis rule incentivizes the affluent to retain their assets until their passing, leveraging the provision that forgives all appreciation upon death.[385] In response, this Article combines heightened capital-gains taxes during one's lifetime with the closure of loopholes at the time of death.[386] As such, this proposal also effectively closes off the main tax-favored alternative (holding on to assets until death to leverage stepped-up basis).

Additionally, the elimination of the capital-gains preference can finance lower income-tax rates across the board. Indeed, under the principle of revenue neutrality, the billions currently spent on the capital-gains preference can be redirected to fund a decreased general rate schedule.[387] This approach once again addresses the concern that removing the capital-gains preference leads to decreased realizations of capital income: removing the capital-gains preference does not mean that capital gains will be taxed as high as ordinary income now.[388] A reduced uniform rate schedule will increase taxes on the wealthiest individuals while reducing taxation on what is presently categorized as "ordinary income"—pertaining to middle- and lower-income groups.[389] In doing so, it strengthens the vertical equity of the tax system in an administrable manner.

More generally, in the medium-term, somewhat-increased capital-gains rates do not dramatically decrease the number of realizations since capital has turned less elastic over time.[390] This proves that increased capital-gains rates will

---

382. *Id.* (confirming that the capital-gains preference generates sophisticated tax planning).

383. *See Tax Expenditures*, *supra* note 51, at 23.

384. "[C]apital gains elasticity" refers to the adjustments in individuals' behavior in terms of realizing capital gains in response to changes in tax rates on those gains. *See* Ole Agersnap & Owen Zidar, *The Tax Elasticity of Capital Gains and Revenue-Maximizing Rates*, 3 AM. ECON. REV.: INSIGHTS 399, 400, 409 fig.3 (2021) (using the term "capital gains elasticity" in Figure 3); *id.* at 399, 409 fig.3 (defining the concept of "capital gains elasticity").

385. *See* Galle et al., *supra* note 14, at 1278 ("We know for certain that holding assets until death is a key tool the wealthy use to minimize their income taxes . . . ."); *see also* Cunningham & Schenk, *supra* note 368, at 328–30 (noting that increased capital-gains taxation leads to less realizations); Fleischer, *supra* note 211, at 288.

386. *See infra* Section III.B.

387. *See Tax Expenditures*, *supra* note 51, at 23.

388. The highest rate on ordinary income is currently 37% and 20% on capital gains. Galle et al., *supra* note 14, at 1272; *Topic No. 409, Capital Gains and Losses*, *supra* note 368. The new uniform schedule shouldn't necessarily copy the current schedule for ordinary income. As suggested, overall decreased tax rates may be considered.

389. *See* Mazur, *supra* note 376, at 320.

390. *See* Natasha Sarin et al., *Rethinking How We Score Capital Gains Tax Reform*, 36 TAX POL'Y & ECON. 1, 1, 3 (2022) (observing that capital has turned less responsive to changes in the capital-gains tax rate).

yield strong increases in tax revenue.[391] Elasticity estimates are smaller than the estimates of official analysts, and recent economic research finds that a capital-gains tax rate of around 40% would maximize federal tax revenue.[392] This Article does not argue for taxing capital gains at 40%; rather, this research merely illustrates that under a uniform rate schedule a large share of the $107.71 billion expenditures can be recouped as tax revenue—and may thus finance lower general levels of taxation.[393]

Removing the capital-gains preference may serve economic efficiency as well. The current exemption for capital gains pushes taxpayers to favor one kind of economic return over another and discourages predominantly affluent individuals like Giselle from engaging in traditional work and earning salaries.[394] While a thorough economic analysis of the optimal tax rate on capital exceeds the focus of this Article, an argument may be raised that a uniform rate would remove distortions that hamper the creation and discovery of new wealth.[395]

B. *Deemed-Realization Tax*

Recall that Giselle invested $20 million in Yiki Ini artwork in 2021. Suppose she sells the investment in 2059 for $100 million; then, the sale results in $80 million of taxable income.[396] However, if she retains it and passes it on to one of her children upon her death, the appreciation of $80 million between 2021 and 2060 remains untaxed.[397] Unlike selling the asset during her lifetime, when gains are taxed, the transfer at death benefits from a "step up" in basis. Giselle's son will receive the asset with a basis equal to the market value at the date of

---

391. *Id.* at 1 (arguing that the revenue potential from increasing tax rates on capital gains may be substantially greater than previously understood and that the behavioral adjustments under increased rates are overstated).

