Washington Law Review

Volume 97 | Number 1

3-1-2022

How Should Inheritance Law Remediate Inequality?

Felix B. Chang

How Should Inheritance Law Remediate Inequality?

Cover Page Footnote

Professor and Co-Director, Corporate Law Center, University of Cincinnati College of Law. Affiliated Fellow, Thurman Arnold Project, Yale School of Management. E-mail: felix.chang@uc.edu. I am grateful to Bridget Crawford, Adam Hofri, and Alex Boni-Saenz for their support and insightful comments. Thanks, too, to Jeremy Bearer-Friend, Naomi Cahn, Nate Ela, Brian Frye, Lusina Ho, Natalie Lynner, Emily Taylor Poppe, Claire Priest, Daniel Schaffa, Brian Sloan, and Ramsi Woodcock. This Article benefitted greatly from the "Comparative Approaches to Inheritance and Inequality" panel at the 2021 Law and Society Conference, the Law and Macro Conference organized by Yale Law School, the Inframarginalism and Internet Conference organized by University of Kentucky College of Law, and the "Trusts and Estates in Society" panel organized by the 2022 AALS Trusts and Estates Section. I thank Jaclyn Tani, Maya Itah, Arianna Nord, Sarah Cooper, Amy Barbour, Jessica Cable, Tjitske Dekker, Madison Welsh, Caitlin Loyd, Jasmin Chigbrow, Ali Johnson, and the rest of Washington Law Review for their careful editing.

HOW SHOULD INHERITANCE LAW REMEDIATE INEQUALITY?

Felix B. Chang*

Abstract: This Article argues that trusts and estates ("T&E") should prioritize intergenerational economic mobility—the ability of children to move beyond the economic stations of their parents—above all other goals. The field's traditional emphasis on testamentary freedom, or the freedom to distribute property in a will as one sees fit, fosters the stickiness of inequality. For wealthy settlors, dynasty trusts sequester assets from the nation's system of taxation and stream of commerce. For low-income decedents, intestacy (i.e., the system of property distribution for a person who dies without a will) splinters property rights and inhibits their transfer, especially to nontraditional heirs.

Holistically, this Article argues that T&E should promote mean regression of the wealth distribution curve over time. This can be accomplished by loosening spending in ultrawealthy households and spurring savings and investment in low-income households.

T&E scholars are tackling inequality with greater urgency than ever before, yet basic questions remain. For instance, what do we mean by "inequality"? How can we remediate inequality? And what goals should we advance in redressing inequality? This Article contributes to these conversations by articulating a comprehensive framework for progressive inheritance law that redresses long-term inequality.

---

* Professor and Co-Director, Corporate Law Center, University of Cincinnati College of Law. Affiliated Fellow, Thurman Arnold Project, Yale School of Management. E-mail: felix.chang@uc.edu. I am grateful to Bridget Crawford, Adam Hofri, and Alex Boni-Saenz for their support and insightful comments. Thanks, too, to Jeremy Bearer-Friend, Naomi Cahn, Nate Ela, Brian Frye, Lusina Ho, Natalie Lynner, Emily Taylor Poppe, Claire Priest, Daniel Schaffa, Brian Sloan, and Ramsi Woodcock. This Article benefitted greatly from the "Comparative Approaches to Inheritance and Inequality" panel at the 2021 Law and Society Conference, the Law and Macro Conference organized by Yale Law School, the Inframarginalism and Internet Conference organized by University of Kentucky College of Law, and the "Trusts and Estates in Society" panel organized by the 2022 AALS Trusts and Estates Section. I thank Jaclyn Tani, Maya Itah, Arianna Nord, Sarah Cooper, Amy Barbour, Jessica Cable, Tjitske Dekker, Madison Welsh, Caitlin Loyd, Jasmin Chigbrow, Ali Johnson, and the rest of *Washington Law Review* for their careful editing.

INTRODUCTION

Every generation gets the trusts and estates ("T&E") scholarship it deserves.[1] In our era of rampant inequality, the traditional conception of T&E, as a field animated by testamentary freedom,[2] now seems outdated. Freedom of testation entrenches the privileges and wealth distributions of the status quo.[3] At its most extreme, the cold, dead hand of a decedent can steer the disposition of their assets in perpetuity, outside the reach of all creditors.[4]

Today, T&E scholars are confronting the doctrines and default rules most responsible for accelerating inequality.[5] But fundamental questions remain. What do scholars mean by "inequality," and how can inheritance law advance holistic solutions that distribute wealth more evenly across society?

Existing proposals have overlooked how T&E's components fit together—as well as how they complement, or work against, the broader legal and economic system. For instance, business laws determine how wealth is generated in the first instance. If the ground rules for inheritance

---

1. *See Organized Crime and Illicit Traffic in Narcotics: Hearing Before the S. Permanent Subcomm. on Investigations of the Comm. on Gov't Operations*, 88th Cong. 8 (1963) (statement of Robert F. Kennedy, Att'y Gen. of the United States) https://www.justice.gov/sites/default/files/ag/legacy/2011/01/20/09-25-1963.pdf [https://perma.cc/HC6E-HT3F] ("[E]very society gets the kind of criminal it deserves. What is equally true is that every community gets the kind of law enforcement it insists on."); NINA AUERBACH, OUR VAMPIRES, OURSELVES 145 (1995) ("[E]very age embraces the vampire it needs.").

2. Testamentary freedom is the freedom of a testator to dispose of their estate as they please. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 491 & n.9 (1975). More colorfully, testamentary freedom is often called "dead hand control." *See* RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 76 (2010).

3. Naomi Cahn, *Dismantling the Trusts and Estates Canon*, 2019 WIS. L. REV. 165, 167–68.

4. *See* Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149, 1158–60 (2011) (reviewing LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW (2009)).

5. *See, e.g.*, Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts, and Estates*, 49 REAL PROP. TR. & EST. L.J. 317, 340–43 (2014) (advancing a critical view of T&E that reveals structural barriers to socioeconomic equality); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 464–68 (2010) (evaluating how facially neutral inheritance laws perpetuate wealth inequality); Carla Spivack, *Broken Links: A Critique of Formal Equality in Inheritance Law*, 2019 WIS. L. REV. 191, 192 (extending the discourse on formal equality to inheritance law).

and succession are inattentive to the disparities spurred by corporate law, financial regulation, and competition policy, then those disparities can be locked in across generations.[6] Similarly, boom and bust cycles produce winners and losers. Dead hand control of wealth can augment the ensuing disparities by keeping large pools of assets out of the stream of commerce and countering government measures to loosen spending.[7]

A bimodal distribution now defines the instruments of T&E. On one hand, trusts and nonprobate instruments cater to the privacy desires and dynastic aspirations of the hyperwealthy.[8] On the other hand, intestacy and the probate system serve low-income households terribly, throwing intrafamilial conflicts into public view.[9] This schism, between probate and nonprobate, reinforces the unequal distribution of incomes and family compositions across society.[10]

This Article shows how T&E can remediate wealth inequality at a macroeconomic scale.[11] Many of its rules are inputs into the tax system, a comprehensive redress for inequality. For example, fortifying the rule against perpetuities ("RAP") frees up large estates for taxation and, more importantly, incentivizes settlors[12] to divert assets to spending.[13] At the other end of the wealth spectrum, where most decedents pass without having written wills,[14] intestacy reform could preserve assets for

---

6. *See* Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 75–76 (2018); Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981, 984–85 (2020). *See generally* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017).

7. S*ee* Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 B.C. L. REV. 145, 177–78 (2019).

8. *See infra* section III.A.

9. *See infra* section III.B.

10. *See infra* section II.C.

11. For a definition of macroeconomics and its intersections with law, see Yair Listokin, *Law and Macro: What Took So Long?*, 83 LAW & CONTEMP. PROBS. 141, 144 (2020), noting "[m]acroeconomics is the study of how the aggregate economy behaves, examining phenomena like inflation, growth, unemployment, money, and interest rates."

12. A settlor is the person who creates a trust. RESTATEMENT (THIRD) OF TRUSTS § 3 (AM. L. INST. 2003).

13. The most well-known formulation of the RAP is that "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES 174 (3d ed. 1915). The rule determines when estate taxes accrue to a trust; if a state has abolished the RAP or set the vesting period at 1,000 years, grantors can settle trusts under those rules to escape estate taxes altogether. *See* Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1313–15 (2003); *see also* 26 U.S.C. § 2631 (enacting the GST exemption amount).

14. *See* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 878 (2012). The rate of intestacy is difficult to quantify, but most studies suggest that the rate is well over 60%. *See id.* at 887–89 and accompanying sources.

productive use by heirs, thereby supplementing government programs, tax refunds, and intermittent stimuli.[15]

Yet reforming T&E's rules and doctrines can produce distortions that complicate any remediation of inequality. Tightening the tax loopholes around dynasty trusts[16] might prove counterproductive if, for instance, settlors choose to invest rather than spend down money that would otherwise fund trusts.[17] When elites seek investment opportunities in a stagnant economy, like the one we find ourselves in today, their wealth compounds much more quickly than the incomes of average wage-workers.[18] Inequality accelerates in the short term.[19]

We must therefore be mindful of how inheritance laws and the macroeconomy fit together. Where there is incongruence (e.g., between reducing inequality and cushioning recessions) or indeterminacy (e.g., when we trade one type of inequality for another), this Article argues that T&E should prioritize the long-term goal of fostering intergenerational economic mobility ("IEM")—the ability of children to move beyond the economic stations of their parents.[20]

By reorienting inheritance law around IEM, this Article provides a theoretical framework for addressing inequality. Its singular contribution

---

15. On the tortuous path of debates over pandemic stimulus checks in early 2021, see Luke Broadwater & Jim Tankersley, *Biden's Economic Plan Is Set to Clear a Senate Hurdle*, SEATTLE TIMES (Feb. 4, 2021, 9:02 PM), https://www.seattletimes.com/nation-world/bidens-economic-plan-is-set-to-clear-a-senate-hurdle/ [https://perma.cc/7CN6-5WLT] and Luke Broadwater & Jim Tankersley, *Republicans Pitch Biden on Smaller Aid Plan as Democrats Prepare to Act Alone*, N.Y. TIMES (Feb. 1, 2021), https://www.nytimes.com/2021/02/01/us/politics/republicans-biden-coronavirus-stimulus.html [https://perma.cc/GVL8-ZDS6].

16. Dynasty trusts, or perpetual trusts, are trusts created under the laws of a state that has repealed the RAP, avoiding estate and wealth transfer taxes altogether. Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* 1–8 (Univ. Mich. L. Sch. Pub. L. & Legal Theory Rsch. Paper Series, Working Paper No. 259, 2016), https://deliverypdf.ssrn.com/delivery.php?ID=096101005029123029086106096030005072014032009009067021125028079125026005118021102081056106037048008024003098084081092108093029103081013034035005003083107115003120065034004029073072078011113101024125009114019078070068101065124091123094006116108069064&EXT=pdf&INDEX=TRUE\ [https://perma.cc/LW3V-GRE9]. For a response, see generally Bridget J. Crawford, *Who Is Afraid of Perpetual Trusts?*, 111 MICH. L. REV. FIRST IMPRESSIONS 79 (2012), addressing an early draft of Professor Waggoner's criticisms of perpetual trusts).

17. *See infra* section III.A.

18. *See* Robert Armstrong, Opinion, *Rising Markets and Inequality Grow from the Same Root*, FIN. TIMES (June 8, 2020), https://www.ft.com/content/a25bf8b6-a962-11ea-a766-7c300513fe47 (last visited Jan. 14, 2022).

19. *Id.*

20. In economics, IEM can be defined and measured in different ways. One option is to gauge the elasticity of incomes between fathers and sons, so as to avoid the variability of women's income in the labor force due to the gendered wage gap. *See* Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. ECON. PERSPS. 79, 81 (2013).

is to unify the disparate calls for reform within T&E. Concerned about runaway inequality, scholars prescribe a variety of changes to T&E's rules and standards, riddling its defaults with exceptions.[21] Left unabated, this trend will leave the regime "more holes than cheese." An overhaul of T&E is therefore needed to redress inequality—and it should start with the field's foundational principles.[22]

The attention to IEM allows this Article to take a macroeconomic perspective that brings T&E into sharper relief, highlighting the field's capacity to accomplish two goals—loosening spending in ultrawealthy households and spurring savings and investment in low-income households.[23] The first goal breaks up accumulated wealth among the ultrarich, while the second goal eases the transmission of wealth in low-income households. If realized, these aspirations will induce the extreme ends of the wealth distribution bell curve to converge toward the middle.

