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Magical Thinking and Trusts

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At a time of monumental economic inequality in the United States, wealthy individuals and their tax-motivated behavior have come under significant scrutiny from all corners. In 2019, the Supreme Court issued its first major ruling in over sixty years on the state income taxation of trusts. In North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust, *the Court declined to close what some critics consider to be a major loophole that benefits the trusts that wealthy individuals create for family members. This Article makes two principal claims—one interpretative and the other normative. This Article explains why the Court's decision in* Kaestner Trust *is correct as a matter of law. Just as trusts themselves are a type of magical thinking—legal fictions made real by law—so, too, is the hope that the judicial branch can play an active role in limiting the use of trusts by the wealthy. Because judges cannot disregard centuries of trust jurisprudence, critics of family trusts instead have directed their attention mostly to the tax law. This Article suggests that reformation of the substantive law of trusts might help achieve reform, as well.*

Through the prism of a reimagined legal landscape for trusts—by engaging in a different exercise in magical thinking—one can differentiate those aspects of family trusts that serve salutary legal or social purposes from those that serve primarily to preserve and protect wealth. This analysis has important implications for the larger cultural conversation about trusts. Examining how trusts operate and considering what limitations, if any, a just society might impose on them opens the way for identifying allies in the effort to narrow the wealth gap. Reducing wealth inequality is crucial so that all people will have some means of pursuing their personal ideals of social, political, and economic fulfillment.

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I. INTRODUCTION

Dragons and magic beans are the stuff of fiction, not law.[1] Impartial jurors are fictional, too, because no person can be literally free from bias or opinion.[2] But the U.S. Constitution requires an impartial jury, so the law tolerates a certain degree of wishful belief that such a thing exists.[3] Similarly a corporation is an imagined entity.[4] It has no corporeal presence

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[1] *See, e.g.*, J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE (2000) (in which the story's title character must fight a fire-breathing, flying dragon in an inter-school competition); JACK AND THE BEANSTALK (retold by Carol Ottolenghi, Carson Dellosa Publishing 2002), https://tinyurl.com/y3grctq8 (in which Jack sells family cow for magic beans).

[2] The court system operates on the presumption that it is possible to seat an impartial jury, even though cognitive bias is endemic to the human condition. As one scholar describes it, "an impartial juror is not a completely neutral person, but is one who evidences no extreme bias for or against the accused." Tony M. Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images, and Procedures*, 64 N.C. L. REV. 501, 544 (1986) (discussing cognitive bias in the context of jury selection and the Sixth Amendment right to an "impartial jury").

[3] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . .").

[4] Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1638–39 (2011) ("the notion of legal personality is consistent with early case law such as . . . that recognized corporations as legal fictions having the capacities and characteristics given to them in the corporate charter, such as "individuality") (citations omitted).

and owes its existence to shareholders—yet the law treats a corporation as a "person," bestowing on it the ability to contract, sue, make political and charitable donations, and even exercise rights of political free speech.[5]

Like unbiased jurors and corporations, trusts are legal fictions made real by the law.[6] For hundreds of years[7] the common law has recognized the right of a property owner (typically known as the "grantor" or "settlor") to transfer property to a trustee, to hold and manage the property for the benefit of others. In the classic private express trust context, the law treats the trustee as the legal owner of the property and the beneficiary (or beneficiaries) as the equitable owner(s) of the property.[8] The beneficiary

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[5] *See, e.g.*, *id.* at 1638 (historically corporations were permitted "to contract, own property, sue and be sued in the corporate name. Specifically, the corporate ability to own property and to sue and be sued were considered incident to the corporate form at common law") (citations omitted). *See also* 26 U.S.C. § 170(a) (2018) (income tax deduction for charitable contributions); Kristine Cordier Karnezis, *Power of Corporation to Make Political Contribution or Expenditure Under State Law*, 79 A.L.R.3d 491 (discussing general power of corporation to make contributions for certain political purposes). In 2010, the Supreme Court ruled that corporations have constitutional protection for their "political speech." Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342 (2010) ("[P]olitical speech does not lose First Amendment protection 'simply because its source is a corporation.") (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 784 (1978)). *See also* Robert Sprague & Mary Ellen Wells, *The Supreme Court as Prometheus: Breathing Life into the Corporate Supercitizen*, 49 AM. BUS. L.J. 507, 556 (2012) (tracing development of American law of corporations, including with regard to political speech rights).

[6] Related to, or perhaps a branch of, legal fiction are legal presumptions. For a somewhat light-hearted look at evidentiary presumptions in South Carolina law, for example, *see* Walter Moïse, *Bursting Bubbles, Legal Fictions and Evidential Presumptions*, 27 S.C. LAW. 16, 17 (2015) (listing presumptions such as "persons are conclusively presumed to know the law, which includes statutes and common law;" "when a bigamous spouse enters marriage in good faith, his or her children are conclusively presumed to be legitimate;" and "a person is presumed to know and intend the probable and natural consequences of his or her actions") (citing ALEX SANDERS & JOHN S. NICHOLS, TRIAL HANDBOOK FOR SOUTH CAROLINA LAWYERS: PRESUMPTIONS § 12 (2018)).

[7] Depending on the origin story one prefers, the modern day private express trust has a different ancestor. *See, e.g.,* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS & ESTATES 386 (10th ed. 2017) ("Because the [Franciscan] friars [in England] were forbidden to own property, benefactors conveyed land to friends of the friars, to hold to the use of the friars," and thus the use—a precursor to the modern trust—was known in thirteenth century England.). *See also* JOSHUA PRAWER, THE LATIN KINGDOM OF JERUSALEM 211 (1972) (suggesting that Christian contact with Muslims during the Crusades was an inspiration for the English trust); Avisheh Avini, Comment, *The Origins of the Modern English Trust Revisited*, 70 TUL. L. REV. 1139, 1139 (1996) (identifying Crusades as likely point of contact by Englishmen with Muslims and the Islamic legal system that recognized a trust-like device known as a *waqf*); Shael Herman, Note, *Utilitas Ecclesiae: The Canonical Conception of the Trust*, 70 TUL. L. REV. 2239, 2278 (1996) (describing the Islamic *waqf* as an influence on the modern trust). For an overview of the general structure of trusts *see, e.g.*, SITKOFF & DUKEMINIER *supra*, at 401 (detailing how grantors create trusts).

[8] *See* SITKOFF & DUKEMINIER *supra* note 7, at 401. *But see* Johanna Jacques, *Property and the Interests of Things: The Case of the Donative Trust*, 30 L. & CRITIQUE 201, 202–03

may or may not have a right to receive income or principal (or both) from the trust.[9] A beneficiary's creditors ordinarily cannot reach the beneficiary's interest in the trust, as long as the instrument is drafted carefully.[10] The law typically does not treat the beneficiary as the "owner" of the trust property for tax purposes, either, as long as the property stays in the trust and the beneficiary does not have any right to control or obtain it.[11] These legal fictions—trusts—have the force of law because the law converts magical thinking into material reality, with duties for the trustee and corresponding rights of beneficiaries.[12]

From the introduction of trusts in thirteenth-century England, trusts have always intertwined with tax avoidance.[13] That entanglement has continued unabated into the twenty-first century.[14] At a time when wealth inequality in the United States is at staggering levels—and only increasing—critics are drawing attention to the use (and misuse) by wealthy individuals of private express trusts intended as alternatives to

(2019) (critiquing in context of "the kind of private donative trust that is commonly regarded as an alternative to an outright gift" the liberal conception of property as necessarily involving control by one or more individuals).

[9] *See, e.g.*, RESTATEMENT (THIRD) TRUSTS § 49 (AM. LAW. INST. 2019) (describing multiple possible configurations of beneficial interests).

[10] *See id.* at § 60 (Transfer or Attachment of Discretionary Interest).

[11] *But see, e.g.*, 26 U.S.C. §§ 2041(a) (2018) (estate tax inclusion of property over which beneficiary has general power of appointment); 2056(b)(5) (estate tax inclusion of trust in which spouse beneficiary had life estate with power of appointment). *See also* Robert T. Danforth, *A Proposal for Integrating the Income and Transfer Taxation of Trusts*, 18 VA. TAX REV. 545 (1999) (providing an overview of relationship between income taxation of trusts and the wealth transfer tax system); Joseph M. Dodge, *Simplifying Models for the Income Taxation of Trusts and Estates*, 14 AM. J. TAX POL'Y 127, 137–42 (1997) (describing general structure of income tax rules applicable to trusts).

[12] *See, e.g.,* UNIF. TRUST CODE §§ 801 (trustee's duty to administer trust), 802 (trustee's duty of loyalty), 803 (trustee's duty of impartiality), 804 (trustee's duty of prudent administration), 813 (right of beneficiaries to receive certain information about the trust), 1002 (right of beneficiary to receive damages for breach of trust) (UNIF. LAW COMM'N 2000). *See also* David M. English, *The Uniform Trust Code (2000): Significant Provisions and Policy Issues*, 67 MO. L. REV. 143 (2002).

[13] *See, e.g.*, Bridget J. Crawford, *Less Trust Means More Trusts*, 75 WASH. & LEE L. REV. ONLINE 74, 79–80 (2019) (describing trusts as way of avoiding feudal incidents or restrictions on property ownership by certain groups or individuals).

[14] *See, e.g.*, Alyssa A. DiRusso, *Pro and Con (Law): Considering the Irrevocable Nongrantor Trust Technique*, 67 VAND. L. REV. 1999, 2003–05 (2014) (critiquing use of incomplete nongrantor trusts as "tax tricks" that obscure "how dying people want to leave things behind"); Grayson M.P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPP. L. REV. 1291, 1297–99 (2013) (describing use of long-term trusts as way of minimizing or avoiding generation skipping transfer tax); Jeffrey Schoenblum & Neil Schoenblum, *Avoid State Income Tax with the Right Kind of Trusts*, 41 EST. PLAN. 19 (2014) (outlining multiple strategies to allow resident of states with high income tax rates to minimize tax burden on investment assets).

outright gifts.[15] Because the beneficiaries of these trusts typically are related to the grantor, this Article refers to these trusts as "family trusts," and limits its discussion to them.

Critics of family trusts bemoan the relative ease with which wealthy taxpayers can put money in family trusts and avoid further taxation entirely.[16] Some hoped and expected that the Supreme Court would put an end to perceived abusive income tax avoidance with a decision in *North Carolina Department of Revenue v. Kimberley Rice Kaestner 1992 Family Trust*.[17] Contrary to critics' hopes, however, a unanimous Court ruled in June, 2019 that a state may not tax a trust solely on the basis of a beneficiary's in-state residence.[18] Where that beneficiary does not receive any income from the trust, has no right to demand property from the trust, has no right to participate in decisions about whether or when the trustee makes distributions from the trust, and is not certain to receive property from the trust, imposing income tax on the trust violates the Due Process Clause of the Fourteenth Amendment.[19] Justice Alito, joined by Justice Roberts and Justice Gorsuch, emphasized in a concurrence that "the Court merely applies our existing precedent," and that the Court's failure to consider questions absent from the *Kaestner Trust* case is not an invitation to "open for reconsideration any points resolved by our prior decisions."[20] Thus it is highly unlikely that, any time in the near future, the Court will take another case involving the income taxation of trusts.[21]

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15 *See infra* Part IV.

16 *See infra* Part IV.

17 N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr., 139 S. Ct. 2213 (2019). *Kaestner Trust* is the most important decision regarding trusts and income taxation in over sixty years. Prior to that, the most important Supreme Court case involving the ability of a state to impose a tax on a trust was *Hanson v. Denckla*, 357 U.S. 235 (1958). In *Hanson*, a Pennsylvania resident created a trust with a Delaware trustee. The trust grantor later moved to Florida and changed the beneficiaries of the trust. One group of purported beneficiaries residing in Florida sought to have themselves legally declared as the beneficial owners of the trust property. The Supreme Court held that Florida lacked jurisdiction over the Delaware trustee, a necessary party to the Florida proceeding, because the trustee was not located in the state, conducted no administrative activity there, and no trust property was located in Florida. *Hanson*, 357 U.S. at 251.

18 *Kaestner Trust*, 139 S. Ct. at 2224 ("The beneficiaries received no income from the Trust, had no right to demand income from the Trust, and had no assurance that they would eventually receive a specific share of Trust income. Given these features of the Trust, the beneficiaries' residence cannot, consistent with due process, serve as the sole basis for North Carolina's tax on trust income.").

19 *Id.*

20 *Id.* at 2226 (Alito, J., concurring).

21 Indeed, shortly after the decision in *Kaestner Trust*, the Court denied certiorari in *Minn. Comm'r of Revenue v. William Fielding*, a case involving a due process challenge to Minnesota's ability to impose income tax on a trust with assets located in that state. Minn. Comm'r of Revenue v. William Fielding, 916 N.W. 2d 323, 323 (2018) (holding that a trust

This Article brings into focus two interrelated strains of magical thinking in the law of trusts: the one that gives rise to the existence of trusts in the first place; and the other that anticipates that courts will play a visible, if not active, role in minimizing the use of trusts by wealthy individuals. Two claims follow. One is interpretative and the other is normative (or perhaps, more accurately, strategic). This Article explains why the Court's decision in *Kaestner Trust* is correct as a matter of law and argues that centuries of jurisprudence prevent the judicial branch from playing a significant role in curbing the use of trusts. This argument takes seriously concerns about wealth inequality. Dismantling the role that trusts play in perpetuating that inequality will require nothing less than a radical re-imagining of trust law. Shaking free of magical thinking clears the way for meaningful trust reform.[22]

Part II of this Article provides a foundational, factual background about wealth inequality in the United States, with a particular emphasis on wealth inequality's racial and gendered dimensions. It also provides details about the known frequency of use and magnitude of holdings by family trusts in this country. Part III explains the *Kaestner Trust* case and why the Court's decision is consistent with its prior due process jurisprudence.[23] Part IV excavates and evaluates major themes in recent academic critiques of family trusts, including express or implied assertions that these trusts are mere formalities or sham vehicles subject to *de facto* control by the beneficial owners.[24] Part V argues that under existing law, courts are not free to disregard trusts (other than those that are egregiously abusive) in the

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could not be treated as a "resident trust" and thus was not subject to state income taxation where most trust activity occurred outside the state but the trust did hold nonvoting stock representing a minority interest in an S corporation doing business in Minnesota other states), *cert. denied sub nom.* Bauerly v. Fielding, 139 S. Ct. 2773 (2019).

[22] "Magical thinking" is a phrase from anthropology literature that describes non-rational, non-fact-based thought. *See, e.g.*, EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE 26 (Joseph Ward Swain trans., 1969); BRONISLAW MALINOWSKI, MAGIC, SCIENCE AND RELIGION, AND OTHER ESSAYS 67 (1948); RANDALL STYERS, MAKING MAGIC: RELIGION, MAGIC AND SCIENCE IN THE MODERN WORLD 161–62 (2004). Sociologists have integrated the term into their field. *See, e.g.*, Eugene Subbotsky, *Magical Thinking—Reality or Illusion?* 6 PSYCHOLOGIST 336, 338 (2004). Lawyers have not done so to a large degree. *But see, e.g.*, Katya Assaf, *Magical Thinking in Trademark Law*, 37 LAW & SOC. INQUIRY 595, 596 (2012) ("A consistent body of research shows that in modern Western societies magical thinking is commonplace."); Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 CAL. L. REV. 427, 437 (1997) ("The key aspect of 'magical thinking' is the creation of metaphysical entities that make certain worldly events come out the way one desires. To engage in magical thinking, one simply posits a thought that will make things come out the way one desires and one then affirms that the thought is or refers to something that is ontologically real and ontologically effective.").

[23] *See infra* Part III.

[24] *See infra* Part IV.

service of minimizing wealth inequality.[25] Rather, to meaningfully reduce wealth inequality, in the absence of major tax reform, state lawmakers would have to impose significant limitations on trusts' permissible beneficiaries, duration, maximum asset values and terms. Part VI briefly engages in a magical thinking project of its own, presenting an imagined legal system that subjects trusts to one or more of seven invented limitations, including radical restrictions on the identities of beneficiaries and trustees.[26] For a variety of reasons, none of these limitations should be adopted in fact. But identifying potential problems in a fictional legal landscape for trusts serves to elevate and focus an ongoing dialogue about issues at the intersection of trusts and wealth inequality.[27]

II. WEALTH INEQUALITY IN THE UNITED STATES

A. *The Size and Scope of Wealth Inequality*

Generally speaking, the term "wealth," as applied to households, refers to the net value of all of the assets owned by the people living in that household (typically, but not necessarily or exclusively, a group of people related by some degree of kinship).[28] Assets include stock, bonds, and other investments; retirement savings; tangible personal property, and real property, like the family home.[29] Subtract the individual's (or family's) debt obligations, and one has a reasonably accurate measure of wealth.[30]

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[25] *See infra* Part V.

[26] *See infra* Part VI.

[27] *See infra* Part VI.

