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### How Should Inheritance Law Remediate Inequality?

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# How Should Inheritance Law Remediate Inequality?

FELIX B. CHANG\*

This Essay argues that trusts and estates (“T&E”) should prioritize intergenerational economic mobility—the ability of children to move beyond the economic station of their parents—above all other goals. The field’s traditional emphasis on testamentary freedom fosters the stickiness of inequality. For wealthy settlors, dynasty trusts sequester assets from the nation’s system of taxation and stream of commerce. For low-income decedents, intestacy splinters property rights and inhibits their transfer, especially to nontraditional heirs.

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

T&E scholars are tackling inequality with greater urgency than ever before; yet basic questions remain. The Essay contributes to these conversations by articulating a comprehensive framework for progressive inheritance law that redresses long-term inequality.

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## I. INTRODUCTION

Every generation gets the trusts and estates (“T&E”) scholarship it deserves.<sup>1</sup> In our era of rampant inequality, the traditional conception of T&E—as a field animated by testamentary freedom—now seems outdated.<sup>2</sup> Today, T&E scholars are confronting the doctrines and default rules most responsible for accelerating inequality.<sup>3</sup> But fundamental questions remain. What do scholars mean by “inequality,” and how can inheritance law advance holistic solutions?

Existing proposals have overlooked how T&E’s components fit together—as well as how they complement, or work against, business law and economic cycles.<sup>4</sup> A bimodal distribution has come to define the instruments of T&E. On one hand, trusts and nonprobate instruments cater to the privacy desires and dynastic aspirations of the hyperwealthy.<sup>5</sup> On the other, intestacy and the probate system serve low-income households terribly, throwing intrafamilial conflicts into public view.<sup>6</sup> It is a schism that reinforces the distribution of incomes and family compositions across society.

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<sup>1</sup> See JOSEPH DE MAISTRE, *LETTRES ET OPUSCULES INEDITS* (1851) (“Every nation has the government it deserves.”); ROBERT F. KENNEDY, *THE PURSUIT OF JUSTICE* (1964) (“Every society gets the kind of criminal it deserves. What is equally true is that every community gets the kind of law enforcement it insists on.”).

<sup>2</sup> Testamentary freedom is the freedom of a testator to dispose of their estate as they please. See John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 490 (1975).

<sup>3</sup> See, e.g., Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts, and Estates*, 49 REAL PROP. TR. & EST. L.J. 317, 340 (2014); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 457 (2010); Carla Spivack, *Broken Links: A Critique of Formal Equality in Inheritance Law*, 2019 WIS. L. REV. 191.

<sup>4</sup> But see Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (And Beyond)*, 60 B.C. L. REV. 145, 177–78 (2019); Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 981 (2020).

<sup>5</sup> See *infra* Section IV.A.

<sup>6</sup> See *infra* Section IV.B.

This Essay shows how T&E can thwart wealth inequality – and at macroeconomic scale. Many of its rules are inputs into the tax system, a comprehensive redress for inequality. For example, fortifying the Rule against Perpetuities (“RAP”) frees up large estates for taxation and, more importantly, incentivizes settlors to divert assets to spending.<sup>7</sup> At the other end of the wealth spectrum, where most decedents pass without having written wills,<sup>8</sup> intestacy reform could preserve assets for productive use by heirs, thereby supplementing government programs, tax refunds, and intermittent stimulus.<sup>9</sup>

Yet reforming T&E’s rules and doctrines can produce distortions that complicate any remediation of inequality. Tightening the tax loopholes around dynasty trusts might prove counterproductive if, for instance, settlors chose to invest rather than spend down money that would otherwise fund trusts.<sup>10</sup> When elites seek investment opportunities in a stagnant economy, like the one we find ourselves in today, their wealth compounds much more quickly than the incomes of average wage-workers. Inequality accelerates in the short term.

We must therefore be mindful of how inheritance laws and the macroeconomy fit together. Where there is incongruence (e.g., between reducing inequality and cushioning recessions) or indeterminacy (e.g., when we trade one type of inequality for another), this Essay argues that T&E should prioritize the long-

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<sup>7</sup> The RAP determines when estate taxes accrue to a trust; if a state has abolished the RAP or set the vesting period at 1,000 years, grantors can settle trusts under those rules to escape estate taxes altogether. See Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1304 (2003). See also 26 U.S.C. § 2631.

<sup>8</sup> See Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877 (2012).

<sup>9</sup> On the tortuous path of debates over pandemic stimulus in the last month alone, see Luke Broadwater and Jim Tankersley, *Biden’s Economic Plan Is Set to Clear a Senate Hurdle*, N.Y. TIMES, Feb. 4, 2021; Luke Broadwater & Jim Tankersley, *Republicans Pitch Biden on Smaller Aid Plan as Democrats Prepare to Act Alone*, N.Y. TIMES, Feb. 1, 2021.

<sup>10</sup> See *infra* Section IV.A.

term goal of fostering intergenerational economic mobility (“IEM”)—the ability of children to move beyond the economic station of their parents.<sup>11</sup>

By reorienting inheritance law around IEM, this Essay provides a theoretical framework for addressing inequality. Its singular contribution is to unify the disparate calls for reform within T&E. Concerned about runaway inequality, scholars are prescribing a variety of changes to T&E’s rules and standards, riddling its defaults with exceptions.<sup>12</sup> Left unabated, this trend will leave the regime “more holes than cheese.” An overhaul of T&E is therefore needed—and it should start with the field’s first principles.

The attention to IEM allows this Essay to take a macroeconomic perspective that brings T&E into sharper relief, highlighting the field’s capacity to accomplish two goals—loosening spending in ultrawealthy households and spurring savings and investment in low-income households. More broadly, estate planning is both an input and an output of the macroeconomy. Demarcations are blurry among tax law (which effectuates redistribution), business law (which governs the generation of wealth), and T&E (which governs the intergenerational transmission of wealth). Yet inheritance law is a critical interface where the ill-gotten gains incentivized by lax business laws can be clawed back and redirected into the tax system in a progressive manner, targeting large estates for taxation while leaving small estates intact. Assembling these

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<sup>11</sup> In economics, IEM can be defined and measured in different ways. One option is to gauge the elasticity of incomes between fathers and sons, so as to avoid the variability of women’s income in the labor force due to the gendered wage gap. See Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, 27 J. ECON. PERSP. 79 (2013).

<sup>12</sup> See, e.g., Danaya C. Wright, *What Happened to Grandma’s House: The Real Property Implications of Dying Intestate*, 53 DAVIS L. REV. 2603 (2020) (tax sales and foreclosures of decedent property); Heather K. Way, *Informal Homeownership in the United States and the Law*, 29 ST. LOUIS U. PUB. L. REV. 113 (2009) (providing clear title to properties inherited by low-income households).

threads into a comprehensive framework, this Essay provides a blueprint for what progressive inheritance law might look like.

Secondarily, this Essay enriches the law and macroeconomics literature by illustrating how T&E can check inequality. “Law and macro” is quickly emerging as an alternative to the efficiency-obsessed, microeconomics-focused bent of law and economics.<sup>13</sup> Yet inequality presents unique challenges. The compounding of wealth inequality does not swing like, or follow the pace of, economic cycles – it is a slower burn, though intensifying in recent years. Since 1986, when updates to the Generation Skipping Transfer tax spurred the creation of dynasty trusts, the U.S. has undergone at least four cycles of recession and recovery, including the financial crisis. During this time, inequality has not wavered. Some of the antidotes to inequality emanating from T&E will take generations to bear fruit. And as a stimulus measure, constraining dynasty trusts might, perversely, incentivize settlors invest, which further concentrates corporate wealth.<sup>14</sup> We must therefore be mindful of how laws governing the transmission of wealth (i.e., T&E) and the economy fit together.

The remainder of the Essay proceeds as follows: Section II makes the case for IEM as T&E’s animating principle, abandoning the misplaced deference to testamentary freedom. Section III argues that a focus on IEM can reduce long-term inequality, arresting its velocity of inequality by forcing the tail ends of the wealth distribution spectrum – ultrawealthy and low-income households – to regress toward the mean. With these guideposts, Section IV outlines what a progressive brand of T&E might look like, assessing reforms to dynasty trusts and intestacy. Section V concludes.

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<sup>13</sup> See Yair Listokin, *Law and Macroeconomics: The Law and Economics of Recessions*, 34 YALE J. ON REG. 791 (2017); Yair Listokin, *Law and Macro: What Took So Long?*, 83 L. & CONTEMP. PROBL. 141 (2020). Professor Listokin now organizes an annual Law and Macro conference. For the latest program, see *Program, THE 3RD CONFERENCE ON LAW AND MACROECONOMICS (2020)*, <https://lawandmacro.org/#program>.