392. *See* Agersnap & Zidar, *supra* note 384, at 412 ("[A] capital gains tax rate of around 40 percent would maximize federal capital gains tax revenues.").

393. In comparison, Saez and Zucman argue a wealth tax would raise $219 billion in 2022. *See* Saez & Zucman, *supra* note 32, at 2–3. Summers and Sarin argue it would raise ten times less, around $25 billion. *See* Summers & Sarin, *supra* note 270.

394. Dodge, *supra* note 53, at 443 (detailing how the capital-gains preference creates an incentive structure that favors one kind of economic return over another). On the discouragement of engaging in traditional work, see Louis Kaplow, *Human Capital Under an Ideal Income Tax*, 80 VA. L. REV. 1477, 1513 (1994); Michael Simkovic, *The Knowledge Tax*, 82 U. CHI. L. REV. 1981, 1982 (2015).

395. The idea is that when all economic activities are taxed at the same rate, individuals are truly incentivized to engage in activities that promote wealth creation. *See* Mazur, *supra* note 376, at 315 ("[T]axing capital income would reduce, rather than increase, market distortions and improve economic growth."); Gamage, *supra* note 152, at 401; Reuven S. Avi-Yonah & Dmitry Zelik, *Are We Trapped by Our Capital Gains?* 59 (Univ. of Mich. Pub. L. & Legal Theory Rsch. Paper Series, Paper No. 476, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2642860; Edward D. Kleinbard, *Capital Taxation in an Age of Inequality*, 90 S. CAL. L. REV. 593, 656–58 (2017); Chris William Sanchirico, *A Critical Look at the Economic Argument for Taxing Only Labor Income*, 63 TAX L. REV. 867, 867 (2010); Philippe Aghion et al., *Optimal Capital Versus Labor Taxation with Innovation-Led Growth* 2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 19086, 2013), http://www.nber.org/papers/w19086 [https://perma.cc/E44N-LJUP].

396. I.R.C. § 1001.

397. *See* Zelenak, *supra* note 48, at 363.

death.[398] Consequently, holding onto assets until death becomes a significant tax strategy as the act of passing assets to heirs effectively wipes out unrealized gains.[399]

The internal logic in income tax is to tax gains when assets change hands based on their cost or basis.[400] Forgiveness of all gains at death is a flaw in the system that causes large amounts of gains to escape taxation in perpetuity. This provision initially had a valid purpose when estate taxes were applicable as it avoided double taxation of assets.[401] Now, with a higher threshold and reduced liabilities in estate taxation, the stepped-up-basis provision de facto eliminates capital-gains taxation for those who have the means to retain assets.[402] For this reason, Stanley Surrey has long labeled the escape of substantial gains from the grasp of the income-tax system as "[t]he most serious defect in our federal tax structure."[403] As mentioned above, one benefit feeds another as the forgiveness of gains at death prevents the uniform taxation of capital gains and ordinary income.[404] This policy change hinges on the preclusion of other avenues that evade capital taxation, notably through the reform of trust law.[405] The taxation of gifts, on the other hand, can maintain the current carryover-basis rule since these gifts will be taxed at death under deemed realization.[406] Under the carryover rule for gifts, the appreciation in hands of the donor is not forgiven since the donee receives the same basis as the donor.[407] That said, gifts that occurred within a close time frame to the death (typically three years), so called

398. *See* Jay A. Soled et al., *Re-Assessing the Costs of the Stepped-Up Tax Basis Rule* 1 (Tul. Econ. Working Paper Series, Working Paper No. 1904, 2019), http://repec.tulane.edu/RePEc/pdf/tul1904.pdf [https://perma.cc/5JGT-BR97].