More broadly, estate planning funnels resources both into and out of the macroeconomy. The demarcations separating tax law (which effectuates redistribution), business law (which governs the generation of wealth), and T&E (which governs the intergenerational transmission of wealth) can be blurry.[24] Yet inheritance law can also be a critical interface to claw back the ill-gotten gains incentivized by lax business laws. Inheritance law can then redirect those gains into the tax system in a progressive manner, targeting large estates for taxation while leaving small estates intact.[25] Assembling these threads into a comprehensive framework, this Article provides a blueprint for what progressive inheritance law might look like.

Secondarily, this Article enriches the law and macroeconomics literature by illustrating how T&E can check inequality. "Law and macro" is quickly emerging as an alternative to the efficiency-obsessed, microeconomics-focused bent of law and economics.[26] Yet inequality

---

21. *See, e.g.*, Danaya C. Wright, *What Happened to Grandma's House: The Real Property Implications of Dying Intestate*, 53 U.C. DAVIS L. REV. 2603, 2637 (2020) (proposing a prohibition on tax sales and foreclosures of decedent property in order to prevent loss of wealth); Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113, 120–22 (2009) (analyzing provision of clear title to properties inherited by low-income households).

22. *E.g.*, testamentary freedom; *see infra* section I.A.

23. *See infra* section II.C.

24. *See* Chang, *supra* note 6, at 84–86 (conceptualizing wealth—and its regulation—as a system).

25. *Id.* at 85–86.

26. *See generally* Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 YALE J. ON REGUL. 791 (2017) (advancing a macroeconomic perspective on law); Listokin, *supra* note 11 (exploring why the development of law and macroeconomics lagged so far behind that of law and microeconomics). Professor Listokin now organizes an annual Law and Macro conference. For the latest program, see 4TH CONFERENCE ON LAW AND MACROECONOMICS, https://lawandmacroeconomics.com/ [https://perma.cc/V2KU-FPE3].

presents unique challenges. The compounding of wealth inequality does not swing like, or follow the pace of, economic cycles—it is a slower burn, though intensifying in recent years.[27] Since 1986, when updates to the Generation Skipping Transfer tax spurred the creation of dynasty trusts,[28] the U.S. has undergone at least four cycles of recession and recovery, including the 2008 financial crisis.[29] During this time, inequality has not wavered.[30] Some of the antidotes to inequality emanating from T&E will take generations to bear fruit. And as a stimulus measure, constraining dynasty trusts might, perversely, incentivize settlors to seek out investments, which further concentrates corporate wealth.[31] We must therefore be mindful of how laws governing the transmission of wealth (i.e., T&E) and the economy fit together.

The remainder of the Article proceeds as follows: Part I makes the case for IEM as T&E's animating principle, abandoning the misplaced deference to testamentary freedom. Part II argues that a focus on IEM can reduce long-term inequality by pulling both ultrawealthy and low-income households closer to the middle of the wealth distribution spectrum. With these guideposts, Part III outlines what a progressive brand of T&E might look like, assessing reforms to dynasty trusts and intestacy.

I. Reorienting the Goals of Trusts and Estates

T&E was long thought to be the province of testamentary freedom, or the notion that a testator can dispose of their assets however they please.[32] Until roughly 1990, neither inequality nor redistribution played much role

---

27. *See* JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 2–3 (2012).

28. Robert H. Freilich, *Eliminating Perpetual Trusts Is a Critical Step Towards Alleviating America's Devastating Income Inequality*, 88 UMKC L. REV. 65, 78 (2019); Waggoner, *supra* note 16, at 1–2.

29. *See* Tom Huddleston Jr., *How Many Recessions You've Actually Lived Through and What Happened in Every One*, CNBC (Apr. 9, 2020, 2:13 PM), https://www.cnbc.com/2020/04/09/what-happened-in-every-us-recession-since-the-great-depression.html [https://perma.cc/N2LG-YBRN].

30. ANJALI BHATT, MELINA KOLB & OLIVER WARD, PETERSON INST. FOR INT'L ECON., HOW TO FIX INCOME INEQUALITY? (Madona Devasahayam & Steven R. Weisman eds., 2020), https://www.piie.com/microsites/how-fix-economic-inequality#group-Intro-dc0T90OR22 [https://perma.cc/VT2N-HTDW].

31. *See infra* Part I.

32. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. L. INST. 2003) (freedom of testation is the "organizing principle of the American law of donative transfers"). A testator is the "person who executes a will." SHELDON F. KURTZ, DAVID M. ENGLISH & THOMAS P. GALLANIS, WILLS, TRUSTS AND ESTATES: INCLUDING TAXATION AND FUTURE INTERESTS 24 (6th ed. 2021).

in the field.[33] This is understandable. After all, T&E governs discrete relationships among heirs and between principals and agents. It is replete with legal rules balancing the interests among tightly drawn circles of constituents.[34] Even the handful of T&E scholars embracing economic analysis have avoided the subject of redistribution.[35]

This section makes the case for reorienting T&E's organizing principle from testamentary freedom to intergenerational economic mobility. It begins by tracing the evolution of T&E scholarship from testamentary freedom to inequality. Then it examines the macroeconomic markers of IEM.

A. The Shift from Testamentary Freedom to Redressing Inequality

The approach of T&E scholars toward testamentary freedom has evolved over time. In 1975, John Langbein wrote that "virtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life."[36] Professor Langbein made this sweeping declaration to marshal outrage against the rigid formalism of wills execution, which requires wills to be written and signed by testators and attested by witnesses.[37] As he and others saw it, these formalities emanated from the arcane Wills Act of 1677, which

---

33. *See* Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990) (foundational article arguing that property owned at death should be sold with proceeds paid to the government); *see also* Crawford & Infanti, *supra* note 5, at 340 ("In view of the role that the law of wills, trusts, and estates plays in perpetuating the concentration of wealth and reifying the privilege of a wealthy few, one would expect that an examination of this area through the lens of socioeconomic class would be a natural starting point for critical analysis. Surprisingly, however, there is a paucity of work exploring the class-based aspects of the law of wills, trusts, and estates.").

34. Heirs are generally the takers under a will, trust, or other applicable succession law. *See* KURTZ ET AL., *supra* note 32, at 12. In T&E, agents include trustees and executors, whose principals would be heirs and beneficiaries. The legal rules of T&E include intestacy, rules of construction, execution formalities, and curative doctrines (all of which apportion estates among heirs) and fiduciary duties (which apportion the balance of power between beneficiaries and fiduciaries such as executors and trustees). For a full taxonomy, see Chang, *supra* note 6.

35. For examples of economic analysis of T&E sans redistribution, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–8 (1992); Daniel B. Kelly, *Trust Term Extension: An Economic Analysis*, 67 FLA. L. REV. F. 85, 87–88 (2015); and Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2589 (2011). *But see* Chang, *supra* note 6, at 92, 96–98 (identifying how law and economics scholars in particular downplay the redistributive potential of legal rules); Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821, 823 (2000) ("[T]he income tax system possesses several clear advantages over legal rules as a means of redistribution.").

36. Langbein, *supra* note 2, at 491. Langbein did note estate taxes as an exception, and he was writing in the broader context of execution formalities.

37. *Id.* at 490.

could be unresponsive to testamentary desires.[38] These reformers therefore pushed for probate courts to suspend execution requirements if doing so would honor testamentary intent.[39]

At the time, the estate tax exemption was $60,000, and the top estate tax rate was 77% (applying to a top bracket of $10 million and beyond).[40] Advocates of estate tax repeal (hereinafter, the "Repealers") were mostly an unsympathetic band of superrich families who garnered the occasional rate reduction or legislative preference.[41] Professor Langbein had invoked testamentary freedom in his fight to add a more liberal curative doctrine into the Uniform Probate Code for nonconforming wills.[42] Over time, however, he would become indelibly associated with the contractarian turn in T&E's fiduciary standards, which loosened the duties binding trustees and investment advisors.[43] This turn reflected the ethos of the time—the libertarian creep of law and economics into antitrust, contracts, corporate law, torts, and eventually T&E.[44] The enduring legacy of Professor Langbein's body of work, then, is the sentiment that testators should be able to dispose of their assets as they please.

A generation later in 1990, when the estate tax exemption had grown over tenfold to $600,000 and the top estate tax rate had dwindled to 55% (applying to a top bracket of three million),[45] Mark Ascher argued that a

---

38. *See id.* at 490–91; Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033, 1035 (1994).

39. *See* Mann, *supra* note 38.

40. Darien B. Jacobson, Brian G. Raub, & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, STAT. INCOME BULL. (I.R.S., Washington, D.C.), Summer 2007, at 118, 122, https://www.irs.gov/pub/irs-soi/07sumbul.pdf [https://perma.cc/W6B4-UXFY].

41. *See* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 18–21 (2005) (describing the Gallo wine family in California who successfully lobbied Senators Cranston and Dole in 1978 to get ten years to pay off estate taxes).

42. This more liberal curative doctrine was harmless error, also known as the dispensing power. *See* John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 1 (1987).

43. *See generally, e.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995) (adapting, to the trust context, the contractarian approach toward fiduciary duties from law and economics).

44. *See id.* at 630 ("In emphasizing a contractarian view of the trust, the Article falls within an intellectual movement broader than trust law. Contract has become the dominant doctrinal current in modern American law. In fields ranging from corporations and partnership, to landlord and tenant, to servitudes, to the law of marriage, scholars have come to understand our legal rules as resting mainly on imputed bargains that are susceptible to alteration by actual bargains." (internal citations omitted)); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 629–30 (2004); Adam S. Hofri-Winogradow, *Contract, Trust and Corporation: From Contrast to Convergence*, 102 IOWA L. REV. 1691, 1705–07 (2017).

45. *See* Jacobson et al., *supra* note 40, at 122.

decedent's property should escheat entirely to the state upon their death.[46] His thesis was driven by the norm of fairness: permissive inheritance laws defer excessively to testamentary intent, permitting a testator's cold "dead hand" to steer their assets and dictate the trajectory of their descendants long after the testator had died.[47] For extraordinarily wealthy families, this meant that child's station in life would be determined far more by the luck of the family they were born into than their own diligence, which seemed to vitiate the ideal of equality.[48] Dead hand control also limits the productive use of property by the living if, for instance, a trust only gave life estate holders income streams but forbade assets from being sold or pledged.[49] Finally, Professor Ascher argued that at a time when the U.S. was fixated on the federal deficit,[50] it was unconscionable to let gargantuan estates bypass a tax that could bring government coffers some relief.[51]

Shortly after Professor Ascher's seminal article, the Repealers gained momentum, starting with sympathetic lawmakers who took Congress in an off-cycle election. Republicans took the House in 1994 after decades out of power; led by Newt Gingrich, the insurgent wave was different than the previous breed of lawmakers, who had sought compromise over trench warfare.[52] These "Young Turks" allied themselves with the die-hard Repealer Grover Norquist and then enlisted family farms and small businesses to lay siege to the estate tax.[53] This coalition achieved its first legislative victory in the Qualified Family Owned Business Interests provisions of the Taxpayer Relief Act of 1997, which exempted certain

46. Ascher, *supra* note 33, at 73.

47. *Id.* at 150 ("By tolerating almost unrestricted dead hand control over property, this nation has always allowed the children of the wealthy all the financial advantages inheritance has had to offer.").

48. *See* Ascher, *supra* note 4, at 1169 ("Failing to tax transfers of wealth at death . . . promotes and nurtures an aristocratic class—individuals with enormous amounts of wealth and power achieved not because of their talents or effort but solely because of the luck of their birth." (internal quotation marks omitted) (quoting MADOFF, *supra* note 2, at 68)). This argument has not been restricted to law or a specific time period. The writer Zadie Smith, for instance, has said that "[there is the] gift of being born in a certain condition—with a certain amount of money, in a certain state, with a certain skin color and a certain gender. And what rights accrue to you because of that? And what duties accrue to you because of that?" *Novelist Zadie Smith on Historical Nostalgia and the Nature of Talent*, NPR: FRESH AIR (Nov. 21, 2016, 2:18 PM), https://www.npr.org/2016/11/21/502857118/novelist-zadie-smith-on-historical-nostalgia-and-the-nature-of-talent [https://perma.cc/DZ8L-5MR3].