<sup>14</sup> See *infra* Section II.

## II. REORIENTING THE GOALS OF TRUSTS AND ESTATES

T&E was long thought to be the province of testamentary freedom, or the notion that a testator can dispose of their assets however they please.<sup>15</sup> Until recently, neither inequality nor redistribution played any role in the field. This is understandable. After all, T&E governs discrete relationships among heirs and between principals and agents, replete with legal rules balancing the interests among tightly drawn circles of constituents.<sup>16</sup> Even the handful of T&E scholars embracing economic analysis have avoided the subject of redistribution.<sup>17</sup>

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

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<sup>15</sup> See RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003) (freedom of testation the "organizing principle of the American law of succession").

<sup>16</sup> E.g., intestacy, rules of construction, execution formalities, and curative doctrines (apportioning estates among heirs) and fiduciary duties (apportioning the balance of power between beneficiaries and fiduciaries such as executors and trustees). For a full taxonomy, see Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73 (2018).

<sup>17</sup> See, e.g., Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6–8 (1992); Daniel B. Kelly, *Trust Term Extension: An Economic Analysis*, 67 FLA. L. REV. F. 85, 87–88 (2015); Lee-Ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2589 (2011). *But see* Chang, *supra* note 16. Law and economics scholars in particular downplay the redistributive potential of rules. See 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, 822–23 (2000).

## A. From Freedom to Equality

Every generation gets the T&E scholarship it deserves. In 1975, John Langbein wrote that “virtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life.”<sup>18</sup> Professor Langbein made this sweeping declaration to marshal outrage against the rigid formalism of wills execution, which require wills to be written and signed by testators and attested by witnesses.<sup>19</sup> As he and others saw it, these formalities emanated from the arcane Wills Act of 1677, which could be unresponsive to testamentary desires.<sup>20</sup> These reformers therefore pushed for probate courts to suspend execution requirements if doing so would honor testamentary intent.

At the time, the estate tax exemption was \$60,000, and the top estate tax rate was 77% (applying to a top bracket of \$10 million and beyond).<sup>21</sup> Advocates of estate tax repeal (hereafter, the “Repealers”) were mostly an unsympathetic band of superrich families, who notched the occasional rate reduction or legislative preference.<sup>22</sup> Although Professor Langbein had invoked testamentary freedom in his fight to add the dispensing power into the Uniform Probate Code, he would become indelibly associated with the contractarian turn in T&E’s fiduciary standards, which loosened the duties binding trustees and investment advisors.<sup>23</sup> This turn reflected the ethos of the time—

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<sup>18</sup> Langbein, *supra* note 2. Langbein did note estate taxes as an exception, and he was writing in the broader context of execution formalities.

<sup>19</sup> Langbein, *supra* note 2, at 490.

<sup>20</sup> *See id.*; Bruce H. Mann, *Formalities and Formalism in the Uniform Probate Code*, 142 U. PA. L. REV. 1033 (1994).

<sup>21</sup> Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*,

<sup>22</sup> *See* MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 18 (2005) (Gallo wine family in California successfully lobbying Senators Cranston and Dole in 1978 to get 10 years to pay off estate taxes).

<sup>23</sup> *See, e.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

the libertarian creep of law and economics into antitrust, contracts, corporate law, torts, and eventually T&E. The enduring legacy of Professor Langbein's body of work, then, is the sentiment that testators should be able to dispose of their assets as they please.

A generation later in 1990, when the estate tax exemption had grown over 10-fold to \$675,000 and the top estate tax rate had dwindled to 55% (applying to a top bracket of \$3 million),<sup>24</sup> Mark Ascher argued that a decedent's property should escheat entirely to the state upon their death.<sup>25</sup> His thesis was driven by the norm of fairness: excessively liberal inheritance laws permit a testator's cold "dead hand" to steer their assets and dictate the trajectory of their descendants long after the testator had died.<sup>26</sup> For extraordinarily wealthy families, this meant that a child's station in life would be determined far more by the luck of the family they were born into than their own diligence, which seemed to vitiate the ideal of equality.<sup>27</sup> Dead hand control also limits the productive use of property by the living if, for instance, a trust only gave life estate holders income streams but forbade assets

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<sup>24</sup> See Jacobson et al., *supra* note 21.

<sup>25</sup> Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 73 (1990).

<sup>26</sup> *Id.* at 150 ("By tolerating almost unrestricted dead hand control over property, this nation has always allowed the children of the wealthy all the financial advantages inheritance has had to offer.").

<sup>27</sup> See *id.* at 1169 ("Failing to tax transfers of wealth at death . . . promotes and nurtures an aristocratic class—individuals with enormous amounts of wealth and power achieved not because of their talents or effort but solely because of the luck of their birth") (quoting RAY D. MADOFF, *IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD* (2010)). This argument has not been restricted to law or a specific time period. The writer Zadie Smith, for instance, has said that "[there is the] gift of being born in a certain condition—with a certain amount of money, in a certain state, with a certain skin color and a certain gender. And what rights accrue to you because of that? And what duties accrue to you because of that?" Zadie Smith, *Novelist Zadie Smith on Historical Nostalgia and The Nature of Talent*, FRESH AIR, Nov. 21, 2016 (transcript available at <https://www.npr.org/2016/11/21/502857118/novelist-zadie-smith-on-historical-nostalgia-and-the-nature-of-talent>).

from being sold or pledged.<sup>28</sup> Finally, at a time when the U.S. was fixated on the federal deficit,<sup>29</sup> it was unconscionable to let gargantuan estates bypass a tax that could bring government coffers some relief.<sup>30</sup>

Shortly after Professor Ascher's seminal article, the Repealers gained momentum. Republicans took the House in 1994 after decades out of power; led by Newt Gingrich, the insurgent wave was different than the previous breed of lawmakers, who had sought compromise over trench warfare.<sup>31</sup> These "Young Turks" allied themselves with the die-hard Repealer Grover Norquist and then enlisted family farms and small businesses to lay siege to the estate tax. This coalition achieved its first legislative victory in the Qualified Family Owned Business Interests provisions of the Taxpayer Relief Act of 1997.<sup>32</sup> Because this law proved had been watered down by legislative bargaining, it hardened the Repealers' resolve for outright elimination of the estate tax.<sup>33</sup>

In the academy, T&E scholars were using empirical methodologies to show that testamentary freedom was not only elusive but also deleterious. Melanie Leslie surveyed hundreds of probate cases to reveal that judges enforce and disregard formalities freely to arrive at the most "natural" dispositions, typically favoring close family members.<sup>34</sup> Robert Sitkoff and Max Schanzenbach combed through trust holdings reports filed with financial regulators, estimating that roughly \$100 billion in assets

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<sup>28</sup> LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* (2009).

<sup>29</sup> See, Ascher, *supra* note 25, at 1171. This conversation now seems quaint. See *Deficit Tracker*, BIPARTISAN POLICY CENTER, Jan. 12, 2021, at <https://bipartisanpolicy.org/report/deficit-tracker/>.

<sup>30</sup> Ascher, *supra* note 25, at 71–72.

<sup>31</sup> GRAETZ & IAN SHAPIRO, *supra* note 22, at 24–26.

<sup>32</sup> *Id.* at 34–35.

<sup>33</sup> *Id.* at 35–36.

<sup>34</sup> Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 235–36 (1996).

had migrated virtually tax free into dynasty trusts.<sup>35</sup> Crafty estate planners were settling these trusts in states that had eviscerated the rule against perpetuities, so that assets could avoid taxes if they were sequestered in trusts.<sup>36</sup>

The work of Professor Sitkoff and Schanzenbach and others reified Ascher's argument, exposing testamentary freedom as the modus of tax evasion.<sup>37</sup> More fundamentally (and also more disturbingly), Professor Leslie revealed that testamentary intent was merely a myth we teach in law school; in practice, courts felt free to override the decedents' wishes to favor surviving spouses and close blood relatives.

By 2005, when Professors Sitkoff and Schanzenbach were working on the RAP, the estate tax exemption had swollen to \$1.5 million, and the top rate had come down to 47% (applying to a top bracket of \$2 million).<sup>38</sup> These drastic changes were the fruit of decades of organization by the Repealers. Throughout the 1990s, Repealers brought people of color and moderate-income families into their fold by casting the estate tax as a chokehold on everyone's upward mobility—despite the reality that it touched less than 2 percent of households.<sup>39</sup> When George W. Bush took the White House in 2001, federal budget surpluses rendered taxation less urgent, and progressive lawmakers and organizers could not muster a cogent defense.<sup>40</sup> The Repealers secured the most sizeable concessions yet for the estate tax; in 2010, concerned about the mid-term elections President Obama and Democratic lawmakers even extended and augmented those cuts.