399. Gamage & Brooks, *supra* note 9, at 549.

400. *See* McCaffery, *supra* note 4, at 316 ("There are many tax law concepts and terms meant to ensure that 'mere appreciation' eventually gets taxed. Basis refers to one's after-tax cost of acquiring or holding an asset." (emphasis omitted)); Joseph M. Dodge, *Further Thoughts on Realizing Gains and Losses at Death*, 47 VAND. L. REV. 1827, 1839 (1994).

401. Gamage & Brooks, *supra* note 9, at 550.

402. *Id.* at 549–51.

403. Jerome Kurtz & Stanley S. Surrey, *Reform of Death and Gift Taxes: The 1969 Treasury Proposals, the Criticisms, and a Rebuttal*, 70 COLUM. L. REV. 1365, 1381–83 (1970).

404. *See supra* note 385 and accompanying text; *see also* Dodge, *supra* note 53, at 443 ("In contrast, enactment of a deemed-realization system would reduce holding periods of investments and that, in turn, would undermine the reasons for maintaining a separate capital gains system."); *see also* Dodge, *supra* note 400, at 1851 (repealing stepped-up basis allows for eliminating capital gains).

405. For instance, one strategy to safeguard wealth from deemed realization could involve placing assets into perpetual trusts, commonly known as dynasty trusts. *See* Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2466–68 (2006). It is important to note that unrealized gains within the trust should still be subject to some form of generational tax. *Id.* In principle, gifts occurring between individuals can maintain the current carryover-basis principle since all gifts will be taxed at death under the proposal. *See* I.R.C. § 1015(a); *see also id.* § 2001(b); *id.* § 2031(a); Dodge, *supra* note 53, at 439.

406. *See* I.R.C. § 1015(a); *see also id.* § 2001(b); *id.* § 2031(a); Dodge, *supra* note 53, at 439.

407. *See* I.R.C. § 1015(a).

"in contemplation of death," should be taxed under the deemed-realization rule.[408]

Taxing gains at death through deemed realization consistently executes the income-tax principle that gains must be taxed at some point.[409] Between the proposal to assess 20% of U.S. wealth annually and the current practice that de facto exempts the wealthy from capital gains tax (discussed in Section III.B.2) lies a promising solution.[410] Under this tax, known as a deemed-realization tax, a one-time levy taxes the appreciated value of Giselle's assets when they change hands.[411] Under a deemed-realization rule, the executor of the estate must calculate the unrealized gain on the asset—in Giselle's case, $80 million.[412] The mechanics of a deemed-realization provision are such that taxes on gains at death are charged as debt against the estate.[413] The case for a deemed-realization tax becomes more pressing when estate tax thresholds are very high, as is currently the case federally. However, it can also be adopted even if estate taxes are applied, which generally affect estates above $13.61 million for an individual.[414] First, deemed realization aligns with the income-tax principle that all gains should be taxed at some point. Additionally, it achieves increased taxes on wealthy individuals in ways that meet the other two goals of tax policy. Accordingly, the following paragraphs will explain how this measure (1) is administratively less costly than wealth taxation, (2) enhances the equity of the tax system, and (3) promotes, rather than undermines, economic efficiency.

1. *Administrability*

The first way in which the above-mentioned measure is administratively less costly has to do with the *frequency of the tax*: taxing capital gains at death will occur once per generation as opposed to annually.[415] If Giselle still owns Plenty at the time of her passing in 2060, a one-time levy is imposed on the unrealized gains before the shares are transferred to her three children. Under a federal wealth tax, the shares would presumably require valuation and taxation

408. *See id.* § 2035.

409. *See* Dodge, *supra* note 53, at 439 ("In sum, a deemed-realization approach is the natural and correct solution as a matter of doctrine.").

410. Deemed realization also logically means that losses are realized at death, as is the case in Canada. Income Tax Act, R.S.C., 1985, c. 1, s. 70(5); *see also* Joseph B. Katchen, *Deemed Realization: A Proposal*, 18 CANADIAN TAX J. 342, 344 (1970).