[28] *See, e.g.*, LISA A. KEISTER, WEALTH IN AMERICA: TRENDS IN WEALTH INEQUALITY 6 (2000) ("Wealth is property; it is the value of the things people own. Wealth is measured as net worth, defined as total assets . . . minus total liabilities . . . ."). One common-sense definition of "wealth" is "non-financial and financial assets over which ownership rights can be enforced and that provide economic benefits to their owners." Aroop Chatterjee, *Measuring Wealth Inequality in South Africa: An Agenda* 6 (SA-TIED Working Paper No. 52, 2019), http://sa-tied.wider.unu.edu/sites/default/files/pdf/SATIED_WP53_Chatterjee_March_2019.pdf. "Household" is the common unit of measurement, defined as "a group of people occupying a housing unit together," but excluding group residences like nursing homes or dormitories. Jonathan Eggleston & Robert Munk, *Net Worth of Households*, U.S. CENSUS BUREAU 2 (Aug. 2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/P70BR_155.pdf (defining "household" for purposes of reporting on household net worth).

[29] KEISTER, *supra* note 28 (noting that net worth is the amount by which the aggregate value of all assets "such as stocks, bonds, checking and savings accounts, the value of the family home, vacation homes, and other real estate" exceeds total liabilities "such as mortgage debt, the balance on credit cards, student loans, and other car loans").

[30] *Id.* (defining wealth as the value of assets minus indebtedness). *See also* JOSEPH E. STIGLITZ ET AL., REPORT BY THE COMMISSION ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS 33 (2009) (suggesting that measuring material living standards requires consideration of "the income, consumption and wealth positions of

Wealth differs from income in that income refers to the inflow of money to an individual or household, typically from employment (i.e., a salary) or in the form of interest or dividends from investments.[31] Income is offset by expenses for personal consumption and other maintenance.[32]

Since the beginning of the twentieth century, wealth in the United States has been concentrated in the hands of the few.[33] In 1913, for example, the top 0.1% of all households held 22.5% of all national wealth.[34] By 1928, the same 0.1% owned 24.8% of all wealth.[35] After a period of decline from 1929 through 1978, wealth inequality began to rise.[36] By 2012, 0.1% of the population owned 22.0% of all wealth.[37] That gap in asset ownership between the richest segments of society and the rest of the population represents the greatest disparity since the infamous stock market crash that led to the Great Depression in 1929.[38] In 2016, the top 0.1% held 19.0% of all wealth.[39] The wealth gap continues to increase both in the United States and world-wide.[40]

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households or individuals").

31 On the distinction between wealth and income, *see, e.g.*, Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 458 (2010) ("Income, generally earned by or assigned to individuals, is the inflow of resources over a given time and is often offset to a large degree by outflows to cover expenses. Wealth, in contrast, represents accumulated assets and often accrues to families.").

32 Jonathan Fisher et al., *Inequality and Mobility Using Income, Consumption and Wealth for the Same Individuals*, 2 WEALTH INEQUALITY: ECON. & SOC. DIMENSIONS 44, 45 (2016) (recognizing the distinctions between income, expenditures and wealth, and arguing for measuring all three in order to gain an accurate economic picture of the individual or household).

33 Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913*, 131 Q. J. ECON. 519, 521 Figure I (2016) (showing top 0.1% of wealth shares for years 1913 through 2012), http://gabriel-zucman.eu/files/SaezZucman2016QJEAppendix.pdf

34 *Id.*

35 *Id.*

36 *Id.* (showing top 0.1% of households held varying percentages of aggregate wealth in this period, e.g., 16.8% (1938), 10.3% (1948), 9.7% (1958), 10.0% (1968), and 7.1% (1978)).

37 *Id.* (showing top 0.1% of households owning 22.0% of all wealth in 2012).

38 *See* Gabriel Zucman, *Global Wealth Inequality*, 11 ANN. REV. ECON. 109, 120 (2019) ("The top 0.1% wealth share peaked at close to 25% in 1929. It then fell abruptly. . . . US wealth concentration seems to have returned to levels last seen during the Roaring Twenties."). *See also* Andrew Keshner, *America's 1% Hasn't Had This Much Since Just Before the Great Depression*, MARKETWATCH (Feb. 24, 2019, 2:45 PM), https://www.marketwatch.com/story/its-been-almost-a-100-years-since-the-americas-1-had-so-much-wealth-2019-02-11 (reporting that top 10% of all U.S. households held 25% of country's wealth in 1929). Disparity seems to have peaked in 1910, when the top 1% of wealth holders owned approximately 45% of all wealth in 1910. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 439 (2014) (graphically illustrating wealth inequality in the United States 1810 to 2010).

39 Zucman, *supra* note 38.

40 In 2016, the top one percent held 38.6% of the country's wealth. *See, e.g.*, FACUNDA

It is possible that the wealth gap is even larger than has been reported. According to economist Gabriel Zucman, an estimated four percent of U.S. financial wealth is held outside the country, in tax-haven jurisdictions with financial secrecy laws that make it difficult to accurately account for these assets.[41] If his figure is accurate, Zucman explains, then U.S. wealth held in non-U.S. jurisdictions causes the government to lose approximately thirty-five billion dollars in tax revenue every year, and wealth inequality is even more dramatic than many scholars have recognized.[42]

Although it is common to talk about wealth inequality by referring to two groups—the top 0.1% and all others—the picture becomes even bleaker when one considers the top ten percent compared with all others.[43] The Congressional Budget Office has estimated that households in the top ten percent have a seventy-five percent wealth share (and an average net asset value of $942,000).[44] Stated otherwise, the "bottom" ninety percent of all households together own just twenty-five percent of the country's wealth.[45] If one parses the data even more finely, the "bottom" fifty percent holds just one percent of all wealth.[46]

ALVAREDO ET AL., 2018 WORLD INEQUALITY REPORT 13 (2018), https://wir2018.wid.world/files/download/wir2018-summary-english.pdf (illustrating in Figure E9 the expected global increase in the share of wealth held by the top 1% of all households).

41 GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 34–43 (2015) (explaining his calculation that in 2014, $7.6 trillion in financial assets were held in offshore tax-haven jurisdictions, many of which have strict secrecy laws).

42 *Id.* at 53 (estimating $190 billion in global tax revenue lost due to financial assets held in offshore tax-haven jurisdictions, with $35 billion attributable to wealth belonging to U.S. households).

43 *See* CONG. BUDGET OFFICE, TRENDS IN FAMILY WEALTH, 1989 TO 2013 5 (2016), https://perma.cc/25EP-3AN2 (Exhibit 1: Holdings of Family Wealth, by Wealth Group; Exhibit 2: Wealth for Families at Selected Percentiles of the Distribution); CONG. BUDGET OFFICE, TRENDS IN FAMILY WEALTH, 1989 TO 2013 SUPPLEMENTAL DATA (2016) (Exhibit 1 showing top 10% holding 20% of all wealth in 1989 and 51% of all wealth in 2013 and Exhibit 2 showing 90% percentile having $942,000 average wealth).

44 *See* TRENDS IN FAMILY WEALTH, 1989 TO 2013, *supra* note 43 (basing calculations on data from the Survey of Consumer Finances to show percentage of wealth owned by top 10% of all households). *See also The World Top Incomes Database*, PARIS SCHOOL OF ECONOMICS, http://www.mybudget360.com/wp-content/uploads/2013/12/wealth-inequality.png (last visited Oct. 9, 2019) (fixing percentage at 74%).

45 *See* TRENDS IN FAMILY WEALTH, 1989 TO 2013, *supra* note 43, at 4 (Exhibit 1) ("In 2013, families in the top 10% held more than three-quarters of all family wealth, whereas in 1989, their counterparts had held two-thirds of all family wealth). According to a more recent estimate, the top 10% of all households own 77.1% of all wealth. *See* Erin Duffin, *Wealth Distribution in the United States in 2016*, STATISTA (Apr. 29, 2019), https://www.statista.com/statistics/203961/wealth-distribution-for-the-us/ ("With such a small percentage of people in the United States owning such a vast majority of the country's wealth, the gap between the rich and poor in America is becoming larger and larger.").

46 TRENDS IN FAMILY WEALTH, 1989 TO 2013, *supra* note 43, at 4 (Exhibit 1). I use quotation marks around "bottom" because the idea of talking about 90% or even 50% of all

Wealth inequality has race and sex dimensions, to name just two evaluative axes.[47] The Institute for Policy Studies reports that white households in 2016 had an average wealth of $146,984, whereas for Black and Latinx families, those figures were $3,557 and $6,591 respectively.[48] In other words, the average Black family has approximately 2.4% of the wealth that the average white family has, and the average Latinx family has approximately four percent of the wealth that the average white family has.[49] Households led by an Asian or Pacific Islander have a median household net worth of $59,292 compared to $87,056 for non-Hispanic white households.[50] Using data derived from the Survey of Consumer Finances and U.S. Census, the Pew Center arrives at similar figures indicating the same racial disparities.[51]

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households at the lowest rung in any hierarchy seems almost absurd.

47 *See, e.g.*, Danaya C. Wright, *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, 2019 WISC. L. REV. 295, 301–03 (2019) (discussing differences between racial and sex wealth gaps).

48 *Wealth Inequality in the United States, The Racial Wealth Divide*, INEQUALITY, https://inequality.org/facts/wealth-inequality (last visited Oct. 4, 2019) (comparing white, Black and Latino household wealth in 2016, as well as white household wealth versus all other households' wealth in 1983). The use of the word "Latinx" in the text of this article is an intentional choice, so as to recognize that households may be not made up solely of males, females or people who identify as either of those genders. *See, e.g.*, Tanisha Love Ramirez & Zeba Blay, *Why People Are Using the Term "Latinx"*, HUFFINGTON POST (July 5, 2016), https://www.huffpost.com/entry/why-people-are-using-the-term-latinx_n_5775332 8e4b0cc0fa136a159 ("Latinx is the gender-neutral alternative to Latino, Latina and even Latin@. Used by scholars, activists and an increasing number of journalists, Latinx is quickly gaining popularity among the general public. It is part of a 'linguistic revolution' that aims to move beyond gender binaries and is inclusive of the intersecting identities of Latin American descendants."). Such usage is not without its critics. *See e.g.*, Stephen Nuño-Pérez & Gwen Aviles, *Is "Latinx" Elitist? Some Push Back at the Word's Growing Use*, NBC NEWS (Mar. 7, 2019), https://www.nbcnews.com/news/latino/latinx-elitist-some-push-back-word-s-growing-use-n957036 ("But as the term gains traction, some scholars are pointing out that there are Latinos who don't see themselves reflected in the word. Some see Latinx as an elitist attempt to erase a history of more traditional gender roles, or as a distraction from other pressing issues facing Latinos in the United States.").

49 *Wealth Inequality in the United States*, *supra* note 48 ("The median Black family, with just over $3,500, owns just 2 percent of the wealth of the nearly $147,000 the median White family owns. The median Latino family, with just over $6,500, owns just 4 percent of the wealth of the median White family. Put differently, the median White family has 41 times more wealth than the median Black family and 22 times more wealth than the median Latino family.").

50 Alfred O. Gottshalck, *Net Worth and the Assets of Households: 2002*, U.S. CENSUS BUREAU (2008), https://www2.census.gov/library/publications/2008/demo/p70-115.pdf (for year 2002, reporting median net worth for households headed by householder by race of $87,057 (white), $5,446 (Black), $59,292 Asian or Pacific Islander), and $7,950 (Hispanic)).

51 *See* Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, PEW RES. CTR. (Dec. 12, 2014), http://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession/

In the United States, women of all colors have always had less aggregate wealth than men.[52] For 2015, the median net worth of households headed by single women was $26,580; whereas for those headed by single men, the median was $32,300; and for those headed by married-couple households, the median was $187,600.[53] In its study of individuals with gross assets of two million dollars or more, the Internal Revenue Service estimates that men hold sixty percent and women hold forty percent of the average net asset value.[54] The vast majority of these women report that their wealth comes primarily from their husbands or other family members.[55]

Considering the poorest segments of the U.S. population, 13.2% of all women seventy-five and older live in poverty, compared with 11.8% of the total population and 11.3% of all men seventy-five and older.[56] Transgender individuals of any age tend to be among the poorest Americans, with approximately twenty-nine percent of those surveyed

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[https://perma.cc/2WGL-VZJ3] (reporting that in 2013, median net worth of white households was thirteen times greater than Black households and ten times greater than Hispanic households). For further discussion of the racial wealth gap, *see, e.g.*, Daria Roithmayr, *Them That Has, Gets*, 27 MISS. C.L. REV. 373, 373–74 (2008); Beverly Moran & Stephanie M. Wildman, *Race and Wealth Disparity: The Role of Law and the Legal System*, 34 FORDHAM URB. L.J. 1219, 1220 (2007).

52 *See* Carmen Diana Deere & Cheryl R. Doss, *The Gender Asset Gap: What Do We Know and Why Does It Matter?*, 12 FEMINIST ECON. 1, 2–3 (2006) (reporting that women and children held 7.2% of national wealth in 1860; that women held 25% of probate wealth in 1900; roughly 40% of wealth in the 1950s). The authors refer to "women" generally without taking into account slavery and its impact on the privileged legal status white women had compared to all others. *See id.*

53 *See* U.S. CENSUS BUREAU, WEALTH, ASSET OWNERSHIP, & DEBT OF HOUSEHOLDS DETAILED TABLES 2015 Table 1 (2018), https://www.census.gov/data/tables/2015/demo/wealth/wealth-asset-ownership.html. *See also* Gwendolyn Griffith, *The Evolution of Women's Wealth: Implications for Wealth Planners*, 2014 WL 4160088 (2014) (providing similar statistics for 2011).

54 Griffith, *supra* note 53, at *4–5 (evaluating distribution of net value across individuals holding assets of $2 million or more).

55 Griffith, *supra* note 53, at *9. *See also* Wright, *supra* note 47, at 302–03 ("The sex gap is also notable, although it plays out quite differently than the racial wealth gap. While women control overall less wealth than men, of those women who do control significant wealth, roughly three-quarters report their wealth was generated *primarily* from their families or their husbands.").

56 *See* U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, 2019 ANNUAL SOCIAL & ECONOMIC SUPPLEMENT (POV-01), https://www.census.gov/data/tables/time-series/demo/income-poverty/cps-pov/pov-01.html#par_textimage_10 (last visited Oct. 15, 2019) (providing data for segments of population below poverty level). *See also* Amber Christ & Tracey Gronniger, *Older Women & Poverty*, JUST. IN AGING 3–4 (Dec. 2018), https://www.justiceinaging.org/wp-content/uploads/2018/12/Older-Women-and-Poverty.pdf (reporting poverty levels based on Census Bureau's Supplemental Poverty Measure); Juliette Cubanski et al., *How Many Seniors Live in Poverty?*, KAISER FAM. FOUND. 2 (Nov. 2018), files.kff.org/attachment/Issue-Brief-How-Many-Seniors-Live-in-Poverty (noting greater poverty rates for elderly women).

reporting that they live in poverty.[57]

Wealth inequality gives rise to multiple concerns. There are those who argue that wealth inequality is, in itself, immoral.[58] Others are concerned about the consequences of wealth inequality, i.e., that it creates undue social and political advantages for the rich.[59] Frequently embedded in that particular critique is a rhetorical nod to stereotypically "American" ideals of egalitarianism.[60] In 2013, for example, President Obama opined that "[t]his increasing [economic] inequality is most pronounced in our country, and it challenges the very essence of who we are as a people."[61] Similarly, former chair of the Federal Reserve Janet Yellen questioned in a public speech whether rising income and wealth inequality is "compatible with values rooted in our nation's history, among them the high value Americans have traditionally placed on equality of opportunity."[62]

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57 *See, e.g.*, Jillian Edmonds, *Transgender People Are Facing Incredibly High Rates of Poverty*, NAT'L WOMEN'S L. CTR. (Dec. 9, 2016), https://nwlc.org/blog/income-security-is-elusive-for-many-transgender-people-according-to-u-s-transgend0er-survey (reporting that 29% of transgender individuals surveyed in 2015 reported they were living in poverty, compared with 14% of all people in the United States). The Census Bureau reports 11.8% of the population is living in poverty. *See* 2019 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT, *supra* note 56. Differences may be attributable to the applicable measurement of poverty; the Supplemental Poverty Measure takes into account more than baseline food consumption. *See, e.g.,* Dylan Matthews, *The Official Poverty Measure Is Garbage*, VOX (Sept. 12, 2017), https://www.vox.com/2015/9/16/9337041/supplemental-poverty-measure.

58 *See e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 74–75 (1971). *See also* Xavier Marquez, *Is Income Inequality Unjust?: Perspectives from Political Philosophy*, 7 POL. Q. 61 (2011); Amy J. Sepinwall, *Responsibility, Repair and Redistribution in the Wake of the Financial Crisis*, 11 GEO. J. L. PUB. POL'Y 301, 313–14 (2013) (describing in general terms the Rawlsian luck egalitarianism).

59 *See, e.g.*, LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS—AND A PLAN TO STOP IT (2011); MICHAEL WALZER, SPHERES OF JUSTICE (1983); Elizabeth Anderson, *What is the Point of Equality*, 109 ETHICS 287, 289 (1999).

60 Thomas Piketty locates this rhetoric in its historical context, explaining that at the end of the nineteenth century, "in the period known as the Gilded Age, when some US industrialists and financiers (for example John D. Rockefeller, Andrew Carnegie, and J.P. Morgan) accumulated unprecedented wealth, many US observers were alarmed by the thought that the country was losing its pioneering egalitarian spirit. To be sure, that spirit was partly a myth, but it was also partly justified by comparison with the concentration of wealth in Europe." PIKETTY, *supra* note 38, at 348–49.

