4-26-2017

Asymmetries in the Generation and Transmission of Wealth

Felix B. Chang
University of Cincinnati College of Law, felix.chang@uc.edu

ASYMMETRIES IN THE GENERATION AND TRANSMISSION OF WEALTH

FELIX B. CHANG †

This Article assigns a redistributive role to the legal rules of trusts and estates. Unlike business law, trusts and estates has lagged in articulating a comprehensive theory on inequality. Consequently, income inequality is compounded intergenerationally as wealth inequality, with dire consequences for economic productivity and social stability. To move the discourse on wealth inequality, this Article explores the divergent approaches toward inequality in business law and trusts and estates.

Additionally, this Article recasts trusts and estates' legal rules as wealth transfer mechanisms. Four categories of rules are implicated: (1) rules that interact with the tax system, (2) rules that govern relations between beneficiaries and creditors, (3) rules that govern relations between beneficiaries and trustees, and (4) rules that govern relations among beneficiaries.

More broadly, this Article contributes to three lines of scholarly debates. The first revolves around the propriety of drawing analogies between trust law and the law of enterprise organization. The second is whether legal rules or the tax system better effectuates redistribution. The third is whether legal rules should reflect our notions of fairness or welfare.

† Associate Professor, University of Cincinnati College of Law. BA, Yale; JD, Michigan. E-mail: felix.chang@uc.edu. I am indebted to Tom Gallanis for his insightful comments. Thanks, too, to Lee-ford Tritt and Deborah Gordon. This Article benefited greatly from the "Sex, Death, and Taxes" panel at the 2017 annual meeting of the American Association of Law Schools.

CONTENTS

I. INTRODUCTION

Much of the law on the transmission of wealth (i.e., trusts and estates) has been insulated from the pushback against inequality sweeping through the laws governing the generation of wealth (e.g., business law). In recent years, corporate law has advanced a team production theory of the firm and sought to rein in executive compensation,[1] while antitrust has debated the ties between market power and inequality.[2] Trusts and estates, meanwhile, has confined this discourse primarily to the estate tax and, to a lesser extent, a handful of issues such as dynasty trusts, spendthrift and asset protection trusts, and intestate succession.[3] For the most part, however, trusts and estates has lacked a coherent and unifying approach toward inequality.[4]

This is not altogether surprising. The generation of wealth is a team effort where multiple constituencies might have played a role—and therefore can stake a claim—in the output. Hence, arguments for pay equity have some moral force. By contrast, when wealth is to be gratuitously transferred on an individual basis, the transferees might be unborn parties who did not contribute to the accumulation of wealth. Here the law tends to defer to the preferences of testators and settlors, displacing those preferences only under limited circumstances.[5] This tendency is reinforced by social norms toward diligence and success that enable dead hand control.[6]

---

[1] *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (seminal work on the team production theory); 17 C.F.R. 240.14a-21 (shareholder approval of executive compensation).

[2] *See, e.g.*, Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016).

[3] *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 (2013); Pamela Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453 (2010); Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, 27 CARDOZO L. REV. 2523, 2526 (2006); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877 (2012) [hereinafter Weisbord, *Wills for Everyone*].

[4] Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts, and Estates*, 49 REAL PROP. TR. & EST. L.J. 317, 340 (2014).

[5] For a summary, see Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125 (2013) [hereinafter Kelly, *Restricting Testamentary Freedom*].

[6] For a summary, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6-8 (1992). On the centrality of freedom of testation in American succession law, see RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 6-7 (2010). On the evolution of

Nonetheless, this deficiency in trusts and estates law has left wealth inequality with little redress. In fact, the wealth gap is even larger than the income gap and has been steadily growing,[7] with dire consequences for society.[8] Inequality hampers economic growth, thwarts democracy, erodes public health, and foments social instability, political unrest, and racial injustice.[9] Inequality is firmly entrenched and self-perpetuating. Its many distortionary effects are both a cause and a symptom of the concentration of economic and political power in the hands of the very few at the expense of the great many.

To provoke discourse on wealth inequality within trusts and estates, this Article compares the law's treatment toward the generation versus the dissemination of wealth and advances a vision that integrates these two components. The Article analogizes the legal system governing wealth to a unified system, where localized imperfections can raise inequality unless corrected elsewhere.[10] For instance, in business law, a singular devotion to shareholder primacy spurs *income* inequality, which in turn compounds *wealth* inequality when the estate tax fails to arrest the velocity of disparity over several generations.

In taking the first steps toward a unifying theory on inequality, this Article focuses on *non-tax* aspects of trusts and estates. Currently, the principal mechanism of redistribution in trusts and estates is the tax system. However, as a matter of political reality, the estate tax simply has too little traction—and, in the current political climate, is likely to be repealed.[11] As a matter of broader academic trends, examining the redistributive propensity of other areas within trusts and estates mirrors similar conversations in antitrust, corporate law, and financial regulation that are all occurring outside the ambit of tax policy.

the term "dead hand control," see Daniel B. Kelly, *Trust Term Extension: An Economic Analysis*, 67 FLA. L. REV. F. 85, 87-88 (2015) [hereinafter Kelly, *Trust Term Extension*].

7 On the distinction between wealth inequality and income inequality, see Strand, *supra* note 3, at 458-59.

8 For a summary of the literature, see James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 831-49 (2001).

9 *See infra* Section II.B.2.

10 See Ronen Avraham et al., *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125, 1126 (2004) (arguing that redistributive goals are better accomplished on a case-by-case basis).

11 *See infra* Section II.B. *See also* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005).

Assigning a redistributive role to trusts and estates can be controversial,[12] but this Article presents a roadmap for working through potential pitfalls. As an initial step, we define "redistribution" as *a reduction in income or wealth inequality*.[13] Next, we note that redistribution is most efficiently accomplished when there is a transfer from the rich to the poor. Scholars disagree on whether legal rules or the tax system can better effectuate this transfer.[14] With due consideration to that debate, this Article examines the redistributive propensities of trusts and estates' legal rules—specifically, the rules most likely to govern interactions between rich and poor players. Here the analogy to business law loses its force. Whereas a variety of players from different stations come together to generate wealth, the gratuitous transfer of wealth tends to involve families or other units that are likely to be more economically uniform.

To advance the discourse on where trusts and estates is poised to assume redistributive roles, this Article examines four subsets of legal rules: (1) rules that interact with the tax-and-transfer system (e.g., the rule against perpetuities), (2) rules that govern relations between grantors and beneficiaries on one hand and creditors on the other (e.g., spendthrift and asset protection trusts), (3) rules that govern relations between beneficiaries and trustees (e.g., fiduciary duties), and (4) rules that govern relations among beneficiaries (e.g., abatement, ademption, *cy pres*, and execution formalities). The thrust of this exercise is to infuse the discourse on redistribution with theoretical frameworks from law and economics.

Counterarguments abound. For example, legal rules which redistribute wealth might add to distortions in the tax system—the so-called "double distortion" argument.[15] Within trusts and estates,

---

[12] *See infra* Section II.A.

[13] This is the general understanding in economics. *See* PETER LAMBERT, THE DISTRIBUTION AND REDISTRIBUTION OF INCOME 37-39 (3rd ed. 2001).

[14] *See, e.g.*, Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) [hereinafter Kaplow & Shavell, *Why the Legal System is Less Efficient*]; Chris Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003 (2001); Tomer Blumkin & Yoram Margalioth, *On The Limits of Redistributive Taxation: Establishing a Case for Equity-Informed Legal Rules*, 25 VA. TAX REV. 1 (2005).

[15] The "double distortion" argument in law economics holds that a rule which redistributes income only adds to the economic distortions already present in the tax system. *See* Kaplow & Shavell, *Why the Legal System Is Less Efficient*, *supra* note 14. For instance, taxes cause labor/leisure distortions: an individual taxed at a 40% rate will find work to be less attractive than leisure and will work less. David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV.

adherence to efficiency (or, more precisely, welfare) over testator or settlor intent is particularly controversial.[16] Additionally, excessive tinkering with testamentary instruments might drive trusts offshore or toward other favorable jurisdictions.[17] Finally, viewing the laws governing generation and transmission of wealth as a closed system violates economic principles on how wealth moves.[18] This Article addresses each criticism in turn.

Part II of this Article dissects the asymmetrical approaches of business law and trusts and estates toward inequality. Part III recasts trusts and estates' legal rules as wealth transfer mechanisms. Part IV advances a framework for applying these rules to serve distributive ends. Here the governing principles will be (1) the management of spillover effects between rules governing the transmission of wealth and rules governing the generation of wealth, (2) the proper balance between the goals of fairness and welfare, and (3) maximizing distributive efficiency.

II. ASYMMETRICAL APPROACHES TOWARD INEQUALITY

Laws governing the generation of wealth are infused with principles that can redress inequality. However, as currently conceived, laws governing the transmission of wealth are poorly suited to tackle inequality and, in fact, can exacerbate it. This Section introduces the conundrum by citing examples from corporate law, antitrust, and financial regulation, in contradistinction to trusts and estates. This Section then examines the consequences of the asymmetry.

439, 440-41 (2003). When a legal rule becomes a vehicle for redistribution—for example, if wealthy tortfeasors have to pay greater damages than poor tortfeasors—there is both the labor/leisure distortion and a distortion relative to the rule. Individuals might "take too much or too little care, breach contracts inappropriately, under- or over-invest in property, and so on." *Id.* at 447. For a fuller discussion, see infra notes 119-24 and accompanying text.

[16] *See* Lee-Ford Tritt, *The Limits of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579 (2011); Kelly, *Restricting Testamentary Freedom*, *supra* note 5. Welfare is the aggregation of every individual's well-being in a society. KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE 38-41 (2002) [hereinafter KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE]; MARC FLEURBAEY & FRANÇOIS MANIQUET, A THEORY OF FAIRNESS AND SOCIAL WELFARE 234 (2011). Efficiency means wealth maximization, but in legal scholarship, it has become an amorphous concept unmoored from its roots in well-being. *See* KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE at 41. *See also infra* Section IV.B.

[17] *See infra* Section IV.D.

[18] *See infra* Section II.B.

A. *Generation versus Transmission of Wealth*

In recent years, corporate law scholars have challenged shareholder primacy, the notion that corporations exist to serve the interests of shareholders.[19] As one argument goes, shareholder primacy fetishizes shareholder profits, particularly short-term profits, to the detriment of all other constituencies.[20] Large, activist shareholders such as hedge funds might spur a firm to cut its way to profitability by laying off employees; then those large shareholders might sell their stake before the grave consequences of their strategy set in. In response, some academics have refined the primacy norm to argue that directors (not shareholders) enjoy primacy,[21] while others have gone a step further by accounting for employees.[22] In a notable opinion, the Delaware Chancery Court even speculated whether fiduciary obligations should extend to the corporate enterprise as a whole, including creditors, when a firm is "in the vicinity of insolvency."[23] At their core, such positions reorient the principal-agent relationship, which forms the bedrock of fiduciary duty, away from the focal point of the shareholder. This reorientation works to equalize incomes, by directing agents to consider more than shareholder profits in the operation of a corporation.[24]

This is not to say that shareholder primacy always impedes income equality. Corporate reforms eliminating staggered boards, reining in executive compensation, and inhibiting boards from vetoing takeover bids are all pro-shareholder. These reforms limit the ability of executives and board members to steer compensation and also to entrench themselves at the expense of shareholder value. If the quintessential manager is a highly paid executive and the quintessential shareholder is an ordinary investor, then these reforms work to level out incomes.

---

[19] For the roots of shareholder primacy, see ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

[20] *See, e.g.*, Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 788 (2005).

[21] Stephen M. Bainbridge, *Director Primacy*, in Research Handbook on the Economics of corporate Law (2012); Blair & Stout, *supra* note 1.

[22] Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69 (2015).

[23] Credit Lyonnais Bank Nederland, N.V. v. Pathe Commun. Corp., 1991 WL 277613 (Del. Ch. 1991).

[24] This has even led to a movement to explore new corporate forms to accommodate social entrepreneurship. *See* Leo E. Strine, Jr., Making It Easier for Directors to "Do the Right Thing"?, 4 HARV. BUS. L. REV. 235, 249-50 (2014)

Competition policy, too, has recently assumed the mantle of redressing inequality. Since the start of the financial crisis, legal scholars have debated the role of antitrust in enabling financial firms to attain systemic significance.[25] Now economists have entered the fray to argue that monopoly regressivity is a root cause of inequality.[26] Altogether, these developments challenge the Chicago School paradigm, whose central focus in the design and enforcement of regulation is efficiency. When the goal of antitrust rules is broadened beyond efficiency to include equity and redistribution, inequality diminishes.[27] For example, a rule that prevents dominant firms from merging ends up ceding market share—and, therefore, wealth—to smaller rivals.[28] So, too, does a rule that prevents a monopoly from engaging in predatory pricing to drive out its smaller rivals.[29]

Rules governing the generation of wealth are not just administered by courts; they are also administered by regulators. For instance, competitors can sue under federal and state antitrust laws, but the Department of Justice and Federal Trade Commission play prominent roles in intermediating transactions among competitors (e.g., by blocking mergers, which transfers wealth from merging parties to other market players) or between firms and consumers (e.g., by prohibiting deceptive sales practices or supracompetitive pricing, which transfers wealth from regulated firms to consumers). In fact, business law now interfaces as much with public law as with private law, due to the proliferation of regulations governing business operations. Thus, financial reform legislation has interposed administrative agencies onto a host of business-consumer interactions that used to be conceived as purely contractual.[30] Even a traditionally

---

[25] *See, e.g.*, Alan Devlin, *Antitrust in an Era of Market Failure*, 33 HARV. J.L. & PUB. POL'Y 557, 558 (2010).

[26] *See, e.g.*, JOSEPH E. STIGLITZ, THE GREAT DIVIDE: UNEQUAL SOCIEITIES AND WHAT WE CAN DO ABOUT THEM (2015); THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE (2012) [hereinafter STIGLITZ, PRICE OF INEQUALITY]; THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY (Goldhammer trans. 2014); ROBERT B. REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW. *But see* Daniel A. Crane, *Antitrust and Wealth Inequality*, 101 CORNELL L. REV. 1171 (2016) (arguing that monopoly power does not have a substantial connection to wealth inequality).

[27] Antitrust, too, is concerned with various types of efficiency, but sometimes efficiency counsels against enforcement. Here I am tracing the literature that calls for more aggressive competition policy, beyond efficiency's traditional strictures, to mitigate economic inequality. *See supra* note 26.

[28] Sherman Act § 1, 15 U.S.C. § 1 (2012).

[29] *Id*. § 2.

[30] E.g., the Consumer Financial Protection Bureau, which works to redress the asymmetry of information between consumers and firms.

"private" law matter such as the enforcement of fiduciary duty, customarily between private parties before a court, has been made "public" in several settings.[31] Redistribution under legal rules governing business is therefore occurring frequently within the regulatory ambit. To the extent that regulators have more information at their disposal than courts in administering a legal rule, the regulatory turn is a welcome evolution; for regulators can give redistribution maximum effect, while achieving both uniformity and efficiency.