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<sup>35</sup> Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 359 (2005).

<sup>36</sup> *Id.* at 371–74.

<sup>37</sup> See also 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); Dukeminier & Krier, *supra* note 7.

<sup>38</sup> Jacobson et al., *supra* note 21.

<sup>39</sup> GRAETZ & IAN SHAPIRO, *supra* note 22, at 69, 119. Of all the Repealers' branding, the most effective was to rename the estate tax the "death tax."

<sup>40</sup> *Id.* at 99–103.

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Hence, the diverging paths of T&E scholars and the repeal movement illuminate the chasm between the academy and public perceptions of the estate tax. Today, with the Tax Cuts and Jobs Act of 2017, the exclusion has metastasized to \$11.58 million while the top tax rate has wilted to 40% (applying to a top bracket of \$1 million).<sup>41</sup> Wealth inequality in the U.S. is at levels not seen since the Gilded Age, when monopolies in railroads and banking allowed robber barons to pillage their way to fortunes.<sup>42</sup> In the span of four decades, we have reprised the level of wealth concentration at which we started out the last century (see Figure 1).

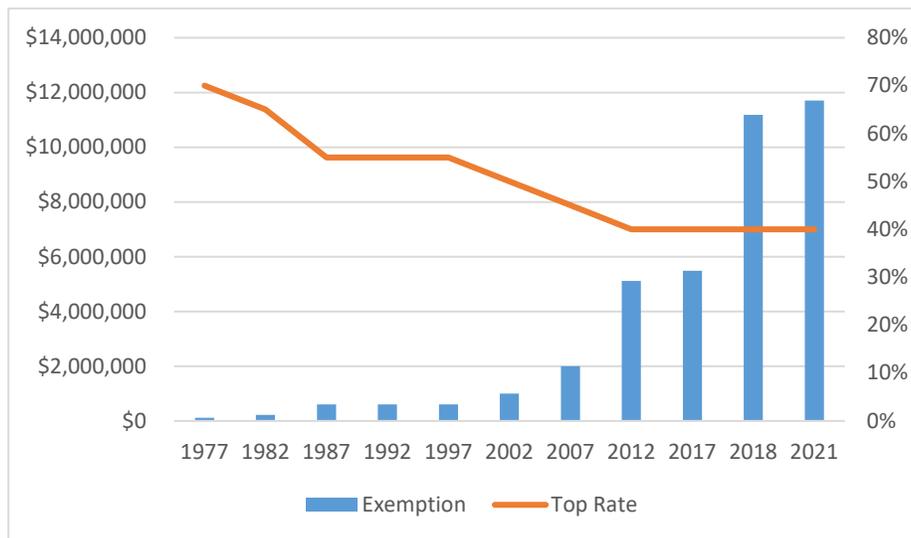


Figure 1: Estate Tax Exemptions and Top Since 1977

The newest generation of T&E scholarship is obsessed with inequality. From dynasty trusts to intestacy, scholars are trying to dismantle the structures most responsible for the velocity of

<sup>41</sup> 26 U.S.C. § 2010; 26 C.F.R. § 20.2010-1.

<sup>42</sup> Estelle Sommeiller & Mark Price, *The New Gilded Age: Income Inequality in the U.S. by State, Metropolitan Area, and County*, ECONOMIC POLICY INSTITUTE (2018), <https://www.epi.org/publication/the-new-gilded-age-income-inequality-in-the-u-s-by-state-metropolitan-area-and-county/>.

inequality. They have pointed out, for instance, that high-wealth families can avail themselves of favorable laws and complex to enjoy a rarified sovereignty.<sup>43</sup> This foments systemic risk in the financial system, shifts tax burdens to lower-income families, and widens inequality.<sup>44</sup> Other scholars have focused on intestacy, which is ill-suited to the needs of heirs and survivors in low-income families.<sup>45</sup> The regime often leads to fractional interests in housing stock, a “tragedy of the anticommons” that allows developers to pick up property cheaply, evict residents, and gentrify a neighborhood.<sup>46</sup>

Methodologically, inequality-minded T&E scholars have also enlisted increasingly sophisticated empirical techniques to gather information and vet their hypotheses.<sup>47</sup> The burgeoning empirical literature has covered probate lending,<sup>48</sup> property taxes,<sup>49</sup> the elective share,<sup>50</sup> and the prevalence of estate planning.<sup>51</sup>

This critical T&E literature sidesteps the artifice of testamentary freedom, as if the imperative to counter inequality displaces all other goals. Indeed, this mandate has been accepted by virtually every other field within law. Inequality has taken on heightened urgency with the string of populist political movements (both right-wing and left-wing) exploiting economic grievances, which only widens economic chasms once these

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<sup>43</sup> See Tait, *supra* note 4.

<sup>44</sup> *Id.*

<sup>45</sup> See Mary Louise Fellows & E. Gary Spitko, *How Should Non-Probate Transfers Matter in Intestacy?*, 53 DAVIS L. REV. 2207 (2020); Weisbord, *supra* note 8.

<sup>46</sup> See Wright, *supra* note 12.

<sup>47</sup> See, e.g., Adam J. Hirsch, *Symposium: Empirical Analysis of Wealth Transfer Law – Introduction*, 53 U.C. DAVIS L. REV. 2083 (2020).

<sup>48</sup> David Horton & Andrea Cann Chandrasekher, *Probate Lending*, 126 YALE L.J. 102 (2016).

<sup>49</sup> Wright, *supra* note 12.

<sup>50</sup> Naomi Cahn, *What’s Wrong About the Elective Share “Right”?*, 53 U.C. DAVIS L. REV. 2087 (2020); Jeffrey N. Pennell, *Individuated Determination of a Surviving Spouse’s Elective Share*, 53 U.C. DAVIS L. REV. 2473 (2020).

<sup>51</sup> Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511 (2020).

insurgents assume power.<sup>52</sup> The phenomenon'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."<sup>53</sup> By virtue of its corrosive power, inequality is one of the greatest threats of our time.

Combatting inequality can certainly be a goal of T&E. Clearly, any invocation to history and precedent in defense of testamentary freedom is misplaced at best and inimical to tax fairness at worst. We can even stipulate to the pernicious effects inequality. However, a more basic question remains: What do we mean by "inequality"? More precisely, what kind of inequality should T&E address?

## B. Defining Inequality

Inequality has different meanings and dimensions. There is income disparity, which scholars and policymakers often mean by "inequality,"<sup>54</sup> and then there is wealth disparity, which is harder to measure.<sup>55</sup> There is inequality within a country, among countries, and worldwide.<sup>56</sup> Even the proper gauge of inequality

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<sup>52</sup> See JAN-WERNER MÜLLER, *WHAT IS POPULISM?* (2016); MARTIN SANDBU, *ECONOMICS OF BELONGING: A RADICAL PLAN TO WIN BACK THE LEFT BEHIND AND ACHIEVE PROSPERITY FOR ALL* (2020).

<sup>53</sup> Chang, *supra* note 16, at 90.

<sup>54</sup> See, e.g., Raj Chetty et al., *Where Is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q. J. ECON. 1553 (2014) (measuring the increase in child incomes against parental incomes); Ellora Deroncourt & Claire Montialoux, *Minimum Wages and Racial Inequality*, 136 Q. J. ECON. 169 (2020) (gauging wage differentials between Black and White workers).

<sup>55</sup> Sandra E. Black & Paul J. Devereux, *Recent Developments in Intergenerational Mobility*, in *HANDBOOK IN LABOR ECONOMICS* (Orley Ashenfelter and David Card eds., 2011); Strand, *supra* note 3, at 458–60.