61 Press Release, White House, Remarks by the President on Economic Mobility (Dec. 4, 2013), https://www.dailykos.com/stories/2013/12/04/1260116/-President-Obama-s-remarks-on-economic-mobility. *See also* Ian Reifowitz, *Obama's Inequality Speech: Telling the Progressive Story of American History*, HUFFINGTON POST (Dec. 6, 2013), https://www.huffpost.com/entry/obamas-inequality-speech_b_4394169 (quoting President Obama's speech and remarking that "Obama's telling of that history always features both progress as well as our failure to live up to the ideals of equality we lay down at the country's founding.").

62 Janet Yellen, Chair, Bd. of Governors of the Fed. Res. Sys., Speech at the Conference on Economic Opportunity and Inequality, Federal Reserve Bank of Boston: "Perspectives on Inequality and Opportunity from the Survey of Consumer Finances"

A third cluster of concerns about gross wealth inequality relates to macroeconomic issues. There are commentators who believe that members of the segment of the population with low or no savings (i.e., no wealth) do not and cannot contribute to economic growth.[63] In other words, if people live based solely on their incomes, from paycheck to paycheck, those same individuals by definition cannot be wealth-producers.[64] They may be consumers, but they will never create businesses that employ others.[65]

Finally, and perhaps most powerfully, is the idea that persistent and significant wealth disparity undermines the stability of democratic societies. As American entrepreneur (and self-described "plutocrat") Nick Hanauer has warned, "any society which allows itself to become radically and indefensibly unequal eventually faces either an uprising or a police state—or both."[66] Comparative law scholar Katharina Pistor makes the same point, citing wealth disparity as a major contributing cause of the French Revolution.[67] Like Obama and Yellen, Pistor rhetorically invokes aspirational ideals of equality, noting that wealth inequality extends well beyond the United States, "in countries that call themselves democracies, with their commitment to self-governance based on majoritarian, not elite, rule. It is hard to reconcile these aspirations with levels of inequality that smack of the Ancien Régime."[68] Although lack of records make it difficult to measure precisely pre-Revolutionary-era French wealth inequality levels, economist Thomas Piketty speculates that "[i]t is possible that the top decile's share attained or even slightly exceeded 90 percent of total wealth on the eve of 1789 and the upper centile's share attained or exceeded 60 percent."[69] After the Revolution, France instituted a gift and

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(October 17, 2014), https://www.federalreserve.gov/newsevents/speech/yellen20141017a.htm

[63] *See, e.g.*, CHUCK COLLINS, 99 TO 1: HOW WEALTH INEQUALITY IS WRECKING THE WORLD AND WHAT WE CAN DO ABOUT IT 65–67 (2012). *See also* Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 12 (2018).

[64] *See* COLLINS, *supra* note 63.

[65] *Id.*

[66] Nick Hanauer, *To My Fellow Plutocrats: You Can Cure Trumpism*, POLITICO (July 18, 2017), https://www.politico.com/magazine/story/2017/07/18/to-my-fellow-plutocrats-you-can-cure-trumpism-215347 (also urging employers to pay workers more, in order to enhance individuals' well-being and stimulate the economy). *See also* Nick Hanauer, *The Pitchforks Are Coming . . . For Us Plutocrats*, POLITICO (July/Aug. 2014), https://www.politico.com/magazine/story/2014/06/the-pitchforks-are-coming-for-us-plutocrats-108014; Nick Hanauer, *Beware Fellow Plutocrats, the Pitchforks Are Coming*, TED (Jul. 21, 2017), https://www.ted.com/talks/nick_hanauer_beware_fellow_plutocrats_the_pitchforks_are_coming/discussion.

[67] KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY 2 (2019).

[68] *Id.*

[69] PIKETTY, *supra* note 38, at 341.

estate tax system, along with a wealth registry.[70]

These multiple critiques of wealth inequality correctly bring continued attention to the wealth gap in the United States (and elsewhere). The causes of wealth inequality are multifaceted and complex, including systemic racism and sexism, poor quality education, overincarceration, housing segregation, lack of financial literacy, and tax policy itself.[71] A growing group of scholars point to trusts as a symptom, or perhaps even a cause or constitutive structure, of wealth inequality in this country.[72] To evaluate this claim, one first must understand the available data about trusts in the United States.[73]

B. *The Frequency and Extent of Trust Use*

For many years, wealthy families have used trusts to preserve and protect assets, and also to confer financial benefits on successive generations.[74] For example, in 1934, John D. Rockefeller, Jr., son of the

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[70] PIKETTY, *supra* note 38, at 337 (calling these taxes and the wealth registry "astonishing innovations at the time, notable for their universal scope").

[71] *See, e.g.*, Wright, *supra* note 47, at 303 ("There are countless other factors besides estate planning that contribute to the various wealth gaps, including income inequality, racism, housing segregation, and lack of education about how to protect and grow wealth. Tax policy contributes to the wealth gap by privileging certain types of investments and protecting certain kinds of gains and not others."). *See also* Olatunde Johnson, *Inclusion, Exclusion, and the "New" Economic Inequality*, 94 TEX. L. REV. 1647 (2016) (examining role of geographical space in financial inequality).

[72] *See, e.g.*, Ray MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 76–84 (2010) (critiquing long-term trusts); Iris Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467, 468 (2010) (calling the family trust company "the masterstroke in a series of aggressive planning techniques"); Kent D. Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 AKRON L. REV. 63, 65–67 (2012) (critiquing, among other features of trusts, the use of spendthrift clauses); Phyllis C. Smith, *The Estate and Gift Tax Implications of Self-Settled Domestic Asset Protection Trust: Can You Really Have Your Cake and Eat It Too?*, 44 NEW ENG. L. REV. 25 (2009) (arguing in favor of estate tax inclusion for self-settled asset protection trusts, even when transfers to the trust are treated as completed gift for wealth transfer tax purposes); Allison Anna Tait, *The Law of High-Wealth Exceptionalism*, 71 ALA. L. REV. 4 (forthcoming 2019), http://papers.ssrn.com/ abstract_id=3406070 ("the wealth management profession has been encouraging high-wealth families to imagine themselves as separate, exceptional entities for several decades"); Reid Kress Weisbord, *Trust Term Extension*, 67 FLA. L. REV. 73 (2015) (arguing against use of decanting power to extend duration of trust).

[73] As Zucman notes, there are undoubtedly many Americans with assets located on offshore jurisdictions. *See* ZUCMAN, *supra* notes 41–42 and accompanying text. The discussion in this Article is limited to family trusts located in the United States.

[74] *See, e.g.*, Duke of Norfolk's Case, (1682) 22 Eng. Rep. 931 (Ch.); 3 Chan. Cas.1 (recognizing as valid a trust for barony title and associated property). This case is included in law school casebooks to illustrate the origins of the common law rule against perpetuities as the executory interest in the grantor's fourth son was certain to vest, if at all, within the lifetime of the fourth son, who was also alive at the time of the trust creation. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 7, at 890–91 (discussing validity of executory interest in

founder of Standard Oil, created a trust for the benefit of his six children.[75] In 2002, when in his late eighties, David Rockefeller, the youngest of those children wrote that, "[t]hese [1934] trusts, in particular, have been the primary source of the preservation, enhancement, and transfer of the family's wealth from generation to generation."[76] Each of the beneficiaries had the ability to ask a trust committee "for permission to invade our trust for some special purpose," and via those trusts, the children were able to purchase Rockefeller Center from their father in 1948, at a price of $2.2 million.[77] That is equal to approximately twenty-three million dollars today.[78] *Forbes* magazine estimates that David Rockefeller's net worth was approximately $3.3 billion at the time of his death.[79] If that estimate is even close to accurate, then the family trusts were very successful indeed in preserving and enhancing family wealth.[80]

In the twenty-first century, wealthy business leaders like Warren Buffett and Bill Gates have announced publicly that they will leave minimal wealth to their heirs.[81] Over 150 billionaires have signed Buffett and Gates' Giving Pledge, a public promise to donate the bulk of their

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Duke of Norfolk's case).

75 DAVID ROCKEFELLER, MEMOIRS 463 (2002) (describing creation of family trusts by John D. Rockefeller, Jr. in 1934). From 1996 through 2003, I was an attorney in the Trusts & Estates Department at Milbank LLP (then Milbank, Tweed, Hadley & McCloy LLP), a firm that represented (and represents) members of the Rockefeller family. *See* Bridget J. Crawford, *Faculty Profile*, PACE LAW SCHOOL, https://law.pace.edu/faculty/bridget-j-crawford (last visited Oct. 1, 2019), *and David Rockefeller Obituary Notice by Milbank, Tweed, Hadley & McCloy LLP*, N.Y. TIMES (Mar. 23, 2017), https://tinyurl.com/y6j3k7x2 ("Milbank is proud to have had a close relationship with the Rockefeller family since the early 20th century, and David Rockefeller continued this relationship . . . . Mr. Rockefeller worked with many of our partners on numerous important transactions over the years—among them corporate, real estate, trusts and estates, and philanthropic."). All information in this article about any member of the Rockefeller family comes from publicly-available sources.

76 *See* ROCKEFELLER, *supra* note 75.

77 *See* ROCKEFELLER, *supra* note 75, at 464–69 (describing the role his brother Nelson Rockefeller played in "persuading Father to sell us the property in 1948 for $2.2 million").

78 *See Calculate the Value of $100 in 1948*, DOLLAR TIMES, https://www.dollartimes.com/inflation/inflation.php?amount=100&year=1948 (last visited Sept. 29, 2019) (calculating $2.2 million in 1948 as worth $23,620,197 in 2019).

79 *#581 David Rockefeller, Sr.*, FORBES, https://www.forbes.com/profile/david-rockefeller-sr/?list=billionaires#668ed7af6442 (last visited Oct. 15, 2019).

80 *See id.*

81 *See, e.g.*, Roxanne Roberts, *Why the Super-Rich Aren't Leaving Much of Their Fortunes to Their Kids*, WASH. POST (Aug. 10, 2014), https://www.washingtonpost.com/lifestyle/style/why-the-very-rich-arent-giving-much-of-their-fortunes-to-their-kids/2014/08/10/4a9551b4-1ccc-11e4-82f9-2cd6fa8da5c4_story.html ("Bill and Melinda Gates are giving a reported $10 million for each of their three children: pocket change compared with their $76 billion. Buffett's three kids each have a $2 billion foundation funded by Dear Old Dad. The rest of his money? Going to charity . . . .").

wealth to charity.[82] In addition to having philanthropic intentions, some of these ultra-wealthy people are concerned that successive generations not be burdened (or boosted) by inherited wealth.[83] Yet many other wealthy Americans have taken advantage of recent changes in trust laws to create multi-million dollar trusts that may last for an unlimited time period, forever protecting assets from taxation and creditors.[84]

It is difficult, if not impossible, to accurately determine the number of family trusts presently in operation in the United States.[85] When a grantor creates a trust, there is no filing of any certificate or document with the state or federal government.[86] The trustee of a trust may be a private individual or a bank or a trust company.[87] Private individuals acting as trustees are not required to report their fiduciary holdings to the government. In contrast, when a bank or trust company that is part of the Federal Reserve System acts as trustee, that institution must make reports each year to various federal agencies.[88] The institution must disclose the number of trust accounts under its management and the size of the trust holdings.[89] At the end of 2015, these federally regulated banks and other institutions were the trustees of approximately 710,000 accounts (including

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82 *See, e.g.*, Peter Kotecki, *The Billionaire "Giving Pledge" Signed by Bill Gates and Elon Musk Could Soon Be Worth Up to $600 Billion*, BUS. INSIDER (Jul. 18, 2018), https://www.businessinsider.com/bill-gates-elon-musk-giving-pledge-may-reach-600-billion-2018-7 (describing Gifting Pledge and naming as signatories Elon Musk and Mark Zuckerberg, but noting that pledge does not appear to be binding).

83 *See* Roberts, *supra* note 81 (quoting recording artist Sting as saying of his estimated $300 million net worth, "I certainly don't want to leave them trust funds that are albatrosses round their necks. They have to work. All my kids know that and they rarely ask me for anything, which I really respect and appreciate.").

84 *See, e.g.*, McCouch, *supra* note 14 (describing repeal of rule against perpetuities in multiple U.S. jurisdictions).

85 *See supra* notes 15–17 and accompanying text (detailing the type of trusts that are the focus of this Article). Distinguish the gift-type trust from revocable trusts intended as will substitutes; charitable trusts; trusts to provide asset management for disabled or otherwise incapacitated beneficiaries; or business trusts, to give a few examples. On the various types of trusts, *see, e.g.*, BOGERT'S TRUST AND TRUSTEES § 1 (describing general categories of trusts).

86 Indeed, trusts for property other than real property can be created by oral declaration. *See, e.g.*, RESTATEMENT (THIRD) TRUSTS § 20 (AM. LAW. INST. 2019) ("Validity of Oral Inter Vivos Trusts").

87 *See, e.g.*, BOGERT'S TRUST AND TRUSTEES, *supra* note 85, § 121 (detailing multiple factors that inform a grantor's selection of a trustee and the range of legal persons who may act as trustee).

88 Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 387–88 (2005) (citing federal statutes that make mandatory certain filings with four different federal agencies).

89 *Id.* at 388.

charitable trusts) with an aggregate value of approximately $918 billion.[90] Because reporting rules apply only to accounts for which the institution is acting as trustee, however, these figures will necessarily represent only a portion of the trusts in operation.

Professors Robert Sitkoff and Max Schanzenbach were among the first to realize the importance of this publicly available federal banking information to the study of trusts. In 2005, they reported the results of their empirical investigation of the consequences of certain states' repeal of the rule against perpetuities.[91] They found that between 1997 and 2003, approximately $100 billion worth of trust assets flowed to states that had effectively repealed the rule.[92] The authors cabin their results by explaining that it is impossible to know whether this figure represents the creation of new trusts or the relocation of existing trusts to repeal states.[93] In any event, the authors also note that studies based on the federally available data are incomplete, because they include only trust accounts for which a reporting institution is acting as trustee.[94]

To get a better understanding of the total number of trusts and the aggregate wealth they hold, one naturally looks to publicly available tax data. A family trust typically obtains its own taxpayer identification number,[95] but the Internal Revenue Service does not publicly disclose how many identification numbers it issues to trusts each year. And even if the IRS did make this information available, the fact that a trust received a taxpayer identification number at some point does not mean that the trust is still in existence. The trust may have terminated or otherwise expired according to its terms. For that reason, knowing the number of taxpayer identification numbers issued to trusts will not necessarily help determine

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90 SITKOFF & DUKEMINIER, *supra* note 7, at 393.

91 Sitkoff & Schanzenbach, *supra* note 88, at 376.

92 Sitkoff & Schanzenbach, *supra* note 88, at 404 ("Within the timeframe of our sample, 17 states abolished the RAP with a resulting average increase of $6 billion in trust assets per state. This implies that as of 2003, roughly $100 billion in trust funds have poured into the states that abolished the Rule ($6 billion per state * 17 states = $102 billion in total assets).").

93 *Id.* ("[W]e cannot discern the extent to which the observed increase in trust assets reflects an inflow of newly created trusts or the poaching of already existing trusts.").

94 *Id.* ("Because our sample includes only trusts administered by federally reporting institutions, our estimates probably understate the total increase in trust assets experienced by the abolishing states."); Sitkoff & Schanzenbach, *supra* note 88, at 387–88 (citing federal statutes that make mandatory certain filings with four different federal agencies).

95 *Taxpayer Identification Numbers*, INTERNAL REVENUE SERVICE, https://www.irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tin (last visited Oct. 4, 2019) ("An Employer Identification Number (EIN) is also known as a federal tax identification number, and is used to identify a business entity. It is also used by estates and trusts which have income which is required to be reported on Form 1041, U.S. Income Tax Return for Estates and Trusts.").

the actual number of existing family trusts or the extent of their holdings.

Federal fiduciary income tax returns—or the tax returns for trusts—provide partial additional insight into the number of trusts in existence in any particular year.[96] For the tax year 2014, the Internal Revenue Service received over 3.1 million trust income tax returns reporting approximately $142 billion of aggregate net income.[97] Approximately 637,000 trusts paid out $5.3 million in aggregate fiduciary fees.[98] This number does not give a complete picture of all trusts in the United States, however, because many trusts are not required to file income tax returns at all.[99]

State income tax data are not necessarily illuminating, either. Each state takes a different approach to the income taxation of trusts. New York, for example, imposes a tax on an irrevocable trust that is created under the will of a person domiciled in the state. New York also imposes a tax on an irrevocable trust if a trustee is domiciled in the state, the trust has source income in the state, or the trust property is located in the state.[100] Florida, in contrast, imposes no tax at all on most trusts.[101]

From the patchwork of available information about federal reporting institutions' holdings and trusts' federal tax returns, one cannot accurately estimate the number of all family trusts or their holdings. There likely are hundreds of millions of private express trusts presently in existence.[102] These trusts likely hold assets worth trillions of dollars.[103] But a complete

[96] *See Form 1041, U.S. Income Tax Return for Estates and Trusts 2018*, INTERNAL REVENUE SERVICE, https://www.irs.gov/pub/irs-pdf/f1041.pdf (last visited Oct. 15, 2019) (income tax return to be filed by a decedent's estate or any one of several types of trusts).