In the *transmission* of wealth, however, redistribution unfolds very differently. To be sure, scholars have tried to lay the groundwork for trusts and estates to redress inequality. Professor Ascher's article "Curtailing Inherited Wealth" argues that all property owned by a decedent should be sold and the proceeds turned over to the government, subject to certain exceptions and payment of debts and expenses.[32] Recently, with the attention on societal inequality, academics have called for the wealth transfer taxes to be bolstered and, more fundamentally, a critical trusts and estates research agenda to incorporate the voices of disempowered groups.[33] In this vein, Professor Weisbord has proposed ways for Americans—especially the poor—to avoid intestacy so as to maintain intergenerational economic continuity.[34] At the other end of the economic hierarchy, scholars have assailed dynasty trusts and asset protection trusts, which lock away the wealth of the very rich.[35] All of these proposals, however, suffer from practical and normative deficiencies.

As a practical matter, once wealth has been accumulated during a testator's lifetime, the principal mechanism of redistribution is the tax system: estate taxes (on the donor's estate) and inheritance taxes (on recipients). Yet over the last few decades, these taxes have

[31] *See, e.g.*, 17 C.F.R. 23.400 et seq. (business conduct standards for swap dealers in certain derivatives sales); Securities & Exchange Comm'n, *Study on Investment Advisers and Broker-Dealers, As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act* (2011) (imposing fiduciary duties upon broker-dealers). Recently, however, the viability of the fiduciary rule for broker-dealers has come into question. *See* Ben Protess & Julie Hirschfeld Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. TIMES, Feb. 3, 2017.

[32] Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990).

[33] *See* James R. Repetti, *supra* note 8 (canvassing the literature on estate, gift, and income tax arguments); Caron &. Repetti, *supra* note 3; Crawford & Infanti, *supra* note 4.

[34] *See* Weisbord, *Wills for Everyone*, *supra* note 3.

[35] *See* Adam S. Hofri-Winogradow, *The Stripping of the Trust: From Evolutionary Scripts to Distributive Results*, 75 OHIO ST. L.J. 529 (2014); French, *supra* note 3.

been eviscerated. Where once an estate tax rate in excess of 77% (beyond a $40,000 exemption) roamed, now a rate of 35% (and an exemption of $5 million) hobbles.[36] Nonetheless, given recurring appeals to resuscitate the estate tax, the academy seems not to have yet accepted the political reality that the rollback on this tax is here to stay and the repeal imminent.[37]

The natural alternative is to look to the myriad of legal rules within trusts and estates. This move, too, is fraught with practical difficulties. Unlike business law, trusts and estates rarely interfaces with regulators. Occasionally a state attorney general might intervene in the administration of a charitable trust if there are allegations of fraud or misuse of trust assets, but of course, someone must first alert the attorney general. Where trusts and estates intersects with Medicaid, Medicare, Social Security, and housing programs, there is some regulatory oversight, but the legal rules implicated tend not to touch upon the core attributes of redistribution explored above: a transfer of wealth from rich to poor, ideally by a regulator that can gauge the macroeconomic effects of its intervention. In trusts and estates, redistribution by rules would seem to be consigned to trust litigation and probate proceedings, which is altogether more ramshackle.[38]

Yet there are redeeming features of trusts and estates' legal rules. When courts go to construe those rules, notions of equity and fairness are often at play. Courts emphasize or dispense with will formalities and other rules to arrive at results that protect a testator's surviving family members.[39] In this way, trusts and estates mirrors the enforcement of corporate law, particularly fiduciary duty, where courts often stretch to get to a "fair" result that runs counter to black letter law.[40] Hence, redistribution might be meted out in small doses,

---

[36] For a concise history of the evolution, see Jay A. Soled & Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 WASH. & LEE L. REV. 257, 262-72 (2015). On the coalition that fought estate taxes, see GRAETZ & IAN SHAPIRO, *supra* note 11.

[37] *See, e.g.*., Caron & Repetti, *supra* note 3. *See also* Ashlea Ebeling, *Will Trump Victory Yield Estate Tax Repeal?*, FORBES, Nov. 9, 2016.

[38] For now, this Article will sidestep the critique of haphazardness, addressing it more in depth in Sections III.B.3 and IV.C.

[39] Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996) [hereinafter Leslie, *Myth of Testamentary Freedom*].

[40] This is why the classical fiduciary duty cases are often so difficult to teach. *See, e.g.*, *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928); *Page v. Page*, 55 Cal.2d 192 (1961) (finding that even though a majority partner could have cut out the minority partner, the partner was still bound by the amorphous duty of good faith and fair

between parties to a judicial proceeding, but it is redistribution nonetheless.

As a normative matter, however, assigning a redistributive role to trusts and estates' legal rules violates dearly held values that are peculiar to the field. Freedom of testation is the "organizing principle of the American law of succession."[41] The notion that a testator or settlor, having amassed wealth during his lifetime, enjoys the discretion to control its disposition is deeply ingrained in American society. It is so ingrained, in fact, that ordinary Americans reflexively endorse limits on the government's ability to tax inherited wealth. For scholars, calls to curtail dead hand control encounters equally passionate opposition premised upon freedom of testation—often at the expense of tailored discussions over *why* dead hand control holds any normative significance.[42]

Another normative obstacle is the fact that unlike the creation of wealth, which tends to involve numerous and diverse parties, the transmission of wealth involves fewer parties, who are often economically uniform. Wealth generation is the interplay of diverse intra-firm constituents ranging from executives to part-time service workers, as well as extra-firm diversity of producers varying in degree of specialization and market share. Any of these constituents might have an equitable claim to a specific party's wealth. The transmission of wealth, by contrast, occurs within a much smaller orbit—typically within a family or other similar unit, where the members with an equitable claim to the testator or settlor's wealth are few.[43] There are some exceptions. Creditor claims cut across trusts and estates law just as they do business law. But for the most part, the law surrounding the

dealing in doing so). These analyses often conflate *fairness* with *welfare*. In Section IV.B, I will attempt to untangle the concepts.

[41] Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643 (2014); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003).

[42] *See, e.g.*, Kelly, *Trust Term Extension*, *supra* note 6, at 89 ("Apart from specific arguments, saying that a doctrine may increase (or decrease) dead hand control does not have any normative significance. Although many scholars assume that dead hand control is bad, asserting that a legal reform may involve dead hand control does not tell us anything about whether or not the reform is socially desirable."); Hirsch & Wang, *supra* note 6, at 5 ("legal regulation of future interests may well require more precise calibration according to the attributes of control which testators seek to retain in any given case").

[43] *See* Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, Book Review, 89 TEX. L. REV. 1149, 1160 (2011) ("In most cases, however, children at least knew their parents. Maybe, even, in a miniscule number of instances, they contributed to a parent's acquisition of property. Grandchildren, too, generally knew their grandparents to at least some extent. But what about great-grandchildren? And great-great grandchildren?").

transmission of wealth faces much different normative and practical realities than the law surrounding the generation of wealth, differences that complicate the redistribution proposition for trusts and estates' legal rules.

Why, then, should these rules take on the redistribution mantle? Simply put, wealth inequality is too complex and too socially destructive a problem. The current scheme of income redistribution (that is, redistribution at the wealth generation end) and weak wealth transfer taxes cannot adequately redress inequality. The patchwork of trusts and estate's legal rules must work to fill the cavernous gaps at the wealth transmission end. The next Subsection addresses the magnitude of the problem, and the remaining Sections of the Article explore and defend the potential solutions.

B. *Wealth Inequality*

1. *Conceptualizing wealth as a system*

In recent years, academic and policy attention has been lavished on income inequality.[44] However, *wealth* is a more holistic assessment of inequality than *income*.[45] Income is the earnings of an individual over a specific period, but wealth represents accumulated assets, typically by families and across generations.[46] For instance, wealth accrues when decedents pass on their assets to family members; in turn, those family members may pass on the unused portions of inherited assets to their own beneficiaries.

Because wealth is compounded across generations and within families, it amplifies socioeconomic gaps. Not only do the poor earn less during their lifetimes to pass on to survivors than do the rich, the poor may have begun life with less advantage, being born to parents who inherited little and likely passed on little.[47] Not surprisingly,

[44] *E.g.*, BRANKO MILANOVIC, INCOME, INEQUALITY, AND POVERTY DURING THE TRANSITION FROM PLANNED TO MARKET ECONOMY (1998); RAGHURAM G. RAJAN, FAULT LINES: HOW HIDDEN FRACTURES STILL THREATEN THE WORLD ECONOMY 8-9 (2010). In 2016, income inequality was a centerpiece of the U.S. Presidential election and the United Kingdom's referendum to leave the European Union.

[45] STIGLITZ, PRICE OF INEQUALITY, *supra* note 26, at 2 ("Income inequality data offer only a snapshot of an economy at a single moment in time. But this is precisely why the data on wealth inequality are so troubling—wealth inequality goes beyond the variations seen in year-to-year income. Moreover, wealth gives a better picture of differences in access to resources.").

[46] Strand, *supra* note 3, at 464-65.

[47] Such is the luck of birth. *See* MADOFF, *supra* note 6, at 68; ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, Book III p

wealth gap is greater than income gap; also, not surprisingly, the wealth gap tracks racial disparities.[48]

Wealth can be construed as a system comprised of two spheres: wealth generation and wealth transmission. Similarly, the legal system governing wealth can also be broken down into laws governing wealth generation and laws governing wealth transmission. To draw the analogy further, we can even depict this as a thermodynamic system, where overall wealth is neither created nor destroyed but merely shifted in response to laws.[49] Thus, imperfections in one sphere may augment overall imperfection in the system unless corrected elsewhere.

As a concrete example, assume that a dominant entertainment conglomerate has built up market power by conspiring to exclude smaller rivals in the initial screening of films or by forcing cable companies to bundle less desirable channels with popular channels.[50] The majority of stock in the conglomerate is owned and controlled by its chief executive.[51] During his lifetime, the executive is vastly wealthier than any of his firm's employees. If his succession plan transfers his ownership stake to trusts managed on behalf of five of his grandchildren, then at the next generation, when the wealth held by those five beneficiaries is compared against the wealth held by *all* the successors of *all* of the firm's employees, wealth disparity will likely be even greater simply because there are proportionately more successors of firm employees than successors of the executive.

Of course, wealth disparity can be fixed with robust estate, inheritance, and gift taxes. However, if wealth transfer taxes are feeble, then the velocity of disparity will accelerate from one generation to the next. Assume, for instance, that a corporation which operates discount retail and grocery stores maximizes profitability by

158 (Thomas Nelson ed. 1843) (decrying the foundation of European landed estates on the "most absurd of all suppositions . . . that every successive generation of men have not an equal right to earth . . . but that the property of the present generation should be restrained and regulated according to the fancy of those who died, perhaps five hundred years ago").

[48] Strand, *supra* note 3, at 466-68.

[49] This is akin to the First Law of Thermodynamics: in a closed system, energy is neither created nor destroyed.

[50] *See* Shalini Ramachandran & Merissa Marr, *New Attach on TV "Bundles": Cablevision Says Viacom violates Antitrust rules for How It Groups Cable Channels*, WALL ST. J., Feb. 26, 2013.

[51] *See About National Amusements*, National Amusements, Inc., https://www.nationalamusements.com/ (last visited Nov. 14, 2016); Keach Hagey & Joe Flint, *Sumner Redstone's National Amusements to Call on Viacom and CBS to Explore Merger*, WALL ST. J., Sept. 28, 2016.

paying its employees extremely low (and sometimes discriminatory) wages,[52] selling products manufactured in countries with low labor and environmental protection standards,[53] and bribing government officials abroad to expedite construction permits.[54] The founder accumulates so much wealth that his heirs become the richest family in the country. Six of the heirs wield more wealth than the bottom 42 percent of all Americans combined, a proportion that has increased with time.[55] The heirs might avoid or minimize estate taxes by utilizing grantor retained annuity trusts ("GRATs"), where a grantor is paid an annuity for a fixed period and any money left over passes to his heirs tax-free, and charitable lead annuity trusts ("CLATs"), where payments are made to a charity for a fixed period and any money remaining passes to an heir with minimal taxes.[56] These GRATs and CLATs, borne of generous tax loopholes, enable the heirs to pass on billions of dollars of assets virtually tax-free generation after generation, exacerbating wealth inequality.[57]

Admittedly, the thermodynamic model is simplistic. It omits an important qualification: no system is completely closed.[58] Wealth flows into and out of countries, either legally or illicitly.[59] After all, the cross-border movement of wealth forms the foundation for international trade, as well as cottage industries exploiting arbitrage opportunities.[60] Wealth is simply not created or transmitted in

---

[52] See Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[53] *See* S. Prakash Sethi, *The world of Wal-Mart*, Carnegie Council (2013), http://www.carnegiecouncil.org/publications/ethics_online/0081.

[54] *See* David Barstow & Alejandra Xanic von Bertrab, *The Bribery Aisle: How Wal-Mart Got Its Way in Mexico*, N.Y. TIMES, Dec. 17, 2012.

[55] *See* Josh Harkinson, *Walmart Heirs Hold More Wealth Than 42% of Americans Combined*, MOTHER JONES, Jul. 18, 2012.

[56] *See* Zachary R. Mider, *How Wal-Mart's Waltons Maintain Their Billionaire Fortone: Taxes*, BLOOMBERG, Sept. 12, 2013; *How to Preserve a Family Fortune Through Tax Tricks*, BLOOMBERG, Sept. 12, 2013; Samuel R. Scarcello, Note, *Transfer Taxes in Flux: A Comparison of Alternate Plans for GRAT Reform*, 107 NW. U. L. REV. 321 (2012); Kent C. Kiffner, Note, *Charitable Remainder Annuity Trusts: Why the Internal Revenue Service's Approach Needs Revision*, 54 SYRACUSE L. REV. 739 (2004).

[57] *See* Mider, *supra* note 56.

[58] The analogy to thermodynamics breaks down because unlike energy, wealth is not necessarily a zero-sum game in a closed system.

[59] Just as wealth is distributed unevenly *within* a country, its distribution is also uneven *among* countries. *See* BRANKO MILANOVIC, WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY (2005) [hereinafter MILANOVIC, WORLDS APART]. In fact, these disparities are the root of outsourcing.

[60] *See* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1048-50(2000) [hereinafter Sterk, *Asset Protection*

confined economies. Yet thermodynamic model can still be a useful way of thinking through legal rules, by disassembling the legal system into a set of laws governing the generation of wealth and another set governing the transmission of wealth. When one set spurs concentration in wealth and the other does nothing to reduce it, concentration will continue unabated.[61]

2. *Effects of wealth inequality*

The effects of wealth concentration tend to manifest over a long period, which impedes sustained study.[62] For many decades, hypotheses abounded on the trajectories of inequality, but substantiation was difficult.[63] Yet the tools for gauging inequality have steadily become more sophisticated.[64] We can say with

Trusts]; Red K. Weisbord, *A Catharsis for U.S. Trust Law: American Reflections on the Panama Papers*, 116 COLUM. L. REV. ONLINE 93 (2016).

[61] Criticisms of the thermodynamics analogy are as valid for the laws governing wealth as for wealth itself, since wealth flows to the jurisdictions that regulate its transmission the most lightly. *See infra* note 111 and accompanying text.

[62] *See* Repetti, *supra* note 8, at 835-36; PIKETTY, *supra* note 26, at 164-68.