49. FRIEDMAN, *supra* note 4, at 116–18.

50. *See* Ascher, *supra* note 4, at 1171. This conversation now seems quaint. *See Deficit Tracker*, BIPARTISAN POL'Y CTR. (Dec. 13, 2021), https://bipartisanpolicy.org/report/deficit-tracker/ [https://perma.cc/HC6S-JC2D].

51. Ascher, *supra* note 33, at 71–72.

52. GRAETZ & SHAPIRO, *supra* note 41, at 24–26.

53. *Id.* at 27–31.

family businesses from the estate tax.[54] Because this law had been watered down by legislative bargaining and proved too complex to be broadly useful, it hardened the Repealers' resolve for outright elimination of the estate tax.[55]

In the academy, T&E scholars were using empirical methodologies to show that testamentary freedom was not only elusive but also deleterious. Melanie Leslie surveyed hundreds of probate cases to reveal that judges enforce and disregard formalities freely to arrive at the most "natural" dispositions, typically favoring close family members.[56] Robert Sitkoff and Max Schanzenbach combed through trust holdings reports filed with financial regulators, estimating that roughly $100 billion in assets had migrated virtually tax free into dynasty trusts.[57] Crafty estate planners were settling these trusts in states that had eviscerated the RAP, so that assets could avoid taxes if they were sequestered in trusts.[58]

The work of Professor Sitkoff and Schanzenbach and others reified Ascher's argument, exposing testamentary freedom as the modus of tax evasion.[59] More fundamentally (and also more disturbingly), Professor Leslie revealed that testamentary intent was merely a myth we teach in law school; in practice, courts felt free to override the decedents' wishes to favor surviving spouses and close blood relatives.[60]

By 2005, when Professors Sitkoff and Schanzenbach were studying the jurisdictional competition for trust funds, the estate tax exemption had swollen to $1.5 million, and the top rate had come down to 47% (applying to a top bracket of two million dollars).[61] These drastic changes were the fruit of decades of organization by the Repealers. Throughout the 1990s, Repealers brought people of color and moderate-income families into their fold by casting the estate tax as a chokehold on everyone's upward mobility—despite the reality that it touched less than 2% of households.[62] When George W. Bush took the White House in 2001, federal budget

---

54. *Id.* at 34–35.

55. *Id.* at 35–36.

56. Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 235–36 (1996).

57. Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359 (2005).

58. *Id.* at 371–74.

59. *See* Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003) (tying the onslaught against the RAP in part to the enactment of GST taxes); Dukeminier & Krier, *supra* note 13 (tracing the decline of the common law RAP and attributing it primarily to GST taxes).

60. Leslie, *supra* note 56, at 236–37.

61. Jacobson et al., *supra* note 40, at 122.

62. GRAETZ & SHAPIRO, *supra* note 41, at 69, 119, 125. Of all the Repealers' branding, the most effective was to rename the estate tax the "death tax."

surpluses rendered taxation less urgent, and progressive lawmakers and organizers could not muster a cogent defense.[63] The Repealers secured the most sizeable concessions yet for the estate tax.[64] These cuts were extended and even augmented in 2010 by President Obama and Democratic lawmakers, who were concerned about the mid-term elections.[65]

Hence, the diverging paths of T&E scholars and the repeal movement illuminate the chasm between the academy and public perceptions of the estate tax. Today, with the Tax Cuts and Jobs Act of 2017, the exclusion has metastasized to $11.7 million while the top tax rate has wilted to 40% (applying to a top bracket of one million dollars).[66] Wealth inequality in the U.S. is at levels not seen since the Gilded Age, when monopolies in railroads and banking allowed robber barons to pillage their way to fortunes.[67] In the span of four decades, we have reprised the level of wealth concentration at which we started out the last century (see Figure 1).

63. *Id.* at 99–106.

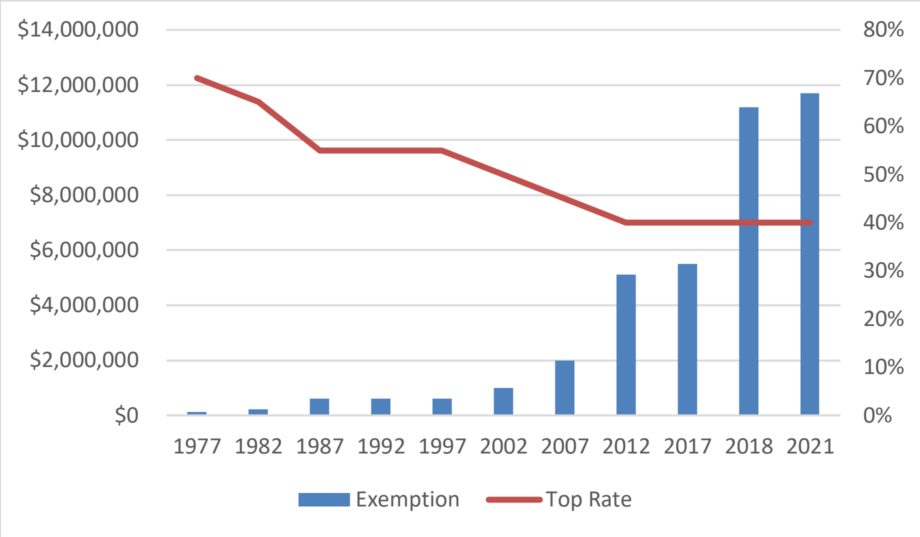
64. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38.

65. *See* Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010, Pub. L. No. 111-312, 124 Stat. 3296; David M. Herszenhorn, *Next Big Battle in Washington: Bush's Tax Cuts*, N.Y. TIMES (July 24, 2010), https://www.nytimes.com/2010/07/25/us/politics/25tax.html [https://perma.cc/2QLD-EG6S].

66. 26 U.S.C. § 2010; 26 C.F.R. § 20.2010-1 (2021); Julie Garber, *How the Federal Estate Tax Exemption Changed from 1997 to Today*, BALANCE (Jan. 20, 2022), https://www.thebalance.com/exemption-from-federal-estate-taxes-3505630 [https://perma.cc/4DX3-E3CV].

67. Estelle Sommeiller & Mark Price, *The New Gilded Age: Income Inequality in the U.S. by State, Metropolitan Area, and County*, ECON. POL'Y INST. (July 19, 2018), https://www.epi.org/publication/the-new-gilded-age-income-inequality-in-the-u-s-by-state-metropolitan-area-and-county/ [https://perma.cc/CF7J-D5UC].

Figure 1: Estate Tax Exemptions and Top Rates Since 1977[68]



The newest generation of T&E scholarship is particularly apprehensive about inequality. From dynasty trusts to intestacy, scholars are trying to dismantle the structures most responsible for the velocity of inequality. They have pointed out, for instance, that ultrarich families can avail themselves of favorable laws and complex wealth preservation plans to enjoy a rarified sovereignty.[69] This foments systemic risk in the financial system, shifts tax burdens to lower-income families, and widens inequality.[70] Other scholars have focused on intestacy, which is ill-suited to the needs of heirs and survivors in low-income families—families are often more heterogenous than intestacy defaults can account for.[71] The regime often leads to fractional interests in housing stock, a "tragedy of the anticommons" that allows developers to pick up property cheaply,

68. Jacobson et al., *supra* note 40, at 122 fig. D (tracking estate tax exemptions and top tax rates from 1916 to 2007); Garber, *supra* note 66 (tracking estate tax exemptions and top rates from 1997 to present).

69. *See generally* Tait, *supra* note 6 (examining how high-wealth families manipulate complex financial rules and estate plans to construct wealth governance systems).

70. *Id.* at 985.

71. *See, e.g.*, Mary Louise Fellows & E. Gary Spitko, *How Should Non-Probate Transfers Matter in Intestacy?*, 53 U.C. DAVIS L. REV. 2207, 2209–10 (2020) (probing the mismatch between intestacy and likely donative intent); Weisbord, *supra* note 14, at 891–96 (examining the disadvantages of intestacy for nontraditional families).

evict residents, and gentrify a neighborhood.[72]

Methodologically, inequality-minded T&E scholars have also enlisted increasingly sophisticated empirical techniques to gather information and vet their hypotheses.[73] The burgeoning empirical literature has covered probate lending,[74] property taxes,[75] the elective share,[76] and the prevalence of estate planning.[77]

This critical T&E literature shuns or outright dismisses the artifice of testamentary freedom, as if the imperative to counter inequality displaces all other goals. Indeed, this mandate has been at least introduced and seriously debated in virtually every other field within law.[78] Inequality has taken on heightened urgency with the string of populist political movements (both right-wing and left-wing) exploiting economic grievances, which only widens economic chasms once these insurgents assume power.[79] Inequality's "pervasive and pernicious effects are therefore a feedback loop reinforcing the concentration of economic and political power in the hands of the very few at the expense of the great many."[80] By virtue of its corrosive power, inequality is one of the greatest threats of our time.

Combatting inequality can certainly be a goal of T&E. Clearly, any invocation to history and precedent in defense of testamentary freedom is misplaced at best and inimical to tax fairness at worst. We can even

---

72. *See* Wright, *supra* note 21. The anticommons situation arises when too many owners hold rights to a scarce resource. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998).

73. *See, e.g.*, Adam J. Hirsch, *Empirical Analysis of Wealth Transfer Law*, 53 U.C. DAVIS L. REV. 2083, 2084 (2020) (introducing contributions to a symposium issue focusing on empirical scholarship of wealth transfers).

74. *E.g.*, David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102 (2016).

75. *E.g.*, Wright, *supra* note 21.

76. *E.g.*, Naomi Cahn, *What's Wrong About the Elective Share "Right"?*, 53 U.C. DAVIS L. REV. 2087 (2020); Jeffrey N. Pennell, *Individuated Determination of a Surviving Spouse's Elective Share*, 53 U.C. DAVIS L. REV. 2473 (2020).

77. *See generally* Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511 (2020).

78. *See, e.g.*, Ramsi Woodcock, Antimonopolism as a Symptom of American Political Dysfunction (June 10, 2021) (unpublished manuscript), https://ssrn.com/abstract=3864585 [https://perma.cc/KM5N-2CV8] (antitrust); Matthew Dimick, *Should the Law Do Anything About Economic Inequality?*, 26 CORNELL J.L. & PUB. POL'Y 1 (2016) (legal rules generally); Aneil Kovvali, *Countercyclical Corporate Governance* (2021) (unpublished manuscript) (on file with author) (arguing for a macroeconomic approach to corporate governance, in part to address inequality).

79. *See* JAN-WERNER MÜLLER, WHAT IS POPULISM? 1–2, 8–9 (2016); MARTIN SANDBU, THE ECONOMICS OF BELONGING: A RADICAL PLAN TO WIN BACK THE LEFT BEHIND AND ACHIEVE PROSPERITY FOR ALL 12–14 (2020).

80. Chang, *supra* note 6, at 90.

stipulate to the pernicious effects of inequality. However, a more basic question remains, one overlooked in the preoccupation with inequality: What precisely do we mean by "inequality"? More precisely, what kind of inequality should T&E address?

B. Defining Inequality

Inequality has different meanings and dimensions. There is income disparity, which is what scholars and policymakers often mean by "inequality,"[81] and then there is wealth disparity, which is harder to measure.[82] There is inequality within a country, among countries, and worldwide.[83] Even the proper gauge of inequality is subject to dispute—for instance the Gini coefficient is the standard measure,[84] but it is prone to criticism.[85]

Today, inequality has blurred national boundaries. The ultrawealthy can travel and move assets effortlessly across borders.[86] Outsourcing and globalization have hollowed out manufacturing-dependent middle classes in nearly every Western industrialized nation.[87] Curiously, worldwide

---

81. *See generally, e.g.*, Raj Chetty, Nathaniel Hendren, Patrick Kline & Emmanuel Saez, *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553 (2014) (measuring the increase in child incomes against parental incomes); Ellora Derenoncourt & Claire Montialoux, *Minimum Wages and Racial Inequality*, 136 Q.J. ECON. 169 (2020) (gauging wage differentials between Black and White workers).