411. *See* Katchen, *supra* note 410, at 343.

412. *See* I.R.C. § 2031(c)(7); *see also* Katchen, *supra* note 410, at 343.

413. *See* Dodge, *supra* note 53, at 441; *see also* Katchen, *supra* note 410, at 345 ("The mechanics of the provision for deemed realization at death are that all the chargeable 'capital gains' accruing to the deceased on the deemed realization are aggregated, together with similar gains on any asset disposed of by 'donatio mortis causa' . . . .").

414. *See* I.R.C. § 2010(c).

415. *See* Dodge, *supra* note 400, at 1836 ("A deemed-realization-at-death rule would raise these issues about once a generation, as opposed to annually . . . .").

annually.[416] This means that federal authorities need to assess and tax Plenty's value from its start-up beginnings in 2024 until its dissolution in 2060—at least thirty-six times.[417] For a task as difficult as assessing market values, taxing all gains at once is far more feasible than a system that guesses the value of assets every year.[418]

One may argue that there are more deaths every year—approximately 3,000,000[419]—than there are taxpayers above the wealth tax threshold, approximately 100,000.[420] Yet, it is the overall wealth under consideration that determines administrative costs. On average, an estate's net worth ranges between $50,000 and $250,000.[421] Assuming a scenario with 3,000,000 estates, each averaging $150,000 in value, the cumulative total is $450 billion in deemed-realization amounts.[422] This figure pales in comparison to the trillions of dollars subject to evaluation for the annual wealth tax as previously discussed.[423]

Second, it is easier to map and value assets during an actual estate transfer. Within the existing system, taxing gains at death adds a request to the executor to consider an extra tax liability as part of the decedent's final tax bill.[424] In this way, deemed realization operates in a decentralized manner and makes use of the estate's inventory at the time of death. When the estate opens, the executor organizes the legal transfer: a new deed is notarized for a home or a new shareholder is recorded for a corporation.[425] Comparing wealth versus transfer taxes, taxing assets at the time of death is administratively convenient because it coincides with the moment when assets change hands. Additionally, for some estates, valuation is required anyway.[426] This further decreases the cost of

416. *See supra* note 24 and accompanying text.

417. *See supra* note 24 and accompanying text.

418. *See* Dodge, *supra* note 400, at 1836.

419. Farida B. Ahmad et al., *Provisional Mortality Data — United States, 2022*, 72 CTRS. FOR DISEASE CONTROL & PREVENTION: MORBIDITY & MORTALITY WKLY. REP. 488, 488–92 (2023), https://www.cdc.gov/mmwr/volumes/72/wr/pdfs/mm7218-H.pdf [https://perma.cc/N5QD-CAGT] (reporting 3,273,705 deaths in 2022).

420. *See* Saez & Zucman, *supra* note 32, at 1–2.

421. *Estate Settlement and Executor Statistics*, ESTATEEXEC, https://www.estateexec.com/Docs/General_Statistics [https://perma.cc/V2WQ-646P].

422. *See id.*

423. *See supra* Section II.C.2.

424. *See* Dodge, *supra* note 53, at 441. This also alleviates the liquidity issue since the executor is already obligated to settle existing liabilities through, for instance, abatement. *See* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 393 (11th ed. 2022). In general, debts in an estate are paid from the residue and then from the general bequests. Deemed realization does not necessarily follow the same order. *See* Dodge, *supra* note 400, at 1850.

425. *Cf.* ALA. CODE § 43-2-839 (1975); *id.* § 43-2-837 (1975); *see Managing Assets During Probate & an Executor's Legal Duties*, JUSTIA, https://www.justia.com/probate/probate-administration/the-duties-of-an-executor-of-an-estate/managing-assets-during-probate/ [https://perma.cc/E58R-CS5G].