<sup>56</sup> BRANKO MILANOVIC, *WORLDS APART: MEASURING INTERNATIONAL AND GLOBAL INEQUALITY* 7–11 (2005).

is subject to dispute—for instance the Gini coefficient is the standard measure,<sup>57</sup> but it is prone to criticism.<sup>58</sup>

Today, inequality has blurred national boundaries. The ultrawealthy can travel and move assets effortlessly across borders.<sup>59</sup> Outsourcing and globalization have hollowed out manufacturing-dependent middle classes in nearly every Western industrialized nation.<sup>60</sup> Paradoxically, though, Curiously, *worldwide* inequality has diminished in recent years.<sup>61</sup> This is primarily because a vibrant middle class has emerged in Asia—more specifically, China—where manufacturing has flourished.<sup>62</sup>

Inequality is slippery and persistent. When we counter it in one area, we may augment it elsewhere. The field of welfare economics is replete with exercises pondering such scenarios. For example, hypothetical is a society where the poorest member has wealth of 9 units, the next 1,000 poorest members have wealth of 10 units, and the remaining 1,000 members have wealth of 100 units. An allocation that absolutely prioritizes redistribution to

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<sup>57</sup> See *Human Development Reports*, UNITED NATIONS DEVELOPMENT PROGRAMME (2013), <http://hdr.undp.org/en/content/income-gini-coefficient> [<https://perma.cc/9JND-ECCS>].

<sup>58</sup> See José Gabriel Palma, *Homogeneous Middles vs. Heterogeneous Tails, and the End of the 'Inverted-U': It's All About the Share of the Rich*, 42 DEVELOPMENT AND CHANGE 87 (2011).

<sup>59</sup> BROOKE HARRINGTON, *CAPITAL WITHOUT BORDERS: WEALTH MANAGERS AND THE ONE PERCENT* (2016).

<sup>60</sup> Branko Milanovic has depicted this graphically in his now-famous “elephant chart,” which suggests, among other things, that working class incomes in developed economies have stagnated—a feature some economists have ascribed to globalization. For a discussion, see Caroline Freund, *Deconstructing Branko Milanovic's "Elephant Chart": Does It Show What Everyone Thinks?*, PIIIE (2016), <https://www.piie.com/blogs/realtime-economic-issues-watch/deconstructing-branko-milanovics-elephant-chart-does-it-show>.

<sup>61</sup> See *id.*

<sup>62</sup> This dynamic has reformed the relationships between China on one hand and the U.S. and Europe on the other. China draws ire for peeling away manufacturing jobs and pilfering trade secrets, but American and European sectors from biotech to education are heavily dependent on Chinese funds.

the poorest member may overlook the other members who are not far off.<sup>63</sup>

More practically, some T&E reforms may exacerbate short-term inequality in their attempts at redressing long-term inequality. As Section IV discusses, closing off estate tax loopholes may divert settlors toward inter vivos investments. Given that investments appreciate in value more quickly than wages rise,<sup>64</sup> the gaps between the investing class and labor will continue to widen.

Of inequality's myriad variations, this Essay argues that T&E must tackle the intergenerational stickiness of wealth disparities. The field should facilitate IEM by enabling children to eventually move into a different economic class than their parents. At its core, T&E governs the transmission of wealth, usually across generations.<sup>65</sup> It is therefore an apt setting to equalize, as much as possible, the advantages and headwinds that each new generation is born into.

The literature on IEM is most fully developed in economics. From its roots in the intergenerational transmission of earnings,<sup>66</sup> the literature has exploded into a variety of inventive empirical studies, such as the causal effects of parental education and earnings on children's earnings,<sup>67</sup> the correlation between income inequality and intergenerational earnings elasticity,<sup>68</sup> and the

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<sup>63</sup> See Roger Crisp, *Equality, Priority, and Compassion*, 113 ETHICS 745, 752–55 (2003) (citing THOMAS NAGEL, *MORTAL QUESTIONS* 125 (1979)). See also MARC FLEURBAEY & FRANÇOIS MANIQUET, *A THEORY OF FAIRNESS AND SOCIAL WELFARE* 39–45 (2011).

<sup>64</sup> This is Thomas Piketty's central thesis in *Capital in the Twenty-First Century*—that capital grows more quickly than labor. See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* (Goldhammer trans. 2014).

<sup>65</sup> Even inter vivos trusts, whose assets a settlor can enjoy during their lifetime, contemplate a day when the grants become irrevocable after the settlor passes.

<sup>66</sup> For a summary, see Gary Solon, *Intergenerational Mobility in the Labor Market*, in *HANDBOOK OF LABOR ECONOMICS*, Vol. III, 1761 (Orley Ashenfelter and David Card eds., 1999).

<sup>67</sup> Black & Devereux, *supra* note 55.

<sup>68</sup> Corak, *supra* note 11.

inelasticity of incomes and wealth between forebears and descendants.<sup>69</sup>

IEM is often measured as the stickiness of incomes from one generation to the next, a phenomenon with both lineal and lateral dimensions. At the lineal dimension, incomes prove sticky not only from one generation to the next, but also across multiple generations. In one novel study, researchers in Italy found that contemporary families tend to inhabit the same occupations as their ancestors in medieval Florence, some 600 years earlier!<sup>70</sup> At the horizontal dimension, the degree of intergenerational earnings mobility varies geographically. Researchers have found that moving from a zip code with low socioeconomic indicators to a zip code with higher ones can have marked effect on a child's lifetime earnings.<sup>71</sup>

Even though scholars tend to use earnings as a benchmark for inequality,<sup>72</sup> a focus on intergenerational income differences takes us slightly off track. This Essay has proposed evaluating inequality through the intergenerational transmission of *wealth*, as well as countering inequality by fostering IEM. However, wealth is difficult enough to measure even as a snapshot in time,<sup>73</sup> much less across generations.<sup>74</sup> Two pressing questions follow: what

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<sup>69</sup> Guglielmo Barne & Sauro Mocetti, *Intergenerational Mobility in the Very Long Run: Florence 1427-2011*, \_\_ REV. ECON. STUD. \_\_ (forthcoming 2020). As the authors note, "political, demographic and economic upheavals [that] occurred in the meanwhile were not enough to untie the Gordian knot of socioeconomic inheritance." *Id.* at \_\_.

<sup>70</sup> This study is subject to some criticisms: for example, it cannot really account for the dynamics of immigration (of newcomers who might succeed or fail) and emigration (of those who do not succeed).

<sup>71</sup> Chetty et al., *supra* note 54.

<sup>72</sup> See, e.g., *id.*; Derenoncourt & Montialoux, *supra* note 54.

<sup>73</sup> JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY: HOW TODAY'S DIVIDED SOCIETY ENDANGERS OUR FUTURE 2* (2012) ("Income inequality data offer only a snapshot of an economy at a single moment in time . . . wealth gives a better picture of differences in access to resources.").

<sup>74</sup> Black & Devereux, *supra* note 55. *But see* Charles Kerwin K. & Erik Hurst Charles, *The Correlation of Wealth across Generations*, 111 J. POL. ECON. 1155 (2003).

does IEM-focused T&E look like, and how will we know that it is working? The remainder of the Essay addresses the first question, raising the second for future exploration.

### **III. THE FUNDAMENTALS OF PROGRESSIVE T&E**

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

This is a significant undertaking. It requires no less than an overhaul of how we think about T&E. Relatedly, it also requires communicating T&E's equalizing potential to the public, a task scholars are sometimes loath to take on. Yet more so than in decades, academic and public attitudes toward inequality are converging. Politically, Americans of diametric dispositions are also railing against a rigged economic system. This is an opportune time for progressive scholars to relay the importance of T&E, by capitalizing on the indignation of our era.

#### **A. Interface with Business Laws**

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

former shall level the economic scales by progressively reshaping wealth transfers.

Despite our era of political, social, and racial polarization, this is a propitious time to reframe the conversation around wealth transfers. Both conservatives and progressives agree vehemently on one thing: the economic system is rigged.<sup>75</sup> Laws governing the generation of wealth are not rules of fair play but, instead, cater to wealthy elites and fuel inequity.

Examples abound. From the 2008 financial crisis to the 2020 pandemic, low-income households have borne the brunt of recession but were the last to be lifted by the “rising tide” of recovery. Households of color suffered disproportionately in both downturns, but working-class Whites were stymied as well. Indeed, prompted by the embrace of right-wing populism in working-class ethnic majorities around the world,<sup>76</sup> academics have been consumed with the travails of the White working class. This racialized socioeconomic group has been displaced by globalization, union busting, private equity corporate shuffles, and other seismic trends; yet they have also consolidated as a

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<sup>75</sup> At the conservative end of the political spectrum, the example is the sizeable crossover of Sanders supporters to Trump voters in 2016. See John Sides, *Did Enough Bernie Sanders Supporters Vote for Trump to Cost Clinton the Election?*, WASH. POST, Aug. 24, 2017, <https://www.washingtonpost.com/news/monkey-cage/wp/2017/08/24/did-enough-bernie-sanders-supporters-vote-for-trump-to-cost-clinton-the-election/> (quoting Brian Schaffner, who pegged this number at 12%). This connection is far from settled, though. See Brian F. Schaffner, *Understanding White Polarization in the 2016 Vote for President: The Sobering Role of Racism and Sexism*, 133 POL. SCI. Q. 9 (2018) (attributing Clinton’s electoral loss to racism and sexism). On the progressive end, the unexpected success of the *Jacobin* magazine stands as an example of the resurgence of socialist economics in our times.