[97] INTERNAL REVENUE SERVICE, STATISTICS OF INCOME BUREAU, FIDUCIARY RETURNS – SOURCES OF INCOME, DEDUCTIONS, AND TAX LIABILITY – TAX STATUS AND SIZE OF GROSS INCOME 2014, https://www.irs.gov/statistics/soi-tax-stats-fiduciary-returns-sources-of-income-deductions-and-tax-liability-tax-status-and-size-of-gross-income (last visited Oct. 15, 2019).

[98] *Id.*

[99] *See* 26 U.S.C §§ 671–79 (2018) (providing rules relevant for determining multiple circumstances in which trust income or other tax items are attributable to the grantor or someone other than the trust). *See also Instructions for Form 1041*, INTERNAL REVENUE SERVICE, https://www.irs.gov/pub/irs-pdf/i1041.pdf (last visited Oct. 15, 2019) (listing "Who Must File").

[100] *See* N.Y. TAX LAW § 605(b)(3)(C) (McKinney 2014) (defining "resident trust" subject to taxation in the state); N.Y. TAX LAW § 605(b)(3)(D) (McKinney 2014) (describing those resident trusts not subject to state income taxation).

[101] *See generally* RICHARD W. NENNO, BASES OF STATE INCOME TAXATION OF NONGRANTOR TRUSTS FOR 2018 (2019), https://www.actec.org/assets/1/6/Nenno_state_non grantor_tax_survey.pdf. Other states that do not impose income tax on trusts include Alaska, Nevada, South Dakota, Texas and Wyoming. *See id.*

[102] *See supra* note 97 and accompanying text.

[103] If reporting institutions held $918 billion in assets at the end of 2015, *supra* note 88 and accompanying text, it is likely that the total of all assets held in all trusts reaches the trillions, once one includes trusts with private trustees and any trust assets such as real

picture remains to be drawn. The lack of clarity about how many trusts there are and how much wealth these trusts hold, combined with the stark facts of wealth inequality,[104] mean that trusts are an easy target for critics. When, during the 2018-2019 term, the Supreme Court took up its first case in over sixty years concerning the state income taxation of trusts, one particular trust for a North Carolina woman named Kimberley Rice Kaestner brought a spotlight to family trusts.[105]

III. *KAESTNER TRUST* AND DUE PROCESS

A. *Background*

The story of how Kimberley Rice Kaestner came to be the beneficiary of a family trust begins in 1992. After a brief stint practicing law with an elite New York Law firm, Joseph Lee Rice had a long and successful career in private equity.[106] In 1992, when he was sixty years old, Rice transferred $100,000 to an irrevocable trust for the benefit of his descendants.[107] At that time, the beneficiaries were Rice's daughter Kimberley, age twenty-three, and his two other children, Daniel and Lee.[108] Rice was a New York resident and domiciliary; so was the initial trustee, William Matteson.[109] The trust was subject to taxation by the State of New York. In 1995, Matteson, the initial trustee, moved to Florida.[110] Subsequently, Kimberley Rice Kaestner moved to North Carolina, where

property and closely-held business interests that cannot be maintained in a bank or trust company. This is, however, speculation only.

[104] *See supra* Part II.A.

[105] *See* N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr., 139 S. Ct. 2213, 2218 (2019); *supra* note 17 and accompanying text.

[106] *See* Founder, Joseph L. Rice, III, CDR-INC.COM, https://www.cdr-inc.com/professionals/joseph-l.-rice-iii (last visited Oct. 15, 2019) (providing biographical information for Joseph Lee Rice III); Joseph L. Rice III, REVOLVY.COM, https://www.revolvy.com/page/Joseph-L.-Rice-III (last visited Oct. 15, 2019) (providing biographical information for Joseph Lee Rice III).

[107] Complaint at ¶ 11, Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, No. 12 CVS 8740, 2015 WL 1880607 (N.C. Super. Ct. Apr. 23, 2015), 2012 WL 12282023 [hereinafter Complaint], *aff'd*, 789 S.E. 645 (N.C. Ct. App. 2016), *aff'd* 814 S.E.2d 43 (N.C. 2018), *aff'd* 139 S. Ct. 2213 (2019). *See also* Joint Appendix, Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, No. 12 CVS 8740, 2015 WL 1880607 (N.C. Super. Ct. Apr. 23, 2015), 2018 WL 7469782, *aff'd*, 789 S.E. 645 (N.C. Ct. App. 2016), *aff'd* 814 S.E.2d 43 (N.C. 2018), *aff'd* 139 S. Ct. 2213 (2019); Affidavit of David H. Bernstein, Appendix to Exhibit A, Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, No. 12 CVS 8740, 2015 WL 1880607 (N.C. Super. Ct. Apr. 23, 2015), 2012 WL 12282023 [hereinafter Bernstein Affidavit], *aff'd*, 789 S.E. 645 (N.C. Ct. App. 2016), *aff'd* 814 S.E.2d 43 (N.C. 2018), *aff'd* 139 S. Ct. 2213 (2019).

[108] Complaint, *supra* note 107, at ¶ 17.

[109] Complaint, *supra* note 107, at ¶ 13.

[110] Complaint, *supra* note 107, at ¶ 16.

she established both her residence and domicile.[111]

The trust created by Rice provided that on the tenth anniversary of the trust's creation, i.e., on December 30, 2002, the trust divided into separate shares, with one share held in further trust for each of Rice's children and their respective descendants as "Beneficiaries" of that separate share trust.[112] During both the initial ten-year term of the trust and the continued administration of the separate share trusts, the trust instrument directed the trustee to consider the trust funds a "family asset" and "to be liberal in the exercise of discretion . . . to meet the needs of the Beneficiaries, including, without limitation, to provide for their health, education and welfare, to purchase or provide a home for them, and to aid them at the time of marriage or in setting up a business, rather than to preserve such principal."[113] On the adult child's fortieth birthday, the trust would terminate automatically, and the adult child would receive all of the trust assets.[114]

After Matteson resigned as initial trustee in 2005, David H. Bernstein, a resident and domiciliary of Connecticut, became the successor trustee. Shortly thereafter, Bernstein split the separate share trusts for investment purposes. (Previously it seems that they were split only for administrative purposes.)[115]

When Kimberley Rice Kaestner found out about the trust for her benefit in 2006, she was approximately 37 years old.[116] At that time, her

[111] *See* Complaint, *supra* note 107, at ¶ 17 (stating that Kaestner moved to North Carolina in 1997); Bernstein Affidavit at ¶ 8 (stating that Kaestner "moved to North Carolina in 1997).

[112] Complaint, *supra* note 107, at ¶ 17.

[113] Copy of Trust Agreement at ¶ 1.4(c), Appendix A to Affidavit of David H. Bernstein, Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, No. 12-CVS-8740, 2015 WL 1880607 (N.C. Super. Ct. Apr. 23, 2015), 2012 WL 12282023 [hereinafter Trust Agreement] (stating that Kaestner "moved to North Carolina in 1997, almost five years after the Family Trust's creation"), *aff'd*, 789 S.E. 645 (N.C. Ct. App. 2016), *aff'd* 814 S.E.2d 43 (N.C. 2018), *aff'd* 139 S. Ct. 2213 (2019).

[114] Trust Agreement, *supra* note 113, at ¶ 1.2(c).

[115] Bernstein Deposition at 91–93, Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, No. 12-CVS-8740, 2015 WL 1880607 (N.C. Super. Ct. Apr. 23, 2015), 2012 WL 12282023 [hereinafter Bernstein Deposition] (stating that Kaestner "moved to North Carolina in 1997, almost five years after the Family Trust's creation"), *aff'd*, 789 S.E. 645 (N.C. Ct. App. 2016), *aff'd* 814 S.E.2d 43 (N.C. 2018), *aff'd* 139 S. Ct. 2213 (2019). Bernstein did so because one of Rice's three children was substantially younger than the others, and Bernstein believed that the younger child's trust should be invested differently. *Id.* ("I didn't believe that the investment philosophy for all three trusts needed to be the same. One of Mr. Rice's children, for example, is much younger, and so has a very different investment time frame.").

[116] Kimberley Rice Kaestner did not find out about the trust for benefit until 2006, when she was approximately 37 years old. Kaestner Deposition at 84, Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, No. 12-CVS-8740, 2015 WL 1880607 (N.C.

trust had approximately $13 million in assets.[117] Kaestner expressed trepidation about managing that amount of money when she turned forty.[118] Undoubtedly informed by this view, Bernstein exercised the authority granted to him as trustee under New York law to "decant" the trust assets into a further trust that did not terminate at Kaestner's fortieth birthday.[119]

During the years 2005 through 2008 inclusive, Bernstein, as trustee of Kaestner's separate share trust—The Kimberley Rice Kaestner 1992 Family Trust—paid more than $1.3 million in income tax to the State of North Carolina.[120] Bernstein filed for a refund on two grounds. He asserted first that the Due Process Clause of the Fourteenth Amendment prevented North Carolina from imposing tax on the trust's income, given that the trust's only connection with the forum state was Kaestner's residence and that she received no distributions of income from the trust during those years.[121] The trustee next argued that the Commerce Clause of Article I of the U.S. Constitution prohibited North Carolina from taxing the trust, because there was no substantial nexus between the forum jurisdiction and the taxed entity (i.e., the trust).[122]

The Superior Court of North Carolina, Wake County, granted the trustee's motion for summary judgment.[123] The Superior Court reasoned that the North Carolina taxing statute violated both the Due Process Clause, because the trustee lacked the necessary minimum contacts in the state,[124]

Super. Ct. Apr. 23, 2015), 2012 WL 12282023 [hereinafter Kaestner Deposition], *aff'd*, 789 S.E. 645 (N.C. Ct. App. 2016), *aff'd* 814 S.E.2d 43 (N.C. 2018), *aff'd* 139 S. Ct. 2213 (2019).

[117] *Id.*

[118] *Id.* ("[My father and I] had several discussions, and I felt nervous about being given that sum of money and unsure as to whether I would do a good job with that money.").

[119] *See* Bernstein Deposition, *supra* note 115, at 96. The basic theory behind decanting is that if a trustee had sole and absolute discretion to pay all of the trust assets to a trust beneficiary, transferring them to a trust for the same beneficiary is an exercise of a lesser included power. For a general introduction to the topic of decanting, the details of which are beyond the scope of this article, *see, e.g.*, William R. Culp & Briani Bennett Mellen, *Trust Decanting: An Overview and Introduction to Creative Planning Opportunities*, 45 REAL PROP. TR. & EST. L.J. 1 (2010); Ronald R. Volkmer, *Common Law Trust Decanting*, 41 EST. PLAN. 43 (2014). For a comprehensive overview of the tax consequences of decanting, including potential gift and estate tax consequences to a beneficiary, *see* Diana S.C. Zeydel & Jonathan G. Blattmachr, *Tax Effects of Decanting—Obtaining and Preserving the Benefits*, 111 J. TAX'N 288 (2009).

[120] *See, e.g.*, Complaint, *supra* note 107, at ¶¶ 24–25.

[121] *See* U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"). Complaint, *supra* note 107, at ¶¶ 5–6.

[122] Complaint, *supra* note 107, at ¶¶ 37–38. *See* U.S. CONST. art. I, § 8, cl. 3 (reserving to Congress the sole power to regulate commerce among the states).

[123] Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, No. 12-CVS-8740, 2015 WL 1880607, at *1–2 (N.C. Super. Ct. Apr. 23, 2015), *aff'd*, 789 S.E. 645 (N.C. Ct. App. 2016), *aff'd* 814 S.E.2d 43 (N.C. 2018), *aff'd* 139 S. Ct. 2213 (2019).

[124] *Id.* at *17–21.

and the Commerce Clause, because the state did not have a "substantial nexus" with the trust that was "fairly related" to any services the state provided.[125]

On appeal, the Court of Appeals of North Carolina affirmed the trial court's grant of the trustee's motion for summary judgment, on the grounds that the trust did not have minimum contacts with the state, given that no trust administration took place in the state, no trust property was located in the state, the trustee was not a domiciliary or resident of the state, and the beneficiary received no distributions of income while in the state.[126] Having decided the case on due process grounds, the Court of Appeals did not reach the Commerce Clause issue.[127]

Although the State of North Carolina lost its case at both the trial court and appellate levels, it appealed to the North Carolina Supreme Court. The state Supreme Court affirmed the decision of the lower courts, again citing the lack of minimum contacts between the state and the trust.[128] The North Carolina Department of Revenue then appealed to the Supreme Court of the United States.[129]

B. *The Supreme Court's Due Process Jurisprudence*

The issue in *Kaestner Trust* as framed by the Supreme Court was whether North Carolina's imposition of tax on trust income that is for the "benefit of" a North Carolina resident violates the Due Process Clause of the Fourteenth Amendment.[130] The Court held that the North Carolina statute did violate the Due Process Clause in this case, on the grounds that Kaestner did not have "some degree of possession, control, or enjoyment of the trust property or a right to receive that property."[131] The Court also

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[125] *Id.* at *26–32.

[126] Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, 789 S.E. 645, 648-51 (N.C. Ct. App. 2016), *aff'd* 814 S.E.2d 43 (N.C. 2018), *aff'd* 139 S. Ct. 2213 (2019).

[127] *Id.* at 651.

[128] Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, 814 S.E.2d 43, 51 (N.C. 2018), *aff'd* 139 S. Ct. 2213 (2019) ("For taxation of a foreign trust to satisfy the due process guarantee of the Fourteenth Amendment and the similar pledge in Article I, Section 19 of our state constitution, the trust must have some minimum contacts with the State of North Carolina such that the trust enjoys the benefits and protections of the State. When, as here, the income of a foreign trust is subject to taxation solely based on its beneficiaries' availing themselves of the benefits of our economy and the protections afforded by our laws, those guarantees are violated.").

[129] Various amici had filed briefs in favor of Petitioner, the North Carolina Department of Revenue. The docket shows a total of fourteen amicus briefs filed: three in support of the Petitioner, the North Carolina Department of Revenue; nine in support of Respondent, the Trustee of The Kimberley Rice Kaestner 1992 Family Trust; and two neutral briefs. N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr., 139 S. Ct. 2213 (2019).

[130] *Id.* at 2217 (quoting N.C. GEN. STAT. ANN. §§ 105–160.2 (2017)).

[131] *Id.* at 2222.

rejected the argument advanced by North Carolina that if the state could not tax trusts based solely on the beneficiary's residence there, all state tax systems would be undermined, pointing out that "North Carolina is one of a small handful of States that rely on beneficiary residence as a sole basis for trust taxation, and one of an even smaller number that will rely on the residence of beneficiaries regardless of whether the beneficiary is certain to receive trust assets."[132]

Shortly after the North Carolina Supreme Court issued its opinion in *Kaestner Trust*, but before the U.S. Supreme Court heard oral arguments in the case, the Court had issued a landmark ruling in *South Dakota v. Wayfair*, which upheld a state income tax imposed on certain out of state retailers that lacked a physical presence in the state.[133] In doing so, the Court partially overruled its prior decision in *Quill Corp. v. North Dakota*.[134] For that reason, some commentators speculated that the Court might be inclined to apply a "no trust presence required" analysis in *Kaestner Trust*.[135] But *Wayfair* was decided under the Commerce Clause, not the Due Process Clause (the basis for the *Kaestner Trust* challenge to the North Carolina tax), so the *Wayfair* analysis did not apply to *Kaestner Trust*.[136]

In deciding in favor of the trustee in *Kaestner Trust*, the Court instead relied on its earlier due process analysis in *Quill,* which was not overruled by *Wayfair*, to require a two-step test. First, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[137] Second, the income taxable to the state must be "rationally related to the 'value connected with the taxing State.'"[138] In evaluating the first part of the test—the minimum connection—Justice Sotomayor, writing for a unanimous Court, applied the "minimum contacts" test of *International Shoe*.[139] The Court reasoned that

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[132] *Id.* at 2225 ("[T]he State argues that ruling in favor of the Trust will undermine numerous state taxation regimes. Today's ruling will have no such sweeping effect. North Carolina is one of a small handful of states that rely on the residency of beneficiaries regardless of whether the beneficiary is certain to receive trust assets.") (citation omitted).

[133] South Dakota v. Wayfair, Inc., 138 S. Ct. 2080 (2018).

[134] Quill Corp. v. North Dakota, 504 U.S. 298 (1992) (finding under Commerce Clause that a state must have a "substantial nexus" in order to impose sales and use tax on out of retailer, and that nexus not satisfied where the company had no sales representatives or stores in the jurisdiction), *overruled in part by Wayfair*, 138 S. Ct. at 2080.

[135] *See, e.g.*, Daniel Mudd, *I've Got Trust Issues—Are Nonresident Trusts the New Nexus Fight*, 28 J. MULTISTATE TAX'N 35, 37 (2018).

[136] *Wayfair*, 138 S. Ct. at 2091.

[137] *Id.* at 2220 (citing *Quill*, 504 U.S. at 308) (internal quotations omitted).