426. For a similar observation after researching wealth vs. transfer taxes globally, see Kopczuk, *supra* note 275, at 333 ("Taxation at death is administratively convenient: this is the time when assets change hands and need to be valued anyway, thereby increasing [the] tax administration's ability to observe them."). Valuations are often not conducted for small estates. For reasons expressed at the end of Section III.B.2, small estates will often not be subject to the deemed-realization tax.

valuation for a deemed-realization rule. The current income tax requires valuation at death to step up the basis for the heirs.[427] This means that for valuable assets that appreciated significantly, a valuation is needed to identify the new basis for the beneficiary.[428] Also, the distribution of the estate to the heirs sometimes requires valuation, or even a sale—which logically reveals assets' market value.[429] Valuation is also required if the estate's value exceeds the federal or state threshold for either estate or inheritance taxes.[430] In conclusion, whereas a federal wealth tax implies a new superadministration that records and values 20% of the nation's wealth annually, deemed realization expands on already-existing rules for intergenerational transfers, which may even be paired with assessments. Now for many small estates, the above does not apply. For an estate involving only furniture, clothing, a car, and some collectibles, it may not be necessary to value these items individually before dividing them up.[431] Crucially, these assets typically have not appreciated and may even include a nondeductible loss.[432] A savvy family settlement can use those losses or unrealized appreciation of assets to avoid tax liability.[433] These types of estates will naturally escape the deemed-realization tax. Under the proposal, on the final tax bill of the decedent, it should be possible to note that the deemed tax doesn't apply since the estate contains no appreciated property.[434]

The third element of deemed realization that renders valuation easier is its unique incentive structure. Under the wealth tax, conflicting incentives arise between taxpayers and the IRS, as both parties benefit from valuations in

427. I.R.C. § 1014(a)(1). Technically, even small estates require valuation. *See* Dodge, *supra* note 400, at 1856 ("It is said that valuation in the case of small estates is not worth the effort, especially because no valuation would be required for estate tax purposes. This argument is disingenuous, because a valuation is required even in small estates under current law to establish a Section 1014 basis.").

428. Naturally, the less valuable the asset, the less likely it is for this to occur immediately, if at all.

429. When the heirs receive shares of the estate (for instance 40% for one heir and 60% for another), the dividing up the property requires valuation of the specific assets unless, in the unlikely scenario, there is only cash. Treas. Reg. § 20.2031-1.

430. I.R.C. § 2010(c); *see also id.* § 2001. For instance, any property above $1,000 dollars is subject to inheritance taxes in Maryland. *See Inheritance Tax*, OFF. OF THE REG. OF WILLS, https://registers.maryland.gov/main/taxes.html [https://perma.cc/A6EE-ACQJ].

431. *See Inheritance Tax*, *supra* note 430 (noting estate-tax exemption for personal property in estate not exceeding a total of $1,000); *see also Valuing Assets in an Estate & Legal Considerations*, JUSTIA, https://www.justia.com/probate/probate-administration/the-duties-of-an-executor-of-an-estate/valuing-assets-in-an-estate/#:~:text=Once%20you%20have%20identified%20and,federal%20or%20state%20estate%20tax [https://perma.cc/KBK6-QWE8] (providing advice on valuation of valuable personal property, but not necessarily all personal property).

432. *See* Katchen, *supra* note 410, at 361 (discussing assets held for personal use and their losses that will be nondeductible if those assets do not appreciate).

433. *See id.* at 361–62 (explaining how unrealized appreciation escapes tax liability).

434. De facto, for small estates with minimal asset appreciation, surviving spouses or other heirs will select the 'N/A' option on the tax return.

opposite directions.[435] The taxpayer gains from undervaluation and will use contestation and litigation to achieve this goal.[436] A deemed-realization tax levied during the transfer at death enables a smoother valuation process. With the taxpayer deceased and the executor managing the estate, the incentives are better aligned since the beneficiary of the bequest does not necessarily benefit from undervaluation.[437] Specifically, the value assigned for deemed-realization purposes becomes the basis for the beneficiary.[438] This means that a high valuation resulting in a high tax bill at death creates a lower future tax in the hands of the beneficiary of the asset, and vice versa—a low valuation and corresponding tax bill at death creates a higher future tax for the beneficiary.[439] Discounting for the time value of money, deemed realization is superior because the beneficiary does not always benefit from an undervaluation.[440] The deemed-realization tax targets an appreciation that will be taxed anyhow; undervaluation will be recouped via tax liabilities at a later date, and an inflated tax base leads to unnecessary, earlier payments or overpayments.