82. *See* Sandra E. Black & Paul J. Devereux, *Recent Developments in Intergenerational Mobility*, *in* 4b HANDBOOK OF LABOR ECONOMICS 1533 (Orley Ashenfelter & David Card eds., 2011) (describing methodological advances in gauging intergenerational wealth elasticity); Strand, *supra* note 5, at 458–60. On the difficulty of measuring wealth, see Gary Burtless, *Putting a Tax on Wealth Means We First Must Measure It*, BROOKINGS INST. (June 5, 2019), https://www.brookings.edu/opinions/putting-a-tax-on-wealth-means-we-first-must-measure-it/ [https://perma.cc/UYC5-DXA8], describing the difficulty of valuing assets owned by the very rich and, relatedly, of determining wealth distribution.

83. BRANKO MILANOVIĆ, WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY 7–11 (2005).

84. *See Human Development Reports: Income Gini Coefficient*, UNITED NATIONS DEV. PROGRAMME (2013), http://hdr.undp.org/en/content/income-gini-coefficient [https://perma.cc/9JND-ECCS]. The Gini coefficient "measures how equally income is distributed across a population, with 0 being perfectly equal (where everyone receives an equal share) and 1 being completely unequal (where 100 percent of income goes to only one person)." BHATT ET AL., *supra* note 30.

85. *See generally* José Gabriel Palma, *Homogeneous Middles vs. Heterogeneous Tails, and the End of the 'Inverted-U': It's All About the Share of the Rich*, 42 DEV. & CHANGE 87 (2011).

86. BROOKE HARRINGTON, CAPITAL WITHOUT BORDERS: WEALTH MANAGERS AND THE ONE PERCENT (2016); Hidden Brain, *What's It Like to Be Rich? Ask the People Who Manage Billionaires' Money*, NPR (Oct. 25, 2016), https://www.npr.org/transcripts/499213698 [https://perma.cc/4UFT-VKH7] (interviewing Brooke Harrington, sociologist of wealth and taxation, and recounting one wealth manager's story of flying on a client's private jet across borders without a passport).

87. Branko Milanović has depicted this graphically in his now-famous "elephant chart," which

inequality has diminished in recent years.[88]

Inequality is slippery and persistent. When we counter it in one area, we may augment it elsewhere. A move to close estate tax loopholes, for instance, gave rise to the dynasty trust.[89] The field of welfare economics is replete with exercises pondering such scenarios. For example, one hypothetical is a society where the poorest member has wealth of nine units, the next 1,000 poorest members have wealth of ten units, and the remaining 1,000 members have wealth of 100 units. An allocation that absolutely prioritizes redistribution to the poorest member may overlook the other members who are not far off.[90]

More practically, some T&E reforms may exacerbate short-term inequality in their attempts at redressing long-term inequality. As Part III discusses, closing off estate tax loopholes may divert settlors toward inter vivos investments (i.e., investments during a settlor's lifetime).[91] Given that investments appreciate in value more quickly than wages rise,[92] the gaps between the investing class and labor would continue to widen.

Of inequality's myriad variations, this Article argues that T&E must tackle the intergenerational stickiness of wealth disparities. The field should facilitate IEM by enabling children to eventually move into a different economic class than their parents. At its core, T&E governs the transmission of wealth, usually across generations.[93] It is therefore an apt setting to equalize, as much as possible, the advantages and headwinds that each new generation is born into.

---

suggests, among other things, that working class incomes in developed economies have stagnated—a feature some economists have ascribed to globalization. For a discussion, see Caroline Freund, *Deconstructing Branko Milanovic's "Elephant Chart": Does It Show What Everyone Thinks?*, PETERSON INST. FOR INT'L ECON. (Nov. 30, 2016, 1:45 PM), https://www.piie.com/blogs/realtime-economic-issues-watch/deconstructing-branko-milanovics-elephant-chart-does-it-show [https://perma.cc/7B9D-345V].

88. *See id.* This is primarily because a vibrant middle class has emerged in Asia—more specifically, China—where manufacturing has flourished. *See id.*

89. Kades, *supra* note 7, at 177–78; Freilich, *supra* note 28, at 65; Waggoner, *supra* note 16, at 2; *see also infra* section III.A.

90. *See* Roger Crisp, *Equality, Priority, and Compassion*, 113 ETHICS 745, 752–55 (2003); *see also* MARC FLEURBAEY & FRANÇOIS MANIQUET, A THEORY OF FAIRNESS AND SOCIAL WELFARE 39–45 (2011).

91. *See infra* Part III.

92. This is Thomas Piketty's central thesis in *Capital in the Twenty-First Century*—that capital grows more quickly than labor. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 23, 33–36 (Arthur Goldhammer trans. 2014).

93. Even inter vivos trusts, whose assets a settlor can enjoy during their lifetime, contemplate a day when the grants become irrevocable after the settlor passes. *See, e.g.*, Sullivan v. Burkin, 460 N.E.2d 572, 574–75 (Mass. 1984) (holding a trustee's right to revoke an inter vivos trust is cut off at the trustee's death); *see also* KURTZ ET AL., *supra* note 32, at 413 (noting that "the living trust can be a very effective technique for avoiding probate").

The literature on IEM is most fully developed in economics. From its roots in the intergenerational transmission of earnings,[94] the literature has exploded into a variety of inventive empirical studies, such as the causal effects of parental education and earnings on children's earnings,[95] the correlation between income inequality and intergenerational earnings elasticity,[96] and the inelasticity of incomes and wealth between forebears and descendants.[97]

IEM is often measured as the "stickiness" of incomes (i.e., the inelasticity or lack of change in incomes) from one generation to the next, a phenomenon with both lineal and lateral dimensions. At the lineal dimension, incomes prove "sticky" intergenerationally, exhibiting close correlation between parental earnings and a child's earnings as an adult.[98] In one novel study, researchers in Italy found that contemporary families tend to inhabit the same occupations as their ancestors in medieval Florence, some 600 years earlier.[99] At the lateral dimension, the degree of intergenerational earnings mobility varies geographically. Researchers have found that moving from a zip code with low socioeconomic indicators to a zip code with higher ones can have marked effect on a child's lifetime earnings.[100]

Even though scholars tend to use earnings as a benchmark for inequality,[101] a focus on intergenerational income differences takes us

---

94. For a summary, see generally Gary Solon, *Intergenerational Mobility in the Labor Market*, *in* 3 HANDBOOK OF LABOR ECONOMICS (Orley Ashenfelter & David Card eds., 1999).

95. Black & Devereux, *supra* note 82, at 1507–28. This correlation is at the heart of the economic literature on IEM. In societies with high income inequality, incomes of the populace hold steady from one generation to the next. Children tend to earn the same salaries as their parents, and each successive generation tends to find itself in the same economic station as the prior generation. *See* Corak, *supra* note 20.

96. Corak, *supra* note 20, at 79–80. Intergenerational earnings elasticity is the degree of fluctuation in earnings from one generation to the next. This parameter forms the basis for the measurement of IEM. *See* Black & Devereux, *supra* note 82, at 1489 (formula 2).

97. Guglielmo Barone & Sauro Mocetti, *Intergenerational Mobility in the Very Long Run: Florence 1427–2011*, at 5–8 (Banca D'Italia Eurosistema, Working Paper No. 1060, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2856359 [https://perma.cc/94BU-SVE5]. As the authors note, "political, demographic and economic upheavals that . . . occurred in the city across the centuries were not able to untie the Gordian knot of socioeconomic inheritance." *Id.* at 5.

98. Corak, *supra* note 20, at 81.

99. Barone & Mocetti, *supra* note 97, at 21–22. This study is subject to some criticisms; for example, it cannot really account for the dynamics of immigration (of newcomers who might succeed or fail) and emigration (of those who do not succeed).

100. Raj Chetty, Nathaniel Hendren & Lawrence F. Katz, *The Effects of Exposure to Better Neighborhoods on Children: New Evidence from the Moving to Opportunity Experiment*, 106 AM. ECON. REV. 855, 855 (2016).

101. *See, e.g.*, Chetty et al., *supra* note 81, at 1563 (describing methodology of earnings analysis from tax filings in analyzing intergenerational mobility).

slightly off track. This Article has proposed evaluating inequality through the intergenerational transmission of *wealth*, as well as countering inequality by fostering IEM. Wealth encompasses assets accrued over time, including those transmitted across generations.[102] It is a more accurate composite of inequality than income, which tends to be measured as a snapshot in time.[103] However, wealth is difficult enough to measure even as a snapshot in time, much less across generations.[104] Two pressing questions follow: what does IEM-focused T&E look like, and how will we know that it is working? The remainder of the Article addresses the first question, raising the second for future exploration.

II. THE FUNDAMENTALS OF PROGRESSIVE T&E

T&E stands as one of the last bastions against wealth disparities, where the ill-gotten gains of one generation can be clawed back to start the next generation off on a more equal footing. This section outlines the principles of a progressive paradigm of T&E that prioritizes IEM. Three elements unify such an approach: T&E's relationship with business law; our ideals of merit, diligence, and opportunity, which inform how much inequality we can tolerate; and forcing mean regression in the wealth distribution bell curve over time.

This is a significant undertaking. It requires no less than an overhaul of how we think about T&E. Relatedly, it also requires communicating T&E's equalizing potential to the public, a task that scholars have overlooked in the past.[105] Yet more so than in decades, academic and public attitudes toward inequality are converging.[106] Politically, Americans of diametric dispositions are also railing against a rigged

---

102. *See* BHATT ET AL., *supra* note 30, at 5 (wealth includes the value of assets minus outstanding debt).

103. STIGLITZ, *supra* note 27, at 2.

104. Gabriel Zucman, *Global Wealth Inequality*, 11 ANN. REV. ECON. 109, 112 (2019) ("To the extent that wealth is accumulated out of past earnings, studying its distribution is a way of getting at the distribution of lifetime income, which is typically hard to study with available income data (most of which are cross-sectional only."). *But see* Kerwin Kofi Charles & Erik Hurst, *The Correlation of Wealth Across Generations*, 111 J. POL. ECON. 1155, 1159 (2003) (arriving at household wealth by tallying the value of real estate, financial assets, and other holdings).

105. *See, e.g.*, Ronald J. Scalise, Jr., *Public Policy and Antisocial Testators*, 32 CARDOZO L. REV. 1315, 1317–26 (2011) (reviewing theories of testation throughout history and across civilizations); Langbein, *supra* note 2, at 491–92 (contrasting freedom of testation with the excessive formalism of the Wills Act). Even reform-minded scholars, who pointed to deficiencies in T&E, have often avoided a direct connection to inequality. *See, e.g.*, Leslie, *supra* note 56, at 236–37 (emphasizing the imposition of a judicial moral order); Sitkoff & Schanzenbach, *supra* note 57, at 359 (emphasizing jurisdictional competition).

106. On political attitudes, see *infra* note 109.

economic system.[107] This is an opportune time for progressive scholars to relay the importance of T&E by capitalizing on the indignation of our era.

A. How T&E Interfaces with Business Laws

To galvanize support for IEM, progressive T&E scholars must portray inheritance as the realm to reset the economic playing field with each new generation. Due to differences in education and opportunity, in any given generation, high-income earners might accumulate far more wealth than everyone else, but that separation need not carry over to the children of high-income earners—and certainly not in perpetuity.[108] Inheritance law therefore stands as the counterpoint to business law: if the latter foments inequality, the former shall level the economic scales by progressively reshaping wealth transfers.

Despite our era of political, social, and racial polarization, this is a propitious time to reframe the conversation around wealth transfers. Both conservatives and progressives agree vehemently on one thing: the economic system is rigged.[109] At the conservative end of the political spectrum, the example is the sizeable crossover of Sanders supporters to Trump voters in 2016.[110] On the progressive end, the unexpected success of the *Jacobin* magazine stands as an example of the resurgence of

---

107. *See* DĒMOS, EVERYONE'S ECONOMY: 25 FEDERAL POLICIES TO LIFT UP WORKING PEOPLE, at ii (Amy Traub & Connie Razza eds., 2018) (summarizing survey results showing that the vast majority of Americans assert the economic system is "rigged").

108. By "high-income earners" and "ultrawealthy," I refer to the top 0.1%. *See* Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data*, 131 Q.J. ECON. 519, 520 (2016) ("[T]he share of wealth owned by the top 1% families has regularly grown since the late 1970s and reached 42% in 2012. Most of this increase is driven by the top 0.1%, whose wealth share grew from 7% in 1978 to 22% in 2012, a level comparable to that of the early 20th century."); *see also* Howard R. Gold, *Never Mind the 1 Percent. Let's Talk About the 0.01 Percent*, CHI. BOOTH REV. (Nov. 29, 2017), https://review.chicagobooth.edu/economics/2017/article/never-mind-1-percent-lets-talk-about-001-percent [https://perma.cc/F969-K5Y7].