[63] *See, e.g.*, Simon Kuznets, *Economic Growth and Income Inequality*, 45 AM. ECON. REV. 1 (1955) (hypothesis that inequality tracks the progression of an economy from rural to industrial); Alberto Alesina & Dani Rodrik, *Distribution, Political Conflict and Economic Growth: A Simple Theory and Some Empirical Evidence*, in POLITICAL ECONOMY, GROWTH, AND BUSINESS CYCLES 23, 34 (Alex Cukierman et al. eds., 1992) (hypothesis that inequality results from high taxes on the wealthy, which discourages investment and impairs growth); Charles Garrison & Feng-Yao Lee, *Taxation, Aggregate Activity and Economic Growth: Further Cross-Country Evidence on Some Supply-Side Hypotheses*, 30 ECON. INQUIRY 172 (1992) (challenging the Alesina & Rodrik hypothesis); BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 95 (1999) (hypothesis that inequality is a product of the failure to invest in education); Roberto Perotti, *Growth, Income Distribution, and Democracy: What the Data Say*, 1 J. ECON. GROWTH 149 (1996) (hypothesis that inequality both causes and results from sociopolitical instability); BRANKO MILANOVIC, INCOME, INEQUALITY, AND POVERTY DURING THE TRANSITION FROM PLANNED TO MARKET ECONOMY (1998) (case study of inequality during the instability of post-Communist transition in Eastern Europe).

[64] One recent work to garner acclaim is PIKETTY, *supra* note 26. Piketty and his colleagues managed to create a fuller picture of wealth distribution by supplementing census and other survey data with tax data. Through this compilation, they concluded that two factors dictate the composition of wealth—capital and income—and the current wealth gap is attributed to stagnant income for most of the economy and a relative explosion in capital for the those at the top. For one of the many reviews of Piketty's work, see Paul Krugman, *Why We're in a New Gilded Age*, N.Y. BOOKS, May 8, 2014. Another prominent figure is the economist Angus Deaton, who devoted his career to refining the measurement of consumption as a lens for poverty and welfare. For this, Deaton won the 2015 Nobel Prize in Economic

confidence and precision that inequality has grown at an alarming clip in recent decades, a trend that has only accelerated since the financial crisis.[65] In fact, our country is more economically unequal today than at any point since the Great Depression.[66] Along with advances in measuring inequality, our alarm over inequality has intensified. Inequality hampers economic growth, but there are spillover effects into every other imaginable sphere of life—democracy, public health, education, and social stability.

A consensus of empirical evidence shows that the more concentrated an economy is, the lower its growth rate.[67] Inequality constitutes such a formidable headwind to growth that it can arrest the momentum of innovation in jolting the economy.[68] This is in part because feeding the wealth gap means consigning workers to part-time jobs with few benefits and no security.[69] Simultaneously, top earners become closely intertwined with political leaders, from whom they extract rents such as tax cuts.[70] Consequently, the wealth gap takes a

Sciences. *See* Royal Swedish Academy of Sciences, *Angus Deaton: Consumption, Poverty and Welfare* (2015), http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2015/advanced-economicsciences2015.pdf.

[65] For one synopsis, see STIGLITZ, PRICE OF INEQUALITY, *supra* note 26, at 2 ("By 2007, the year *before* the crisis, the top 0.1 percent of America's households had an income that was 220 times larger than the *average* of the bottom 90 percent."). During the financial crisis and afterward, recovery was uneven because the wealthy tended to be invested in the financial markets (i.e., to recall Piketty's work, *capital*) and saw their losses rebound quickly, while most Americans had their net worth tied up in housing, where pricing rebounded more slowly and unevenly. *Id*. at 3.

[66] *Id*. at 5.

[67] *See, e.g.*, Philippe Aghion et al., *Inequality and Economic Growth: The Perspective of the New Growth Theories*, 37 J. ECON. LIT. 1615 (1999); Alesina & Rodrik, *supra* note 63; Torsten Persson & Guido Tabellini, *Is Inequality Harmful for Growth?*, 84 AM. ECON. REV. 600, 607, 617 (1994). For a summary of the research, see Repetti, *supra* note 8, at 832-36.

[68] *See* ROBERT J. GORDON, THE RISE AND FALL OF AMERICAN GROWTH: THE U.S. STANDARD OF LIVING SINCE THE CIVIL WAR 605-41 (2016). Admittedly, some inequality is inevitable and can actually propel growth. For this conventional view, see ARTHUR M. OKUN, EQUALITY AND EFFICIENCY (1975).

[69] For a heartbreaking anecdote, BRIAN ALEXANDER, GLASS HOUSE: THE 1% ECONOMY AND THE SHATTERING OF THE ALL-AMERICAN TOWN (2017) (tracing the effect on a town's working class when its largest employer is bought out by private equity).

[70] *See* Committee for Economic Development of the Conference Board, *Crony Capitalism: Unhealthy Relations between Business and Government* 16 (2015) (capital gains taxes as favorable to hedge fund managers); Todd Zywicki, *Rent-Seeking, Crony Capitalism, and the Crony Constitution*, 23 SUP. CT. ECON. REV. 77, 88 (2015) (arbitrary tax breaks as a product of rent-seeking); WALTER SCHEIDEL, THE GREAT LEVELER: VIOLENCE AND THE HISTORY OF INEQUALITY FROM THE STONE AGE TO THE TWENTY-FIRST CENTURY 51 (2017) (the rich owe their success

toll on investments in education and health by both the government (whose revenues are strapped by tax breaks) and individuals (whose incomes are limited by unsteady work), which in turn inhibits long-term productivity.[71]

Sure fixes to inequality include progressive taxation and expansive social security,[72] but the outsized political influence exerted by the wealthy constrains taxes and shreds the social safety net.[73] Instead, government leaders frequently opt for the politically expedient alternative of loosening access to credit, so as to dull the pain of stagnant wages and shrinking public expenditures.[74] This, in turn, spurs consumption but creates asset bubbles, which then precipitates other financial crises that further widen inequality.[75]

Inequality and its pernicious effects are not only closely correlated, they are mutually reinforcing. Besides democracy and economic growth, the wealth gap also corrodes race relations and social stability. More than any other factor, equality in wealth has the greatest equalizing effect between Blacks and Whites.[76] The wealth gap confines many within the minority community to inconsistent and substandard housing[77] and also saddles them with disproportionate court costs,[78] which inhibits the stability necessary to build wealth.[79]

---

as much to political clout as to anything else). *See also* STIGLITZ, PRICE OF INEQUALITY, *supra* note 26, at 39-43 (defining and describing rent-seeking).

[71] Long-term productivity closely tracks education and health. *See* PIKETTY, *supra* note 26, at 21 ("Knowledge and skill diffusion is the key to overall productivity growth as well as the reduction of inequality both within and between countries.").

[72] *See* ANTHONY B. ATKINSON, INEQUALITY: WHAT CAN BE DONE? 179-240 (2015).

[73] On the push to exert political influence, see Citizens United v. Federal Election Commission, 558 U.S. 310 (2010); McCutcheon v. Federal Election Commission, 572 U.S. __, 134 S.Ct. 1434 (2014); JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2016). On privatization, see STIGLITZ, PRICE OF INEQUALITY 176-78.

[74] *See* RAJAN, *supra* note 44, at 8-9 (2010).

[75] *Id*. at 21-45.

[76] The sociologist Dalton Conley found that Blacks and Whites diverged in wealth holdings even when other factors such as education, age, gender, and previous income were controlled for. *See* DALTON CONLEY, BEING BLACK, LIVING IN THE RED: RACE, WEALTH, AND SOCIAL POLICY IN AMERICA 47-49 (10th anniversary ed. 2010). However, when class measures were equalized, racial differences vanished. *Id*.

[77] MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016).

[78] Erik Eckholm, *Court Costts Entrap Nonwhite, Poor Juvenile Offenders*, N.Y. TIMES, Aug. 31, 2016.

[79] Even more destructive are over-policing and mass incarceration in minority communities (which fattens the coffers of privatized prisons) and substantive and procedural dilution of their voting rights (which consolidates political power in the

Nor is inequality confined to racial minorities. In 2016, voting blocs comprised of working-class majority populations unsettled a political orthodoxy that had embraced free trade. Rightly or wrongly, this bloc attributed its economic demise to globalization; with its support, a populist was elected by plurality to the U.S. Presidency, and the United Kingdom voted to leave the European Union.[80] Unfortunately, however, if comparisons are made to societies that exhibit similar levels of inequality, these politicians are likely to disappoint voters. By the common measure of inequality known as the Gini coefficient, the United States is similar to Russia, Turkey, Morocco, and Nicaragua, while the United Kingdom is on par with Bosnia, Cambodia, Laos, Italy, Estonia, and Sri Lanka.[81] Several of these comparators are countries whose leaders stoke fiery nationalism even as the broader society crumbles.[82]

Inequality begets inequality. It spills over "horizontally," exerting a corrosive influence on democracy, education, public health, race relations, and social stability. It is also flows "vertically," passed down from generation to generation. A child born into a wealthy family will have a leg up in virtually every respect, from nutrition to education to future prospects for employment, health, and longevity.[83] 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.

---

hands of wealthy elites). *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA (2015).

[80] *Populism* is a claim to speak for "the people" that is antipluralist, critical of elites, and rooted in identity politics. *See* JAN-WERNER MÜLLER, WHAT IS POPULISM? (2016). In 2017, the European Union is bracing itself for the possibility that a populist groundswell will catapult right-wing parties to victory in the Dutch, French, and German elections.

[81] *See Human Development Reports*, United Nations Development Programme (2013), http://hdr.undp.org/en/content/income-gini-coefficient (search for countries which measure at "40," which corresponds to America's Gini coefficient, and "36," which corresponds to the U.K.'s Gini coefficient).

[82] Notably, the U.S. and U.K. are redeemed by their high human development indicators; hence, they are clustered around countries rated at "very high human development." By focusing on inequality to the exclusion of all other factors, the Gini coefficient only presents one dimension of society.

[83] *See, e.g.*, Kirsten Weir, *Closing the health-wealth gap: Inequality in the United States is undermining Americans' health and longevity, say experts*, AMERICAN PSYCHOLOGICAL ASSOCIATION (2013), http://www.apa.org/monitor/2013/10/health-wealth.aspx; Annie Lowrey, *Income Gap, Meet the Longevity Gap*, N.Y. TIMES, Mar. 15, 2014.

3. *Central questions*

This Section only presents a snapshot of inequality's consequences. There are a number of other dimensions that cannot be fully explored here.[84] To maintain focus, this Article distills the problem of inequality to a few key questions for trusts and estates law scholars.

First, what is the role of trusts and estates law in sustaining inequality? The common thread among the multitude of explanations is that laws governing the transmission of wealth are weak (e.g., the estate tax) and lax (the use of trusts to build dynasties).[85]

Second, who benefits from this legal landscape? The list is small—the rich, of course, and their coterie of lawyers and financial institutions—when compared against the magnitude of those on the losing end—government, creditors, society.

A third question flows from the above two: *What can trusts and estates law do?* It turns out that the most effective ways to level out economic disparity are war, revolution, state collapse, and plague.[86] Short of those cataclysms, governments can pursue progressive taxation, pay parity, social security, and other policies.[87] Yet these measures are insufficient and likely to be eroded over the long term. Legal rules governing the transmission of wealth comprise a promising second-best solution,[88] especially since these rules have not yet been explored for their redistributive propensity the same way that business law has.

---

[84] For instance, inequality has a geographic dimension. When we speak of inequality, we might mean inequality within a country, or among countries, or among the worldwide population. *See* MILANOVIC, WORLDS APART, *supra* note 59. Inequality also has a temporal dimension. To properly contextualize today's levels of inequality, we should step back further to observe the sweep of inequality throughout history. *See* SCHEIDEL, *supra* note 70; PIKETTY, *supra* note 26.

[85] *See, e.g.*, Hofri-Winogradow, *supra* note 35, at 537-51.

[86] *See* Scheidel, *supra* note 70.

[87] ATKINSON, *supra* note 72, at 237-39; STIGLITZ, PRICE OF INEQUALITY, *supra* note 26, at 465-90.

[88] On the origins of the theory of second best, see R. G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956). Application of this theory to welfare economics posits that if the Pareto-optimum (i.e., first best) solution is unattainable because its conditions do not hold, the remaining conditions to Pareto optimality need not be pursued. This theory has become popular in the debate over double distortion, as a justification for departing from other Pareto efficiency conditions (i.e.., legal rules staying out of redistribution) because of inefficiencies in the tax system. *See, e.g.*, Matthew Dimick, *Should the Law Do Anything About Economic Inequality?*, 26 CORNELL J.L. & PUB. POL'Y 1, 60-63 (2016); Sanchirico, *supra* note 14, at 1017-18.

However, we must be careful not to overstate their redistributive propensity. As the prior Subsection demonstrates, inequality is an affliction whose magnitude can hardly be exaggerated, but as the remainder of this Article shows, the rules of trusts and estates vary in their redistributive efficiency. Nonetheless, recounting inequality's woes helps to counter the moral force of testamentary freedom as an organizing principle for trusts and estates and also to reorient the field around an equally pressing imperative: redistribution.

III. REDISTRIBUTION BY RULES IN TRUSTS AND ESTATES

Inequality's effects are pervasive and pernicious. Yet the legal system governing wealth does not adequately prevent inequality at the wealth generation end (business law) or the wealth transmission end (wealth transfer taxes). Therefore, we must supplement by turning to the legal rules within trusts and estates. This Section organizes the possibilities for doing so. First, it considers a hybrid system that blends elements of private law with the tax system—specifically, the rule against perpetuities, which interfaces with estate taxes. Next, this Section examines three groups of rules that transfer wealth between private parties, without the regulatory arm of the state. Broadly construed, these rules affect wealth distribution between trusts and creditors (e.g., spendthrift and asset protection trusts), between beneficiaries and trustees (e.g., fiduciary duties), and among beneficiaries (e.g., abatement, ademption, *cy pres*, and execution formalities).

Before we proceed, however, a few caveats must be laid bare. First, this Article takes a welfare economics approach that analyzes the effect of rules on the well-being of individuals, with priority given to wealth equality.[89] Under this view, redistribution is accomplished by transferring wealth from the rich to the poor. This is because the marginal utility of increased wealth is greater for the poor than the

[89] For the pillars of welfare economics, see, e.g., KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951); AMARTYA SEN, ON ECONOMIC INEQUALITY (1973); INEQUALITY REEXAMINED (1992) [hereinafter SEN, INEQUALITY REEXAMINED]. Some scholars have argued that in gauging well-being, subjective notions of happiness and justice should not matter at all. *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE (1971); *Social Unity and Primary Goods*, in UTILITARIANISM AND BEYOND (Amartya Sen & Bernard Williams eds., 1982); RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY; KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note 16; SEN, INEQUALITY REEXAMINED.

rich—put differently, the poor (who begin with little wealth) value slight increases in wealth more than the wealthy (who begun with vast wealth).[90] Wealth transfers from rich to poor raise overall social welfare, though not necessarily overall wealth.