<sup>76</sup> A brief list of examples includes the populist right’s rise in Austria, Brazil, Bulgaria, Croatia, Hungary, Germany, the Netherlands, the Philippines, Poland, Russia, Serbia, Spain, the U.K., and the U.S. in the last two decades.

voting block around nativism.<sup>77</sup> Nonetheless, this constituency shares with the political left the same economic grievances against ultrawealthy elites.

Uneven business laws have allowed the already-wealthy to amass fortunes at the expense of almost everyone else. Shareholder primacy in corporate law elevates equity owners above all other constituents, including workers (hence, the dichotomy between capital and labor),<sup>78</sup> creditors (who, famously, are owed no fiduciary duties),<sup>79</sup> and the public (to whom costs are externalized).<sup>80</sup> Corporate raiders through the decades have exploited shareholder primacy to take over ailing companies, cut costs mercilessly, saddle target entities with debt, and flip them for profit.<sup>81</sup> In antitrust, lax policies have abetted big finance, big pharma, big ag, and especially big tech in their erosion of salaries, privacy, and competition.<sup>82</sup> Sitting on fortresses of cash reserves, incumbents are able to invest lavishly

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<sup>77</sup> See ANDREA L.P. PIRRO, *THE POPULIST RADICAL RIGHT IN CENTRAL AND EASTERN EUROPE: IDEOLOGY, IMPACT, AND ELECTORAL PERFORMANCE* (2015); MÜLLER, *supra* note 52; SANDBU, *supra* note 52.

<sup>78</sup> See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 323–24 (1999); PIKETTY, *supra* note 64. However, Silicon Valley turns the primacy of capital over labor on its head. There, innovation is primarily the product of a highly educated and handsomely paid work force, which is now being criticized for holding venture capital (and its constraints on erratic founder behavior) on its head. See Charles Duhigg, *How Venture Capitalists are Deforming Capitalism*, NEW YORKER, Nov. 30, 2020.

<sup>79</sup> See, e.g., *Credit Lyonnais Bank Nederland, N.V. v. Pathe Commc'ns Corp.*, No. 121501991 WL 277613, \*34 (Del. Ch. Dec. 30, 1991). *But see* Adam S. Hofri-Winogradow (manuscript on file with author).

<sup>80</sup> See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

<sup>81</sup> Examples abound. See, e.g., Julie Creswell, *Profits for Buyout Firms as Company Debt Soared*, N.Y. TIMES, Oct. 4, 2009 (storied bedding company filing for bankruptcy protection because its investors incurred greater debts for larger short-term payouts).

<sup>82</sup> See ZEPHYR TEACHOUT, *BREAK 'EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY* (2020); DAVID DAYEN, *MONOPOLIZED: LIFE IN THE AGE OF CORPORATE POWER* (2020); TIM WU, *THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE* (2018).

in tactics that undercut insurgents while conveying minimal benefits to consumers.<sup>83</sup> What emerges, then, is a two-tiered business world where monopolies and oligopolies survive – even thrive – amidst downturns while almost everyone else fails.

Through it all, the largest shareholders of these goliath firms – most prominently, Jeff Bezos, Elon Musk, Mark Zuckerberg, Bill Gates, and Warren Buffet – pocket ill-gotten gains that are not adequately recaptured by taxes.<sup>84</sup> The tax rates for capital gains, such as dividends from stockholdings, are notoriously below those for ordinary income, which is how wagers are paid.<sup>85</sup> Further, the trend today is for enterprises to move away from classifying their workers as employees, so that they can forego benefits.<sup>86</sup> Savvy planning can even help the ultrawealthy avoid taxes altogether, by funneling their assets through shell companies and jurisdictions that serve as tax dodges.<sup>87</sup> This has prompted economists to call for taxes on wealth holdings regardless of their situs, as well as for corporate taxes based on customers rather than domicile.<sup>88</sup> In reality, taxes

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<sup>83</sup> Ufuk Akcigit & William Kerr, *Growth through Heterogeneous Innovations*, 126 J. POL. ECON. 1374 (2018).

<sup>84</sup> On the obscene increases in billionaire wealth during the pandemic, see *Net Worth of U.S. Billionaires Has Soared by \$1 Trillion – To Total of \$4 Trillion – Since Pandemic Began*, AMERICANS FOR TAX FAIRNESS, Dec. 9, 2020, <https://americansfortaxfairness.org/wp-content/uploads/12-9-20-National-Billionaires-Report-Press-Release-1T-4T-FINAL-1.pdf>.

<sup>85</sup> See *Topic No. 409: Capital Gains and Losses*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/taxtopics/tc409> (last accessed Feb. 25, 2021).

<sup>86</sup> See *Proposition 22: Exempts App-based Transportation and Delivery Companies from Providing Employee Benefits to Certain Drivers*, CALIFORNIA SECRETARY OF STATE, <https://voterguide.sos.ca.gov/propositions/22/> (last accessed Feb. 25, 2021).

<sup>87</sup> RONEN PALAN, *THE OFFSHORE WORLD: SOVEREIGN MARKETS, VIRTUAL PLACES, AND NOMAD MILLIONAIRES* (2006); GABRIEL ZUCMAN *THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS* (TERESA LAVENDER FAGAN TRANS., 2015); BASTIAN OBERMAYER & FREDERIK OBERMAIER, *THE PANAMA PAPERS: BREAKING THE STORY OF HOW THE RICH AND POWERFUL HIDE THEIR MONEY* (2017).

<sup>88</sup> See PIKETTY, *supra* note 64.

seem to be paid by those who cannot afford blue chip financial and legal counsel (i.e., most taxpayers).<sup>89</sup>

T&E itself plays a major role in accentuating inequality. A business owner who engages in a risky enterprise, such as medicine,<sup>90</sup> real estate,<sup>91</sup> or outright fraud,<sup>92</sup> can set up a trust in a jurisdiction that does not recognize foreign judgments.<sup>93</sup> This way, if a tort victim or defrauded contractor sues and prevails, the settlor would be judgment-proof. Better yet, the trust could designate the settlor as both the beneficiary and initial trustee, so that the offender can direct the trust and enjoy its assets during their lifetime.<sup>94</sup> These asset protection trusts (“APTs”) generate fees for a coterie of lawyers and financial advisors, so jurisdictions have raced to validate them.

Liberal inheritance laws premised on testamentary freedom then allow those gains to be transmitted gratis to future beneficiaries, forever out of the reach of creditors. In the example above, dynasty trusts can be settled in states that have abrogated

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<sup>89</sup> Alan Rusbridger, *Panama: The Hidden Trillions*, N.Y. REVIEW OF BOOKS (Oct. 27, 2016), <http://www.nybooks.com/articles/2016/10/27/panama-the-hidden-trillions/> [perma.cc/9APW-M6MB] (“[T]he rich and the powerful exited long ago from the messy business of paying tax . . . . They don’t pay tax anymore, and they haven’t paid tax for quite a long time.”) (quoting Luke Harding, *The Guardian*; internal quotations omitted).

<sup>90</sup> See *Asset Protection for Doctors*, ASSET PROTECTION PLANNERS (2019), <https://www.assetprotectionplanners.com/strategies/doctors/>; *How To Set Up a Cook Islands Trust*, THE OFFSHORE CORPORATION (2021), <https://offshorecorporation.com/trust/how-to-cook-islands-trust/>.

<sup>91</sup> See Michael Kranish, *Donald Trump, Facing Financial Ruin, Sought Control of His Elderly Father’s Estate. The Family Fight was Epic*, Wash. Post, Sept. 27, 2020; Gabe Alpert, *Companies Owned by President Donald Trump*, Investopedia (2021), <https://www.investopedia.com/updates/donald-trump-companies/>.

<sup>92</sup> *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1243 (9th Cir. 1999).

<sup>93</sup> See Cook Islands International Trusts Act of 1984 (2004), available at <https://trusts.it/admincp/UploadedPDF/200707241052350.ICookInternationalTrustsAct1984.pdf> (last accessed Feb. 25, 2021). See also Stewart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1048–50 (2000).