109. *See* DĒMOS, *supra* note 107, at ii ("73 percent of American adults agreed that 'the economic system in the U.S. is rigged in favor of certain groups.' When an earlier iteration of the same survey asked which groups the economy was rigged to benefit, 86 percent agreed it was rigged for corporations and 91 percent asserted it was rigged to favor the rich." (internal footnote omitted)). These percentages are high enough to cut across political affiliation.

110. *See* John Sides, *Did Enough Bernie Sanders Supporters Vote for Trump to Cost Clinton the Election?*, WASH. POST (Aug. 24, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/24/did-enough-bernie-sanders-supporters-vote-for-trump-to-cost-clinton-the-election/ [https://perma.cc/TU3B-HSPK] (describing Brian Schaffner's survey which found this number to be 12%). This connection is far from settled though. *See* Brian F. Schaffner, Matthew MacWilliams & Tatishe Nteta, *Understanding White Polarization in the 2016 Vote for President: The Sobering Role of Racism and Sexism*, 133 POL. SCI. Q. 9, 30–31 (2018) (attributing Clinton's electoral loss to racism and sexism).

socialist economics in our times.[111]

The consensus, then, seems to be that laws governing the generation of wealth are not rules of fair play but, instead, cater to wealthy elites and fuel inequity. Examples abound. From the 2008 financial crisis to the Covid-19 pandemic, low-income households have borne the brunt of recessions but were the last to be lifted by the "rising tide" of recovery.[112] Households of color suffered disproportionately in both downturns, but working-class Whites[113] were stymied as well.[114] Indeed, prompted by the embrace of right-wing populism in working-class ethnic majorities around the world, academics have been consumed with the travails of the White working class.[115] This racialized socioeconomic group has been displaced by globalization, union busting, private equity corporate shuffles, and other seismic trends; yet this group has also consolidated as a voting block around nativism.[116] Nonetheless, this constituency shares with the political left the same economic grievances against ultrawealthy elites.[117]

Uneven business laws have allowed the already wealthy to amass fortunes at the expense of almost everyone else. Shareholder primacy in

---

111. The *Jacobin* is socialist-leaning magazine. In the short time since its founding in 2011, the *Jacobin* has reached 75,000 subscribers and a web audience of over 3,000,000 a month. *About*, JACOBIN, https://www.jacobinmag.com/about/ [https://perma.cc/XDW4-LR4D].

112. *See, e.g.*, Atif Mian, Kamalesh Rao & Amir Sufi, *Household Balance Sheets, Consumption, and the Economic Slump*, 128 Q.J. ECON. 1687, 1703 (2013) (comparing the losses in net worth among U.S. households across deciles of wealth after the Great Recession); Mitchell Barnes, Lauren Bauer & Wendy Edelberg, *11 Facts on the Economic Recovery from the COVID-19 Pandemic*, BROOKINGS INST. (Sept. 29, 2021), https://www.brookings.edu/research/11-facts-on-the-economic-recovery-from-the-covid-19-pandemic/ [https://perma.cc/D4CS-GE9V] (summarizing research on the unevenness of the economic recovery from the pandemic in the U.S.); Ambar Narayan, Alexandru Cojocaru, Miriam Muller & David Newhouse, *The Risks of an Uneven Economic Recovery in an Unequal World*, BROOKINGS INST. (Sept. 27, 2021), https://www.brookings.edu/blog/future-development/2021/09/27/the-risks-of-an-uneven-economic-recovery-in-an-unequal-world/ [https://perma.cc/86HZ-5JVT] (analyzing the uneven recovery worldwide).

113. I have chosen to capitalize the W in White to recognize that "White" is a race and draw attention to Whiteness. *See* Kwame Anthony Appiah, *The Case for Capitalizing the* B *in Black*, ATLANTIC (June 18, 2020), https://www.theatlantic.com/ideas/archive/2020/06/time-to-capitalize-blackand-white/613159 [https://perma.cc/B86G-3KE5].

114. *See* ANNE CASE & ANGUS DEATON, DEATHS OF DESPAIR AND THE FUTURE OF CAPITALISM 6–7 (2020) (summarizing the decline of the White working class over the last half century).

115. A brief list of examples includes the populist right's rise in Austria, Brazil, Bulgaria, Croatia, Hungary, Germany, the Netherlands, the Philippines, Poland, Russia, Serbia, Spain, the U.K., and the U.S. in the last two decades. *See generally* ANDREA L.P. PIRRO, THE POPULIST RADICAL RIGHT IN CENTRAL AND EASTERN EUROPE: IDEOLOGY, IMPACT, AND ELECTORAL PERFORMANCE (2015) (tracing populist parties such as Ataka in Bulgaria, Jobbik in Hungary, and the Slovak National Party).

116. *See* MÜLLER, *supra* note 79; SANDBU, *supra* note 79.

117. *See* MÜLLER, *supra* note 79 (comparing the Tea Party and Occupy Wall Street as well as the symmetry between Donald Trump and Bernie Sanders).

corporate law elevates equity owners above all other constituents,[118] including workers (hence, the dichotomy between capital and labor),[119] creditors (who, famously, are owed no fiduciary duties),[120] and the public (to whom costs are externalized).[121] Corporate raiders through the decades have exploited shareholder primacy to take over ailing companies, cut costs mercilessly, saddled target entities with debt, and flipped them for profit.[122] In antitrust, lax policies have abetted big finance, big pharma, big ag, and especially big tech in their erosion of salaries, privacy, and competition.[123] Sitting on fortresses of cash reserves, incumbents are able to invest lavishly in tactics that undercut insurgents while conveying minimal benefits to consumers.[124] What emerges, then, is a two-tiered business world where monopolies and oligopolies survive—even thrive—amidst downturns while almost everyone else fails. At the firm level, business laws have created stark disparities between monopolies and oligopolies and virtually every other enterprise. At the individual level, these disparities are enhanced by uneven tax laws governing the wealth of firm owners.

Through it all, the largest shareholders of these goliath firms—most prominently, Jeff Bezos, Elon Musk, Bill Gates, Mark Zuckerberg, and

---

118. Equity owners hold an equity stake in a business and, thus, a stake in the profits.

119. *See* Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 323–25 (1999); PIKETTY, *supra* note 92, at 303–04. However, Silicon Valley turns the primacy of capital over labor on its head. There, innovation is primarily the product of a highly educated and handsomely paid work force, which is now being criticized for sidelining venture capital (and its constraints on erratic founder behavior). *See* Charles Duhigg, *How Venture Capitalists Are Deforming Capitalism*, NEW YORKER (Nov. 23, 2020), https://www.newyorker.com/magazine/2020/11/30/how-venture-capitalists-are-deforming-capitalism [https://perma.cc/W2TP-QCV7].

120. *See, e.g.*, Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp., No. 12150, 1991 WL 277613, at *34 (Del. Ch. Dec. 30, 1991) ("At least where a corporation is operating in the vicinity of insolvency, a board of directors is not merely the agent of the residue risk bearers, but owes its duty to the corporate enterprise."). *But see* Adam Hofri-Winogradow & Gal David, *Quistclose* Trusts and Directors' Creditor-Regarding Duies in Near-Insolvent Companies (unpublished manuscript) (on file with author).

121. *See generally* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

122. Examples abound. *See, e.g.*, Julie Creswell, *Profits for Buyout Firms as Company Debt Soared*, N.Y. TIMES (Oct. 4, 2009), https://www.nytimes.com/2009/10/05/business/economy/05simmons.html [https://perma.cc/83D8-RKC3] (describing storied bedding company filing for bankruptcy protection because its investors incurred greater debts for larger short-term payouts).

123. *See* ZEPHYR TEACHOUT, BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY 12, 19, 56–57, 223–25 (2020); DAVID DAYEN, MONOPOLIZED: LIFE IN THE AGE OF CORPORATE POWER 9–12 (2020); TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 20–22 (2018).

124. *See generally* Ufuk Akcigit & William R. Kerr, *Growth Through Heterogeneous Innovations*, 126 J. POL. ECON. 1374 (2018) (analyzing how firm size affects innovation differently and, in turn, economic growth).

Warren Buffet—pocket ill-gotten gains that are not adequately recaptured by taxes.[125] The tax rates for capital gains, such as dividends from stockholdings, are notoriously below those for ordinary income, which is how wageworkers are paid.[126] Further, the trend today is for enterprises to move away from classifying their workers as employees, so that they can forego benefits.[127] Savvy planning can even help the ultrawealthy avoid taxes altogether, by funneling their assets through shell companies and jurisdictions that serve as tax dodges.[128] This has prompted economists to call for taxes on wealth holdings regardless of their situs, as well as for corporate taxes based on customers rather than domicile.[129] In reality, taxes seem to be paid by those who cannot afford blue-chip financial and legal counsel (i.e., most taxpayers).[130]

---

125. On the obscene increases in billionaire wealth during the pandemic, see Press Release, Ams. for Tax Fairness, Net Worth of U.S. Billionaires Has Soared by $1 Trillion—To Total of $4 Trillion—Since Pandemic Began (Dec. 9, 2020), https://americansfortaxfairness.org/wp-content/uploads/12-9-20-National-Billionaires-Report-Press-Release-1T-4T-FINAL-1.pdf [https://perma.cc/74Z2-UF6A]. This source estimates their net worth, as of March 18, 2020, at $113 billion, $24.6 billion, $98 billion, $54.7 billion, and $67.5 billion, respectively. *Id.* The richest 25 Americans collectively gained $401 billion in net worth from 2014 to 2018, but they paid only 3.4% in taxes. Jesse Eisinger, Jeff Ernsthausen & Paul Kiel, *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, PROPUBLICA (June 8, 2021, 5:00 AM), https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax [https://perma.cc/4HY9-JHA9]. In 2021, Democratic lawmakers proposed a tax on unrealized capital gains that would have cost the 20 richest Americans $345 billion, but that plan failed. Giacomo Tognini, *How Much Elon Musk and Jeff Bezos Saved After Joe Manchin Scuttled Democrats' Tax Proposal*, FORBES (Oct. 29, 2021, 6:30 AM), https://www.forbes.com/sites/giacomotognini/2021/10/29/these-billionaires-might-have-just-dodged-a-333-billion-tax-bullet-thanks-to-revised-tax-proposal/?sh=a7bf9475fbde [https://perma.cc/9NPC-3FN3].

126. *See Topic No. 409: Capital Gains and Losses*, I.R.S., https://www.irs.gov/taxtopics/tc409 [https://perma.cc/JQ5U-END7].

127. *See* Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for 21st Century Work: The "Independent Worker"*, BROOKINGS INST. (Dec. 8, 2015), https://www.brookings.edu/research/a-proposal-for-modernizing-labor-laws-for-21st-century-work-the-independent-worker/ [https://perma.cc/N7KB-W4F6]; *see also Proposition 22: Exempts App-Based Transportation and Delivery Companies from Providing Employee Benefits to Certain Drivers*, CAL. SEC'Y OF STATE, https://vigarchive.sos.ca.gov/2020/general/propositions/22/ [https://perma.cc/YT9G-567D] (providing a breakdown of the arguments for and against classification of ride-share drivers as "employees" versus "independent contractors").

128. RONEN PALAN, THE OFFSHORE WORLD: SOVEREIGN MARKETS, VIRTUAL PLACES, AND NOMAD MILLIONAIRES 4–7 (2006); GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 27–33 (Teresa Lavender Fagan trans., 2015); BASTIAN OBERMAYER & FREDERIK OBERMAIER, THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH & POWERFUL HIDE THEIR MONEY 13–15 (2017).

129. *See* PIKETTY, *supra* note 92, at 663–65.