Once more, unlike wealth taxes, taxpayers are not likely to oppose deemed realization. Research by Liscow and Fox shows that taxing appreciation at death carries substantial support: 64% in the control group, or up to 79% of the respondents, favor taxing gains at death, whereas taxes on unsold gains do not carry wide support.[441] Public support for tax policies generally improves compliance and thus administrability.[442]

---

435. *See* Lederman, *supra* note 29, at 1497 (noting that valuation issues are challenging due to the opposing incentives that taxpayers have relative to the agency).

436. *See supra* Section II.C.2.

437. *See* Dodge, *supra* note 53, at 447.

438. *Id.* ("It can be noted here, nevertheless, that an income tax can adopt a flexible approach to valuation, partly because whatever value is assigned for deemed-realization purposes becomes the basis for the transferee . . . .").

439. For instance, a beneficiary of a large estate with multiple heirs may prefer a higher valuation and taxation at the estate level to reduce her future tax burden. Under certain circumstances, beneficiaries may still prefer a lower valuation (for example, a sole beneficiary might want a low valuation to maximize the total inheritance). However, the key difference is that, unlike with a wealth tax, this isn't always the case.

440. *See id.* at 490 ("Under a deemed-realization system, however, there is far less reason to aim for 'correctness' about which inherently lacks precision (the valuation enterprise), because an inaccurate valuation cuts both ways under the same tax.").

441. Liscow & Fox, *supra* note 378, at 8 (recording 64% of support in the control group and 79% of support in the group that was only asked about the taxation of rich individuals).

442. *See generally* Jonathan Farrar et al., *Fairness, Legitimacy, and Tax Compliance*, 19 EJOURNAL TAX RSCH. 186 (2022) (detailing how the perceived legitimacy of taxes increases taxpayer compliance); Eva Hoffman et al., *Enhancing Tax Compliance Through Coercive and Legitimate Power of Tax Authorities by Concurrently Diminishing or Facilitating Trust in Tax Authorities*, 36 L. & POL'Y 290 (2014) (theorizing that the increase of the legitimate power of tax authorities increases reason-based trust, voluntary cooperation, and perceptions of a service climate).

2. *Equity*

Stepped-up basis cost the federal government $49.92 billion in 2019,[443] $43.91 billion for 2022,[444] and a projected $74.83 billion for 2031.[445] Discounting the fact that deemed realization and removing the capital-gains preference are more administratively feasible, the combined effect of these two measures would result in a substantial increase in tax revenue, reaching approximately three-fourths of the theoretical revenue that the wealth tax would raise.[446] A deemed-realization tax does not involve a special tax on the rich like the wealth tax does. On its face, it applies as a general rule to all taxpayers.[447] However, this formal feature does not prevent the tax from increasing the tax burden on the wealthy.[448] The stepped-up-basis loophole is the main driver of the so-called "Buy, Borrow, Die" strategy.[449] This approach, endorsed by tax planners for the wealthy, involves delaying the recognition of capital gains until death, allowing taxpayers to save millions in taxes on highly appreciated assets.[450] By wisely investing and leveraging assets as collateral,[451] taxpayers like Giselle can acquire new assets without paying income tax on the gains until their death, when the income tax forgives all appreciation.

Progressive politicians and scholars, such as Ed McCaffery, identify stepped-up basis as the fiscal cause that drives wealth inequality.[452] The

---

443. *Tax Expenditures*, U.S. DEP'T TREASURY OFF. TAX ANALYSIS (Oct. 19, 2018), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2020.pdf [https://perma.cc/S3Y6-7CZ9].