Second, welfare economics governs this Article's conception of *efficiency*. Faced with a choice between two regimes for redistribution, we settle on that which distributes wealth most efficiently. "Efficiency" typically refers to either Pareto efficiency, where no one is made worse off if someone is made better off, or Kaldor-Hicks efficiency, where those made better off can compensate those made worse off.[91] Pareto efficiency is rare in the real world, so most economists and legal scholars settle for Kaldor-Hicks efficiency.[92] But as between two legal regimes, Kaldor-Hicks efficiency can be indeterminate—that is, the Kaldor-Hicks test could justify going from regime A to regime B as much as going from regime B to regime A.[93] Yet if wealth distribution is factored in, the regime that distributes wealth more evenly will prevail.[94] Such a result satisfies distributive efficiency, rather than Kaldor-Hicks efficiency.

Finally, this Section aims to re-conceptualize trusts and estates' legal rules as tools for redistribution. These rules inevitably pit some groups against others (e.g., trusts versus creditors, beneficiaries versus trustees); yet the redistributive approach does not mean that certain groups will always win. Empirical questions regarding relative wealth can help to sort through the rules. More fundamentally, this Article adopts approaches from law and economics, which has vigorously debated the redistributive potential of legal rules in general.[95] By doing so, this Article attempts to breathe new life into old debates within trusts and estates. The examples in the following Subsections are starting points for what will hopefully become a broader effort to reimagine the field.

---

[90] *See* Louis Kaplow & Steven Shavell, *Fairness versus Welfare*, 114 HARV. L. REV. 961, 990-92 (2001) [hereinafter Kaplow & Shavell, *Fairness versus Welfare*].
[91] Jules L. Coleman, *The Grounds of Welfare*, Book Review, 112 YALE L.J. 1511, 1516-17 (2003).
[92] *Id*. at 1517-19.
[93] This is because the winners in the change of a A to B could compensate the losers, but if the situation were reversed, the winners in the change of B to A could just as easily compensate the losers. *See id*. at 1076 n.1013.
[94] *See* Kaplow & Shavell, *Fairness versus Welfare*, *supra* note 90, at 1076 n.1016 ("[I]t may be indeterminate whether regime A, in which Jack gets $100 and Jill gets $50, or regime B, in which each gets $75, is more efficient, but a social welfare function . . . would produce a clear choice. In this example, plausible social welfare functions would ordinarily favor the more equal distribution. . .").
[95] *See supra* note 14.

A. *Private-Rule/Tax-and-Transfer Hybrid: The Rule Against Perpetuities*

1. *Background*

Redistribution can occur either by the public tax-and-transfer system (i.e., taxes) or by private law (i.e., legal rules).[96] Yet an intermediate scheme exists within the dichotomy: a hybrid that has elements of both private law and the tax-and-transfer system. For instance, one side of the redistribution scheme (the taking or the giving) might be accomplished through legal rules, while the other might be achieved through taxes or other state action.[97] Examples include eminent domain, where local government takes property from landowners, and voucher systems, where federal or state governments convey in-kind benefits to recipients.[98]

In trusts and estates, the rule against perpetuities ("RAP") fits within this hybrid model. The RAP is a vestige of common law that affects transactions between private parties. The rule states that "a contingent future interest must vest, if at all, within twenty-one years after the expiration of some life in being when the interest was created."[99] In the trusts context, the RAP limits the vesting of assets in remote contingent beneficiaries.[100] A paradigmatic example is a trust that devises property to a succession of life estate holders—e.g., the settlor's child for life, then the child's children for their lives—and then the principal to the contingent remainders—e.g., the settlor's grandchildren.[101] If the contingent remaindermen are too remote, the trust effectively terminates at the expiration of the last life estate.[102]

Such a trust interfaces with the tax-and-transfer system through the estate tax and generation-skipping transfer ("GST") tax, which taxes transfers to a settlor's grandchildren. However, the law also includes an exclusion amount that has swelled in recent years by

---

[96] Kaplow & Shavell, *Why the Legal System is Less Efficient*, *supra* note 14.
[97] Daphna Lewinsohn-Zamir, *In Defense of Redistribution through Private Law*, 91 MINN. L. REV. 326, 333 (2006).
[98] *Id*. at 380, 390-96.
[99] Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1304 (2003).
[100] At its heart, the RAP balances the freedom of the current generation against the freedom of future generations to control property. Thomas P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284 (2000) [hereinafter Gallanis, *RAP*].
[101] Dukeminier & Krier, *supra* note 99, at 1312.
[102] *Id*. at 1313 n.36.

virtue of indexing for inflation and tax reform.[103] The exclusion amount for all gift, estate, and GST taxes was $1 million in 2010, $5 million in 2011, and $5.45 million in 2016; for 2017, it is $5.49 million.[104] Thus, a settlor could evade taxes by creating a trust that would last as long as possible, devising $5.49 million (or its inflation-adjusted equivalent) to a succession of life estates and then a set of contingent remainders. Such a trust would be taxed only when it terminated, and termination is governed by the perpetuities period under state law.

In recent decades, states have altered or outright repealed the RAP. Some jurisdictions have adopted a wait-and-see approach that permits waiting for some period to determine whether contingent remainders might vest, effectively extending a trust for at least that long.[105] Other states have adopted the more explicit Uniform Statutory Rule Against Perpetuities, which sets a fixed perpetuities period ranging from 90 to 1,000 years after creation.[106] Most recently, some states have abolished the RAP outright.[107] The ensuing trusts created under such regimes can last in perpetuity, while also avoiding estate and GST taxes.[108] Such trusts are called "perpetual trusts" or "dynasty trusts."

2. *Redistributive reforms*

[103] *See* Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act, Pub.L. 111–312, H.R. 4853, 124 Stat. 3296 (2010).

[104] *That's New – Estate and Gift Tax*, INTERNAL REVENUE SERVICE (Jan. 18, 2017), https://www.irs.gov/businesses/small-businesses-self-employed/whats-new-estate-and-gift-tax.

[105] *See, e.g.*, 20 Pa.C.S.A. § 6104 (2006); Ohio Rev. Code Ann. §2131.08(C) (Supp. 2013); Vt. Stat. Ann. tit.27, §501 (2002); Restatement (Second) of Property (Donative Transfer) § 1.3.

[106] *See, e.g.*, Ariz. Rev. Stat. Ann. §14-2901 (2009); Cal. Prob. Code §§21200 et seq. (West Supp. 2016); Colo. Rev. Stat. §§15-11-1101 et seq. (West Supp. 2016); Conn. Gen. Stat. Ann. §§45a-490-496 (West Supp. 2016). *See also* Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157 (1988); Jessie Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023 (1987).

[107] *See, e.g.*, 37 Idaho Code §55-111 (2008); S.D. Codified Laws § 43-5-8 (2017).

[108] In fact, empirical evidence suggests that perpetual trusts—and abolition of the RAP—arose in response to the GST tax. *See* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005) [hereinafter Sitkoff & Schanzenbach, *Jurisdictional Competition for Trust Funds*].

Defending the RAP from the current onslaught is a natural—and efficient—starting point for redressing wealth inequality within trusts and estates. There are a number of ways to bolster the RAP, ranging from cautious to sweeping. Straightforward solutions include taxing dynasty trusts,[109] legislating dynasty trusts out of existence,[110] and reinstating the RAP so as to abolish the inter-state race to the bottom.[111] Admittedly, these may be politically infeasible because they require drastic legislative action. A more moderate change is to give courts the ability to tinker with dynasty trusts, such as a *cy pres* power to modify or terminate trusts that do not increase net social welfare.[112] More cautious still, reforms can target the measuring lives of the RAP—for instance, limiting beneficiaries to no more than two generations beyond the grantor,[113] rather than resorting to the arcane malpractice trap of "lives in being."[114] Of course, additional empirical and technical analysis must be conducted to settle on the best approach.

Overall, the RAP should occupy a central role in our redistribution project. A quick glimpse of the opposing sides of perpetuities reform reveals why. Dynasty trusts are roundly condemned by most commentators.[115] Advocates of the rule's repeal

---

[109] Joel C. Dobris, *Undoing Repeal of the rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2537, 2541-42 (2006).
[110] *Id*. at 2542.
[111] *Id*. at 2545-46. On the jurisdictional competition to eliminate the RAP, 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); Sitkoff & Schanzenbach, *Jurisdictional Competition for Trust Funds*, *supra* note 108.
[112] *See* Dobris, *supra* 109, at 2546, n.42; Ronald Chester, *Modification and Termination of Trusts in the 21st Century: The Uniform Trust Code Leads a Quiet Revolution*, 35 REAL PROP. PROB. & TR. J. 697, 724 (2001).
[113] This approach to revitalize the RAP is reflected in the RESTATEMENT (THIRD) OF PROPERTY, § 27.1 (2011), which adopts the recommendations in Daniel M. Schuyler, *Should the Rule Against Perpetuities Discard Its Vest?*, 56 MICH. L. REV. 683 (1958); Thomas P. Gallanis, *The Future of Future Interests*, 60 WASH. & LEE L. REV. 513, 549, 559-560 (2003).
[114] On the rule's technical difficulties, see e.g., G. Graham Waite, *Let's Abolish the Rule Against Perpetuities*, 21 REAL EST. L.J. 93, 97 (1992); Keith L. Butler, *Long Live the Dead Hand: A Case for Repeal of the Rule Against Perpetuities in Washington*, 75 WASH. L. REV. 1237, 1238 (2000); Paul G. Haskell, *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C. L. REV. 545, 545 (1988). Of course, if perpetuities reform is not animated by the bar's fear of malpractice (and it is not), then this reform will not forestall the RAP's erosion.
[115] *See, e.g.*, Joel C. Dobrs, *The Death of the Rule against Perpetuities, Or the RAP Has No Friends*, 35 REAL PROP. PROB. & TR. J. 601 (2000); Sterk, *Jurisdictional Competition*, *supra* note 111; Dukeminier & James E. Krier, *supra* note 99.

tend to be a much smaller group of either financial institutions or estate planning attorneys.[116] Substantively, however, there is in the RAP a confluence of factors not found elsewhere in the field.

First, as a mode of redistribution, the RAP is particularly efficient. The RAP affects the wealthy—those settlors who can create a dynasty trust with the requisite corpus of $5.49 million. Further, the RAP singles out settlors with dynastic aspirations.[117] The RAP also interacts with wealth transfer taxes. This nexus permits the state to be involved; as illustrated above with regulators in business law, the state has more information than a court regarding the macroeconomic effects of distribution. All in all, the RAP facilitates a transfer of wealth from the very rich (when it forces a trust to terminate and be subjected to estate and transfer taxes) to the poor (by virtue of distribution in the tax system).

Second, because the RAP represents a hybrid model that aligns closely with estate and GST taxes, the distortionary effect of the rule on the parties involved is not as severe as a rule which operates wholly outside the tax system. The "double distortion" argument holds that a rule which redistributes income compounds the economic distortions already present in the tax system.[118] Therefore, legal rules should aim for efficiency, leaving redistribution to the tax system.[119] The counterarguments challenge double distortion's premises and posit that deficient tax systems must be supplemented with redistributive

---

[116] *See* Grayson M. P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 Pepp. L. Rev. 1291 (2013); Waite, *supra* note 114.

[117] LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 14 (2009) ("some of the most arcane and mysterious rules find their explanation, ultimately, in their impact on dynastic wealth"); Hirsch & Wang, *supra* note 6, at 33 ("more extensive powers of serial distribution . . . create an opportunity for the testator to satisfy her dynastic ambitions"); McCouch, *supra* note 116, at 1300 ("promotional literature [for perpetual trusts] is replete with thinly veiled appeals to settlors' vanity and dynastic aspirations").

[118] This argument is most closely associated with Professors Louis Kaplow and Steven Shavell. *See* Kaplow & Shavell, *Why the Legal System is Less Efficient*, *supra* note 14. However, it descends from a line of political philosophy traceable to John Rawls. *See* RAWLS, *supra* note 89, at 245 ("[I]nheritance is permissible provided that the resulting inequalities are to the advantage of the least fortunate and compatible with liberty and fair equality of opportunity . . . [F]air equality of opportunity means a certain set of institutions that assures similar chances of education and culture for persons similarly motivated . . .").

[119] Kaplow & Shavell, *Why the Legal System is Less Efficient*, *supra* note 14, at 667-68.

legal rules.[120] For our current purposes, we can reduce double distortion to its essential argument: the tax system is the most efficient way to address inequality, and legal rules are inefficient when they attempt to do the same.[121] Yet when the tax system departs from optimal efficiency, the ancillary legal rules no longer produce efficient results if they remain in their optimal states.[122] By extension, legal rules *must* assume the distributive mantle (and therefore depart from the efficient state of eschewing distribution) to correct for flaws in the tax system. To give a concrete example, we might say that redistribution in trusts and estates is best accomplished by a combination of estate, gift, and GST taxes. We might also say that the balances struck by the RAP should not contemplate distributive ends whatsoever.[123] Yet when the tax system fails to transfer wealth from the rich to the poor,[124] the legal rule has to step in to offset that *inefficiency* in the tax system.[125] Hence, the RAP must stand as a bulwark against dynasty trusts, to compel their termination and taxation at some point.[126]

Third, much of the wealth held in trusts is capital—financial instruments, equity in enterprises, and real estate.[127] To the extent that a differential in capital and income drives inequality,[128] unlocking

[120] *See, e.g.*, David Gamage, *The Case for Taxing (All Of) Labor, Income, Consumption, Capital Income, and Wealth*, 68 TAX L. REV. 355 (2015); Sanchirico, *supra* note 14; Blumkin & Margalioth, *supra* note 14; Dimick, *supra* note 88.

[121] This is more systematically explored by Kaplow and Shavell in a series of works that frames fairness and welfare as mutually exclusive. *See* KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note 16; *Fairness versus Welfare*, *supra* note 90.

[122] *See* Dimick, *supra* note 88, at 63.

[123] Instead, it should focus on balancing the interests of current and future beneficiaries. But this is far from clear. *See* Gallanis, *RAP*, *supra* note 100, at 292 (economic, rather than normative arguments, best support the RAP).

[124] E.g., because legislative capture allows tax exclusions to be raised and rates to be reduced year after year.

[125] I.e., inefficient from a welfare economics perspective because the system raises overall inequality. Distributive efficiency is distinguishable from efficiency in general, which "denote[s] that allocation of resources in which value is maximized." POSNER, ECONOMIC ANALYSIS OF LAW 10 (7th ed. 2007).

[126] This complementary relationship between the RAP and taxes is similar to that between income and consumption taxes, which his animated much of the double distortion debate. *See* Gamage, *supra* note 120.

[127] *See* John H. Langbein, *Why Did Trust Law Become Statute Law in the United States?*, 58 Ala. L. Rev. 1069, 1072 (2007) ("the characteristic trust asset has ceased to be ancestral land and has become instead a portfolio of marketable securities").