130. Alan Rusbridger, *Panama: The Hidden Trillions*, N.Y. REV. OF BOOKS (Oct. 27, 2016), http://www.nybooks.com/articles/2016/10/27/panama-the-hidden-trillions/ [perma.cc/9APW-

T&E itself plays a major role in accentuating inequality. A business owner who engages in a risky enterprise, such as medicine,[131] real estate,[132] or outright fraud,[133] can set up a trust in a jurisdiction that does not recognize foreign judgments.[134] This way, if a tort victim or defrauded contractor sues and prevails, the settlor would be judgment-proof.[135] Better yet, the trust could designate the settlor as both the beneficiary and initial trustee, so that the offender can direct the trust and enjoy its assets during their lifetime.[136] These asset protection trusts ("APTs") generate fees for a coterie of lawyers and financial advisors, so jurisdictions have raced to validate them.[137]

Liberal inheritance laws premised on testamentary freedom then allow those gains to be transmitted gratis to future beneficiaries, forever out of the reach of creditors. In the example above, dynasty trusts can be settled in states that have abrogated the RAP; consequently, the trusts never

---

M6MB] ("[T]he rich and the powerful exited long ago from the messy business of paying tax . . . . They don't pay tax anymore, and they haven't paid tax for quite a long time.") (quoting Luke Harding, former Moscow correspondent for *The Guardian*).

131. *See Asset Protection for Doctors*, ASSET PROT. PLANNERS, https://www.assetprotectionplanners.com/strategies/doctors/ [https://perma.cc/TJ6N-8LGZ]; *How to Set Up a Cook Islands Trust*, OFFSHORE CORP. (Aug. 26, 2021), https://offshorecorporation.com/trust/how-to-cook-islands-trust/ [https://perma.cc/UKY9-6HX6].

132. *See* Michael Kranish, *Donald Trump, Facing Financial Ruin, Sought Control of His Elderly Father's Estate. The Family Fight Was Epic*, WASH. POST (Sept. 27, 2020), https://www.washingtonpost.com/graphics/2020/politics/donald-trump-father-will/ [https://perma.cc/K58B-D3MA]; Gabe Alpert, *Companies Owned by Former President Donald Trump*, INVESTOPEDIA (July 25, 2021), https://www.investopedia.com/updates/donald-trump-companies/ [https://perma.cc/KU3G-55PZ].

133. FTC v. Affordable Media, LLC, 179 F.3d 1228, 1243 (9th Cir. 1999).

134. *See, e.g.*, International Trusts Act § 13D (1984) (Cook Islands) ("Foreign judgements not enforceable."); *see also* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1048–50 (2000).

135. *See, e.g.*, Scheffel v. Krueger, 782 A.2d 410 (N.H. 2001) (holding that a spendthrift trust provision prevented the victim of a sexual assault from recovering against the tortfeasor, the trust's beneficiary).

136. *See Affordable Media*, 179 F.3d at 1243.

137. *See, e.g.*, Nicholas Confessore, *How to Hide $400 Million*, N.Y. TIMES (Nov. 30, 2016), https://www.nytimes.com/2016/11/30/magazine/how-to-hide-400-million.html [https://perma.cc/69HH-7MUB] (discussing Cook Islands trusts); Planet Money, *Episode 403: What Can We Do with Our Shell Companies?*, NPR (Sept. 18, 2012, 10:34 PM), https://www.npr.org/sections/money/2012/09/18/161358307/episode-403-what-can-we-do-with-our-shell-companies [https://perma.cc/2BGJ-MPQ4] (discussing Belize trusts). For a comprehensive list of offshore jurisdictions, see *Offshore Leaks Database*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://offshoreleaks.icij.org/ [https://perma.cc/5DX7-X4C9]. One of the most unsettling revelations of the Pandora Papers was that U.S. states are some of the most prominent "offshore" jurisdictions for APTs. *See Offshore Havens and Hidden Riches of World Leaders and Billionaires Exposed in Unprecedented Leak*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS (Oct. 3, 2021), https://www.icij.org/investigations/pandora-papers/global-investigation-tax-havens-offshore/ [https://perma.cc/V5S6-3BYP] (singling out South Dakota, Delaware, and Nevada).

terminate, and they are not assessed gift and transfer taxes.[138] In this way, the monopolist's children and grandchildren are born into gilded cradles where, without ever lifting a finger, they can enjoy the fruits of their benefactors' aggressive business tactics—a world far from the descendants of wageworkers.

Yet T&E can also have tremendous redistributive potential. Certain rules and doctrines act as inputs into the tax system (e.g., the RAP) or bring together rich debtors and poor creditors (e.g., APTs).[139] These rules are distributively efficient, and they can be altered to prevent excessive sheltering of assets.[140] Such reforms might not prevent the uneven generation of wealth (which would be the province of business laws), but they might slow the disparate accumulation of wealth over generations.

In the past, law and economics scholars have disparaged legal rules as a redistributive mechanism because of efficiency, legitimacy, and administrability concerns.[141] They counter that taxation is preferable.[142] Today, there is a more nuanced understanding of the capacity of legal rules to combat inequality—as well as of the failings of the tax system.[143] In fact, some governments have written equity considerations into the way their legal institutions interpret rules around contracts and torts.[144]

Inheritance might therefore be positioned as a safety net to arrest the velocity of inequality as it compounds. In this way, it serves as a

138. States that have repealed the RAP or undertaken perpetuities reform include Iowa (repeal), South Dakota (repeal), Arizona (lengthening the perpetuities period), California (lengthening the perpetuities period), Colorado (lengthening the perpetuities period), Connecticut (lengthening the perpetuities period), Pennsylvania (wait-and-see), Ohio (wait-and-see), and Vermont (wait-and-see). *See infra* notes 187–191 and accompanying text.

139. *See* Chang, *supra* note 6, at 91–114.

140. For instance, APTs might be subjected to prohibitions against fraudulent transfers and requirements of irrevocability; spendthrift provisions (a key feature of APTs) might be subjected to legal protections for certain creditor claims; and dynasty trusts might be taxed heavily or abolished outright. *See* RESTATEMENT (THIRD) OF TRUSTS § 59(b) (AM. L. INST. 2003); UNIF. TR. CODE § 503(b)(2) (UNIF. L. COMM'N 2010); DEL. CODE ANN. tit. 12, §§ 3570(11)(b), 3572(a) (2016); Joel C. Dobris, *Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2537 (2006).

141. *See* Kaplow & Shavell, *supra* note 35, at 822–25. This has come to be known as the double distortion argument.

142. *Id.*

143. *See* Ronen Avraham, David Fortus & Kyle D. Logue, *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125, 1126 (2004); Tomer Blumkin & Yoram Margalioth, *On the Limits of Redistributive Taxation: Establishing a Case for Equity-Informed Legal Rules*, 25 VA. TAX REV. 1 (2005); Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1006–09 (2001).

144. *See, e.g.*, American Society of Comparative Law, *Legal Heterodoxy in Developing Countries*, YOUTUBE (Oct. 15, 2020), https://www.youtube.com/watch?v=o1kgoW5cVfg&feature=youtu.be (last visited Feb. 28, 2022) (discussing South Africa).

counterpoint to the loose business laws that allow enterprises to amass market power,[145] erode privacy,[146] maximize returns to a narrow class of insiders,[147] and externalize the carnage to labor, the environment, and public systems.[148] Our society's skepticism toward how wealth is generated—under the rules of fair play in business law—can be harnessed for T&E reform. T&E can claw back the ill-gotten gains from poorly designed or enforced business laws before they are locked in for successive generations.

B. Balancing Equality with Opportunity

Classical liberals and Marxists have long tussled over the inevitability of inequality. While liberals view the market as an efficient allocator of economic mobility, Marxists believe that the market simply reproduces class hierarchies.[149] Still, both sides agree that intergenerational mobility should be high.[150] For the political right, a child should be able to transcend their parent's class through hard work; for the left, structural barriers to class transcendence should be dismantled. In converging around intergenerational mobility, many members of both the political right and the political left would accept some degree of inequality for the sake of individual advancement and societal prosperity.

But precisely what type of inequality should we tolerate? Here, T&E can help formulate ground rules for equity and advancement by highlighting the distinctions between income and wealth. Where income measures earnings over a specific period, wealth can capture accumulated assets over generations.

Wealth is passed directly from testators and settlors to beneficiaries. For ultrawealthy households, the assets can include a pool of financial

---

145. *See* Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents*, 11 HARV. L. & POL'Y REV. 235 (2017).

146. *See* Erika M. Douglas, *Monopolization Remedies and Data Privacy*, 24 VA. J.L. & TECH. 1 (2020).

147. Blair & Stout, *supra* note 119.

148. *See* Elhauge, *supra* note 121.

149. Thomas Piketty, *Theories of Persistent Inequality and Intergenerational Mobility*, *in* 1 HANDBOOK OF INCOME DISTRIBUTION 429, 430–31 (A.B. Atkinson & F. Bourguignon eds., 2000).

150. *Id.* at 431.

instruments,[151] real property,[152] or a business;[153] for poorer households, there might be no assets—or merely a fractionated interest in a home.[154] Wealth is easy to devise, hard to measure, and perhaps a truer signifier of inequality than income.[155]

The intergenerational transmission of income, on the other hand, is less straightforward. Wealthy households can cultivate human capital: for instance, they can invest in education to ensure that the next generation maintains high incomes. In this way, incomes become sticky not only from one generation to the next, but also across multiple generations. And in turn, the lack of IEM, as measured by the correlation of incomes between fathers and sons, becomes a marker of inequality.[156]

Normatively, the stickiness of incomes is easier to accept than the stickiness of wealth. To the extent that education and other forms of human capital determine lifetime earnings, investments in these determinants should be encouraged. Moreover, when incomes track ability or diligence, a society that values meritocracy will endure some degree of earnings disparity.[157]

Wealth disparity, on the other hand, is not so easily redeemed. A sizeable bequest by a settlor or testator can set up beneficiaries for life; it allows them to take risks and start businesses,[158] give to charities and imprint themselves on the civic lives of cities,[159] or simply live in the lap

---

151. *See* Jon D. Wisman, *Wage Stagnation, Rising Inequality and the Financial Crisis of 2008*, 37 CAMBRIDGE J. ECON. 921, 925–26 (2013).

152. *See* Kranish, *supra* note 132. On the distinction between capital and land, especially as applied to Piketty's formula, see Joseph E. Stiglitz, *New Theoretical Perspectives on the Distribution of Income and Wealth Among Individuals*, *in* 1 INEQUALITY AND GROWTH: PATTERNS AND POLICY 1, 1–3 (Kaushik Basu & Joseph E. Stiglitz eds., 2016).

153. *See* Letter from Warren E. Buffett, Chairman of the Bd., Berkshire Hathaway, Inc., to S'holders 11 (Feb. 22, 2020), https://www.berkshirehathaway.com/letters/2019ltr.pdf [https://perma.cc/E2QA-5EEC] ("Today, my will specifically directs its executors – as well as the trustees who will succeed them in administering my estate after the will is closed – not to sell *any* Berkshire shares." (emphasis in original)).

154. *See* Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1, 30–31 (2014).

155. STIGLITZ, *supra* note 27, at 2.

156. A confounding factor, however, is the fact that wealthy households often pass down their family businesses, which then aligns parental and child earnings. *Id*.

157. Piketty, *supra* note 149.

158. Kranish, *supra* note 132.

159. *See* Melissa Harris and Julie Wernau, *The Pritzker Family Tree*, CHI. TRIB. (Dec. 18, 2011), https://www.chicagotribune.com/business/ct-xpm-2011-12-18-ct-biz-1218-pritzkers-family-graphic-20111218-story.html [https://perma.cc/95XL-98AE]; *Remembering Brooke Astor*, N.Y. TIMES: CITY ROOM (Aug. 13, 2007, 3:56 PM), https://cityroom.blogs.nytimes.com/2007/08/13/brooke-astor-is-dead-at-105/ [https://perma.cc/4N3U-36HR].

of luxury.[160] By contrast, being born into the low-income household not only fails to convey that head start or leg up, but it may well hold a child back for life.[161]

One way to view wealth disparity is as a constraint on opportunity.[162] Normatively, the determinants of income should be one's merit; yet this maxim is eviscerated if one's income is tied instead to the size of another person's devise.[163] For our purposes, as we try to reorient the goals of T&E, we must answer this question: is the field to curtail the intergenerational stickiness of *wealth* or *income*? On this point, this Article argues that wealth should be the focus, rather than income.

C. Mean Regression in the Wealth Distribution Curve

To curtail the stickiness of wealth inequality, T&E should limit the effortless transmission of wealth in hyperrich households while facilitating it in low-income households. Visually, this is denoted by the extreme ends of a wealth distribution bell curve converging toward the middle. The extremities are where IEM can be fostered most efficiently. Ultrawealthy households can be deterred from amassing more wealth, while low-income households can be propelled forward and upward.