<sup>94</sup> See *Affordable Media, LLC*, 179 F.3d at 1243.

the RAP; consequently, the trusts never terminate, and they are not assessed gift and transfer taxes. In this way, the monopolist's children and grandchildren are born into gilded cradles where, without ever lifting a finger, they can enjoy the fruits of their benefactors' aggressive business tactics—a world far from the descendants of wageworkers.

Yet T&E can also have tremendous redistributive potential. Certain rules and doctrines act as an input into the tax system (e.g., the RAP) or bring together rich debtors and poor creditors (e.g., APTs).<sup>95</sup> These rules are distributively efficient, and they can be altered to prevent excessive sheltering of assets. Such reforms might not prevent the uneven generation of wealth (which would be the province of business laws), but they might slow the disparate accumulation of wealth over generations.

In the past, law and economics scholars have disparaged legal rules as a redistributive mechanism because of efficiency, legitimacy, and administrability concerns.<sup>96</sup> They counter that taxation is preferable.<sup>97</sup> Today, there is a more nuanced understanding of the capacity of legal rules to combat inequality—as well as of the failings of the tax system.<sup>98</sup> In fact, many governments have written equity considerations into the way their legal institutions interpret rules around contracts and torts.<sup>99</sup>

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<sup>95</sup> See Chang, *supra* note 16.

<sup>96</sup> See Kaplow & Shavell, *supra* note 17. This has come to be known as the double distortion argument.

<sup>97</sup> *Id.*

<sup>98</sup> 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); Tomer Blumkin & Yoram Margalioth, *On The Limits of Redistributive Taxation: Establishing a Case for Equity-Informed Legal Rules*, 25 VA. TAX REV. 1 (2005); Chris Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1006–09 (2001).

<sup>99</sup> See Kevin Davis & Mariana Pargendler, *Contract Law and Inequality*, American Society of Comparative Law Annual Conference, Oct. 15, 2020, *video available at* <https://www.youtube.com/watch?v=o1kgoW5cVfg&feature=youtu.be>.

Inheritance might therefore be positioned as a safety net to arrest the velocity of inequality as it compounds. In this way, it serves as a counterpoint to the loose business laws that allow enterprises to amass market power, erode privacy, maximize returns to a narrow class of insiders, and externalize the carnage to labor, the environment, and public systems. Our society's skepticism toward how wealth is generated—under the rules of fair play in business law—can be harnessed for T&E reform. T&E can claw back the ill-gotten gains from poorly designed or enforced business laws before they are locked in for successive generations.

## **B. Equality and Opportunity**

Classical liberals and Marxists have long tussled over the inevitability of inequality. While liberals view the market as an efficient allocator of economic mobility, Marxists believe that the market simply reproduces class hierarchies.<sup>100</sup> Still, both sides agree that intergenerational mobility should be high.<sup>101</sup> For the political right, a child should be able to transcend their parent's class through hard work; for the left, structural barriers to class transcendence should be dismantled. In converging around intergenerational mobility, both sides would accept some degree of inequality for the sake of individual advancement and societal prosperity.

But precisely what type of inequality should we tolerate? Here T&E can help formulate ground rules for equity and advancement, by highlighting the distinctions between income and wealth.

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<sup>100</sup> Thomas Piketty, *Theories of Persistent Inequality and Intergenerational Mobility*, in HANDBOOK OF INCOME DISTRIBUTION, Vol. 1, 430–31 (A.B. Atkinson & F. Bourguignon eds., 2000).

<sup>101</sup> *Id.* at 431.

Wealth is passed directly from testators and settlors to beneficiaries. For ultrawealthy households, the assets can be a pool of financial instruments,<sup>102</sup> real property,<sup>103</sup> or a business;<sup>104</sup>

for the poor, there might be no assets—or merely a fractionated interest in a home.<sup>105</sup> Wealth is easy to devise, hard to measure, and perhaps a truer measure of inequality than income.

The intergenerational transmission of income, on the other hand, is less straightforward. Wealthy household can cultivate human capital, for instance by investing in education, to maintain high incomes for the next generation. In this way, incomes become “sticky” intergenerationally, exhibiting close correlation between parental earnings and a child’s earnings as an adult.<sup>106</sup> And in turn, the lack of IEM, as measured by the correlation of incomes between fathers and sons, becomes a marker of inequality.<sup>107</sup>

Normatively, the stickiness of incomes is easier to accept than the stickiness of wealth. To the extent that education and other forms of human capital determine lifetime earnings, investments in these determinants should be encouraged. Moreover, when

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<sup>102</sup> See Jacobson et al., *supra* note 21.

<sup>103</sup> See Kranish, *supra* note 91. On the distinction between capital and land, especially as applied to Piketty’s formula, see Joseph E. Stiglitz, *New Theoretical Perspectives on the Distribution of Income and Wealth Among Individuals*, in *INEQUALITY AND GROWTH: PATTERNS AND POLICY 2-3* (Kaushik Basu & Joseph E. Stiglitz eds., 2016).

<sup>104</sup> See Warren E. Buffett, Letter to Shareholders 11, Feb. 22, 2020, available at <https://www.berkshirehathaway.com/letters/2019ltr.pdf> (“Today, my will specifically directs its executors – as well as the trustees who will succeed them in administering my estate after the will is closed – not to sell *any* Berkshire shares.”).

<sup>105</sup> See Thomas W. Mitchell, *Reforming Property Law to Address Devastating Land Loss*, 66 ALA. L. REV. 1 (2014).

<sup>106</sup> Corak, *supra* note 11.

<sup>107</sup> A confounding factor, however, is the fact wealthy households often pass down their family businesses, which then aligns parental and child earnings. *Id.*

incomes track ability or diligence, a society that values meritocracy will endure some degree of earnings disparity.<sup>108</sup>

Wealth disparity, on the other hand, is not so easily redeemed. A sizeable bequest by a settlor or testator can set up beneficiaries for life; it allows them to take risks and start businesses,<sup>109</sup> give to charities and imprint themselves on the civic life of a city,<sup>110</sup> or simply live in the lap of luxury.<sup>111</sup> By contrast, being born into the wrong family not only fails to convey that head-start or leg-up, but it may well hold a child back for life.<sup>112</sup>

One way to view wealth disparity, then, is as a constraint on opportunity.<sup>113</sup> The determinants of income should be, to some degree, one's merit; yet this maxim is eviscerated if one's income is tied instead to the size of another person's devise.<sup>114</sup> For our purposes, as we try to reorient the goals of T&E, we must answer this question: is the field to curtail the intergenerational stickiness

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<sup>108</sup> Piketty, *supra* note 100.

<sup>109</sup> Kranish, *supra* note 91.

<sup>110</sup> See Melissa Harris and Julie Wernau, *The Pritzker Family Tree*, Chicago Tribune, Dec. 18, 2011, <https://www.chicagotribune.com/business/ct-xpm-2011-12-18-ct-biz-1218-pritzkers-family-graphic-20111218-story.html>; *Remembering Brooke Astor*, N.Y. TIMES, Aug. 13, 2007, <https://cityroom.blogs.nytimes.com/2007/08/13/brooke-astor-is-dead-at-105/?searchResultPosition=5>.

<sup>111</sup> Zachary R. Mider, *How Wal-Mart's Waltons Maintain Their Billionaire Fortune: Taxes*, BLOOMBERG, Sept. 12, 2013, <https://www.bloomberg.com/news/articles/2013-09-12/how-wal-mart-s-waltons-maintain-their-billionaire-fortune-taxes>; Megan Willett-Wei & Mike Nudelman, *Meet the Waltons: A Guide To America's Wealthiest Family*, BUSINESS INSIDER, Oct. 9, 2013, <https://www.businessinsider.com/meet-the-waltons-wal-mart-family-tree-2013-10?op=1>

<sup>112</sup> Chetty et al., *supra* note 54.

<sup>113</sup> For a revamp of how we view equality and opportunity, see JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY (2014).

<sup>114</sup> Of course, even the notion of merit belies the fact that economic success is mostly dictated by factors wholly outside anyone's control—including luck (the accident of the family one is born into) and economic structures (the winner-take-all free market). See MICHAEL J. SANDEL, THE TYRANNY OF MERIT: WHAT'S BECOME OF THE COMMON GOOD? (2020).

of *wealth* or *income*? On this point, this Essay argues that wealth should be the focus, rather than income.