[138] *Id.* (citing *Quill*, 504 U.S. at 308).

[139] *Id.* at 2220. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (finding that defendant must have "certain minimum contacts" with the State so that subjecting the

the test was not satisfied in this case for multiple reasons. Justice Sotomayor cited the facts that the trustee resided out of state, the trust records and assets were maintained out of state, no trust property was held in the state, the trust grantor never resided in North Carolina, trust income was not distributed to any beneficiary in North Carolina, and the beneficiaries had "no right to demand income and are uncertain to ever receive it."[140] The beneficiaries simply lived in North Carolina, and residency alone does not constitute "minimum contacts," Justice Sotomayor reasoned.[141]

In its opinion, the Court distinguished this case from those involving trusts that make income distributions to beneficiaries located in the state, have a resident trustee, hold assets in the state, or conduct trust administration in the state.[142] The concurring opinion written by Justice Alito, and joined by Justice Roberts and Justice Gorsuch, discussed two cases (also cited in the unanimous opinion) that rejected as unconstitutional attempts by the Commonwealth of Virginia to impose a tax on undistributed trust assets to which the beneficiaries were not entitled, and where the trust otherwise had no connection to Virginia.[143] For Justice Alito, these cases were outcome-determinative, and the Court's failure to consider other factual scenarios was not an invitation to "open for reconsideration any points resolved by our prior decisions."[144] To the casual reader, it would appear that the Court considered this to be a relatively easy case, and that the Court believes that it has provided adequate guidance on most questions involving the state income taxation of trusts.

Before the oral argument in *Kaestner Trust*, in an essay published in the *UCLA Law Review Discourse*, Professor Michelle Simon and I accurately predicted how the Court would rule, and that the Court would base its decision on the determination that an in-state beneficiary's residence, without other connections between the trust and the taxing jurisdiction, does not satisfy the "minimum contacts" test of *International Shoe*.[145] What we did not predict was the strong reaction from academics

defendant to jurisdiction in the state "does not offend 'traditional notions of fair play and substantial justice.'").

140 *Wayfair*, 138 S. Ct. at 2221.

141 *Id.* at 2220–21.

142 *Id.* at 2220 (citing Hanson v. Denkla, 357 U.S. 235 (1958); Greenough v. Tax Assessors of Newport, 331 U.S. 486 (1947); Curry v. McCanless, 307 U.S. 357 (1939); Maguire v. Trefry, 253 U.S. 12 (1920)).

143 *Id.* at 2227–28 (Alito, J., concurring) (citing Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U.S. 83 (1929) and Brooke v. Norfolk, 277 U.S. 27 (1928)).

144 *See supra* note 20 and accompanying text.

145 Bridget J. Crawford & Michelle S. Simon, *The Supreme Court, Due Process and*

who felt that the Court had either missed an opportunity to minimize strategic tax planning by wealthy individuals or that the Court fundamentally misunderstands how family trusts operate. The next Part engages with those reactions and suggests that they are grounded more squarely in notions of fair play—and an intellectual tradition critical of wealth inequality[146]—than legal rules of civil procedure or substantive doctrine governing trusts or taxation.

IV. TRUST CRITIQUES

Undoubtedly, there will be much written in the coming months and years about the Court's decision in *Kaestner Trust*.[147] Two national colleagues, Professor Carla Spivack and Professor Daniel Hemel, were among the first to publish essays after the Court issued its opinion on June 21, 2019. Spivack and Hemel already were familiar with the case; they were among several law professors who signed (or had a role in drafting and signed) one of the fourteen amici briefs submitted to the Court in *Kaestner Trust*.[148] Spivack joined one brief in favor of the Petitioner, the North Carolina Department of Revenue.[149] Hemel co-wrote and signed a

State Income Taxation of Trusts, 67 UCLA L. REV. DISCOURSE 2, 12–17 (2019) (accurately predicting, prior to the date that the Court heard oral arguments in *Kaestner Trust*, that the Court would rule in favor of the trustee and explaining the reasons the Court would do so). We acknowledge in our essay that the lack of uniformity in state income tax laws makes it possible, even in states that impose income tax on trusts, for some trusts to avoid income taxation altogether, and so those states might want to adopt so-called "throw-back" tax rules to recapture income attributable to the time period that a beneficiary lived in the jurisdiction, but did not receive until after moving out of the state. *Id.* at 17.

146 *See generally* PIKETTY, *supra* note 38. I use the term "critical" here in the dictionary sense of tending to criticize, as opposed to referring to an intellectual tradition of trust scholarship in the tradition of Critical Legal Studies, Feminist Legal Theory, Critical Race Theory, or Critical Tax Theory, for example. *See Critical*, MERRIAM-WEBSTER DICTIONARY (2019). *See also* Bridget J. Crawford & Anthony C. Infanti, *A Critical Research Agenda for Wills, Trusts, and Estates*, 49 REAL PROP. TR. & EST. L.J. 317, 318 (2014) (defining critical trusts and estates scholarship as concerned with "examining why the law has developed in the way it has and considering what impact the law has on historically disempowered groups such as people of color; women of all colors; lesbian, gay, bisexual, and transgender individuals; low-income and poor individuals; the disabled; and nontraditional families").

147 The Supreme Court does not take many estate and gift tax cases, so lawyers and professors who specialize in this area are usually enthusiastic about writing about them when opportunities arise. *See, e.g.*, Bridget J. Crawford, *Foreword – The Supreme Court's Estate Planning Jurisprudence*, 42 ACTEC L.J. 1, 1 (2016) (describing "overwhelmingly positive" and "rapid" response to a call for contributions to an issue of the American College of Trust and Estate Counsel Law Journal devoted to the role of the Supreme Court in the "development of contemporary estate planning practice").

148 *See supra* note 129.

149 Brief for Law Professors John V. Orth et al. as Amicus Curiae Supporting Petitioner, N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr., 139 S. Ct. 2213 (2019) (listing as additional amici Kent D. Schenkel, Carla Spivack and Danaya C. Wright).

separate brief, also in support of the Petitioner.[150]

In highlighting the commentaries of Spivack and Hemel, the aim in this Part is not to undertake a point-by-point analysis of perceived substantive errors or misperceptions in their particular analyses; reasonable minds disagree about multiple issues in the case.[151] Rather, the essays of Spivack and Hemel are significant because they raise larger concerns that help frame new discussions of wealth inequality. This Part locates the authors' specific discussions of the *Kaestner Trust* case in the growing body of critical academic analysis of family trusts generally. Taken in aggregate, the critiques can serve as a springboard for imagining a dramatically different legal approach to trusts, and one that could reduce the wealth gap.

A. *The Liberal Property Approach*

Consider first Professor Spivack's essay "Due Process, State Taxation of Trusts and the Myth of the Powerless Beneficiary: A Response to Bridget Crawford and Michelle Simon."[152] Spivack writes that *Kaestner Trust* is "a rare opportunity for the Court to address the tax inequity that allows the wealthy to accumulate assets tax free and in so doing, force those with less to make up the difference and deplete the public fisc. It offers a rare opportunity for the Court to see through the trust's sleight of hand."[153] Spivack's essay responds to the arguments in favor of the trustee, not the Court's actual decision. (Spivack wrote her essay before—but the journal published it after—the Court issued its ruling).[154] In her focus on the details of the *Kaestner Trust* case, Spivack makes three larger contributions to the conceptual conversation about trusts.

[150] Brief for Tax Law Professors as Amici Curiae Supporting Petitioner, N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr., 139 S. Ct. 2213 (2019) (listing as amici Daniel Hemel, Brian Galle, David Gamage, Michael Knoll, Ruth Mason, and Adam Thimmesch).

[151] As evidence that thoughtful lawyers disagree about many issues in the *Kaestner Trust* case, consider the multiple amici briefs submitted in the case. *See supra* notes 148–150 and accompanying text. In my view, the analyses in the briefs submitted on behalf of the Petitioner, the North Carolina Department of Revenue, as well as subsequent analyses by Spivack and Hemel, are substantively flawed on many levels. What I see as errors and misapplication of the law (but Spivack and Hemel do not) can be addressed in future dialogue, if we choose. The aim here, however, is to engage with the themes in these critiques and to explore how they can contribute to a more focused discussion about the relationship of trusts and wealth inequality. *See infra* Part IV.A.

[152] Carla Spivack, *Due Process, State Taxation of Trusts and the Myth of the Powerless Beneficiary: A Response to Bridget Crawford and Michelle Simon*, 67 UCLA L. REV. DISC. 46 (2019).

[153] *Id.* at 68–69.

[154] Email from Carla Spivack to Bridget Crawford (July 24, 2019 16:53 EDT) (on file with author).

First, Spivack's analysis proceeds from a liberal private property perspective, and that leads her to particular results in the trust context. In the words of U.K. scholar Johanna Jacques, the liberal private property view treats property as "primarily about *persons* and their interests, things playing merely a secondary role."[155] That is, property exists only in relationship to a person who has or seeks ownership and the "wedge" that the trust places between a trust's beneficiaries and the trust property has little or no independent significance.[156]

In Spivack's liberal approach to private property, there is little (if any) room for trusts. She decries the focus on the state's jurisdiction over the trust as a "red herring," because the trust, in her view, is *not* subject to taxation: "what is being taxed is the beneficiary's share of trust income—thus, the beneficiary."[157] Spivack assumes that the beneficiary must (and should) be treated as the owner of the trust property for income tax purposes, even if no income is distributed out to her. The trust property cannot belong to the trustee, because the trustee "by definition is barred from enjoying any beneficial interest in the trust property—the only person who may receive beneficial interest is the beneficiary."[158] In Spivack's world, if the trust property does not belong legally to the grantor, and cannot belong beneficially to the trustee, then it must belong for income tax purposes to the beneficiary.[159] This is not, however, the way that any of the

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155 Jacques, *supra* note 8, at 202 (emphasis in the original).

156 Jacques, *supra* note 8, at 202, 204 (describing the underlying premise of the liberal view of property as "the whole purpose of property is to provide and justify control by persons over things").

157 Spivack, *supra* note 152, at 50.

158 *Id.* ("Taxing the beneficiary in this case is entirely consistent with the basic principle of tax law that a person who controls and receives benefit from income should pay taxes on it.").

159 Spivack cites tax law in support of this either/or proposition. Spivack, *supra* note 152, at 61 ("Tax law also supports the conclusion that the beneficiary here had sufficient power over her share of trust income to be considered in control of it for tax purposes. . . . [I]f the trust instructs the trust to distribute funds to a beneficiary for her 'health education and welfare,' the gift is considered complete because the beneficiary can successfully force a distribution that falls within that standard."). It is axiomatic, however, that different rules apply for income, estate and gift tax purposes. The existence of an ascertainable standard in a trust causes a transfer to a trust to be treated as complete for *gift* tax purposes in those cases where the *grantor* is also the trustee. *See* 26 U.S.C. § 2511 (2018), Treas. Reg. § 25.2511-1(g)(2), § 25.2511-2(e) (2018) (emphasis added). The ascertainable standard also will cause the gift to be treated as complete for *income* tax purposes, where the grantor is acting as trustee, causing beneficiary to be taxed on the trust income. 26 U.S.C. § 674(b)(5)(A). In *Kaestner Trust*, the grantor was not acting as trustee, however. The gift was complete for *estate* tax purposes because the trust was irrevocable and the grantor retained no "strings" over the trust property. *See* 26 U.S.C. §§ 2036–2038. Generally speaking, the trust pays tax on accumulated trust income; the beneficiaries pay tax on distributed and distributable trust income. 26 U.S.C. §§ 641(b) (taxable income of trust shall be paid by fiduciary unless otherwise provided); 652 (inclusion of amounts in gross

fifty states actually tax trust income.[160]

Flowing from Spivack's liberal conception of property rights, her second important contribution to the discussion of trusts is her treatment of the split of legal and equitable title in family trusts as a mere formality, because "the reality in most family trusts like the one here is the sole purpose is to benefit the beneficiary, who is usually a child or grandchild of the grantor."[161] It is not obvious, however, why having a family member as a trust beneficiary nullifies any legal ownership or duties of the trustee. The beneficiaries' rights that Spivack references (the right to be considered for an exercise of discretion, the right to demand an accounting, and the right to bring legal claims against the trustee) do not depend on or arise from the beneficiaries' being strangers to the grantor. The rights exist because of the title split, the legal relationship between the trustee and the beneficiaries. It seems circular to cite the beneficiary's informal exercise of one of her rights (Kaestner's "complaining about the trust's large legal expenses") as evidence that the beneficiary was so deeply enmeshed in trust management that she should be treated as the owner of the property for tax purposes.[162] True, Kaestner could (and did) borrow against trust property.[163] But loans are not income for tax purposes because they are offset by corresponding obligations to repay.[164] Only if one believes that the split between legal and equitable title is a mere formality, a sham, does one conclude that Kaestner would receive any property she requested from the trust and should be treated as its present owner for income tax purposes.[165]

Spivack's third major contribution to the discussion of trusts is her construction of existing state tax laws as having present authority to impose a tax on undistributed trust income, solely on the basis of a beneficiary's residence in a jurisdiction.[166] This view is a sort of variation on general

income of beneficiaries of trusts distributing current income); 662 (inclusion of amounts in gross income of beneficiaries of trusts with distributable income). But the grantor may specifically design the trust instrument to cause the trust income to be taxable to the grantor. 26 U.S.C. §§ 671–684 (situations in which grantor or others will be treated as owner of trust income for income tax purposes).

160 *See, e.g.*, NENNO, *supra* note 101.

161 Spivack, *supra* note 152, at 49 (referring to the "myth of the powerless beneficiary").

162 Spivack, *supra* note 152, at 69.

163 Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue, No. 12-CVS-8740, 2015 WL 1880607, at *2 (N.C. Super. Ct. 2015).

164 *See, e.g.*, Cmm'r of Internal Revenue v. Indianapolis Power & Light Co., 493 U.S. 203, 207–08 (1990) (citing basic principle of taxation that the "receipt of a loan is not income").

165 Spivack, *supra* note 152, at 69 ("the record makes clear that Kimberley Kaestner understood she had access to the assets in the trust if she wanted them, for charitable or other purposes").

166 Spivack, *supra* note 152, at 49 (urging the Supreme Court to "respect state taxing

jurisdiction jurisprudence: the determination that a person is domiciled in a state will mean that she and any property held in a family trust for her benefit will be subject to all of the state's laws (including its tax laws).[167] Spivack's construction of the tax law—although magical thinking, insofar as it is inconsistent with any actual state law[168]—flows directly from her broad concept of what it means to "benefit" from a trust. She focuses on a beneficiary's "property power," defined as the beneficiary's "chance to make choices and take opportunities that are unavailable to other people."[169] She goes on to say that Kaestner's property power allowed her "to make different life choices," such as not saving for "retirement, college tuition, illness, or job loss."[170]

And, in the event that property power is not a convincing enough basis for the imposition of tax on a beneficiary with undistributed trust income, Spivack also cites as evidence that Kaestner should be subject to income tax Kaestner's alleged "power to decline distributions,"[171] the fact that "[she] lived off the trust assets indirectly" while in North Carolina,[172] that she paid in-state tuition at a state university, and that she benefited from the state's roads, police, and emergency response systems.[173] If these

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authority").

[167] For a discussion of the difference between general jurisdiction and specific jurisdiction, *see* Crawford & Simon, *supra* note 145, at 14. *See also* Philip S. Goldberg et al., *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 DUKE J. CONST. L. & PUB. POL'Y 51 (2019); Todd David Peterson, *Categorical Confusion in Personal Jurisdiction Law*, 76 WASH. & LEE L. REV. 655 (2019).

[168] *See, e.g.*, NENNO, *supra* note 101.

[169] Spivack, *supra* note 152, at 49.

[170] Spivack, *supra* note 152, at 62 (drawing on Justice Kagan's line of questioning at oral argument).

[171] Spivack, *supra* note 152, at 51. Spivack does not cite to a particular source for this claim, but it may be that she is referring to Kaestner's desire that the trust not terminate on her fortieth birthday. *See supra* notes 118–119 and accompanying text. The New York decanting statute specifically grants to the invaded trust's beneficiaries the right to receive notice of the trustee's exercising of a decanting power and standing to object to the decanting. N.Y. EST. POWERS & TR. LAW § 10-6.6 (McKinney 2017). Therefore, in most cases involving a competent beneficiary, it does not seem unreasonable for a trustee to discuss any decanting plans with the beneficiary and to consider any views expressed by the beneficiary, if for no reason other than to prepare for any possible objections. *See generally* Mark S. Poker & Amy S. Kiiskila, *Prevention and Resolution of Trust and Estate Controversies*, 33 ACTEC J. 262 (2008) (describing strategies for fiduciary administration of trust and estates in a way that will minimize controversies with beneficiaries).