This is not, as is often the case in law, an argument from second-best principles. T&E bears directly on the primary goal of unsticking intergenerational mobility because the field governs how wealth is transferred across generations. Nor does this Article propose to convert T&E into a mechanism for redistribution. Instead, the Article would shore up T&E's defenses against the ability of the ultrarich to easily devise their legacies to their heirs. While portions of T&E feed into the tax system, by eschewing redistribution, reformers can avoid some of the protracted

---

160. Zachary R. Mider, *How Wal-Mart's Waltons Maintain Their Billionaire Fortune: Taxes*, BLOOMBERG (Sept. 12, 2013), https://www.bloomberg.com/news/articles/2013-09-12/how-wal-mart-s-waltons-maintain-their-billionaire-fortune-taxes (last visited Feb. 28, 2022); Megan Willett-Wei & Mike Nudelman, *Meet the Waltons: A Guide to America's Wealthiest Family*, BUS. INSIDER (Oct. 9, 2013, 11:56 AM), https://www.businessinsider.com/meet-the-waltons-wal-mart-family-tree-2013-10?op=1 [https://perma.cc/4DMB-2A25].

161. Chetty et al., *supra* note 81.

162. For a revamp of how we view equality and opportunity, see JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 1–10 (2014).

163. Of course, even the notion of merit belies the fact that economic success is mostly dictated by factors wholly outside anyone's control—including luck (the accident of the family one is born into) and economic structures (the winner-take-all free market). *See* Michael J. Sandel, *Populism, Liberalism, and Democracy*, 44 PHIL. & SOC. CRITICISM 353, 356 (2018) ("In today's economy, it is not easy to rise. This is a special problem for the USA, which prides itself on upward mobility. Americans have traditionally worried less than Europeans about inequality, believing that, whatever one's starting point in life, it is possible, with hard work, to rise from rags to riches. But today, this belief is in doubt. Americans born to poor parents tend to stay poor as adults.").

theoretical discussion about double distortion, or the critique from law and economics that using legal rules to redistribute wealth only compounds the economic distortions in the tax system.[164] Finally, to the extent that the tax system is too feeble or unpopular to foster an egalitarian society, T&E may be a better starting point.

Two macroeconomic perspectives on households are important: IEM and the splintering of family compositions along economic lines. Compared to other industrialized countries, the U.S. exhibits a high degree of inequality and a low degree of IEM, so that the elasticity between paternal earnings and a son's adult earnings is extremely low.[165] While we know that intergenerational earnings elasticity can be cultivated through public institutions such as our education system,[166] we are also aware of the headwinds to class mobility. In recent decades, public investment in education has dwindled,[167] and households have responded by augmenting their private investment in human capital outside schooling, particularly in the elementary years.[168] Rather than addressing structural inequities, political leaders are resorting to quick fixes such as loosening access to credit.[169]

Societies with high inequality also feature low IEM.[170] Low IEM dovetails with another trend in U.S. households—declines in both marriage rates and divorce rates over the past quarter century. In higher-income households, technological improvements have made home care easier.[171] For women, delayed childbirth and higher educational

164. *See* Kaplow & Shavell, *supra* note 35. In other words, the tax system is more efficient at redistribution than legal rules. This argument has been subjected to a great deal of pushback. *See, e.g.*, David Gamage, *The Case for Taxing (All of) Labor, Income, Consumption, Capital Income, and Wealth*, 68 TAX L. REV. 355, 358 (2015) (arguing for multiple, overlapping forms of taxation in the face of the tax system's overall imperfections); Dimick, *supra* note 78, at 58 (making the case that legal rules may be more effective than the tax system at redistribution). For a thorough history of this argument's evolution, see Woodcock, *supra* note 78.

165. Corak, *supra* note 20. This line of research focuses on fathers and sons "to avoid the more complicated analyses needed to address the changing role of women in the labor force." *Id.* at 81. While studies of mothers and daughters do exist, "father–son analyses are more common and permit a broader set of cross-country comparisons." *Id.*

166. *Id.* at 95–97.

167. Michael Leachman, Kathleen Masterson & Eric Figueroa, *A Punishing Decade for School Funding*, CTR. ON BUDGET & POL'Y PRIORITIES (Nov. 29, 2017), https://www.cbpp.org/research/state-budget-and-tax/a-punishing-decade-for-school-funding [https://perma.cc/9UAH-3LVR].

168. *Id.*

169. *See* RAGHURAM G. RAJAN, FAULT LINES: HOW HIDDEN FRACTURES STILL THREATEN THE WORLD ECONOMY 8–9 (2010).

170. Corak, *supra* note 20.

171. Betsey Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and Their Driving Forces* 18–20 (Nat'l Bureau of Econ. Rsch., Working Paper No. 12944, 2007), http://www.nber.org/papers/w12944 [https://perma.cc/7P2T-EHJR].

attainment have begun to close the gendered wage gap (somewhat).[172] These patterns have stabilized marriages, making divorce less likely.[173] Gone are the days of "production complementarities" that Gary Becker posited of marriage, as a union between husbands and wives specializing in different market and domestic spheres.[174] Instead, marriage now binds couples who are on similar economic footing and share similar interests.[175] Among lower-income households, however, marriage is becoming infrequent, replaced by cohabitation.[176] This bimodal distribution reveals that marriage is becoming restricted to couples who are more similar than different; hence, ensuing marriages, particularly among more educated populations, are more stable.[177]

Amid the COVID-19 pandemic, this bimodal distribution is becoming even clearer. While wealthy households work in sectors that can switch effortlessly to remote work, low-income households must contend with the pandemic face-to-face.[178] Put even more starkly, the reality for the global elite is entirely different than for everyone else. A nexus of trusts and holding companies enable these elites to stow their assets in havens that are untouchable by taxes and political accountability.[179]

For ultrarich households comprised of, say, the top 0.01% of earners, curtailing dynasty trusts could prompt would-be settlors to invest rather than sequester their assets in trusts. One of the lessons from the 2008 financial crisis is that when these elites seek investment opportunities in a stagnant economy, asset and real estate bubbles are created, and the financial sector conjures ever more sophisticated products to funnel "the rich's surplus funds" into loans for less affluent households.[180] In

---

172. *See id.* at 20–21.

173. *See* Shelly Lundberg, Robert A. Pollak & Jenna Stearns, *Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing*, 30 J. ECON. PERSPS. 79, 86 (2016) (observing "a pattern of delayed marriage and childbearing to accommodate an extended period of education"); *id.* at 80 ("Compared with college graduates, less-educated women are more likely to . . . have much higher divorce rates.").

174. *See* GARY S. BECKER, A TREATISE ON THE FAMILY (1993).

175. *See* Stevenson & Wolfers, *supra* note 171, at 19–20, 27.

176. *See* T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 91 (2004); Cahn, *supra* note 3, at 188.

177. *See* Lundberg et al., *supra* note 173, at 81 (marriages more stable than cohabitating relationships); *id.* at 82 (marriage more stable among college graduates).

178. *See Covid-19 and Inequality*, INST. FOR POL'Y STUD., https://inequality.org/facts/inequality-and-covid-19/ [https://perma.cc/UAL7-DVY5] ("The Covid-19 pandemic has forced many workers into remote and telework as offices have closed around the country. But not everyone has the same ability to work from home. . . . [P]eople of color have been exposed to greater virus risks.").

179. *See Paradise Papers: Secrets of the Global Elite*, INT'L CONSORTIUM OF INVESTIGATIVE JOURNALISTS, https://www.icij.org/investigations/paradise-papers/ [https://perma.cc/N47U-86CH].

180. Wisman, *supra* note 151, at 925.

advocating for restraints on tax dodges for the ultrawealthy, then, we must bear in mind whether we are trading in one type of inequality for another.

III. IMPLEMENTING IEM

T&E scholars have embraced a critical research agenda that pushes back against inequality. Among other things, they have proposed that the field's legal rules be reconceptualized as redistribution mechanisms,[181] that wealth transfer taxes be bolstered,[182] that default rules avoid the worst pitfalls of intestacy,[183] and that dynasty and asset protection trusts be curtailed.[184] This Part illustrates what prioritizing IEM might look like in T&E. It begins with the most distributively consequential reforms: dismantling dynasty trusts, closing estate tax loopholes, and taxing estates heavily—all tactics targeting ultrawealthy families. Then this Part briefly discusses intestacy, which primarily affects lower-income households.

A. Curtailing Dynasty Trusts

Dynasty trusts owe their existence to perpetuities reform and, by a twist of tax history, the 1986 amendments to the GST tax, enacted to close the loophole of estate tax avoidance through devises to grandchildren (rather than children).[185] The statute allowed trusts to be exempt from the GST taxes but failed to impose a time limit on the duration of such trusts, leaving their duration to the vagaries of state RAPs.[186] Over the ensuing decades, state legislatures eviscerated the RAP by adopting the wait-and-see approach,[187] lengthening the perpetuities period up to 1,000 years,[188]

---

181. *See generally* Chang, *supra* note 6.

182. *See* Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255, 1257 (2013).

183. *See* Weisbord, *supra* note 14, at 891–98.

184. *See* FRIEDMAN, *supra* note 4, at 132–36, 181–82; Adam S. Hofri-Winogradow, *The Stripping of the Trust: From Evolutionary Scripts to Distributive Results*, 75 OHIO ST. L.J. 529 (2014); Kades, *supra* note 7.

185. Kades, *supra* note 7, at 177–78.

186. *Id.*; *see also* 26 U.S.C. § 2631.

187. *See, e.g.*, OHIO REV. CODE ANN. § 2131.08(C) (LexisNexis 2021) (measuring the perpetuities period "by actual rather than possible events"); 20 PA. STAT. AND CONS. STAT. ANN. § 6104(b) (West 2021) (measuring the perpetuities period "by actual rather than possible events"); VT. STAT. ANN. tit. 27, § 501 (2021) (measuring the perpetuities period "by actual rather than possible events"). This approach advocates waiting for some period to see if contingent remainders might vest. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.3 (AM. L. INST. 1983).

188. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-2901 (2021) (five hundred years); CAL. PROB. CODE §§ 21200–21225 (West 2021) (ninety years); COLO. REV. STAT. §§ 15-11-1101 to -11-1107 (2021) (one thousand years); CONN. GEN. STAT. ANN. §§ 45a-490–496 (West 2021) (ninety years); *see also*

and repealing the rule altogether.[189] Concomitantly, the exclusion amount for gift, estate, and GST taxes grew from one million dollars in 2000 to $11.58 million in 2019—amounts that could be augmented roughly sixfold through life insurance and other estate planning strategies.[190] Today, grantors with truly dynastic aspirations can settle trusts in any number of states and forever dodge estate taxes.[191]

Dynasty trusts are especially pernicious in times like ours, when interest rates hover close to 0%, economic stimulus is politically intractable, and regulators have exhausted traditional options.[192] The hoarding of assets in trust reinforces a paradox of thrift within the very circles where spending is viable.[193] Writing in 2005, Robert Sitkoff and Max Schanzenbach reported that states abolishing the RAP saw their total trust assets increase by six billion dollars (up from an average of nineteen billion dollars) and average trust size increase by $200,000 (up from an average of one million dollars, right at the exclusion amount).[194] All in all, approximately one hundred billion dollars had been diverted to perpetual trusts, with virtually no benefit to the states abolishing or otherwise curtailing the RAP.[195]

As the standard bearers of estate planning for the ultrarich, dynasty trusts have been targeted by tax and T&E scholars and policymakers for demolition. Some would close the GST loophole by cutting off the transfer tax exemption at either ninety years after settlement or at the generation of a settlor's grandchildren.[196] Others have suggested federal legislation either against perpetual trusts or enabling living beneficiaries to vote for trust termination.[197] Tax is often central to these proposals:

Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1023 (1987); Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 157–59 (1988).

189. *See, e.g.*, IDAHO CODE § 55-111 (2021) ("There shall be no rule against perpetuities applicable to real or personal property."); S.D. CODIFIED LAWS § 43-5-8 (2021) ("The common-law rule against perpetuities is not in force in this state.").

190. *See* Dukeminier & Krier, *supra* note 13, at 1318–19.