[128] PIKETTY, *supra* note 26. Piketty's findings have been criticized for not sufficiently distinguishing between capital and land. *See* Joseph E. Stiglitz, *New Theoretical Perspectives on the Distribution of Income and Wealth Among*

assets sequestered in trust for taxation or productive use can at least allow some of the assets to be redistributed.[129]

There are, however, potential criticisms of the RAP as a redistribution mechanism. One line of criticism is inherent to hybrid schemes generally—the two sides of the scheme, the "rich" and the "needy," never directly interact but only deal with the state.[130] There is no fostering of relationships, as there is in a legal rule that affects two private parties.[131] Further, the efficacy of the scheme depends as much on the robustness of estate taxes as on the perpetuities period; where tax exemptions are large and tax rates slim, the redistributive effects of the RAP will be hampered. Finally, from a practical perspective, upon the termination of a dynasty trust, beneficiaries may simply redeposit the assets into other trusts.[132] Nonetheless, even if all of these criticisms ring true, limiting the duration of dynasty trusts will enable the generation of *some* tax revenue, which can then be redistributed. Additionally, the RAP also must not be analyzed in isolation; it is the RAP in conjunction with asset protection trusts that wrecks the most havoc upon wealth equality.[133]

B. *Purely Private Legal Rules*

Purely private legal rules constitute another mode for redistribution. For this, trusts and estates is a particularly fertile realm—here the law is comprised of a myriad of rules. This Subsection focuses on three groups of rules: redistribution from

Individuals, in INEQUALITY AND GROWTH: PATTERNS AND POLICY 2-3 (Kaushik Basu & Joseph E. Stiglitz eds., 2016).

[129] In some sense, this is a variation of the old justification for the RAP that it keeps trust property in the stream of commerce, to be put to productive use rather than to fester. *See* Garrett Moritz, Note, Dynasty Trusts and the Rule Against Perpetuities, 116 Harv. L. Rev. 2588, 2597 (2003); Waite, *supra* note 114, at 96. This argument assumes that "unlocked" assets will be put to productive use rather than deposited in trust and, furthermore, that productive use directly benefits the poor rather than, say, the assets being pledged as collateral for loans to develop land, which then widens inequality.

[130] Lewinsohn-Zamir, *supra* note 97, at 390-92.

[131] *See id*. at 392.

[132] Scott Andrew Shepard, *A Uniform Perpetuities Reform Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 89, 103-04 (2013) ("If we assume minimal competence on the part of the beneficiaries (or their attorneys and financial advisors), then we can expect them simply to redeposit that res in trusts indistinguishable from the trust just concluded--in no way diminishing the dynasty family's aggregate wealth.").

[133] Dobris, *supra* note 109, at 2539 ("the toxic combo is perpetual trusts and asset protection trusts").

settlors and beneficiaries to creditors; redistribution between trustees to beneficiaries; and redistribution among beneficiaries.[134]

1. *Beneficiaries/settlors versus creditors: Spendthrift and asset protection trusts*

a. Background

Spendthrift and asset protection trusts apportion wealth between settlors and beneficiaries on one hand and creditors on the other. A spendthrift trust—or, more precisely, a trust with the "disabling restraint" of a spendthrift provision[135]—prevents the sale, assignment, and alienation of a beneficiary's interest in a trust.[136] The restraint bars immediate consumption of the interest either by the beneficiary selling the interest for a lump sum or by a creditor levying execution against the interest. Thus, if a plaintiff has successfully sued a trust beneficiary for sexually assaulting her child and broadcasting the assault over the Internet, the plaintiff cannot reach the trust assets to satisfy the judgment if the trust contains a spendthrift provision.[137] Ostensibly, the settlor of the trust inserted spendthrift language to insulate the assets, perhaps because the settlor did not trust the beneficiary with unfettered access.

If, however, the trust were self-settled—created by a settlor to shield assets from *his own* creditors—then the settlor and the beneficiary are one and the same.[138] Now the creditor is a creditor to the settlor. A self-settled spendthrift trust is more commonly known as an asset protection trust ("APT"). American laws were initially reluctant to recognize APTs since the notion of a debtor creating a vehicle to protect assets from his creditors smacks of fraudulent

[134] Some of these legal rules also intersect with the tax system. For instance, transfers to APTs might trigger tax implications. *See* Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195, 1241-51 (2000); Randall J. Gingiss, *Putting a Stop to "Asset Protection" Trusts*, 51 BAYLOR L. REV. 987, 1005-08 (1999). In this sense, these rules are hybrid modes of redistribution, and the same considerations explored above will apply. However, the remainder of this Subsection explores the private dimensions of these rules—that is, only redistribution among the parties affected by the rules.

[135] Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1 (1995) [hereinafter Hirsch, *Spendthrift Trusts*].

[136] *See* WILLIAM M. MCGOVERN ET AL., WILLS, TRUSTS AND ESTATES 417-20 (4th ed. 2010); UNIF. TRUST CODE § 502(b) [hereinafter UTC].

[137] Scheffel v. Krueger, 782 A. 2d 410 (NH 2001).

[138] *See* Boxx, *supra* note 134, at 1198.

conveyance.[139] Yet as offshore jurisdictions validated APTs and assets started flowing abroad, American states began to follow suit.[140] This precipitated a "race to the bottom" for trust assets and trust administration similar to the competition for corporate charters in state corporate law.[141]

A statute that recognizes APTs can thwart creditor recovery by narrowing the fraudulent transfer exception,[142] shortening the statute of limitations on claims,[143] and barring enforcement of foreign judgments.[144] Thus, if promoters of a telemarketing Ponzi scheme were sued by the Federal Trade Commission, the promoters could transfer their assets to an offshore APT organized under the permissive laws of the Cook Islands, and the Commission would have limited recourse.[145] The promoters' assets would lie beyond the reach of a U.S. court because they rest in a jurisdiction unwilling to tap trust assets to satisfy foreign judgments.[146]

Notably, spendthrift provisions and APTs are subject to conditions. Both sets of legal rules feature exceptions protecting the claims of certain creditors—typically, spouses seeking alimony and children seeking support.[147] In some states, the exceptions for spendthrift trusts are expanded to claims by providers of necessities and also of services to protect trust beneficiaries' interests.[148] APTs, because they are inherently more reprehensible, permit additional carve-outs. These include prohibitions against fraudulent transfers and requirements of irrevocability.[149]

b. Redistributive reforms

[139] UTC § 505 cmt. See generally 2A AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, THE LAW OF TRUSTS § 156, at 164-86 (4th ed. 1987). This view is still reflected in the Restatement and the Uniform Trust Code. *See* Restatement (Third) of Trusts § 58(2) & cmt. b (2003); UTC § 505(a)(2).

[140] *See* Sterk, *Asset Protection Trusts*, *supra* note 60, at 1047-55.

[141] *Id*.

[142] E.g., by requiring that the settlor was insolvent when the creditor claim arose. *See* International Trust Act (1984) § 13(B) (1996) (Cook Islands).

[143] *Id*. at § 13(B)3(b).

[144] *Id*. at § 13(D).

[145] I.e., contempt sanctions. See Federal Trade Commission v. Affordable Media, LLC, 179 F.3d 1228, 1243 (9th Cir. 1999); Sterk, *Asset Protection Trusts*, *supra* note 60, at 1102-03.

[146] See Affordable Media, 179 F.3d.

[147] *See* UNIFORM TRUST CODE § 503(B)(1); RESTATEMENT (THIRD) OF TRUSTS § 59(a). These limitations are common to the general scheme of trusts and estates.

[148] *See* UNIFORM TRUST CODE § 503(B)(2); RESTATEMENT (THIRD) OF TRUSTS § 59(b).

[149] *See* 12 Del. Code §§ 3570, 3571.

For spendthrift provisions and APTs, the key to redistribution lies in their exceptions and conditions—which, if rigorous, prevent settlors from fully shielding their assets. Enabling recovery by certain creditors such as spouses and children operates to shift wealth from beneficiaries and settlors. So, too, does a hard and fast requirement that spendthrift trusts be irrevocable. The most embattled exception, though, is fraudulent transfer: under fraudulent conveyance law, transfers made to hinder creditor claims can be set aside.[150] While this law has traditionally covered both actual and constructive fraud by debtors,[151] at least one state now requires creditors to prove actual fraud.[152] Shoring up the fraudulent transfer exception to encompass constructive fraud by grantors helps to shift wealth to creditors. The exception can also be fortified by recognizing the claims of both current and future creditors.[153]

Either way, fraud is still difficult to prove, as most corporate practitioners can attest.[154] This shortcoming extends to trusts and estates as well.[155] Moreover, fraudulent conveyance had stood for centuries as the doctrinal justification for barring self-settled spendthrift trusts,[156] the view being that it was beyond the pale for a debtor to thwart creditors by creating a trust for his benefit.[157] The advent of foreign, and then domestic, APTs chipped away at that

---

[150] U.F.C.A. ss 4, 6, 7, 7A U.L.A. 474, 507, 509 (1918); U.F.T.A. ss 4, 5, 7A U.L.A. 652-53, 657 (1984). This is espoused in the Uniform Fraudulent Conveyance Act of 1917 ("UFCA") and the Uniform Fraudulent Transfer Act of 1984 ("UFTA"), which has supplanted the UFCA in many states.

[151] *See* Unif. Fraudulent Transfer Act §§ 4(a)(1), 4(a)(2).

[152] *See* Alaska Stat. §§ 34.40.010.

[153] The UFTA already does this. *See* UFTA § 4(a); Sterk, *Asset Protection Trusts*, *supra* note 60, at 1045. However, some states limit the exception's efficacy by undercutting the statute of limitations for claims against trusts. *See, e.g.*, Alaska Stat. § 34.40.110(d)(2); Boxx, *supra* note 134, at 1223-24.

[154] Sterk, *Asset Protection Trusts*, *supra* note 60, at 1046-47. *But see* Jeffrey A. Schoenblum, *In Search of a Unifying Principle for Article V of the Uniform Trust Code: A Response to Professor Danforth*, 27 CARDOZO L. REV. 2609, 2611 (2006) ("As long as fraudulent conveyance laws are enforced and not easily evaded, the settlor will not be able to impair creditors' access to the trust assets.").

[155] *See* Boxx, *supra* note 134, at 1241 ("[F]raudulent conveyance claim is difficult for a plaintiff to establish, and, if the transfer falls short of the definition of fraudulent conveyance, the legislation has harmed the creditor by giving the debtor a relatively painless way to put assets beyond the reach of the creditor.").

[156] That is, if we trace the roots of fraudulent conveyance (as many commentators do) to the English Statute of Elizabeth, enacted in 1570. *See* 5 Debtor-Creditor Law æ 22.03 (Theodore Eisenberg ed., 1999).

[157] *See supra* note 139 and accompanying text.

modicum of propriety as states adopted a series of mechanisms curtailing the ability of creditors to recover.[158]

This should not imply that pro-creditor reforms are out of reach. Because APTs provoke uncommonly sharp ire, proposals to rein them in do not suffer from lack of imagination. Those proposals include Constitutional challenges to APTs,[159] as well as federal reforms to bankruptcy[160] and Medicaid,[161] which would pre-empt state APT law. More fanciful still are calls to criminalize transfers to offshore APTs and to limit these trusts to jurisdictions bound by treaty to cooperate with the United States.[162] These proposals are unlikely to transpire since they require tremendous political will on the part of federal and state legislators, who are already prone to capture. More realistic are acts of judicial resistance within the bounds of existing law.[163] In this regard, one viable alternative is for judges to liberally utilize contempt sanctions for settlors who refuse to turn over assets sequestered in APTs to satisfy judgment.[164]

Rather than put up procedural barriers to spendthrift trusts, another way forward is to expand recovery for additional subsets of creditors. Indeed, this may be an important first step in the exploration of the distributive efficiency of spendthrift trust exceptions, because it forces us to consider the relative wealth of the parties involved.

As in business law, trusts encounter two types of creditors: contract creditors and tort creditors. The treatment of these two groups is not parallel. In corporate law, a creditor who has secured judgment against an undercapitalized enterprise can "pierce the corporate veil" by going directly to the equity holder to satisfy judgment. The creditor

---

[158] *See supra* notes 142-44, 152 and accompanying text. *See also* John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 Cardozo L. Rev. 2621, 2655-61 (2006); Gingiss, *supra* note 134, at 1008-12.

[159] *See* Boxx, *supra* note 134, at 1230-31 (Contract Clause), 1208-10 (Full Faith and Credit Clause, for recognition of out-of-state judgments); U.S. Const. art. I, § 10, cl.1.

[160] *See* Eason, *supra* note 158, at 2668-70 (exploring the eventually unsuccessful proposal, as part of the debate surrounding the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, to cap APTs at $125,000).

[161] *Id*. at 2679-82 (speculating on whether the Medicaid program will eventually limit the ability of applicants to utilize APTs in the qualification process).

[162] *See* Gingiss, *supra* note 134, at 1008.

[163] *See* Daniel A. Farber, *What (If Anything) Can Economics Say About Equity?*, 101 Mich. L. Rev. 1791, n.45 (2003) ("[P]ublic choice problems might make it easier to use the courts than the legislature for redistribution. Certainly, recent rounds of tax legislation have not been an edifying spectacle.").

[164] *But see* Sterk, *Asset Protection Trusts*, *supra* note 60, at 1102-03 (contempt sanctions have limited long-term effect).

might be seeking recovery for an unpaid bill[165] or a tort injury.[166] A successful case can strip the limited liability protection for enterprise equity holders.

Empirical studies show that veil piercing cases are more successful if brought by contract creditors than tort creditors.[167] This may be for practical reasons. Courts tend to permit veil piercing when the facts indicate misrepresentation, and misrepresentation is easier to substantiate with a prior course of dealing that leaves a document trail.[168] By contrast, the tort setting does not implicate misrepresentation. This empirical finding belies strong normative and theoretical arguments to the contrary. Tort creditors should be more successful precisely because there is no course of dealing through which they can extract safeguards.[169] Instead, the interaction is typically unexpected and wholly involuntary, so there is no chance to demand a premium from a tortfeasor-beneficiary in exchange for any limitations on recovery.[170]

The absence of recourse for involuntary creditors is decried by detractors and supporters of spendthrift trusts alike.[171] Bankruptcy, corporate, and tort law reflect similar criticisms.[172] Nevertheless, legislatures are inconsistent when they enact spendthrift trusts; some jurisdictions protect involuntary creditors, while others do not.[173] An unequivocal exception would serve as a mode of redistribution.

The distributive efficiency of a tort creditor exception depends on the relative wealth of tortfeasor-beneficiaries and tort victim-creditors. Decades ago, it was charged that spendthrift trusts "permit

---

[165] See, e.g., Sea-Land Services, Inc. v. Pepper Source, 941 F.2d 519 (7th Cir. 1991).
[166] See, e.g., Walkovszky v. Carlton, 223 N.E.2d 6 (NY 1966)
[167] *See* Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1044 (1991).
[168] *Id*. at 1064-65, 1068-70.
[169] *See* Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 Cardozo L. Rev. 2685, 2694 (2006) [hereinafter Hirsch, *Fear Not the APT*]; Hirsch, *Spendthrift Trusts*, *supra* note 135, at 77-79.
[170] Thus, in the corporate setting, scholars have argued for *unlimited* shareholder liability for tort claims, but so far, lawmakers have not been persuaded. *See* Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879, 1916-23 (1991).
[171] *See, e.g.*, Boxx, *supra* note 134, at 1257-59; Sterk, *Asset Protection Trusts*, *supra* note 60, at 1073; Hirsch, *Fear Not the APT*, *supra* note 169, at 2692-94; Hirsch, *Spendthrift Trusts*, *supra* note 135, at 77-79.
[172] E.g., Peter B. Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89 (2013); Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985); Hansmann & Kraakman, *supra* note 170; Lynn M. Lopucki, *The Death of Liability*, 106 YALE L.J. 1, 45-47 (1996).
[173] *See* Eason, *supra* note 158, at 2661-62.

children of rich men to live in luxury and debt."[174] While the dollar amounts protected by spendthrift trusts are hard to pin down, it is estimated that that spendthrift trusts, APTs, and trusts in general hold astronomical wealth for their beneficiaries.[175] On the other hand, victims of environmental torts—and perhaps even intentional and negligence torts—tend to be drawn from poor (and minority) communities.[176] On average, then, settlors and beneficiaries of these trusts may well be wealthier than tort creditors.