### C. Mean Regression

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

Two macroeconomic perspectives on households are important: IEM and the splintering of family compositions along economic lines. Compared to other industrialized countries, the U.S. exhibits a high degree of inequality and a low degree of IEM, so that the elasticity between paternal earnings and a son's adult earnings is extremely low.<sup>115</sup> While we know that intergenerational earnings elasticity can be cultivated through public institutions such as our education system, we are also aware of the headwinds to class mobility. In recent decades, public investment in education has dwindled, and households have responded by augmenting their private investment in human capital outside schooling, particularly in the elementary years.<sup>116</sup> Rather than addressing structural inequities, political leaders are resorting to quick-fixes such as loosening access to credit.<sup>117</sup>

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<sup>115</sup> Corak, *supra* note 11.

<sup>116</sup> *Id.*

<sup>117</sup> See RAGHURAM G. RAJAN, FAULT LINES: HOW HIDDEN FRACTURES STILL THREATEN THE WORLD ECONOMY 8–9 (2010).

Meanwhile, the past quarter century has witnessed declines in both marriage rates and divorce rates in the U.S.<sup>118</sup> For higher-income households, these trends correlate with technological improvements, which have made home care easier, and delayed childbirth and higher educational attainment among women, which has begun to close the gendered wage cap (somewhat).<sup>119</sup> Gone are the days of “production complementarities” that Gary Becker posited of marriage, as a union between husbands and wives specializing in different market and domestic spheres.<sup>120</sup> Instead, marriage now binds couples who are on similar economic footing and share similar interests. Among lower-income households, however, marriage is becoming infrequent, replaced by cohabitation.<sup>121</sup> This bimodal distribution reveals that marriage is becoming restricted to couples who are more similar than different; hence, ensuing marriages are more stable.

Amid the pandemic, this bimodal distribution is becoming even clearer. While wealthy households work in sectors that can switch effortlessly to remote, low-income households must contend with the pandemic face-to-face.

Finally, for ultrarich households comprised of, say, the top 0.01% of earners, curtailing dynasty trusts could prompt would-be settlors to invest rather than sequester their assets in trusts. The lesson from the financial crisis is that when these elites seek investment opportunities in a stagnant economy, asset and real estate bubbles are created, and the financial sector conjures ever more sophisticated products to funnel “rich’s surplus funds” into

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<sup>118</sup> Betsy Stevenson & Justin Wolfers, *Marriage and Divorce: Changes and their Driving Forces*, 21 J. ECON. PERSP. 27 (2007). See also Shelly Lundberg et al., *Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing*, 30 J. ECON. PERSP. 79 (2016).

<sup>119</sup> Stevenson & Wolfers, *supra* note 118.

<sup>120</sup> See GARY BECKER, *TREATISE ON THE FAMILY* (1981).

<sup>121</sup> See Naomi Cahn, *Dismantling the Trusts and Estates Canon*, 2019 WIS. L. REV. 165 (2019); T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 91 (2004); Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1 (2000).

loans for less affluent households.<sup>122</sup> In advocating for restraints on tax dodges for the ultrawealthy, then, we must bear in mind whether we are trading in one type of inequality for another.

#### IV. IMPLEMENTING IEM

T&E scholars have embraced embrace a critical research agenda that pushes back against inequality. Among other things, they have proposed that the field's legal rules be reconceptualized as redistribution mechanisms,<sup>123</sup> that wealth transfer taxes be bolstered,<sup>124</sup> that default rules avoid the worst pitfalls of intestacy,<sup>125</sup> and that dynasty and asset protection trusts be curtailed.<sup>126</sup> This Section illustrates what prioritizing IEM might look like in T&E. It begins with the most distributively consequential reforms: dismantling dynasty trusts, closing estate tax loopholes, and taxing estates heavily—all tactics targeting ultrawealthy families. Then this Section briefly discusses intestacy, which primarily affects lower-income households.

##### A. Dynasty Trusts

Dynasty trusts owe their existence to perpetuities reform and, by a twist of tax history, the 1986 amendments to the GST tax, enacted to close the loophole of estate tax avoidance through devises to grandchildren (rather than children).<sup>127</sup> The statute

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<sup>122</sup> Jon D. Wisman, Wage stagnation, *Rising Inequality and the Financial Crisis of 2008*, 37 CAMBRIDGE J. ECON. 921, 925 (2013).

<sup>123</sup> See Chang, *supra* note 16.

<sup>124</sup> 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).

<sup>125</sup> See Weisbord, *supra* note 8.

<sup>126</sup> See Susan F. French, *Perpetual Trusts, Conservation Servitudes, and the Problem of the Future*, 27 CARDOZO L. REV. 2523 (2006); Adam S. Hofri-Winogradow, *The Stripping of the Trust: From Evolutionary Scripts to Distributive Results*, 75 OHIO ST. L.J. 529 (2014); Kades, *supra* note 4.

<sup>127</sup> Kades, *supra* note 4, at 177–78.

allowed trusts to be exempt from the GST taxes but failed to impose a time limit on the duration of such trusts, leaving their duration to the vagaries of state RAPs.<sup>128</sup> Over the ensuing decades, state legislatures eviscerated the RAP by adopting the wait-and-see approach,<sup>129</sup> lengthening the perpetuities period up to 1,000 years,<sup>130</sup> and repealing the rule altogether.<sup>131</sup> Concomitantly, the exclusion amount for gift, estate, and GST taxes grew from \$1 million in 2000 to \$11.58 million in 2019—amounts that could be augmented roughly six-fold through life insurance and other estate planning strategies.<sup>132</sup> Today, grantors with truly dynastic aspirations can settle trusts in any number of states and forever dodge estate taxes.

Dynasty trusts are especially pernicious in times like ours, when interest rates hover close to 0%, economic stimulus is political intractable, and regulators have exhausted traditional options. The hoarding of assets in trust reinforces a paradox of thrift within the very circles where spending is viable.<sup>133</sup> Writing in 2005, Robert Sitkoff and Max Schanzenbach reported that states abolishing the RAP saw their total trust assets increase by \$6 billion (up from an average of \$19 billion) and average trust size increase by \$200,000 (up from an average of \$1 million, right at the

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<sup>128</sup> *Id.* See also 26 U.S.C. § 2631.

<sup>129</sup> See, e.g., OHIO REV. CODE ANN. § 2131.08 (LexisNexis 2016); 20 PA. STAT. AND CONS. STAT. ANN. § 6104 (West Supp. 2017); VT. STAT. ANN. tit.27, § 501 (LexisNexis 2002); RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 1.3 (AM. LAW. INST. 1981).

<sup>130</sup> 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 Jessie Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1023 (1987); Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities: The Rationale of the 90-Year Waiting Period*, 73 CORNELL L. REV. 157, 157-59 (1988).

<sup>131</sup> See, e.g., 37 IDAHO CODE §55-111 (2012); S.D. CODIFIED LAWS § 43-5-8 (2017).

<sup>132</sup> See Dukeminier & Krier, *supra* note 7, at 1318-19.

<sup>133</sup> See Kades, *supra* note 4.

exclusion amount).<sup>134</sup> All in all, approximately \$100 billion had been diverted to perpetual trusts, with virtually no benefit to the states abolishing or otherwise curtailing the RAP.<sup>135</sup>

As the standard bearers of estate planning for the ultrarich, dynasty trusts have been targeted by tax and T&E scholars and policymakers for demolition. Some would close the GST loophole by cutting off the transfer tax exemption at either 90 years after settlement or at the generation of a settlor's grandchildren.<sup>136</sup> Others have suggested federal legislation either against perpetual trusts or enabling living beneficiaries to vote for trust termination.<sup>137</sup> Tax is often central to these proposals: perpetual trusts would look very different if they were taxed mercilessly.<sup>138</sup> More directly, as a cudgel against wealth inequality, scholars have proposed a wealth tax to supplant income, GST, and estate taxes.<sup>139</sup> Wealth taxes would squarely confront the disparity in pace of growth between the capital (e.g., real estate or corporate holdings held by ultrarich households in trusts) and labor (i.e., how most households make money), though their constitutionality is contested.<sup>140</sup>

One of the most innovative suggestions has come from Eric Kades. Professor Kades proposes taxing dynastic trusts to pull the

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<sup>134</sup> Sitkoff & Schanzenbach, *supra* note 12.

<sup>135</sup> *Id.* at 359.

<sup>136</sup> Staff of J. Comm. on Taxation, 109th Cong., Options To Improve Tax Compliance and Reform Tax Expenditures 392-95 (Comm. Print 2005).

<sup>137</sup> Joel C. Dobris, *Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2537 (2006).