[172] Spivack, *supra* note 152, at 57. Spivack seems to support this claim of indirect profit from the trust assets because "the record contains no evidence" that Kaestner "worked at all." *Id.* Even if Kaestner was not formally employed, her household may have had other income (i.e., her husband's wealth or salary). Furthermore, Kaestner did invest in some sort of commercial venture involving vanilla. Bernstein Deposition, *supra* note 115, at *100. Whether it is fair to say that Kaestner herself, or the Kaestner household, did not contribute to the North Carolina economy, then, is unclear. *See id.*

[173] Spivack, *supra* note 152, at 62–63.

facts, taken together, were enough to cause Kaestner to be deemed a recipient of income from her trust, as Spivack believes they do, then North Carolina's would be able to tax the value of those "distributions."[174]

There are multiple doctrinal obstacles to using either "property power" or the other referenced benefits as grounds for taxing a beneficiary like Kaestner, however. First, the actual state law definition of trust income is narrow.[175] "Income" for purposes of North Carolina trust law is "money or property" received by a fiduciary as "current return from a principal asset."[176] Property power—defined as the "chance to make choices"—and the ability to use roads or receive in-state tuition are not susceptible to entrustment and thus could not give rise to trust income.[177]

Second, generally speaking the law does not tax a financially privileged person's "ability to make choices" just because she has them and a less privileged person does not. This makes common sense. It is not obvious that Kaestner's learning, at age thirty-seven, that she was the discretionary beneficiary of a thirteen million dollar trust caused her to make qualitatively different life choices (and there is no evidence to support such an assertion in this case).[178] Even assuming that Kaestner had made certain financially-informed "life choices," how might one begin to parse which of these were attributable to her specific knowledge that she was the discretionary beneficiary of this particular trust (and thus she should be taxed on its undistributed trust income)? Kaestner's decisions might have been motivated instead by general hopes and beliefs (if she had them) that she could rely on her father for lifetime gifts to meet her needs for tuition and illness-related expenses.[179] Existing law does not tax the adult (or minor) children of wealthy individuals simply because they have more life choices than others do. This is akin to the law's egalitarian income treatment of taxpayers without regard to their educational backgrounds. That is, the law does not impose an income tax on someone who receives her degree at an elite institution as opposed to a community

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174 *See generally* Maguire, *supra* note 142, at 16–17 (state taxation of actual distribution of trust income is valid as a matter of due process).

175 *See* N.C. GEN. STAT. ANN. § 37A-1-102(4) (West 2018) (adopting Uniform Principal and Income Act, including definition of trust income as "money or property that a fiduciary receives as current return from a principal asset").

176 *Id.*

177 *See supra* notes 169–170 and accompanying text (defining "property power").

178 *See supra* note 116 and accompanying text.

179 Such direct payments of tuition or medical expenses would, in fact, be consistent with sound estate planning, insofar as the transfers are not subject to the gift tax under 26 U.S.C. § 2503(e) (excluding from definition of taxable gifts transfer that otherwise meet the requirements of a "qualified transfer" to certain educational institutions or as payment for medical care). *See also* Treas. Reg. § 25.2503-6 (2018) (further defining "qualified transfer" for purposes of IRC § 2503).

college, for example, even though the former likely will have more (or more lucrative) employment choices than will the latter.[180] Freedom and choice—a kind of subjective mental state combined with actual or perceived personal well-being or comfort—are not generally subject to income taxation.[181]

A third challenge to Spivack's expansive approach to taxation is the "minimum contacts" standard of *International Shoe*, which suggests that "traditional notions of fair play and substantial justice" would not be met by a beneficiary's use of roads and the potential availability to her of public safety and health services.[182] Otherwise, even the casual out-of-state traveler driving on North Carolina roads could expect to owe income tax on the fraction of her salary from employment, say, that accrues while the traveler uses a vacation day to travel through North Carolina to the state of her final destination. So Spivack's expansive definition of trust income is untethered from the actual statutes, case law, or precedent. Even so, the conceptual possibility that a broader range of benefits could be defined as trust income forces any dialogue about trusts and taxation to confront the questions about the purpose and implementation of any state income tax regime.

B. *The Institutional Approach*

Like Professor Spivack, Professor Hemel is skeptical that family trusts are truly arm's length arrangements. But where Spivack sees a Court that is duped by trusts' "sleight of hand,"[183] Hemel sees a Court that knows exactly what it is doing in declaring North Carolina's tax unconstitutional in *Kaestner Trust*.[184] In an essay published the day after the Court's

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[180] *See generally, e.g.*, Kathleen Elkins, *The 25 Colleges Where Students Go On to Earn the Most Money*, CNBC (May 1, 2018), https://www.cnbc.com/2018/05/01/the-colleges-where-students-go-on-to-earn-the-most-money.html (listing among schools that produce highest-earning graduates the Massachusetts Institute of Technology, Harvard University, Georgetown and Stanford University); Nick Morrison, *World Rankings Show the Best Universities for Getting a Job*, FORBES (Nov. 23, 2016, 6:16 AM), https://www.forbes.com/sites/nickmorrison/2016/11/23/world-rankings-show-the-best-universities-for-getting-a-job/#3829dfc74879 (evaluating employment statistics from 300 universities and listing among schools whose graduates are most "appealing" to employers as Stanford University, the Massachusetts Institute of Technology, Columbia University and Princeton University).

[181] *See, e.g.*, Anthony C. Infanti, *Tax ~~Equity~~*, 55 BUFF. L. REV. 1191, 1238 (2008) (explaining in discussion of social stigmas against LGBT individuals and associated emotional or mental stress or disorders, "as a natural corollary of its inability to account for 'psychic' income, the income tax does not allow for any sort of a 'psychic' deduction to account for the negative mental health effects of discrimination").

[182] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[183] *See* Spivack *supra* note 152, at 68–69.

[184] N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr., 139 S. Ct. 2213 (2019). *See* Daniel Hemel, *A Constitutional Right to Skirt State Income Tax?*, MEDIUM

decision, Hemel quipped, "It's a pity that Supreme Court opinions don't come with emojis, because this [opinion] just calls out for the winking face."[185] He criticizes Justice Sotomayor's opinion for overreliance on the trustee's discretion, pointing, as Spivack does, to the grantor's direction that the trustee should treat the trust as a "family asset," and make trust distributions for the beneficiaries' milestone expenses like education, a home purchase, and starting a business.[186] Hemel calls Sotomayor's reasoning "formalism at its acme," because "we all know" that the trustee will make whatever distributions the grantor and the beneficiaries want.[187]

Unlike Spivack, Hemel focuses on the decision itself to raise questions pertinent to fundamental constitutional doctrine—the "institution" of constitutional law—as well as the larger tax law structure—the "institution" of tax administration. For example, Hemel rhetorically questions who (or what) suffers from a violation of the Due Process Clause if North Carolina imposes a tax solely on the basis of a trust beneficiary's in-state residence: "Who exactly is suffering the due process violation here? The court doesn't bother to say."[188] Pregnant in this question is the possibility that Hemel suspects that trusts do not have due process rights, or, if they do, those rights are somehow different (if not less than) the due process rights afforded to individuals or corporations.[189] If so, that would represent a substantial development in constitutional law doctrine,[190] and

(June 22, 2019), https://medium.com/whatever-source-derived/a-constitutional-right-to-skirt-state-income-tax-605dc8c42fbc.

185 Hemel, *supra* note 184.

186 *See supra* note 113 and accompanying text.

187 Hemel, *supra* note 184.

188 *Id.* Later in the essay, Hemel asks whether the due process rights belong to the trustee or the beneficiaries. *Id.* This seems to be a distinction without a difference. *Compare* Bridget J. Crawford (@ProfBCrawford), TWITTER (June 21, 2019, 1:28 PM), https://twitter.com/ProfBCrawford/status/1142167341352062982 ("State tax laws must meet the requirements of the Due Process Clause of the 14th Amendment. Who was North Carolina trying to tax? The trust. Non-grantor irrevocable trusts are distinct taxpaying entities for state and fed purposes. No news there.") *with* Daniel J. Hemel (@DanielJHemel), TWITTER (June 21, 2019, 1:37 PM) https://twitter.com/DanielJHemel/status/1142169768499306497 ("So it was the irrevocable trust's due process rights that were being violated? (The fact that they are distinct taxpaying entities is not the same as saying they are persons for purposes of the due process clause.)") *and* Bridget J. Crawford (@ProfBCrawford), TWITTER (June 21, 2019, 1:41PM), https://twitter.com/ProfBCrawford/status/1142170727002624000 ("'Person' vs non-person does no work in this argument. Is there a sufficient degree of enjoyment, etc. by beneficiary to permit trust to be taxed? The system must meet requirements of due process. Any person or entity subject to taxation has right to due process.")

189 An individual defendant domiciled in a state can be haled into courts there. *See generally* Daimler AG v. Bauman, 571 U.S. 117 (2014). A corporate defendant incorporated in a state or doing business in that state are subject to the jurisdiction of courts there, too. *See generally id.*

190 *See, e.g.,* United States v. Morrison, 596 F. Supp. 2d 661 (E.D.N.Y. 2009)

Hemel rightfully wishes the court had been clearer on this point.

Hemel's general skepticism about family trusts leads to bleak predictions about the impacts of the Court's decision. He forecasts that states that presently do impose income tax on trusts will need to experiment with a variety of tax options, such as new gift taxes or an imperfect throw-back tax on trust income.[191] Hemel's concerns about the tax landscape are grounded in the practical (he touches on the complexity of a throw-back tax). He further warns that Sotomayor's opinion provides a blueprint for future strategic behavior by taxpayers:

> If you're a rich person in a high-tax state, the path forward is quite clear. Transfer income-generating assets to an irrevocable trust in a state that does not tax trust income on the basis of trustee residence or place of administration. . . . [I]ncome generated by the trust now lies beyond the reach of tax authorities in your home state. Choose a reputable trustee and give her nominal discretion over the timing of distributions. . . . [T]he income generated by the trust lies beyond the reach of tax authorities in your beneficiary's home state too.[192]

Practically speaking, however, the nature of the federal system is that each state is free to structure its laws, including its tax laws, in any way that it chooses, as long as those laws do not conflict with the U.S. Constitution.[193] In such a system, it is inevitable that wealthy (and even less wealthy) individuals will exploit differences in state tax laws so as to minimize, or even avoid, taxation.[194] There seems to be a general tolerance for taxpayers

(recognizing due process rights for an individual in state taxation matter); Borden Chemicals and Plastics, L.P. v. Zehnder, 726 N.E.2d 73 (Ill. App. 2000) (recognizing due process rights for a partnership's out-of-state partner in a state taxation matters); Dept. of Revenue v. GAP (Apparel), Inc., 886 So. 2d 459 (La. Ct. App. 2004) (recognizing due process rights for an intangible holding company in a state taxation matters); Am. Chicle Co. v. State Tax Comm'n, 11 A.D.2d 256 (N.Y. App. Div. 1960) (recognizing due process rights of a corporation in a state taxation matter).

191 Hemel, *supra* note 184.

192 *Id.*

193 *See, e.g.,* Bell's Gap R.R. Co. v. Pennsylvania, 134 U.S. 232, 237 (1890) (Nothing prevents a state "from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all . . . All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution."). *See also* Gerald L. Neuman, *Equal Protection, "General Equality" and Economic Discrimination from a U.S. Perspective*, 5 COLUM. J. EUR. L. 281, 300–08 (1999) (discussing constitutional limitations on differences in U.S. state tax systems).

194 Tax-motivated domicile changes are the topic of many publicly available articles written for the general public. *See, e.g.*, Julie Garber, *5 Good Reason to Become a Florida Resident*, BALANCE (May 20, 2019), https://www.thebalance.com/top-reasons-to-become-a-florida-resident-3505072 (stating that combined state income tax and estate tax rates "can provide a huge incentive for individuals to look for a more desirable and less taxing place to

who cross state lines to buy tax-free liquor, for example,[195] and those retirees who move to states with low (or no) income or estate taxes.[196] What is important about Hemel's contribution, then, is that it provides an example of the strong negative reaction to similar tax-motivated behavior, when undertaken by wealthy individuals who create family trusts.[197] The strength of that reaction suggests an underlying moral or philosophical dimension to the critique.[198] Tax and trust scholars may turn more explicitly to moral and philosophical concerns in future work.[199]

Hemel ends his essay with distinct awareness of the expressive value of Supreme Court opinions. He describes *Kaestner Trust* as a ruling that will cause more than lost revenue for North Carolina and other states:

> Will [*Kaestner Trust*] go down as part of the anti-canon of the worst Supreme Court decisions ever? Of course not. But when the history of our second Gilded Age is written, *Kaestner* will warrant a plaintive footnote—an illustration that in an era of already-too-wide wealth inequality, concerns about high-end tax

call home like Florida," and explaining that Florida has no income tax, no estate tax and a generous homestead exemption").

[195] *See, e.g.*, Kara Newman, *How New Hampshire's Liquor Stores Became Must-Visit Travel Destinations*, SEVEN FIFTY DAILY (Dec. 18, 2017), https://daily.sevenfifty.com/how-new-hampshires-liquor-stores-became-must-visit-travel-destinations/ ("New Hampshire is also the only control state that operates liquor stores—and sells that liquor tax free. That means that New Hampshire draws a significant amount of out-of-state business. It's an unusual business model. More than half of sales at these gargantuan retailers comes from out-of-state-customers. . . .").

[196] *Compare, e.g.*, Sandra Block et al., *10 Most Tax-Friendly States for Retirees, 2018*, KIPLINGER (Nov. 29, 2018), https://www.kiplinger.com/slideshow/retirement/T037-S001-10-most-tax-friendly-states-for-retirees-2018/index.html (ranking Alaska as the most "tax-friendly state" for retirees because of absence of state income tax and estate tax and low state and local sales tax rates), *with The Top 10 Most Tax-Friendly States for Retirement*, RETIREMENT LIVING (Jan. 30, 2019), https://www.retirementliving.com/top-10-most-tax-friendly-states (ranking Wyoming as the most "tax-friendly state" for retirees because of the absence of state income and estate tax, low state and local sales tax rates, and low gas tax rates).

[197] *See* Hemel, *supra* note 184.

[198] *See supra* notes 58–62 and accompanying text.

[199] For excellent extant work exploring philosophical perspectives in wealth transfers, *see, e.g.*, Jennifer Bird-Pollan, *Why Tax Wealth Transfers: A Philosophical Analysis*, 57 B.C. L. REV. 859 (2016); Jennifer Bird-Pollan, *Utilitarianism and Wealth Transfer Taxation*, 69 ARK. L. REV. 695 (2016); Jennifer Bird-Pollan, *Unseating Privilege: Rawls, Equality of Opportunity, and Wealth Transfer Taxation*, 59 WAYNE L. REV. 713 (2013); Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 ME. L. REV. 1 (2013); Miranda Perry Fleischer, *Libertarianism and the Charitable Tax Subsidies*, 56 B.C. L. REV. 1345 (2015); Miranda Perry Fleischer, *Charitable Giving and Utilitarianism: Problems and Priorities*, 89 IND. L.J. 1485 (2014); Miranda Perry Fleischer, *Theorizing the Charitable Tax Subsidies: The Role of Distributive Justice*, 87 WASH. U. L. REV. 505 (2010).

avoidance elicited from the justices little more than a shrug.[200]

The image of the justices giving "little more than a shrug" in response to behavior that helps rich people stay that way is profoundly evocative. In reading Hemel's description of the present era "our second Gilded Age," one immediately recalls that the wealth gap in 2012 was not that different from the wealth gap just before the great stock market crash in 1929, and that the wealth gap has widened since 2012.[201] Hemel appreciates both the historical context of the Court's decision and present-day wealth inequalities.[202] For both Hemel and Spivack, then, the *Kaestner Trust* decision represents the Court's missed opportunity to do justice.[203] Although neither Spivack nor Hemel implies that the judiciary should be the primary instrument for dismantling complex systems of wealth inequality, both believe that the Court has a role to play and that it failed to do its duty in this case.

C. *Themes in Critical Academic Analyses of Trusts*

Like Spivack and Hemel, most academics tend to be critical of family trusts. There seems to be a general distaste for transfers of "partial bundles of sticks" to trustees for beneficiaries who otherwise possess the full legal capacity to own property.[204] The concerns tend to cluster into three general categories: taxes, control, and accountability.

Critics' tax concerns manifest in noting that, with careful planning, legal and equitable title split might result in trust assets being subject to no income tax at all.[205] Furthermore, trusts unconstrained by the rule against perpetuities can escape the estate tax entirely.[206] This runs counter to the intuition that all property belongs to someone, and thus should be susceptible to taxation at all points in time.[207]

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200 Hemel, *supra* note 184.

201 *See supra* notes 38–39 and accompanying text.

202 *See supra* Part II.A.

203 *See* Spivack, *supra* note 152, at 68–69; Hemel, *supra* note 184 and accompanying text.

204 *See, e.g.*, Bridget J. Crawford, *Who Is Afraid of Perpetual Trusts?*, 111 MICH. L. REV. FIRST IMPRESSIONS 79, 79 (2012) ("Throw a stone into a room full of law professors, and it is virtually impossible to hit someone who will defend perpetual trusts.").

205 *See* Hemel, *supra* note 184 and accompanying text.

206 *See, e.g.*, Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1342 (2003) (explaining how perpetual trusts are not subject to estate taxation); Jeramie J. Fortenberry, *Use Dynasty Trusts for Multigenerational Wealth Transfers*, 44 EST. PLAN. 35 (2017) (providing overview of dynasty trusts). *See also* Jay A. Soled, *Reimagining the Estate Tax in the Automation Era*, 9 U.C. IRVINE L. REV. 787, 820–21 (explaining objections to so-called perpetual trusts as relating to opportunities for "taxpayer exploitation" and tax avoidance).