444. *Tax Expenditures*, U.S. DEP'T TREASURY OFF. TAX ANALYSIS (Dec. 9, 2021), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2023.pdf [https://perma.cc/8XKS-XR3Q].

445. *Id.*

446. As mentioned in Section III.A, the proposed tax must factor in behavioral adjustments. Given the wealth tax's administrative weaknesses, there is little reason to believe this measure would be better at attaining its intended effect. *See* McCaffery, *supra* note 4, at 306 (discussing generally the weaknesses of the tax system).

447. For the reasons discussed *supra*, many small estates will also not be subject to the deemed-realization tax discussed in Section III.B.1.

448. The tax would not only lift the burden on those with wealth above $50 million but also on the "affluent," and any group with substantial assets passed at death. *See generally* Alex Raskolnikov, *Taxing the Ten Percent* (Colum. L. & Econ., Working Paper No. 4760118, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4760118 (criticizing the view that only the "extremely wealthy" should pay more in taxes, which the wealth tax promotes, and arguing that the richest 10% should all pay more, which is what a deemed-realization tax achieves).

449. *See* McCaffery, *supra* note 4, at 321.

450. *See id.* at 306.

451. Cash proceeds from loans are not "income" since they are offset by "liabilities." *See* Woodsam Assocs., Inc. v. Comm'r, 16 T.C. 649, 649–52 (U.S.T.C. 1951) (describing a taxpayer who took out several mortgages on the same property tax-free), *aff'd*, 198 F.2d 357 (2d Cir. 1952).

452. For the Obama administration's proposal for a deemed-realization tax, see CONG. BUDGET OFF., *supra* note 372, at 6, 31 (referring to Table 1, which shows the projected budgetary effect of capital gains on assets transferred at death as $644 billion from 2014 to 2023). For the scholarly perspective, see McCaffery, *supra* note 4, at 306 ("All the statistics about economic inequality in the United States are getting worse . . . . The surprise is that the U.S. tax system is a significant cause of these problems, not a cure for them. The tax law doctrines that allow those who already have financial wealth to live, luxuriously and tax-free, are simple. They follow the steps in what I have dubbed Tax Planning 101: Buy/Borrow/Die." (emphasis omitted)).

equitable alternative to wealth taxes is to tax capital gains at death. Deemed realization undermines "Buy, Borrow, Die" as it eliminates the ultimate reason for holding onto assets. This would be a major change in the tax system: for families headed by those seventy-five or older, unrealized real-estate capital gains account for 23.8% of net worth.[453] Wealth is unequally distributed, and taxing capital gains at death impacts the wealthy much more. A 2013 Congressional Budget Office study observed that the current stepped-up basis serves as a subsidy for the rich.[454] Sixty-five percent of the tax benefit goes to the top quintile income group. Within that group, the tax benefits are again highly skewed toward the rich: 28% goes to the 96th–99th percentile income group—and no less than 21% goes to the top 1%.[455] Provided that other loopholes are also addressed,[456] this means that repealing the stepped-up basis will mostly affect taxpayers in the top 20%. Since the top 1% own a greater share of assets subject to the stepped-up basis, a repeal will affect those taxpayers more significantly.[457]

3. Efficiency

Stepped-up basis is one of the most inefficient features of the tax system: it creates lock-in effects because taxpayers hold onto assets longer than they otherwise would.[458] If a museum wants to buy Giselle's Yiki Ini artwork today for $40 million—creating $20 million in (taxable) gains—she will forgo this sale, however profitable, in order to transfer the assets tax free at death.[459] In contrast to the existing law, where capital owners benefit from retaining assets until their demise, the deemed-realization tax will enhance capital mobility and remove these undesirable distortions in the allocations of resources.[460]

Taxing gains at death has a second beneficial economic effect compared to wealth taxes. Section II.C.4 showed that wealth taxes eliminate nonprofitable projects early in the market process. This Article argues that taxing the

453. *Tax Expenditure for Exclusion of Capital Gains at Death*, U.S. DEP'T TREASURY OFF. TAX ANALYSIS 1, 2 (Aug. 2014), https://home.treasury.gov/system/files/131/Step-Up-Basis-2014.pdf [https://perma.cc/6MJR-ZSNL].