These empirical questions must be answered with precision for the tort creditor exception to work. In fact, empirical "indeterminacy" is a major obstacle to the enhancement of social welfare by way of legal rules.[177] However, once these questions are answered, the exception may be refined. For instance, if victims of environmental or strict liability torts tend to be uniformly poor, then perhaps the exception to spendthrift and asset protection trusts should extend only to creditors pursuing satisfaction of judgment for those torts.[178] In any event, a tort creditor exception is a good place to start. As scholarship develops on redistributive potential of piercing the spendthrift trust, analysis can widen to exceptions for contract creditors. However, empirical and theoretical inquiries will be more complicated because, among other things, contract creditors might be more economically diverse.

2. *Beneficiaries versus trustees: Fiduciary duties*

So far, this Section has contemplated legal rules primarily through the lens of distributive efficiency. Yet there are many rules in trusts and estates where the analysis is fraught with other concerns that

[174] Willard M. Bushman, *The (In)Validity of Spendthrift Trusts*, 47 ORE. L. REV. 304, 312 (1968).
[175] *See* Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV. 179, 182 n.16 (1993); Sterk, *Asset Protection Trusts*, *supra* note 60, at 1036.
[176] *See* Robert D. Bullard, *Environmental Racism and Invisible Communities*, 96 W. VA. L. REV. 1037 (1994); Tsachi Keren-Paz, *An Inquiry into the Merits of Redistribution through Tort Law: Rejecting the Claim of Randomness*, 16 CAN. J.L. & JUR. 91, 94-95 (2003); Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 799-800 (1990).
[177] *See* Kaplow & Shavell, *Fairness versus Welfare*, *supra* note 90, at 1375-76.
[178] Similarly, in a comparative negligence regime, where defendants lose if they are careless, it might be hypothesized that tortfeasors are comparatively better off than tort victims. After all, tortfeasors lose if they are careless, and those with a lower marginal utility for damages (i.e., the rich) are likelier to be careless than those with a greater marginal utility for damages (the poor).

muddle the redistributive calculation. One such concern is fairness, which includes notions of justice, equity, rights, and related concepts but not social welfare.[179] To explore the intersections and divergences of fairness and welfare, this Subsection evaluates the redistributive propensities (and limitations) of fiduciary duties, which govern relations between beneficiaries and trustees.

a. Background

Fiduciary duties determine the legal boundaries of agents' behavior toward their principals. The officer-shareholder relationship in a corporation, for example, is an agency relationship where officers are bound by fiduciary duties.[180] So, too, are the partner-partnership,[181] investor-investment adviser,[182] and executor-estate relationships.[183] For trusts in particular, fiduciary duties evolved to protect beneficiaries from trustees. As in all agency situations, the interests of beneficiaries and trustees can be misaligned. Distinctive features about trusts amplify the potential for trustees to behave badly: trustees hold legal but not beneficial title in trust property, which may lead them to pursue imprudent investment strategies, while beneficiaries often lack the capacity or knowledge to be able to monitor trustees.[184]

Over time, agency law devised a number of duties for agents—specifically, the duties of (1) loyalty, (2) care, (3) good faith and fair dealing, (4) disclosure, (5) accounting and maintenance of the principal's funds, (6) good conduct and obedience, and (7) indemnification.[185] Of these, only loyalty, care, and, depending on the jurisdiction, sometimes good faith and disclosure count as *fiduciary*

---

[179] *See* KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note 16, at 38-45; Kaplow & Shavell, *Fairness versus Welfare*, *supra* note 90, at 999-1005.

[180] *See, e.g.*, AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 (1994); MODEL BUS. CORP. ACT § 8.30 (1984).

[181] *See* UNIF. PARTNERSHIP ACT § 21; REV. UNIF. PARTNERSHIP ACT §§ 404(b), (c) [hereinafter RUPA].

[182] *See* Investment Advisers Act § 206, 15 U.S.C. § 80b-6; SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

[183] See, e.g., In re Rothko, 372 N.E.2d 291 (N.Y. 1977).

[184] *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004) [hereinafter Sitkoff, *Agency Costs Theory*]; Lusina Ho, *Trusts: The Essentials*, in THE WORLDS OF THE TRUST 17-20 (Lionel Smith ed. 2013).

[185] *See* J. DENNIS HYNES & MARK J. LOEWENSTEIN, AGENCY, PARTNERSHIP, AND THE LLC: THE LAW OF UNINCORPORATED BUSINESS ENTERPRISES (8th ed., 2011).

duties,[186] obliging the agent "to act primarily for the benefit of" the principal.[187] Within this subset, the paramount fiduciary duty is loyalty, described as "stricter than the morals of the market place," "the punctilio of an honor the most sensitive," "unbending and inveterate," and uncompromisingly rigid.[188]

In trusts, elements of the duty of loyalty constitute a "mandatory core" that cannot be eviscerated by contract.[189] Most prominently, Section 1008 of the Uniform Trust Code ("UTC") bars an exculpation clause that (1) "relieves the trustees of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries"[190] or (2) "was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor."[191] The first prohibition, on exculpation for bad faith and recklessness, is reflected in corporate law.[192] The second prohibition essentially requires that exculpations be made in good faith.[193] Finally, Section 1008 compels exculpations (3) be "fair under the circumstances" and "adequately communicated to the settlor."[194] This third mandate, of fairness and adequate disclosure, also has analogs in business law.[195] At its core, it embodies our tastes and preferences for fairness in fiduciary law.[196] After all, it might well be Kaldor-Hicks efficient for a trustee to compensate the principal for a waiver by lowering fees or agreeing to take stewardship of complex assets. Yet the UTC refuses to reduce exculpations to an efficient-transaction analysis. Thus, even though a libertarian

---

[186] *See* HYNES & LOEWENSTEIN, *supra* note 185. Sometimes good faith is subsumed within other duties, and sometimes it is separated out as a standalone duty. *Cf.* AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE § 4.01 (good faith is part of the duty of care); RUPA 404(d) (good faith as separate duty); *Stone v. Ritter*, 911 A.2d 362, 370 (Del.) (duty of loyalty encompasses good faith).

[187] Restatement (Second) of Agency § 13, comment a.

[188] Meinhard, 164 N.E. at 464.

[189] *See* UTC §§ 1008, 105(b)(10); John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 Nw. U. L. Rev. 1105, 1123 (2004) [hereinafter Langbein, *Mandatory Rules*].

[190] UTC § 1008(a)(1)

[191] UTC § 1008(a)(2).

[192] *See, e.g.*, DEL. GEN. CORP. L. § 102(b)(7) [hereinafter DGCL].

[193] *See* Langbein, *supra* note 189, at 1123.

[194] UTC § 1008(b).

[195] *See* Restatement (Second) of Agency § 390 (agent acting on own account must still deal fairly and disclose); RUPA § 404(d) (partner must discharge duties consistent with good faith and fair dealing); DGCL § 144(a) (material facts of a conflicted transaction must disclosed, and transaction must be fair).

[196] *See* Ward Farnsworth, *The Taste for Fairness*, Review Essay, 102 COLUM. L. REV. 1992 (2002).

revolution has swept through business law to render most fiduciary duties waivable,[197] in trusts the duty of loyalty has never fully succumbed to contractarianism.[198] And the requirements of good faith, fairness, and disclosure form a buffer against contractarian creep.[199]

We should not lose perspective. Viewed against the grand scheme of trusts law, Section 1008 is more an anomaly than a buffer. The libertarian revolution has permeated trusts as thoroughly as it has business law; the core fiduciary duties of loyalty,[200] impartiality,[201] and care[202] have become mere defaults that can be modified by settlors.[203] This is not surprising. If loyalty, the pinnacle of the fiduciary standard, can be broadly (though not completely) waived, then lesser duties can be obliterated.[204] In corporate law, for example, this means that an agent's duty of care is not simply the reasonable man standard from negligence law; to prevail on breach of care, a plaintiff needs to prove conduct somewhere in the vicinity of *gross* negligence[205] and also to overcome procedural obstacles in the business judgment rule[206]—assuming that charter does not insulate agents from breach of care.[207]

---

[197] *See* RUPA § 103(b)(3) (partnership agreement may authorize act that would breach duty of loyalty and may identify acts that do not violate loyalty, if certain conditions are satisfied), 103(b)(5) (partnership agreement may prescribe standards to measure good faith); Del. Code Ann. tit. 6, § 18-1101(e) (limited liability company agreement can eliminate fiduciary duties except acts that constitute bad faith or violate the covenant of good faith and fair dealing); DGCL § 102(b)(7) (corporate charter can eliminate fiduciary duty except for the duty of loyalty and good faith, among other things). In trusts, self-dealing cannot be cured by co-trustee approval. *See* MCGOVERN ET AL., *supra* note 136, at 513. However, it is acceptable if authorized by the terms of the trust, approved by the court, or consented to by the beneficiary. UTC § 802(b); Restatement (Third) of Trusts § 78 cmt. c.

[198] *See* Langbein, *Mandatory Rules*, *supra* note 192.

[199] Elsewhere in trusts law, there are also duties to inform. E.g., the UTC mandates certain disclosures of trustees that cannot be waived. *See id*. at §§ 105(b). *See also* T.P. Gallanis, *The Trustee's Duty to Inform*, 85 N.C. L. REV. 1595 (2007).

[200] UTC § 802(a); RESTATEMENT (SECOND) OF TRUSTS § 170(1) (1959).

[201] UTC § 803; RESTATEMENT (SECOND) OF TRUSTS §§ 183, 232 (1959).

[202] UTC § 804; RESTATEMENT (SECOND) OF TRUSTS § 174 (1959).

[203] Or, more precisely, these duties are not designated as mandatory by the UTC, which supports the conclusion that they are waivable. *See* Langbein, *Mandatory Rules*, *supra* note 192, at 1122.

[204] We also trust agents to be careful more than we trust them to be loyal. *See* POSNER, *supra* note 125, at 441.

[205] See Gagliardi v. TriFoods Int'l, Inc., 683 A.2d 1049 (Del. Ch. 1996).

[206] See In re Citigroup Inc. Shareholder Deriv. Litig., 2009 WL 481906 (Del. Ch. 2009).

[207] *See* DGCL 102(b)(7)

In trusts, the duty of care takes a slightly different turn. A trustee must still administer the trust "as a prudent person would," exercising "reasonable care, skill, and caution."[208] However, there are additional overlays for "prudence" in the investment of trust assets. Because trust assets are becoming increasingly financialized, two questions frequently arise: what are the parameters for the delegation of trust functions, and what are the requirements for the investment of trust assets? As to the first question, the modern trend is to permit the delegation of essential investment functions.[209] As to the second, the modern trend is also more permissive. The conservative "prudent man rule," which emphasizes preservation of trust funds and derivation of income[210] and at one time shied away from stock,[211] has been supplanted by the "prudent investor standard," which evaluates risk not in isolation but on a portfolio basis.[212] The new standard incorporates the Modern Portfolio Theory to confront, and even embrace, financial risk, so long as it is properly diversified.[213]

A breach of fiduciary duty can be remedied by damages, known as a "surcharge," against the offending trustee.[214] Surcharges can take the form of lost profits[215] or appreciation damages,[216] and

---

[208] UTC § 804.

[209] *Compare* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (1992) (delegation permitted) *and* UNIF. PRUDENT INVESTOR ACT (1994), 7B U.L.A. 16 (Supp. 1995) (delegation permitted) [hereinafter UPIA], *with* RESTATEMENT (SECOND) OF TRUSTS §§ 171, 224(2)(b). For the academic debate, see John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996); Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trust Identity*, 27 CARDOZO L. REV. 2713 (2006); Stewart E. Sterk, *Rethinking Trust Law Reform: How Prudent Is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851 (2010).

[210] *See* RESTATEMENT (SECOND) OF TRUSTS § 227; Harvard College v. Armory, 26 Mass. (9 Pick.) 446, 461 (1830).

[211] *See* RESTATEMENT (SECOND) OF TRUSTS § 227 cmt. m (1959).

[212] UPIA § 2; RESTATEMENT (THIRD) OF TRUSTS: THE PRUDENT INVESTOR RULE.

[213] On the academic and policy debate, see Joel C. Dobris, *Speculations on the Idea of "Speculation," in Trust Investing: An Essay*, 39 REAL PROP., PROB. & TR. J. 439 (2004); C. Boone Schwartzel, *Is the Prudent Investor Rule Good for Texas?*, 54 BAYLOR L. REV. 701 (2002).

[214] *See* John H. Langbein, *What ERISA Means by "Equitable": The Supreme Court's Trail of Error in Russell, Mertens, and Great West*, 103 COLUM L. REV. 1317, 1352-53 (2003).

[215] E.g., if assets are improperly retained or acquired. *See* Schwartzel, *supra* note 213, at 810-17; *Buder v. Sartore*, 774 P.2d 1383, 1390 (Colo. 1989).

[216] E.g., if a fiduciary improperly sells estate assets, in a conflicted transactions, for less than market value. See Matter of Estate of Mark Rothko, 43 N.Y.2d 305, 321-22 (1977); Matter of Estate of Janes, 90 N.Y.2d 41, 55 (1997).

they can be imposed if the trust suffers no loss[217] or if the trustee makes no profit.[218] Where the duty of loyalty has been abrogated, courts often mete out damages that overcompensate an aggrieved principal, so as to deter errant agents.[219] This is, in part, because self-dealing and other disloyal behavior is so difficult to uncover.

b. Redistributive reforms

Empirical questions will dictate how fiduciary duties can be reconfigured for redistribution. Trustees are diverse, as are beneficiaries. Family members and friends are often called upon to serve as trustees; what they lack in investment expertise, they redeem in awareness of settlor and beneficiary dynamics.[220] Of course, with the financialization of trust assets, settlors are looking to professional trustees with greater frequency. Even then, however, it can be difficult to discern the relative wealth of trustees and beneficiaries.[221]

For the above reasons, it cannot be said that a blanket prohibition on contracting out of fiduciary duties serves distributive ends efficiently. There may well be normative reasons for resisting the evisceration of trustee fiduciary duties.[222] From a welfare economics perspective, however, fiduciary duties are too indeterminate to justify a wholesale assault or defense of the contractarian trend.[223] In other words, we cannot confidently claim that holding trustees to inflexible duties of care, loyalty, and good faith adequately shifts wealth from rich to poor. Nor can we confidently claim the opposite—that allowing those duties to be waived is an effective means of redistribution.

Unexpectedly, the modern trend in the Third Restatement may strike the right balance: authorize the delegation of investment

---

[217] RESTATEMENT (THIRD) OF TRUSTS § 205(a); Coster v. Crookham, 468 N.W.2d 802, 806-07 (Iowa) (1991).