207 *See* Jacques, *supra* note 8 (explaining the "liberal understanding of private property" as having a political dimension, characterized by the belief that "people have an equal right

Control concerns stem from multiple aspects of substantive trust law. One strain of critique evocatively focuses on the need for time limits on "dead hand control" by a grantor long gone.[208] Some period of time in which a grantor's wishes may govern trust property seems to be acceptable. That time period typically is the common law perpetuities period that law students and scholars have come to grudgingly accept as justified (with the traditional rationale that a property owner rightfully may condition the use of property for those he knows personally—typically his children and their children—but the control must end after the infamous period of lives in being plus twenty-one years).[209]

The other strain of the control critique, raised separately or together with first, is that family trusts are somehow not "real." The argument is that any legal and equitable title split in a family trust is illusory, and the trustee is a mere (paper) figure-head who poses no meaningful obstacle to the beneficiary's enjoyment of the trust property.[210] The flipside of this critique relies on an opposite view on the trustee, one that emphasizes the trustee's power, not the trustee's *de facto* impotence when presented with the wishes of the grantor or beneficiaries.[211] Consider in particular that under a state's decanting statute, trustees may have the ability change the situs, term or beneficial interest in trusts by exercise of their decanting

to pursue their aims in life, from which follows a corresponding equal right to acquire the resources that will enable them to pursue these aims," as well as the legal dimension driven by "the right to control things in accordance with one's interests as well as the right to deny others the use of these things" in furtherance of individual autonomy).

208 *See, e.g.*, Ray Madoff, *America Builds an Aristocracy*, N.Y. TIMES (July 11, 2010), https://www.nytimes.com/2010/07/12/opinion/12madoff.html (critiquing long-term trusts as contributing to inappropriate preservation of wealth).

209 In adjudicating the dispute in the *Duke of Norfolk's Case*, (1682) 22 Eng. Rep. 931 (Ch.); 3 Chan. Cas.1, the judge recognized the right of the *pater familias* to make decisions regarding the transmission of some, all or no property rights to those he knew. *Id.* The English lawyer and judge Arthur Hobhouse, First Baron Hobhouse, famously wrote that, "A clear, obvious, natural line is drawn for us between those persons and events which the Settlor knows and sees, and those which he cannot know or see. Within the former province we may trust his natural affections and his capacity of judgment to make better dispositions than any external Law . . . ." Arthur Hobhouse, *The Devolution and Transfer of Land*, *in* THE DEAD HAND: ADDRESSES ON THE SUBJECT OF ENDOWMENTS AND SETTLEMENTS OF PROPERTY 188 (1880). For a contemporary critique of perpetual trusts, *see, e.g.*, Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149, 1160 (2011) (calling long-term trusts "loony").

210 *See, e.g.*, Cmm'r of Internal Revenue v. Indianapolis Power & Light Co., 493 U.S. 203, 207–08 (1990); Spivak *supra* note 152, at 49; Hemel, *supra* note 184 and accompanying text.

211 *See* Weisbord, *supra* note 72 (exploring the contours and limitations of a trustee's decanting powers); Alex Boni-Saenz, *Baselines in Trust Term Extensions*, 67 FLA. L. REV. F. 30 (2015) (calling trustees' exercise of decanting power to extend duration of trust "the next battleground in the rancorous war over the Rule Against Perpetuities").

powers.[212] This powerful trustee is quite the opposite of trustee-as-figurehead. In this view, the trustee plays a highly determinative role in shaping beneficial interests.[213]

Commentators' accountability concerns center on the rights of third parties. Spendthrift trusts, critics claim, allow beneficiaries to behave irresponsibly without financial consequences, because they become judgment-proof against claims by tort victims or other creditors, like divorcing spouses.[214] Critics reserve particular distaste for self-settled asset protection trusts created in U.S. jurisdictions; they do so without full practical appreciation for the attractiveness of offshore jurisdictions, not to mention potential lost tax revenue, if such trusts became unavailable in this country.[215]

One nineteenth century Pennsylvania judge opined that, "Whoever has the right to give, has the right to dispose of the same as he pleases."[216] One predicts that most academics would agree, in the sense that any individual property owner has the authority to choose the individual recipient of a post-mortem gift of a particular heirloom, for example, or that the owner could choose to destroy the heirloom during her lifetime if she so desires. But when evaluating transfers to a trust for oneself or one's family members, there is little tolerance for arrangements that result in no liability for income or estate tax,[217] limited (or no) liability for bad acts,[218] or limitations on a jurisdiction's ability to hale a trust grantor or beneficiary into court, if either of them has any contact of any level with the forum state.[219]

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212 *See, e.g.*, Weisbord, *supra* note 72, at 76.

213 *See, e.g.*, *id.*

214 *See, e.g.*, Spivack, *supra* note 152, at 48–49, 64–67 (describing cases in which trust spendthrift clauses deny divorcing spouse the ability to reach assets in trust).

215 *See, e.g.*, Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000) (calling repeal of rule against perpetuities a "race to the bottom"). *Cf.* Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287 (2002) (articulating possible argument in favor of the self-settled asset protection trust in terms of the creditors of a trust grantor having no more right to reach trust property than the grantor could).

216 It sounds better in Latin: "*Cujus est dare ejus est disponere.*" Ashhurst v. Given, 5 Watts & Serg. 323, 330 (Pa. 1843) (disallowing creditors to reach beneficiary's interest in trust based on restrictions placed by grantor).

217 *See, e.g.*, *supra* note 153 and accompanying text; *supra* note 207 and accompanying text; N.C. Dep't of Revenue v. Kimberley Rice Kaestner 1992 Family Tr., 139 S. Ct. 2213 (2019).

218 *See, e.g.*, *supra* notes 214–215 and accompanying text.

219 *See, e.g.*, *supra* note 166–174 and accompanying text.

V. COURTS, TAXES, AND WEALTH CONCENTRATIONS

A. *Courts Cannot Solve the Problem of Wealth Inequality*

Particularly for wealthy taxpayers, the tax system in the United States is a cat-and-mouse game.[220] The system's foundations are state and federal laws (and sometimes local laws, too, as in the case of sales tax), amplified by the regulations that purport to interpret those laws.[221] For most income, estate, and gift taxes, a taxpayer self-reports the amount of tax owed, and the government can either accept or reject the return.[222] If a conflict arises between a taxpayer and the government that cannot be resolved administratively, then a judge will be called upon to interpret and apply the applicable tax laws in order to end the dispute.[223] But courts lack the power to change the tax laws, unless the laws violate the applicable state constitution or the U.S. Constitution.[224] Until now, critics of the state

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220 The vivid (and accurate) description does not originate here; multiple other scholars and commentators have deployed the metaphor. *See, e.g.*, David Cay Johnston, *The Loophole Artist*, N.Y. TIMES (Dec. 21, 2003), https://nyti.ms/2UUxxMQ ("[The tax] cat-and-mouse game is to work the loopholes in the system until the government finds them and draws them closed."); Jay A. Soled & Mitchell Gans, *Related Parties and the Need to Bridge the Gap Between the Income Tax and Transfer Tax Systems*, 62 ALA. L. REV. 405, 438 (2011) ("Congress should not approach transfer tax reform in a piecemeal fashion . . . this cat-chasing-mouse process will only result in frustration as clever taxpayers and their undaunted advisers will continue to formulate and develop new transfer tax-saving methodologies."); George K. Yin, *Reforming (and Saving) the IRS by Respecting the Public's Right to Know*, 100 VA. L. REV. 1115, 1155 (2014) ("Since enforcement of the tax laws is to some extent a cat-and-mouse game, the agency's ability to use its limited enforcement resources most efficiently must be preserved.").

221 *See, e.g.*, Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination and Human Rights*, 2017 WIS. L. REV. 491, 500 (discussing sales tax-free status of medical supplies and necessities). *See also, e.g.*, FLA. STAT. § 212.08(nnn) (2018) (providing sales tax exemption for "products used to absorb menstrual flow" defined as "products used to absorb or contain menstrual flow, including, but not limited to, tampons, sanitary napkins, pantiliners, and menstrual cups").

222 For a brief overview of federal income tax procedure, *see* NEWMAN ET AL., FEDERAL INCOME TAXATION: CASES, PROBLEMS & MATERIALS 9–10 (7th ed. 2019).

223 *Id.* (describing judicial pathways of a federal income tax case).

224 Relevant limitations in the U.S. Constitution include, for example, the Due Process Clause and the Commerce Clause. *See* U.S. CONST. amend. XIV, § 1 (prohibiting state from state depriving any person "of life, liberty, or property, without due process of law"); U.S. CONST. art. I, § 8 (reserving to Congress the right to regulate commerce "among the several states"). Although some provisions of state constitutions may mirror, overlap with, or be interpreted similarly to their federal counterparts, that is not always true. *See, e.g.*, Aileen H. Char Life Interest v. Maricopa County, 93 P.3d 486 (Ariz. 2004) (interpreting the state constitution's Uniformity Clause, Ariz. Const. art. IX, § 1, to provide taxpayers with greater protection than the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution). Also, distinguish between a court's ability to declare that a law is unconstitutional (*i.e.*, unenforceable) with the ability to change the law. *See, e.g.*, Eric S. Fish, *Choosing Constitutional Remedies*, 63 UCLA L. REV. 322, 324–25, 380–81 (2016) (distinguishing between declaring law unconstitutional versus changing legislative content,

income taxation of trusts, or even trusts in general, have tended to use scholarly articles and amicus briefs to make technical arguments against family trusts.[225] But if loopholes in state laws permit family trusts to flourish inappropriately, state legislatures, not the courts, are likely the most effective source of reform.[226]

At their core, trusts are creations of legal fiction, to be sure.[227] But legal decisions over centuries have recognized trusts, including their split of legal and equitable title, as valid.[228] To the extent that trust law has changed dramatically in the last twenty-five years, the transformation is the result of state-by-state legislation.[229] Proposals for reform have come from national organizations such as the American Law Institute and the Uniform Law Commission, as well as individuals and groups—typically local lawyers, bankers, and their professional associations—in each state.[230] As

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while also noting that "in cases where the existing law is unconstitutional, the court must generally make a change that will either expand or contract the law"). *See also* Ruth Bader Ginsburg, Address, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation,* 28 CLEV. ST. L. REV. 301, 317 (1979) ("When the court passes on the constitutionality of a statute . . . it concludes its essentially judicial business. If it declares the statute unconstitutional as written, the remaining task is essentially legislative.").

225 *See supra* notes 149–150 and accompanying text and *supra* Parts IV.A and B.

226 Undoubtedly, the focus on the production of scholarly articles makes sense, given that most tenured and tenure-track faculty members are expected to produce scholarship as part of their jobs. *See, e.g., College of Law Tenure Standards and Procedures*, UNIVERSITY OF IOWA COLLEGE OF LAW (2009), https://uiowa.edu/conflictmanagement/sites/uiowa.edu.conflictmanagement/files/Law.pdf ("[E]very faculty member is expected to engage in the study of and critical evaluation of some aspects of the legal system. It is also expected that the fruits of this inquiry will result in scholarly publications."). Furthermore, one suspects that there are far more law professors who are familiar with amicus briefs (from their experiences as judicial clerks) than there are law professors who have experience with state or federal legislative lobbying. *See, e.g*, Sarah Lawsky, *Spring Self-Reported Entry Level Hiring Report 2019*, PRAWFSBLAWG (June 4, 2019), https://prawfsblawg.blogs.com/prawfsblawg/2019/06/spring-self-reported-entry-level-hiring-report-2019.html (showing 63% of all self-reported recent law school faculty hires held a clerkship prior to accepting their faculty position, but not gathering data about legislative lobbying experience). This is not to say that law faculty are not involved at the state or national levels on law reform projects. *See, e.g., Electronic Wills Act, Draft for Discussion*, UNIF. LAW COMM'N (Feb. 12, 2019), https://tinyurl.com/y3pufoj5 (listing Professor Susan Gary of the University of Oregon School of Law as the Committee's Reporter).

227 *See supra* note 6 and accompanying text.

228 *See supra* notes 7–8 and accompanying text.

229 *See* Crawford, *supra* note 13, at 81–82 ("In the case of trusts that are designed to keep rich people rich, three very curious things have happened in the United States in the last twenty-five years. These have revolutionized trust law more than anything else in the last 400 years: the rise of self-settled asset protection trusts, the proliferation of trust decanting rules and the repeal of the rule against perpetuities in over half of the jurisdictions in the nation.") (citations omitted).

230 This is what Robert Sitkoff calls the "top-down versus bottom-up" model of reform, with proposals from American Law Institute and the Uniform Law Commission typically intended "to update the law in accord with emerging academic and elite practitioner policy

with state income tax laws, once the legislature enacts a provision, generally speaking a court must find a violation of the state constitution, the U.S. Constitution, or perhaps public policy, in order to change it.[231] For that reason, courts are ill-equipped to play a role in dismantling wealth inequality through interpretation of income tax laws or trust laws.

B. *Taxes Could Solve the Problem of Wealth Inequality*

Given the wealth inequality in this country, one naturally turns to the estate tax as a possible remedy. After all, Congress enacted the estate tax in 1916,[232] motivated by the need to raise revenue during the first world war and to address rising wealth inequality.[233] Unfortunately, however, the country's past and existing iterations of the estate tax have never raised much revenue.[234] In 2018, estate tax collections represented approximately

consensus on necessary revision to the canon." Robert Sitkoff, *Top-Down Versus Bottom-Up Law Reform in Trusts and Estates: Future Interests and Perpetuities*, JOTWELL (Nov. 22, 2010), https://trustest.jotwell.com/top-down-versus-bottom-up-law-reform-in-trusts-and-estates-future-interests-and-perpetuities. In contrast, "the other law reform pattern, which we can characterize as bottom-up, local bankers and lawyers lobby state lawmakers for a specific reform. Bottom-up reforms are usually meant to attract trust business (think perpetual or asset protection trusts)." *Id.*

231 There are, of course, exceptions to this general rule, although arguably courts accomplish legal change by choosing to follow or depart from case law precedent interpreting a statute, rather than attacking the statute itself. *See, e.g.*, Sullivan v. Burkin, 460 N.E.2d 572 (Mass. 1984). In that case, the Supreme Judicial Court of Massachusetts addressed the question of whether a revocable inter vivos trust created by a husband was subject to the widow's elective share right. *Id.* A prior decision had interpreted the elective share statute to apply to only probate property. *See* Kerwin v. Donaghy, 59 N.E.2d 299 (Mass. 1945). In *Sullivan*, the court announced that "for the future . . . as to any inter vivos trust created or amended after the date of this opinion, we shall no longer follow the rule announced in *Kerwin v. Donaghy*." *Sullivan*, 460 N.E.2d at 577. Practically speaking, that meant that the court prospectively expanded the elective share right of a surviving spouse, even though the statute did not change. *See id.*

232 An Act to Increase the Revenue, and for Other Purposes, Pub. L. No. 64-271, § 1, 39 Stat. 756, 756–57 (1916).

233 *See* Jeffrey A. Cooper, *The Ghosts of 1932: The Lost History of Estate and Gift Taxation*, 9 FLA. TAX REV. 875, 882 (2010) ("In 1916, Congress again turned to estate taxes to fund another looming military conflict, enacting a new estate tax just prior to U.S. entry into World War I."); WILLIAM H. GATES, SR. & CHUCK COLLINS, WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES 41 (2002) ("Early in the twentieth century, Gilded Age corruption and inequality, powerful and popular social movements, and growing moral misgivings within the wealthy elite all converged on America's political stage. Out of that convergence came America's first lasting estate tax."); PIKETTY, *supra* note 38, at 440 ("[T]his fear of growing to resemble Europe was part of the reason why the United States in 1910–1920 pioneered a very progressive estate tax on large fortunes, which were deemed to be incompatible with US values . . . .").

234 *See generally* James R. Repetti, *Should We Tax the Gratuitous Transfer of Wealth? An Introduction*, 57 B.C. L. REV. 815, 815 (2016) (reporting on comparative percentages of total tax revenue attributable to the estate tax for the period 1981 through 2014 ranging from an approximate high of 1.2% to a low 0.65%).

0.65% of total tax revenue.[235] Given the generous wealth transfer tax exemption (in 2019, $11.4 million per person or $22.8 million per couple),[236] the number of estates subject to taxation is necessarily small.[237]

The current wealth transfer framework of high exemptions and relatively low tax rates has not been constant throughout the estate tax's history, however.[238] For example, for the period September 1, 1936 through June 25, 1945, net estates valued at more than ten million dollars were subject to taxation at a rate of seventy percent.[239] For the period 1977 through 1981, that same top rate of seventy percent applied to estates valued at more five million dollars.[240] Only after President George W. Bush signed into law the Economic Growth and Tax Relief Reconciliation Act of 2001 did estate tax rates start steadily declining substantially downward, while the wealth transfer tax exemption amount trended steadily upward.[241]

Although there is historical precedent for higher rates of taxation,[242] making only modifications to rates or exemptions may not be enough to make a meaningful change to the wealth gap. France, for example, has a more robust estate tax system than the United States does, with a top rate of forty-five percent.[243] In France, the rate of wealth inequality is still high

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[235] *See* INTERNAL REVENUE SERV. DATA BOOK 2018, INTERNAL REVENUE SERV. 14, https://www.irs.gov/pub/irs-soi/18databk.pdf (last visited Oct. 4, 2019) (see Table 6).