454. *See* CONG. BUDGET OFF., *supra* note 372.

455. *Id.* at 36.

456. The effectiveness of taxing capital gains at death will also depend on the reform of trust law. Estates well above the threshold often escape estate taxes because, by the time property transfers to the next generation, wealth is placed in an irrevocable trust outside the hands of the fisc. *See* Schanzenbach & Sitkoff, *supra* note 405, at 2472–75 (discussing different reforms and repeals in trust law).

457. Huaqun Li, *Analysis of the Economic, Revenue, and Distributional Effects of Repealing Step-up in Basis*, TAX FOUND.: TAX POL'Y BLOG (Feb. 24, 2020), https://taxfoundation.org/blog/repealing-step-up-in-basis-analysis/ [https://perma.cc/2PZP-VY47].

458. Zelenak, *supra* note 48, at 363 ("[E]lderly taxpayers are discouraged from disposing of appreciated assets, because if they hold the assets until death, the appreciation will escape income taxation permanently.").

459. *See id.*

460. Katchen, *supra* note 410, at 346.

perceived market values of assets hampers innovation.[461] However, taxing gains at death does not undermine the market discovery process for the obvious reason that the proposed capital-gains tax takes place after that process. Rather than punishing nonprofitable endeavors, deemed realization refrains from taxing projects on their general market value during the life of the capital owner. Taxation kicks in only when the taxpayer is deceased.[462] This offers entrepreneurs fiscal breathing room: they are not taxed purely for holding assets of which the perceived market value goes up, and it preserves the market as an open-ended space for economic experimentation. Taxing capital gains at death finds a middle ground between taxing too early—under the wealth tax—which stifles innovation and thus efficiency, and not taxing at all—under current tax law—which undermines equity.

CONCLUSION

In tax law's static models, assets have objective values and fixed returns. This explains why the literature presents wealth taxation's valuation challenge as a surmountable administrative issue. This Article corrects this view and explains that the market discovery process reveals the value of specific assets and investments over time. *Ex ante*, we do not know the value of any given asset; consequently, competing capital investments exist against the backdrop of a knowledge problem. In the real world, taxing agencies will fail to systematically value capital assets in the manner wealth taxation requires. The current U.S. tax system magnifies this knowledge problem because a federal wealth tax would require the annual assessment of up to 20% (or more) of national wealth. The attempt to tax trillions of dollars of hard-to-value assets annually will lead to massive administrative problems and generate a sprawl of litigation. Research on property taxes shows that assessment-based taxes do not guarantee equitable outcomes. On the contrary, valuation difficulties create an opening for those with the most legal resources to bring down their tax liabilities. In terms of economic efficiency, levying taxes based on the overall market values of assets hinders innovative entrepreneurship associated with these assets and constrains the potential for generating new wealth.

Increasing taxes on wealthy individuals requires clear-cut, workable rules. Removing the capital-gains preference does not require any extra valuation effort and increases taxes on wealthy individuals while meeting the goals of administrability and economic efficiency. Furthermore, the uniform taxation of ordinary and capital income should coincide with a deemed-realization rule that eliminates the stepped-up-basis loophole. Taxing transfers of unrealized gains at death puts a halt to the notorious "Buy, Borrow, Die" strategy and effectively

---

461. *See* discussion *supra* Sections II.A, II.B & III.A; *see also* OECD, *supra* note 9, at 63.
462. *See* Katchen, *supra* note 410.

strengthens the vertical equity of the tax system. Compared to the wealth tax, deemed realization is more administrable. This tax would occur once per generation, corresponding with the often-necessary valuation of assets at death. Additionally, this strategy aligns the incentives of the IRS and beneficiaries of the bequest concerning valuation. Deemed realization takes advantage of the market discovery process, promotes economic efficiency, and unlocks billions of dollars' worth of capital.