[218] RESTATEMENT (THIRD) OF TRUSTS § 205(b) (1992); UTC § 1002(a)(1).

[219] See, e.g., Tarnowski v. Respo, 51 N.W.21 801 (Minn. 1952).

[220] *See* MCGOVERN ET AL., *supra* note 136, at 580 (discussing considerations in the selection of trustees).

[221] Another evaluation, implicated by the Modern Portfolio Theory but not directly addressed here, is the relative wealth of current versus future trust beneficiaries. To the extent that the transition from the prudent man regime to the Modern Portfolio Theory favors current over future beneficiaries, *see* Schwartzel, *supra* note 213, this inquiry may also be relevant to redistribution.

[222] *See* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 Geo. L.J. 67, 70 (2005) [hereinafter Leslie, *Trusting Trustees*] ("labeling fiduciary duties 'default rules' threatens to strip fiduciary rules of their moral content").

[223] *See* KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note 16, at 457-58.

functions,[224] but discipline the wayward trustee with lost-profit damages.[225] With this combination, investment professionals are likelier to assume the helm; yet their violations of duty trigger damages that transfer of wealth back to beneficiaries.

If professional trustees are wealthier on average than trust beneficiaries, then additional modifications can be made. Rather than reinstating a prudent man standard or prohibiting waivers on fiduciary duty (which would divert wealth from lay trustees to beneficiaries), fiduciary law could hold professional trustees to a higher standard.[226] Additionally, lost profits could be awarded more liberally—for example, to remedy breaches of the duty of care in addition to the duty of loyalty.[227] Finally, the causal link for damages could be relaxed. The current view adopts a proximate cause analysis to surcharging trustees: if losses would have occurred in the absence of a breach of trust—say, because the entire market moved downward, not just the portfolio's investments—then the causal link is severed.[228] This view effectively treats breach of fiduciary duty as a tort, which in corporate law has been controversial for its burdens on shareholder-plaintiffs.[229]

3. *Beneficiaries versus beneficiaries: Abatement, ademption, cy pres, and execution formalities*

Rules that govern relations among beneficiaries comprise a fourth category of rules in trusts and estates. These rules perform a variety of functions, but overall, they work to resolve ambiguities in wills and trust instruments. This Subsection utilizes abatement, ademption, *cy pres*, and execution formalities to explore the redistributive potential of this category of rules.[230]

---

[224] *See supra* note 209.
[225] *See supra* notes 214-19 and accompanying text.
[226] *See* RESTATEMENT (SECOND) OF TRUSTS § 174 cmt. a (1959) ("if the trustee has a greater degree of skill than that of a man of ordinary prudence, he is liable for a loss resulting from the failure to use such skill as he has"). This view was not wholly rejected by the UTC. *See* UTC § 804 cmt. ("This section appropriately bases the standard on the purposes and other circumstances of the particular trust."). *See also id*. § 806; UPIA § 2(f).
[227] On the traditional reluctance to do so, see, e.g., Matter of Janes, 90 N.Y.2d at 55.
[228] *See* RESTATEMENT (SECOND) OF TRUSTS § 205 cmt. f (1959).
[229] See Cede & Co. v. Technicolor, Inc. 634 A.2d 345, 367 (Del. 1993) (requiring proof that breach of care proximately caused shareholder losses is contrary to well established Delaware precedent on a plaintiff's burden of proof in duty of care cases).
[230] This list is not exhaustive of the category. We could also add other rules such as incorporation by reference, which determines whether devises made without testamentary formalities (e.g., written on a separate notebook) are part of the general

Using these rules to effectuate redistribution is likely to attract the criticism of haphazardness in two ways.[231] First, redistribution unfolds only when certain ambiguities plague wills, and then only among the beneficiaries who are implicated.[232] Second, the rules may effectuate wrong-way redistribution that favors the well-off and exacerbates inequality.[233]

a. Background

One subset within this category is rules of construction triggered by ambiguities in "devises," or bequests. Abatement, for example, occurs when a testator's estate is too small to satisfy all devises. Rules of abatement establish a hierarchy for satisfying devises unless a will provides otherwise.[234] During probate, the court classifies all devises—bequests of a specifically described item are "specific," bequests paid out of the estate's general assets are "general," and all other bequests in a will are "residuary."[235] The rules typically stipulate that residuary devises "abate" (i.e., are extinguished or reduced pro rata) first, then general devisees, and finally specific devises.[236] Hence, the order of abatement protects specific devises. Yet the order can be altered to meet policy objectives. At least one legislature has determined that devises to spouses enjoy first priority, so that they abate after specific devises.[237]

Ademption proceeds in the reverse order, so that specific devises are extinguished first. If a specifically devised asset is not found in the estate, then the devise has "adeemed" (failed).[238]

---

scheme of distribution, *see* UPC §§ 2-510, and lapse, which determines whether a devise to a beneficiary who has passed away before the decedent must fail or go to alternate takers, *see* UPC § 2-603.

[231] Haphazardness is a criticism of legal rules found throughout the double distortion literature. *See, e.g.*, 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, 832 (2000).

[232] *See* Sanchirico, *supra* note 14, at 1051 ("potential objection to redistribution by private-law rules begins with the assertion that the redistributive event in the private law is random rather than periodic, and narrowly focused rather than broad-based").

[233] *Id*. at 1055.

[234] *See* UNIF. PROBATE CODE § 3-902 [hereinafter UPC]; MCGOVERN ET AL., *supra* note 136, at§ 8.4.

[235] MCGOVERN ET AL., *supra* note 136, at 340-41; RESTATEMENT (THIRD) OF PROPERTY § 5.1 (1999). This excludes demonstrative devises, which exhibit a blend of specific and general traits. MCGOVERN ET AL., *supra* note 136, at 341.

[236] *See supra* note 230.

[237] *See, e.g.*, Iowa Code § 633.436.

[238] *See* UPC §§ 2-606, 2-609; MCGOVERN ET AL., *supra* note 136, at§ 8.2.

However, two alternatives enable the specific devisee to take something nonetheless. First, state law can construe ademption narrowly, permitting beneficiaries to inherit the value of an extinguished devise unless the will provides otherwise.[239] Second, when one beneficiary is pitted against another, a probate court can classify ademption and specific devises narrowly or broadly to favor the more sympathetic beneficiary.[240]

Finally, a devise to a charitable organization can be frustrated if the organization becomes defunct. To fulfill a generalized philanthropic intent, courts invoke the *cy pres* doctrine to transfer the bequest to another charity.[241] *Cy pres* enables redirecting trust funds to alternate institutions,[242] modifying trusts to work around tax law changes,[243] and eliminating racial and religious restrictions in devises.[244] As a type of equitable power to modify trusts, *cy pres* can apply to a plethora of situations, though some scholars assert that it is not utilized enough.[245] More than the other rules of construction, an aggressive use of *cy pres* is not likely to encounter academic opposition because it likely achieves both donor intent and efficiency.[246]

The other subset within the category of rules governing inter-beneficiary relations pertains to will execution formalities.[247] Every state sets forth formalities that must be met when a will is executed (e.g., how a will should be signed and witnessed). These strictures date to the medieval Statute of Wills[248] and perform four key functions of wills.[249] Yet, punctilious as they may seem, formalities do yield to other considerations. Formalities can bend for holographic and electronic wills, where other indicia of authenticity exist and courts

---

[239] This is the result in jurisdictions that have adopted the UPC. *See* UPC § 2-606.

[240] *See, e.g.*, McGee v. McGee, 122 R.I. 837 (1980).

[241] *See* RESTATEMENT (SECOND) OF TRUSTS § 399 (1959) ("[I]f the settlor m manifested a more general intention to devote the [trust] property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose that falls within the general charitable intention of the settlor.").; MCGOVERN ET AL., *supra* note 136, at 445-50.

[242] See Estate of Crawshaw, 249 Kan. 388 (1991).

[243] *See* UTC § 416.

[244] See Coffee v. William Marsh Rice Univ., 408 S.W.2d 269 (Tex. Civ. App. 1966); Howard Savings Inst. v. Peep, 170 A.2d 39 (N.J. 1961).

[245] *See* LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 129 (1955).

[246] *See* POSNER, *supra* note 125, at 441.

[247] *See* MCGOVERN ET AL., *supra* note 136, at §§ 4.1-4.5.

[248] *See id*.; Statute of Wills, 32 Hen. 8, c.1 (1540).

[249] I.e., the protective, channeling, evidentiary, and ritual functions. *See* MCGOVERN ET AL., *supra* note 136, at 198-99.

take liberties to avoid the alternative of intestacy.[250] Even more unsettling, courts can play up or minimize the failure to abide by execution formalities to arrive at the *natural* outcomes.[251]

b. Redistributive reforms

Rules of construction and execution formalities can facilitate redistribution in two ways: through broad, ex ante prescriptions by legislatures or through specific decisions by courts during ex post litigation. An example of wholesale legislative reform is the adjustment to abatement priorities favoring surviving spouses.[252] Yet it is hard to imagine another interest group either powerful enough or sympathetic enough to successfully lobby for such a carve-out. Moreover, in the abstract, inter-beneficiary rules are likely to be indeterminate—that is, it cannot be generalized that one type of beneficiary is sufficiently wealthier that we should set applicable rules to a default position that transfers wealth away from these beneficiaries. Doing so may lead to wrong-way distribution in which the winners were wealthier than the losers from the outset.[253]

The other way to redistribute by these rules is through courts in probate and trust litigation. Where a will is ambiguous or its execution ceremony deficient, courts could construe rules to benefit the economically worse-off party. In an ademption setting, a court could classify as general (instead of specific) those devises to the poorer beneficiary. If a devise to a charitable organization failed, a court exercising *cy pres* power might consider the relative economic stations of the will's residuary beneficiaries versus the populations who would be served if the devise passed to an alternate charity.

There is precedent or taking these liberties. Classification of devises is an imprecise endeavor; interpreting similarly drafted provisions, two courts could come out diametrically.[254] Some of the

---

[250] "Holographic wills are wholly handwritten by the testator." *Id*. at 212. See, e.g., Zhao v. Wong, 40 Cal. App. 4th 1198 (1995). Electronic wills are created, signed, and/or executed on an electronic medium. See, e.g., In re Estate of Javier Castro, 2013-ES-00140 (Ct. Comm. Pl. Lorain Cnty., Probate Div., Ohio, June 19, 2013).

[251] I.e., outcomes that cohere with probate judges' preconceptions of what most testators want—usually to take care of close family members. Leslie, *The Myth of Testamentary Freedom, supra* note 39.

[252] *See supra* note 237.

[253] *See* Kaplow & Shavell, *Fairness versus Welfare, supra* note 90, at 1375-76.

[254] Compare Halsam v. Alvarez, 70 R.I. 212 (1944), with In re DeVoss, 474 N.W.2d 542 (Iowa 1991).

iconic cases on rules of construction result in beneficiaries who had been provided little to nothing under the will prevailing over beneficiaries who had already received much of the estate.[255] Execution formalities, too, can bend to arrive at "just" results.[256] Finally, there is even an efficiency dimension to the *cy pres* doctrine, whose application tends to enhance the welfare of the many at the expense of a few beneficiaries.[257] If in each of these circumstances, if equity and efficiency justifications were replaced or supplemented with redistributive considerations, then these rules too could be enlisted in the struggle against inequality.

The attractiveness of these rules lies in their application. Courts can weigh the relative wealth of the beneficiaries on a case-by-case basis. The rules can also foster positive interactions among beneficiaries, prompting settlement or dialogue to resolve their differences.[258] Yet here lies the vulnerability of the rules as well. These rules do not apply as broadly as tax laws, and they would only redistribute among the beneficiaries who are affected. Hence, their redistribution is haphazard—of random and limited effect.[259] The retort to this criticism is that these rules are merely one facet of a broader strategy to overhaul *all* rules governing wealth. Small as their effect might be, they can fill gaps overlooked by the tax system as well as other rules.

Another criticism is that the redistributive burden will fall to the beneficiaries of testators who cannot afford expert draftsmen. Slipshod lawyers are more prone to committing the ambiguities and errors that trigger these rules, but the ultra-rich do not hire such lawyers. The generic response to this observation, which is of little consolation, is that the tax system is also rife with loopholes.[260] In this

[255] See, e.g., McGee, 122 R.I. (devise of bank account balances to grandchildren, who already received stock, deemed specific and therefore abated so that friend of decedent could receive $20,000); Clark v. Greenhalge, 411 Mass. 410 (1991) (separate notebook of testatrix deemed incorporated by reference into the will so that a sentimental painting goes to testatrix's friend rather than her nephew, who already received much of the estate). Of course, this does not necessarily mean that the prevailing beneficiaries are poorer overall than the losing beneficiaries.
[256] *See* Leslie, *The Myth of Testamentary Freedom*, *supra* note 39.
[257] *See* POSNER, *supra* note 125, at 441.
[258] *See* Lewinsohn-Zamir, *supra* note 97, at 390 ("[Redistribution by rules] is more conducive to advancing objective goods such as self-respect, accomplishment and appropriate relationships; enhances the recipients' valuation of the things they have been given; and may decrease both the givers' opposition to the redistribution and the injury to their welfare.").
[259] *See supra* notes 231-33 and accompanying text.
[260] *See* Sanchirico, *supra* note 14, at 1013.

way, the rules approximate the tax system, where savvy lawyers and financial planners help the rich avoid taxation, leaving the burden to the rest of us.[261] Legal rules, in other words, are not unique in this aspect.

Like other lines of criticisms and counterarguments sampled in this Article, the exchanges explored above derive from the double distortion discourse over whether rules or taxes are better at redistribution. This discourse is not tailored enough to rules governing inter-beneficiary disputes to be useful for our purposes. These rules may well shift the redistributive burden to estates that cannot pay fancy lawyers, but they may also capture a segment of smaller estates that are overlooked by reforms to the RAP, APTs, and fiduciary duties. More holistically, all of these reforms should be integrated into a model that factors in concerns unique to the rules governing the transmission of wealth. The next Section undertakes this objective.

IV. ASSEMBLING A UNIFYING THEORY

This Article has proposed several reforms to the legal rules of trusts and estates to combat inequality. Yet to assemble a truly unifying theory on the laws governing wealth, one that integrates trusts and estates with business law, several additional questions must be addressed. First, how should we tolerate doctrinal divergences in the laws governing the transmission of wealth versus the laws governing the generation of wealth? Second, should the legal rules of trusts and estates defer at all to notions of fairness? Third, how do the reform proposals rank in distributive efficiency?

A. *Doctrinal Asymmetries and Spillover Effects*

Several of the reforms explored in this Article will take trust law out of synchronization with business law. For instance, the proposed constraints on spendthrift and asset protection trusts are more aggressive than their analogs in corporate law regarding limited liability. This is in part because fraudulent conveyance and misrepresentation are too weak for distributive purposes in trusts and estates.[262] Hence, if these proposals are adopted, we may see more tort

[261] *See* Alan Rusbridger, *Panama: The Hidden Trillions*, N.Y. BOOKS, Oct. 27, 2016 (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, *The Guardian*; internal quotations omitted).