<sup>138</sup> *See id.*

<sup>139</sup> *See, e.g.,* Emmanuel Saez & Gabriel Zucman, *How Would a Progressive Wealth Tax Work? Evidence from the Economics Literature* (2019), at <https://eml.berkeley.edu/~saez/saez-zucman-wealthtaxobjections.pdf>.

Wealth taxes proposed by Saenz and Zucman?, benefits include harder to dodge (Piketty himself proposes this as a more direct solution to wealth inequality); constitutionality fiercely deliberated over;

<sup>140</sup> *See* Daniel Hemel and Rebecca Kysar, *The Big Problem With Wealth Taxes*, N.Y. TIMES, Nov. 7, 2019, <https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html?searchResultPosition=1>.

national savings rate up to the “golden rule” rate of 15%, where consumption is maximized.<sup>141</sup> This rate equals the “sum of the depreciation rate for capital (roughly, the annual rate at which capital wears out) and the rate of growth of the population.”<sup>142</sup> Additionally, to combat the shorter-term paradox of thrift, Professor Kades has suggested taxing dynasty trusts as an “automatic stabilizer” during of economic downturns.<sup>143</sup> These taxes would counteract excessive savings among wealthy households, prompting settlors to redirect some of their assets from trusts toward spending and investment.

Yet perpetuities amendment faces legal and macroeconomic challenges. Because dynasty trusts are creatures of a race to the bottom with states competing for trust assets, federal intervention is required. Thus, the most viable schemes would harness federal taxation powers or some form of coordinated national response.<sup>144</sup> Nonetheless, competition for trust assets does not only occur within the U.S.—it happens internationally as well. Wealth flows to the jurisdictions that regulate it most lightly, and grantors have already settled trillions of dollars in asset protection trusts (“APTs”) offshore, to keep them out of the reach of creditors.<sup>145</sup> Dismantling dynasty trusts here might push settlors

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<sup>141</sup> See Kades, *supra* note 4, at 207–08. See also Edmund Phelps, *The Golden Rule of Accumulation: A Fable for Growthmen*, 51 AM. ECON. REV. 638 (1961).

<sup>142</sup> Kades, *supra* note 4, at 198.

<sup>143</sup> *Id.* at 208–10.

<sup>144</sup> See Robert H. Freilich, *Eliminating Perpetual Trusts Is a Critical Step Towards Alleviating America's Devastating Income Inequality*, 88 UMKC L. REV. 65 (2019).

<sup>145</sup> An APT is a self-settled (i.e., the settlor is the beneficiary) trust with the “disabling restraint” of a spendthrift provision that prevents the sale, assignment, and alienation of the beneficiary’s interest. For examples, see, e.g., *FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1243 (9th Cir. 1999). See also Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1048–50 (2000); Alan Rusbridger, *Panama: The Hidden Trillions*, N.Y. REVIEW OF BOOKS (Oct. 27, 2016), <http://www.nybooks.com/articles/2016/10/27/panama-the-hidden-trillions/> [perma.cc/9APW-M6MB] (“The economic system is, basically, that the rich and the powerful exited long ago from the messy business of paying

to re-route funds into countries that already operate as situses for their APTs.

A more worrisome consequence of curbing dynasty trusts, however, is that it will catalyze certain forms of inter vivos expenditures over others. Stronger GST taxes on dynasty trusts, just like robust estate taxes, drives settlors toward lifetime consumption.<sup>146</sup> Increased spending by settlors and lifetime beneficiaries certainly bolsters demand for goods and services, similar to the multiplier effect that Keynesian fiscal policy seeks to achieve.<sup>147</sup> However, even the most determined beneficiary can find it difficult to fully spend down exorbitant sums of money.<sup>148</sup> If unused funds are directed toward investment, it may hasten inequality in unexpected ways, particularly during recessions.

Some economists have traced the financial crisis back to ultrawealthy families and their hunt to invest unconsumed assets.<sup>149</sup> Prior to the crisis, opportunities were rare because companies were funneling retained earnings not into investment or wages but, rather, into dividends (which operated as a feedback loop for income inequality). As a result, financiers packaged the wealth of rich households into loans to lower-income households – loans that were securitized and then sold on secondary markets.<sup>150</sup> In addition to augmenting the credit circulating the financial markets, this created housing and stock

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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).

<sup>146</sup> Michael J. Boskin, *An Economists' Perspective on Estate Taxation*, in *Death, Taxes and Family Property: Essays and American Assembly Report* 62 (Edward C. Halbach, Jr. ed., 1977); Daniel J. Amato, *The Good, the Bad, and the Ugly: The Political Economy and Unintended Consequences of Perpetual Trusts*, Note, 86 S. Cal. L. Rev. 637 (2013).

<sup>147</sup> See Kades, *supra* note 4, at 195–27. See also N. GREGORY MANKIW, *MACROECONOMICS* 305–17 (8th ed. 2013).

<sup>148</sup> For actual and fictional examples, see Geraldine Fabrikant, *Brooke Astor Has a Year's Worth of Giving Left*, N.Y. TIMES, Dec. 18, 1996; BREWSTER'S MILLIONS (1985).

<sup>149</sup> See, e.g., Wisman, *supra* note 122.

<sup>150</sup> *Id.* at 924–26.

bubbles. In boom times, to quote Picketty's paradigm, the value of capital pulls away from the value of labor; in downturns, capital is funneled into devalued assets, sowing the seeds for inequality. This dynamic mirrors theoretical studies of firm behavior in low-interest environments, which have found that incumbents with market power tend to invest while smaller players do not.<sup>151</sup> Eventually, the smaller exit the market, enhancing its concentration. All in all, recessions lay the groundwork for future inequality; prying assets from the coffers of dynasty trusts for spending may contribute to widening income and wealth gaps. Put differently, this strategy amount to trading one type of inequality for another.

How, then, should we assess the different types of inequality? This Essay argues that T&E reforms should prioritize IEM. Because the instruments and doctrines of T&E operate at intergenerational interfaces, it they can affect disparities in the transmission of wealth across generations. For ultrawealthy households, reductions in assets held by dynasty trusts can precipitate the downward slide of a future generations of a settlor's heirs. Even if inequality is fomented *intragenerationally* through heightened investment, it may be necessary in the advancement toward more parity in *intergenerational* mobility between rich and lower-income households.

## B. Intestacy

For lower-income households, intestacy stands as the greatest threat within T&E to the intergenerational transmission of wealth. Accordingly, scholars have recommended a number of improvements to intestacy. For example, appending a will as a testamentary schedule to tax filings would reduce the instances of

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<sup>151</sup> Ernest Liu et al., *Low Interest Rates, Market Power, and Productivity Growth* (2019), available at <https://www.nber.org/papers/w25505>.

intestacy.<sup>152</sup> Utilizing a decedent's nonprobate transfers (e.g., insurance or retirement plan beneficiary designations) to guide intestacy distributions would help conform to a decedent's likely wishes—especially if it resulted in distributions to non-family members, who are disfavored under intestacy defaults.<sup>153</sup> Similarly, permitting transfer-on-death designations for homes, often the most valuable asset in most estates, would enable homes to pass outside the probate system and directly to heirs, reducing the likelihood of intestate successors receiving fractionated interests.<sup>154</sup>

As with dynasty trusts, taxes are also central to the analysis of intestacy. Delinquency in paying property taxes, often in combination with the inability to physically maintain real property, can result in tax sales and foreclosures when heirs hold partial interests in a home. Staying tax sales and foreclosures for a period after a decedent's death would allow heirs to pay off those debts and retain the home—or to restore and sell it.<sup>155</sup>

These proposals share two themes: honoring, rather than vitiating, testamentary freedom; and maximizing the assets passed from decedents to their heirs.<sup>156</sup> In some instances, decedents will not spend their windfall. Inheritance windfalls may even defy the policy goals of other types of windfalls, such as when governments give tax breaks or stimulus checks to lower-income households to lubricate spending. Yet if heirs choose to hold onto their devises—for example, by living in, rather than selling, a home—those devises would provide a tailwind for

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<sup>152</sup> See Weisbord, *supra* note 8.

<sup>153</sup> See Fellows & Spitko, *supra* note 45.

<sup>154</sup> See Wright, *supra* note 12, at 2637–38.

<sup>155</sup> *Id.*

<sup>156</sup> They also highlight disparities between the probate system, which touches succession in most households, and the relative ease of nonprobate transfers such as trusts. To be sure, probate is intractable for many heirs, but a fuller exploration of the bimodal distribution between probate and nonprobate is beyond this paper.

economic mobility. And if assets can be transmitted to the next generation, then intergenerational mobility is all the likelier.

## V. Conclusion

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