191. South Dakota is a clear example. S.D. CODIFIED LAWS § 43-5-8. In fact, South Dakota's deference to settlors has turned it into one of the primary "offshore" jurisdictions for APTs. *See Offshore Havens and Hidden Riches of World Leaders and Billionaires Exposed in Unprecedented Leak*, *supra* note 137.

192. *See* Listokin, *supra* note 11, at 151 ("[W]hen nominal interest rates fall to zero, as they quickly did during the Great Recession, conventional monetary policy loses traction.").

193. *See* Kades, *supra* note 7, at 194–97.

194. Sitkoff & Schanzenbach, *supra* note 57, at 359.

195. *Id.* at 359–60.

196. STAFF OF J. COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 392–95 (Comm. Print 2005).

197. Dobris, *supra* note 140, at 2542–43.

perpetual trusts would look very different if they were taxed mercilessly.[198] More directly, as a cudgel against wealth inequality, scholars have proposed a wealth tax to supplant income, GST, and estate taxes.[199] Wealth taxes would squarely confront the disparity in pace of growth between the capital (e.g., real estate or corporate holdings held by ultrarich households in trusts) and labor (i.e., how most households make money), though their constitutionality is contested.[200]

One of the most innovative suggestions has come from Eric Kades. Professor Kades proposes taxing dynastic trusts to spur spending. He would achieve this by disincentivizing savings above the rate where consumption is maximized.[201] This rate is known as the "golden rule," and it is pegged at 15%.[202] The golden rule rate equals the "sum of the depreciation rate for capital (roughly, the annual rate at which capital wears out) and the rate of growth of the population."[203] Additionally, to combat the shorter-term paradox of thrift, Professor Kades has suggested taxing dynasty trusts as an "automatic stabilizer" during economic downturns.[204] These taxes would counteract excessive savings among wealthy households, prompting settlors to redirect some of their assets from trusts toward spending and investment.[205]

Yet a perpetuities amendment faces legal and macroeconomic challenges. Because dynasty trusts are creatures of a race to the bottom with states competing for trust assets, federal intervention is required. Thus, the most viable schemes would harness federal taxation powers or some form of coordinated national response.[206] Nonetheless, competition for trust assets does not only occur within the U.S.—it happens

---

198. *See id.* at 2541–42.

199. *See, e.g.*, Emmanuel Saez & Gabriel Zucman, How Would a Progressive Wealth Tax Work?: Evidence from the Economics Literature (Feb. 15, 2019) (unpublished manuscript), https://eml.berkeley.edu/~saez/saez-zucman-wealthtaxobjections.pdf [https://perma.cc/3FXL-AM27] (advancing proposals to enforce a progressive wealth tax). Piketty himself proposes this as a more direct solution to wealth inequality. *See* THOMAS PIKETTY, CAPITAL AND IDEOLOGY (Arthur Goldhammer trans., 2020). The constitutionality of wealth taxes in the U.S. has been debated. *See* Daniel Hemel & Rebecca Kysar, *The Big Problem with Wealth Taxes*, N.Y. TIMES (Nov. 7, 2019), https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html [https://perma.cc/65FJ-83RA].

200. *See* Hemel & Kysar, *supra* note 199.

201. Kades, *supra* note 7, at 198.

202. *Id.* at 207–08; *see also* Edmund Phelps, *The Golden Rule of Accumulation: A Fable for Growthmen*, 51 AM. ECON. REV. 638 (1961).

203. Kades, *supra* note 7, at 198.

204. *Id.* at 208–10.

205. *See id.*

206. *See* Freilich, *supra* note 28, at 99.

internationally as well.[207] Wealth flows to the jurisdictions that regulate it most lightly, and grantors have already settled trillions of dollars in APTs offshore, to keep them out of the reach of creditors.[208] Dismantling dynasty trusts here might push settlors to re-route funds into countries that already operate as situses for their APTs.

A more worrisome consequence of curbing dynasty trusts, however, is that it will catalyze certain forms of inter vivos expenditures over others. Stronger GST taxes on dynasty trusts, just like robust estate taxes, drive settlors toward lifetime consumption.[209] Increased spending by settlors and lifetime beneficiaries certainly bolsters demand for goods and services, similar to the multiplier effect that Keynesian fiscal policy seeks to achieve.[210] However, even the most determined beneficiary can find it difficult to fully spend down exorbitant sums of money.[211] If settlors permit unused funds to be directed toward investment, they may hasten inequality in unexpected ways, particularly during recessions.[212]

Some economists have traced the financial crisis back to ultrawealthy families and their hunt to invest unconsumed assets.[213] Prior to the crisis, opportunities were rare because companies were funneling retained earnings not into investment or wages but, rather, into dividends (which operated as a feedback loop for income inequality).[214] As a result, financiers packaged the wealth of rich households into loans to lower-income households—loans that were securitized and then sold on secondary markets.[215] In addition to augmenting the credit circulating the

207. Rusbridger, *supra* note 130.

208. An APT is a self-settled (i.e., the settlor is the beneficiary) trust with the "disabling restraint" of a spendthrift provision that prevents the sale, assignment, and alienation of the beneficiary's interest. *See, e.g.*, FTC v. Affordable Media, LLC, 179 F.3d 1228, 1243 (9th Cir. 1999); *see also* Sterk, *supra* note 134, at 1048–50; Rusbridger, *supra* note 130 ("The economic system is, basically, that the rich and the powerful exited long ago from the messy business of paying tax . . . . They don't pay tax anymore, and they haven't paid tax for quite a long time.") (quoting Luke Harding, former Moscow correspondent, *The Guardian*). On disabling restraints, see Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 2 (1995).

209. Daniel J. Amato, Note, *The Good, the Bad, and the Ugly: The Political Economy and Unintended Consequences of Perpetual Trusts*, 86 S. CAL. L. REV. 637, 640 (2013).

210. *See* Kades, *supra* note 7, at 195–27.

211. For actual and fictional examples, see Geraldine Fabrikant, *Brooke Astor Has a Year's Worth of Giving Left*, N.Y. TIMES (Dec. 18, 1996), https://www.nytimes.com/1996/12/18/nyregion/brooke-astor-has-a-year-s-worth-of-giving-left.html [https://perma.cc/LZ9W-53XS]; BREWSTER'S MILLIONS (Silver Pictures 1985).

212. *See* Wisman, *supra* note 151, at 926 (explaining how investments in the housing market during low interest rates after the 2001 recession created a housing bubble).

213. *See, e.g.*, *id.* at 925 (analyzing the financialization of the economy that stemmed from the recycling of wealth from rich households as loans to less well-off households).

214. *Id.* at 925.

215. *Id.* at 924–26.

financial markets, this created housing and stock bubbles.[216] In boom times, to paraphrase Piketty's paradigm,[217] the value of capital pulls away from the value of labor; in downturns, capital is funneled into devalued assets, sowing the seeds for inequality. This dynamic mirrors theoretical studies of firm behavior in low-interest environments, which have found that incumbents with market power tend to invest while smaller players do not.[218] Eventually, the smaller firms exit the market, enhancing its concentration. All in all, recessions lay the groundwork for future inequality; prying assets from the coffers of dynasty trusts for spending may contribute to widening income and wealth gaps. Put differently, this strategy amounts to trading one type of inequality for another.

How, then, should we assess the different types of inequality? This Article argues that T&E reforms should prioritize IEM. The most consequential way for T&E to foment IEM is to reform the regime's rules affecting the top end of the wealth spectrum. Dismantling dynasty trusts, closing estate tax loopholes, and taxing estates heavily could frustrate the ability of ultrarich households to pass their wealth onto future generations. Over time, then, these reforms increase the likelihood that lineal descendants of the top 0.01% might slide down the economic ladder.

Because the instruments and doctrines of T&E govern the transmission of wealth across generations, T&E as a field can affect intergenerational wealth disparities. For ultrawealthy households, reductions in assets held by dynasty trusts can precipitate the downward slide of future generations. Even if inequality is fomented *intra*generationally through heightened investment, it may be necessary in the advancement toward more parity in *inter*generational mobility between rich and lower-income households.

B. Addressing the Distortions from Intestacy

For lower-income households, intestacy stands as the greatest threat within T&E to the intergenerational transmission of wealth. Accordingly, scholars have recommended a number of improvements to intestacy. For example, appending a will as a testamentary schedule to tax filings would reduce the instances of intestacy.[219] Utilizing a decedent's nonprobate transfers (e.g., insurance or retirement plan beneficiary designations) to

---

216. *Id.* at 926, 929.

217. PIKETTY, *supra* note 92, at 33–34. Piketty's framework $r > g$ is that the return on capital outstrips the economic growth rate. *Id.*

218. Ernest Liu, Atif Mian & Amir Sufi, *Low Interest Rates, Market Power, and Productivity Growth* 39 (Nat'l Bureau of Econ. Rsch., Working Paper No. 25505, 2020), https://www.nber.org/papers/w25505 [https://perma.cc/93RD-UA7Y].

219. *See* Weisbord, *supra* note 14, at 920.

guide intestacy distributions would help conform to a decedent's likely wishes—especially if it resulted in distributions to non-family members, who are disfavored under intestacy defaults.[220] Similarly, permitting transfer-on-death designations for homes, the most valuable asset in most estates, would enable homes to pass outside the probate system and directly to heirs.[221] These designations would then reduce the likelihood of intestate successors receiving fractionated interests.[222]

As with dynasty trusts, taxes are also central to the analysis of intestacy. Delinquency in paying property taxes, often in combination with the inability to physically maintain real property, can result in tax sales and foreclosures when heirs hold partial interests in a home.[223] Staying tax sales and foreclosures for a period after a decedent's death would allow heirs to pay off those debts and retain the home—or to restore and sell it.[224]

These proposals share two themes: honoring, rather than vitiating, testamentary freedom; and maximizing the assets passed from decedents to their heirs.[225] Advancing these two goals will enable testators to transmit assets as they see fit, which is more likely to keep assets intact than conveying multiple takers fractional interests. Given intestacy's limitations in accommodating the heterogeneity and desires of low-income households, honoring testamentary freedom should transmit more wealth to heirs. In some instances, heirs will not spend their windfalls. Inheritance windfalls may even defy the policy goals of other types of windfalls, such as when governments give tax breaks or stimulus checks to lower-income households to lubricate spending.[226] Yet if heirs choose to hold onto their devises—for example, by living in, rather than selling, a home—those devises would provide a tailwind for economic mobility. And if assets can be transmitted to the next generation, then

---

220. *See* Fellows & Spitko, *supra* note 71, at 2254–55.

221. *See* Wright, *supra* note 21, at 2637–38.

222. *Id.*

223. *Id.* at 2632. For a discussion on the racial dimensions of this problem, see Bernadette Atuahene & Christopher Berry, *Taxed Out: Illegal Property Tax Assessments and the Epidemic of Tax Foreclosures in Detroit*, 9 U.C. IRVINE L. REV. 847 (2019).

224. Wright, *supra* note 21, at 2632.

225. These proposals also highlight disparities between the probate system, which touches succession in most households, and the relative ease of nonprobate transfers such as trusts. To be sure, probate is intractable for many heirs, but a fuller exploration of the bimodal distribution between probate and nonprobate is beyond the scope of this Article.

226. On the spending habits of recipients of the pandemic stimulus relief, see *How Did Americans Spend Their Stimulus Checks and How Did It Affect the Economy?*, PETER G. PETERSON FOUND. (May 14, 2021), https://www.pgpf.org/blog/2021/05/how-did-americans-spend-their-stimulus-checks-and-how-did-it-affect-the-economy [https://perma.cc/PTY5-7HV2].

intergenerational mobility is all the likelier.

CONCLUSION

This Article has examined potential reforms to T&E from the standpoint of reducing inequality. Where results conflict with short-term economic stimulus, or seem indeterminate in confronting inequality, this Article would prioritize the result that best cultivates intergenerational economic mobility. While this Article analyzed dynasty trusts and intestacy as surrogates for ultrawealthy and lower-income households, wealth distribution is not entirely bimodal, and many instruments (e.g., inter vivos trusts) within T&E cater to the needs of the significant proportion of middle and upper-middle income households. Dynasty trusts and intestacy may be the most distributively consequential areas of T&E, but scholars should also assess the myriad other instruments of T&E that affect inequality and intergenerational mobility. With IEM as the field's first principle and mean regression as its economic guidepost, T&E will be better positioned to counter inequality.