[262] *See supra* notes 154-55 and 169 and accompanying text.

creditor exceptions in trusts and estates than in corporate law.[263] Similarly, proposals to raise duty of care standards and damages for breach do not align with corporate law, which confers directors and officers with substantive and procedural protections that encourage risk-taking.[264]

These asymmetries may produce spillover effects. One possibility is that business law will follow suit by bolstering creditor protections and tempering contractarianism. This would vitiate modern trends, but it is not wholly improbable, given that concerns about inequality are prompting similar calls for reform in business law.[265] After all, this is how law often changes: an early mover, venturing into unfamiliar terrain, ends up prompting a paradigm shift.[266] The opposite possibility is that the limited liability and fiduciary duty contractarianism of corporate law could rein contrary trends in trusts, so that redistributive reforms would be short-lived.

Equally likely, the reforms may not spill over at all. Instead, the asymmetries may become ingrained, so that parallel doctrines in business law and trusts and estates end up treading different paths. After law, contract law (the basis for corporate law) and trust law evolved separately to begin with.[267]

Trust law exceptionalism has been the subject of intense debate for nearly a quarter-century.[268] In 1998, Professors Hansmann and Mattei published a pair of articles arguing that trust law's central contribution is its asset partitioning function.[269] Partitioning enables assets to be pledged in separate bundles to different classes of

---

[263] *See supra* notes 176-78 and accompanying text. Again, the denial of remedy to involuntary creditors has troubled corporate commentators enough to propose constraining limited liability in business law as well. *See* Hansmann & Kraakman, *supra* note 170.

[264] In re Citigroup Inc. Shareholder Deriv. Litig., 2009 WL 481906 (business judgment rule).

[265] *See supra* notes 19-29 and accompanying text.

[266] Indeed, in trusts, contractarianism took off because of initial forays in corporate law, after which other fields followed suit.

[267] Leslie, *Trusting Trustees*, *supra* note 222, at 73-76.

[268] If you count the associated debate over whether trust law is contractarian, this history stretches back over a century. *See* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 643-50 (1995) [hereinafter Langbein, *Contractarian Basis*](chronicling the debate between Frederic Maitland and August Scott).

[269] *See See* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434 (1998) [hereinafter Hansmann & Mattei, *Functions of Trust Law*]; *Trust Law in the United States: A Basic Study of Its Special Contribution*, 46 AM. J. COMP. L. SUPP. 133 (1998).

creditors,[270] a function that cannot be replicated by contract.[271] The corollary—that fiduciary duties are a less convincing explanation for trust law's distinctiveness, since they can be reproduced as a body of contracts—has proven to be far more controversial.[272] Hansmann and Mattei's thesis can be read as a variation on the "end of history" arguments that were circulating in the early post-Cold War era, when ebullient scholars predicted worldwide convergence in political systems,[273] corporate law,[274] and apparently trusts and enterprise organization.[275] In another sense, however, their thesis is a continuation of the attempt by scholars to read contractarianism—or, as Professor Langbein would argue, to *re*-read contractarianism—into trusts law.[276] Either way, the central question is whether trusts law is distinct enough to merit its divergence from trends in corporate law. Answering "no" are the contractarians.[277] Answering "yes" are scholars who emphasize trust law's moral content,[278] unique history and dynamics,[279] and the primacy it places upon fiduciary duties.[280]

[270] Hansmann & Mattei, *Functions of Trust Law*, *supra* note 237, at 438.
[271] *Id*. at 453.
[272] For criticisms, see, e.g., Thomas P. Gallanis, *The Contribution of Fiduciary Law*, in THE WORLDS OF THE TRUST (Lionel Smith ed. 2013) [hereinafter Gallanis, *Contribution of Fiduciary Law*]; Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, in THE WORLDS OF THE TRUST (Lionel Smith ed. 2013); Leslie, *Trusting Trustees*, *supra* note 222.
[273] *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).
[274] *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001).
[275] *See* Hansmann & Mattei, *Functions of Trust Law*, *supra* note 237, at 479 ("We are left, then, with the question whether the differences between [trusts and corporates] are in any way fundamental, or whether the roles now served by these two forms could both be served as well by a single legal form that by itself imposes little beyond the asset partitioning that is their lowest common denominator . . .").
[276] Langbein argued that the contractarian basis was in trusts law all along, though Scott took the field on a tangent. *See* Langbein, *Contractarian Basis*, *supra* note 236, at 644. The precursors were FRANK H. EASTERBROOK, DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1996), and, of course, Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). The trust-law-as-default-rules analysis extended by Sitkoff, *Agency Costs Theory*, *supra* note 184, and, if we include law and economics analysis of trusts more broadly, Kelly, *Restricting Testamentary Freedom*, *supra* note 5.
[277] E.g., Langbein, *Contractarian Basis*, *supra* note 236; Adam J. Hirsch, *Freedom of Testation/Freedom of Contract*, 95 MINN. L. REV. 2180 (2011).
[278] E.g., Leslie, *Trusting Trustees*, *supra* note 222.
[279] E.g., id.; Deborah S. Gordon, *Trusting Trust*, 63 U. KAN. L. REV. 497 (2015).
[280] E.g., Gallanis, *Contribution of Fiduciary Law*, *supra* note 240. Gallanis also argues that fiduciary duties cannot easily be replicated by contract.

This Article embraces a more functional approach to trust law exceptionalism. It takes no position on whether trusts are grounded in moral obligation or unique history. Instead, this Article hitches the field's claim of uniqueness to utilitarianism—that is, trust law is unique because it *has to be* unique. Given the gravity of inequality's consequences and the inability of trusts and estates to counteract inequality through the tax system, the legal rules must step in, even if it fosters inconsistencies in doctrines shared with business law.

B. *Fairness versus Welfare*

If the law were only to serve distributive ends, its results would defy our sense of fairness.[281] Fairness encompasses justice, equity, rights, and related concepts; under the technical formulation of Professors Kaplow and Shavell, fairness is everything that is not welfare.[282] Welfare, meanwhile, is shorthand for *social welfare*, which is the aggregation of every individual's well-being in society.[283] Over a decade ago, Professors Kaplow and Shavell asserted provocatively that the law should *only* serve welfare, disregarding fairness altogether.[284] As expected, this austere endorsement of utilitarianism was denounced by scholars who argue that law should at least partially reflect moral norms.[285] One recurring criticism among the detractors has been that fairness better captures our preferences than welfare; hence, the welfare calculus should make room for noneconomic considerations such as fairness.[286]

In trusts and estates, normative principles are so deeply embedded that a single-minded pursuit of redistribution would be scorned. The overriding principle in the field is testamentary

[281] *See* Kaplow & Shavell, *Fairness versus Welfare*, *supra* note 90.
[282] *See id*. at 38-41.
[283] *Id*. at 24-28.
[284] *See* KAPLOW & SHAVELL, FAIRNESS VERSUS WELFARE, *supra* note 16.
[285] On the placement of Kaplow and Shavell's argument within the deontic-utilitarian debate, see Coleman, *supra* note 91. On how Kaplow and Shavell fit into the consequentialist and welfare spectrum, see Christopher P. Taggart, *Fairness versus Welfare: The Limits of Kaplow and Shavell's Pareto Argument*, 99 MARQ. L. REV. 661 (2016).
[286] Farnsworth, *supra* note 196, at 2015-18. Curiously, the efficiency-only position seems to have been rejected long ago in the welfare economics literature on which Kaplow and Shavell base their argument. *See* FLEURBAEY & MANIQUET, *supra* note 16, at xv (citing KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2nd ed., 1963)).

freedom,[287] which so dominates conceptions of fairness that limiting principles are exceedingly rare.[288] This is not to suggest, though, that testamentary freedom cannot be abridged on equity grounds. For example, Professor Leslie has shown that courts can bend will formalities to ensure that surviving family members are provided for, regardless of whether the testator's will does so.[289] Apart from testamentary freedom, fiduciary duties too are pregnant with moral and ethical obligations.[290]

The normative vocabulary—or, if we adopt Kaplow and Shavell's succinct definition, *fairness*—therefore pervades trusts and estates. Consequently, the reduction of beneficiary-beneficiary relations to a distributive function (i.e., the fourth category of legal rules) would surely offend our sense of fairness. Testamentary intent would be routinely vitiated. Poor beneficiaries might be viewed as receiving a windfall if they had led a life of inebriation or sloth or treated the testator badly. To the extent that our well-being is enhanced by the law's pursuit of fairness,[291] and to the extent that these results strike us as unfair, overemphasis on redistribution in these circumstances would be cavalier.

The path to a unifying theory therefore cannot completely disregard fairness. The strategy must be to "weaken fairness requirements until they capture basic, sensible, and perhaps context-specific ethical objectives that are compatible with efficiency requirements."[292] Of course, more work must be done on the extent to which fairness should defer to welfare. Once the proper balance is struck, we can turn to the equally complicated task of devising feasible policy.[293]

---

[287] *See supra* note 41. Note, however, that testamentary freedom and fairness do not always align.
[288] See Hodel v. Irving, 481 U.S. 704, 716 (1987) ("[T]he right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times . . . . [T]otal abrogation of the right to pass property is unprecedented and likely unconstitutional."). For this reason, the limitations on testamentary power are themselves limited. *See* MCGOVERN ET AL., *supra* note 136, at Ch. 3. Certainly inequality-based justifications have previously met with little success, due to the reliance on progressive taxation. *See id*. at 133.
[289] *See* Leslie, *The Myth of Testamentary Freedom*, *supra* note 39.
[290] *See* Leslie, *Trusting Trustees, supra* note 222.
[291] Farnsworth, *supra* note 196, at 2015-16; Coleman, *supra* note 91, at 1512-13.
[292] FLEURBAEY & MANIQUET, *supra* note 16, at 235.
[293] Complications include setting the right incentives to get the parties involved to communicate their preferences (economic and non-economic) to judges and lawmakers, as well as the political feasibility of deviations from the status quo. *See id*. at 236.

C. *Distributive Efficiency*

If we were to construct a hierarchy on the distributive efficiency of the reforms explored in this Article, the RAP and exceptions to APTs would occupy the top rung. In combination, dynasty trusts and APTs have permitted settlors to squirrel away some trillions of dollars.[294] Dynasty trust and APT reform are attractive in that the distribution flows from the very wealthy. Where these rules intersect with the tax system, there is the additional benefit that distributions can flow to the weighted priorities built into public programs—assuming that we trust the government with adequately weighting its distribution for maximum redistributive efficacy.[295]

Yet we should not abandon redistribution at the more granular level of inter-beneficiary relations. The fourth category of trusts and estates' rules might only transfer wealth between two discrete parties affected by litigation. Nonetheless, as part of a holistic model integrating the tax system, business law, and other rules in trusts and estates, inter-beneficiary distributions capture what the other schemes omit. Put metaphorically, if every bucket has holes, then water (i.e., wealth) is best caught by nesting buckets together with different holes.[296] In this rubric, even "weakly redistributive" results that transfer wealth between discrete parties in litigation can play a role.[297]

[294] *See* Sitkoff & Schanzenbach, *Jurisdictional Competition for Trust Funds*, *supra* note 108, at 404 & n.125 ($100 billion in trust assets moved from the abolition of the GST tax and 2003); Alan Rusbridger, *Panama: The Hidden Trillions*, N.Y. BOOKS, Oct. 27, 2016 ($7.6 trillion in wealth is deposited in tax havens globally) (citing economist Gabriel Zucman). For an account of one creditor's foray into the world of offshore APTs, see Nicholas Confessore, *How to Hide $400 Million*, N.Y. TIMES, Nov. 30, 2016.

[295] Welfare economics can pursue a variety of allocations. For instance, an allocation can give absolute priority to the worst-off member of a society. However, imagine the following hypothetical: the absolute worst-off member has a utility measurement of 8.9, 1000 people comprising the next worse-off group measure at 9.1, and the other 1000 members of society measure at 100. Absolute priority to the worst off overlooks the next worse-off. It is up to policymakers to derive a priority that weighs these considerations appropriately. *See* Roger Crisp, *Equality, Priority, and Compassion*, 113 ETHICS 745, 752-52 (2003) (citing THOMAS NAGEL, MORTAL QUESTIONS 125 (1979)); FLEURBAEY & MANIQUET, *supra* note 16, at 39-45.

[296] *See* Sanchirico, *supra* note 14, at 357. For more technical explanations, see FLEURBAEY & MANIQUET, *supra* note 16, at

[297] I borrow the "weakly redistributive" terminology from the welfarist conception of *weak Pareto efficiency*, in which one allocation is better than another if each of the relevant actors prefers it. *See id*. at 8.

Legitimately, critics might denounce wealth transfer schemes premised upon litigation as *inefficient* because the fail to provide clear ex ante prescriptions and instead incentivize lawsuits.[298] Yet from the standpoint of administrative efficiency, probate judges have insights into the preferences and relative wealth of the relevant parties at a level of intimacy that administrative agencies simply do not.[299] From the standpoint of feasibility, wholesale transfers crafted by legislatures may simply be impossible.

Within this distributive efficiency rubric, fiduciary duties sit somewhere in the middle, between the RAP and APTs on one end on rules of construction and execution facilities on the other. Reforms to fiduciary duties are likelier to be more indeterminate.[300] On these points and also the design of empirical research to address redistributive indeterminacy, future work must follow.

V. CONCLUSION

This Article lays the foundation for a theory of inequality that unifies laws regulating the generation and transmission of wealth. It also evaluates the redistributive potential of the legal rules within trusts and estates. With proper justification, the goal of welfare enhancement can overcome the field's entrenched notions of fairness such as freedom of testation. This Article proffers the perils of inequality as such a justification, perils severe enough to also merit doctrinal divergences in business law and trusts and estates.

Further work is needed to resolve the distributive indeterminacy of the rules. Empirical research in particular could establish a ranking of the distributive efficiency of reforms proposed in this Article. Notwithstanding such a ranking, the best result may be all-encompassing, nesting the weakly redistributive mechanisms within more sweeping ones.

The ultimate goal is to harness the redistributive potential of trusts and estates. Much of the law and economics discourse on redistribution by legal rules unfolds abstractly,[301] with boilerplate

[298] *See* Mark L. Ascher, *The 1990s Uniform Probate Code: Older and Better, Or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639 (1993) (decrying litigation incentives in the UPC).
[299] Or agencies simply cannot achieve this intimacy of knowledge without huge expenditures. *See* Blumkin & Margalioth, *supra* note 14, at 11.
[300] *See supra* notes 220-21 and accompanying text.
[301] For instance, Kaplow and Shavell popularized the exploration of fairness versus welfare through abstract tort-law hypotheticals. *See* Kaplow & Shavell, *Fairness versus Welfare*, *supra* note 90, at 1039. In turn, critics have responded with abstract

defenses arguing that the tax system is just as difficult to administer as legal rules and just as susceptible to forum selection.[302] Similarly, welfare economics can quickly descend into obscure theorems and mathematical proofs.[303] Welfare economics and law and economics provide the framework, but the *content* must be filled out by diving into the rules, norms, and efficiencies of the specific *context*. Hopefully, this Article comprises the beginning of a larger movement to do so for trusts and estates.

hypotheticals from other areas of law. *See, e.g.*, Blumkin & Margalioth, *supra* note 14.

[302] *See, e.g.*, Blumkin & Margalioth, *supra* note 14.

[303] For a valiant attempt to keep the proofs simple, see FLEURBAEY & MANIQUET, *supra* note 16.