[236] *See* Rev. Proc. 2018-57 (announcing inflation-adjusted figures applicable for tax year 2019); 26 U.S.C. § 2010(c) (2018), amended by Tax Cut and Jobs Act of 2017, Pub. L. No. 115-97, 131 Stat. 2054 (increasing wealth transfer tax exemption in 2018 to $11.18 per person, indexed for inflation).

[237] *Compare* INTERNAL REVENUE SERV. DATA BOOK 2018, *supra* note 235, at Table 2 (showing 34,092 estate tax returns filed for 2018) *with* INTERNAL REVENUE SERV. DATA BOOK 2009, INTERNAL REVENUE SERV., https://www.irs.gov/pub/irs-soi/09databk.pdf (last visited Oct. 4, 2019) (see Table 2) (showing 46,000 estate tax returns filed for 2009). Practically speaking, the high exemptions mean that only approximately 0.1% of decedents' estates are subject to estate taxation each year. *See, e.g.*, Julie Garber, *Federal Estate Tax Exemptions 1997 Through 2019*, BALANCE (July 9, 2019), https://www.thebalance.com/exemption-from-federal-estate-taxes-3505630 (providing overview of operation and amount of exemption from federal estate and gift taxes).

[238] *See supra* note 236 and accompanying text (furnishing wealth transfer tax exemption figures for 2019 of $11.4 million per individual and $22.8 million for per married couple).

[239] *See, e.g.*, *A Historical Look at Estate and Gift Tax Rates*, CCH, https://www.cch.com/press/news/historicalestategifttaxrates.pdf (last visited Oct. 4, 2019) (providing maximum estate tax rates for years 1916 through 2011).

[240] *Id.*

[241] H.R. 1836, 107th Cong. (1st Sess. 2001).

[242] *See supra* note 236 and accompanying text; *supra* note 238 and accompanying text; *supra* note 239 and accompanying text.

[243] *See, e.g.*, Alan Cole, *Estate and Inheritance Taxes Around the World*, TAX FOUND. (2015), https://taxfoundation.org/estate-and-inheritance-taxes-around-world (providing data on highest estate and inheritance tax rates in thirty-four countries); Jean-Marc Tirard & Maryse Naudin, *Private Client Law in France: Overview*, WESTLAW.COM (Dec. 1, 2017),

(although lower than the rate of inequality in the United States), with the top ten percent of all households owning approximately sixty-two percent of all of the country's wealth.[244] This suggests that higher tax rates do have some impact on wealth inequality, but query how high the rate would have to go (and how low the exemption would need to be set) to see similar (or better) results in the United States compared to France, for example.[245]

Even short of imposing estate tax at near-confiscatory rates, it is far from obvious that the majority of the American electorate would support broad-reaching changes to the present system of taxing transfers of wealth during lifetime or at death.[246] According to a recent poll conducted for the *New York Times*, two-thirds of all Americans (including fifty-five percent of self-identified Republicans and sixty-six percent of self-identified Independents) support a two percent tax on households having more than fifty million dollars of wealth.[247] At the same time, however, rank-and-file Democratic voters express concern that sweeping change, like the wealth tax they overwhelmingly support when polled, might not be practical. Some of these voters report that they worry that proposals like the two percent wealth tax are too "radical" to receive support in the general election, and that in order to increase the chance that a Democrat will be elected as President, any candidate should take a more incremental approach to tax (and other) reform.[248]

If significant estate tax reform or a wealth taxes are not viable near-term strategies for combatting wealth inequality, consider instead the

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https://tinyurl.com/y6zjfkoj (providing overview of taxes in inheritances and lifetime transfers); Jacques, *supra* note 8.

244 PIKETTY, *supra* note 38, at 430 (showing historic changes in top decile's share of country's total wealth).

245 Professor Jim Repetti suggests that it is far from obvious that any version of the U.S. estate tax system has, in fact, been effective in breaking up concentrations of wealth. *See, e.g.*, Repetti, *supra* note 234 (reporting low percentages of revenue generated by estate tax).

246 *See, e.g.*, MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH 6–7 (2006) (describing inaccurate yet effective deployment of the phrase "death tax" in marshalling opposition to the estate tax).

247 *See, e.g.*, Jim Tankersley & Benn Casselman, *Wealth Tax and Free College Get Poll Support*, N.Y. TIMES (July 21, 2019), https://nyti.ms/2YYTCwh (showing overall support for the wealth tax at a rate of sixty-sixty percent, with the level of support among self-identified Democrats at eighty-one percent). *See also* Matthew Yglesias, *Elizabeth Warren's Proposed Tax on Enormous Fortunes, Explained*, VOX (Jan. 24, 2019), https://www.vox.com/policy-and-politics/2019/1/24/18196275/elizabeth-warren-wealth-tax (describing for a general audience Senator Warren's proposal for a 2% tax on households with over fifty million dollars in wealth, projected to raise $2.75 trillion in ten years).

248 *See* Tankersley & Casselman, *supra* note 247 ("Polls show several of those ideas [of Democratic presidential hopefuls] are quite popular with the electorate, including taxing the assets of very wealthy Americans . . . But Democratic voters . . . worry that the popularity of the proposals will fade before next year's general election and become a liability for their party's nominee.").

possibility of income tax reform. In the past, the income tax rate has been as high as ninety-four percent.[249] Because it may not be politically feasible to return income tax rates to such a high level,[250] some critics of wealth inequality have suggested revising the existing income tax rules so as to treat gifts, bequests, and devises as income to the beneficiary.[251] Adopting this rule would mean abandoning the step-up in basis rule under Section 1014 (which provides that the donee takes a basis in the property equal to the fair market value of the property as of the decedent's date of death or as of the alternate valuation date) and the implementing a carry-over basis regime under Section 1015 (which provides that the donee takes the donor's basis).[252] The country's two prior experiments with carry-over basis were unsuccessful, but that does not mean that an updated version of a similar proposal should be off-limits.[253] There have been many

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[249] *See U.S. Federal Individual Income Tax Rates History, 1862-2013 (Nominal and Inflation-Adjusted Brackets)*, TAX FOUND. (Oct. 17, 2013), http://taxfoundation.org/article/us-federal-individual-income-tax-rates-history-1913-2013-nominal-and-inflation-adjusted-brackets (showing rate of 94% in 1945 and above 90% from 1946 until 1963). *See also* Tracey M. Roberts, *Brackets: A Historical Perspective*, 108 NW. U. L. REV. 925 (2014) (surveying graduated income tax rate structure from 1913 to 2013).

[250] In January 2019, Representative Alexandria Ocasio-Cortez (D-NY) proposed a highest marginal tax rate of 70% applicable to those earning $10 million or more. *See, e.g.*, Howard Gleckman, *About Rep. Ocasio-Cortez's 70 Percent Tax Rates*, TAX POL'Y CTR. (Jan. 8, 2019), https://www.taxpolicycenter.org/taxvox/about-rep-ocasio-cortezs-70-percent-tax-rates (explaining that Representative Ocasio-Cortez proposed a marginal—not average—tax rate of seventy percent). A poll shows that approximately 59% of all registered voters support the proposal, including 60% of Republicans and 71% of Democrats. *See, e.g.*, Steve Goldstein, *Poll Finds Broad Support for Occasion Cortez's 70% Top-Tax-Rate Proposal*, MARKETWATCH (Jan. 15, 2019), https://www.marketwatch.com/story/poll-finds-broad-support-for-ocasio-cortezs-70-top-tax-rate-proposal-2019-01-15. The proposal may be rhetorically appealing but it is not likely comprehensive enough for some Democrats. *See, e.g.*, Monica Prasad, *Actually, It Was Democrats Who Killed the 70 Percent Tax*, POLITICO (Feb. 5, 2019), https://www.politico.com/agenda/story/2019/02/05/democrats-70-percent-tax-rate-000879 ("Pushing the capital gains tax modestly upward might not have the same emotional appeal to progressives as raising the top tax rate to a theatrical number like 70 percent, but it is critical to generating revenue."). Some Republicans have simply misinterpreted the proposal. *See, e.g.*, Gleckman, *supra*.

[251] This is something that Professor Joseph Dodge, for one, has been advocating for over forty years. *See, e.g.*, Joseph M. Dodge, *Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income*, 91 HARV. L. REV. 1177 (1978).

[252] 26 U.S.C.A. §§ 1014, 1015 (West 2018). *See generally* Karen C. Burke & Grayson M.P. McCouch, *Estate Tax Repeal: Through the Looking Glass*, 22 VA. TAX. REV. 187 (2002) (explaining carryover basis system's operation and challenges).

[253] *See, e.g.*, Marc S. Bekerman & William P. LaPiana, *Carryover Have We Features*, 19 PROB. & PROP. 38 (2005) (describing first proposed carryover basis law in 1976 as "so unsuccessful that it was repealed retroactively shortly after passage"); Grayson M.P. McCouch, *The Empty Promise of Estate Tax Repeal*, 28 VA. TAX REV. 369, 383 (2008) (critiquing carryover basis because it "inherently allows taxpayers who inherit appreciated property to defer paying tax on the unrealized gain until they sell the property. In this context, deferral is equivalent to a reduction in the rate of tax on capital gains; the longer the

thoughtful scholarly proposals to address wealth inequality through income tax reform.[254] Such reform in fact might be able to accomplish a reduction in the wealth gap. The complexities of income tax reform are beyond the scope of this Article, however.[255] Instead, the next Part considers a new possible focus for concerns about wealth inequality: revisions to the substantive law of trusts.

VI. TRUSTS IN A MAGICAL WORLD

Courts lack the institutional capacity to meaningfully change state income tax laws or substantive state laws governing trusts.[256] The federal estate tax system is not especially effective in its current form, and it is not obvious that there is political will to transform it.[257] There are thoughtful ways that the federal income tax system could more effectively treat accessions to personal wealth.[258] What has received less attention is how the law of trusts could be changed with the explicit goal of reducing wealth inequality. A careful unpacking of the critiques of the *Kaestner Trust* case in particular, as well as family trusts in general,[259] prompts the question of whether limiting the use of trusts—or even eliminating them altogether—might be one way to address the wealth gap. This Part briefly (and reluctantly) brackets tax reform out of the analysis to imagine a new legal landscape for trusts.[260]

First, envision a system in which the only allowable trusts were for those who lack the legal capacity to manage money for themselves. This would limit the universe of trust beneficiaries largely to minors and those who have been declared legally incompetent. If a senior generation family member wants to transfer assets to a younger generation family member who has the legal capacity to own assets, but the intended donee lacks financial savvy, the younger family member will have to hire someone to manage the assets. In this iteration of an altered trust landscape, there

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deferral period, the lower the effective tax rate.").

254 Other law professors have advanced well-reasoned proposals for estate tax reform. *See, e.g.*, Miranda Perry Fleischer, *Divide and Conquer: Using an Accessions Tax to Combat Dynastic Wealth Transfers*, 57 B.C. L. REV. 913 (2016); Joseph M. Dodge, *Replacing the Estate Tax with a Reimagined Accessions Tax*, 60 HASTINGS L.J. 997 (2009).

255 For a powerful argument in favor of a focus in income tax reform to address wealth inequality, *see, e.g.*, Edward J. McCaffery, *Distracted from Distraction by Distraction: Reimagining Estate Tax Reform*, 40 PEPP. L. REV. 1235, 1253 (2013) (arguing for abandoning the estate tax in favor of "a consistent progressive consumption, or equivalently, a cash-flow spending tax").

256 *See supra* Part V.A.

257 *See supra* Part V.B.

258 *Id. See also* McCaffery, *supra* note 255.

259 *See supra* Part IV.

260 *See supra* note 255 and accompanying text.

could be no special needs trusts for beneficiaries with disabilities, as long as they have the technical legal capacity to hold property. A parent therefore would have to choose between disinheriting an adult child who is physically disabled, but has full mental capacity, or leaving assets outright to the adult child, for example. If the parent does the latter, the adult child initially would not be eligible for governmental benefits to assist with needs arising from the disability. The adult child would have to consume all of the parent's bequest first.

A second feature of an alternate trust universe could be a limitation on the duration of any trust to the lifetime of a named individual who is alive at the time of the trust creation. Upon that individual's death, the assets could vest in say, a particular beneficiary's estate, or pass outright to someone else entirely. Some dead hand control would be tolerated, but for only one lifetime. There would be zero possibility that assets could pass tax free successively down the generations.

A third option, to be deployed alone or in connection with other features, could be eliminating spendthrift clauses.[261] A beneficiary would have no protection, then, against voluntary or involuntary creditors. Presumably, this would encourage responsible and prudent behavior by the beneficiary, but even the most morally faultless beneficiary could not shield assets if legally responsible for causing harm to another. In this world, beneficiaries with drug addictions or imprudent spending habits would soon be parted from their funds.

A fourth possibility in the imagined new trust world could be to permit family trusts, but to limit the amount of money that can be held in all trusts for any beneficiary, akin to the cap on funds that can be held for one individual in college tuition savings programs, also known as "529 plans."[262] Every time a grantor creates a trust, the trust would have to register with the state or federal government, and the trustee would be required to make annual reports of the assets under management. The government would confiscate any amounts over the financial limit. The limit could be set at, say, the individual wealth transfer tax exemption of $11.4 million (in 2019).[263] A drawback to this feature, however, is it could

[261] This approach would be more consistent with English law, which generally does not recognize spendthrift trusts. *See* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1198–99 (1985).

[262] The limits depend on the particulars of the state that sponsors the plan. *See, e.g.*, Kathryn Flynn, *How Much Can You Contribute to a 529 Plan in 2019?*, SAVING FOR COLLEGE (Feb. 12, 2019), https://www.savingforcollege.com/article/how-much-can-you-contribute-to-a-529-plan ("Limits vary by state, ranging from $235,000 to $529,000. This amount represents what the state believes to be the full cost of attending an expensive school and graduate school, including textbooks and room and board.").

[263] *See supra* note 236 (announcing individual wealth transfer tax exemption, indexed

have the unintended consequence of causing trustees to invest in an overly conservative manner, something that twentieth-century trust reformers recognized as a long-standing problem and then largely addressed by the Uniform Prudent Investor Act.[264] The Uniform Act explicitly permits the trustee to make any investment a prudent investor would "by considering the purposes, terms, distribution requirements, and other circumstances of the trust," without fear that an under-performing asset will cause the trustee to be deemed to have breached the trustee's fiduciary duty.[265] If a trustee of a wealth-capped family trust knew that having "too successful" investments could trigger a financial penalty, the trustee might be encouraged to invest in assets with minimal growth potential. As an economic matter, having an entire class of property owners who are not free in practice to invest in growth assets likely would skew the market inappropriately. This is hardly a desirable result.

A fifth option, again to be used alone or in conjunction with other proposals, could be to disallow all self-settled asset protection trusts. Those U.S. domiciliaries who want to shield their assets from creditors likely would simply establish a self-settled trust in the Cayman Islands, for example, and make the money much more difficult for any voluntary or involuntary creditor to reach, or for any criminal investigator to discover.[266] This would have negative consequences for U.S. resident banks and trust companies that presently maintain such trusts in one of the fifty states (and the workforces that support the administration of those trusts).

A sixth possible option could be to require that all trustees be banks or trust companies with no prior relationship with the grantor or any of the beneficiaries. The grantor would be unable to choose a trusted family

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for inflation).

[264] *See* UNIF. PRUDENT INVESTOR ACT § 2(a) (UNIF. LAW COMM'N 1994) ("A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution."). *But cf.* RESTATEMENT (THIRD) OF TRUSTS § 227 (AM. LAW INST. 2007) (under section entitled "General Standard of Prudent Investment," requiring trustee to invest trust property "as a prudent investor would"). Forty-three states, the District of Columbia, and the U.S. Virgin Islands have adopted the Uniform Prudent Investor Act. *See Unif. Prudent Investor Act*, UNIF. L. COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=58f87d0a-3617-4635-a2af-9a4d02d119c9 (last visited Oct. 15, 2019) (listing jurisdictions that have adopted the law). For a discussion of the Uniform Prudent Investor Act and its basis in modern portfolio theory, *see, e.g.*, Steward E. Sterk, *Rethinking Trust Law Reform: How Prudent is Modern Prudent Investor Doctrine?* 95 CORNELL L. REV. 851 (2010).

[265] *See* UNIF. PRUDENT INVESTOR ACT § 2(a) (UNIF. LAW COMM'N 1994).

[266] *See, e.g.*, James M. Duggan, *The Prudence of Offshore Planning for Affluent Clients*, 40 EST. PLAN. 18 (2013) (describing jurisdictional obstacles to reaching assets in a trust established in a jurisdiction such as Jersey, Bermuda, and the Cayman Islands).

friend or advisor as trustee. With an institutional "stranger" as trustee, outside observers would have more confidence that the split of legal and equitable title represents a meaningful separation of the beneficiary from the trust property. There could be a further requirement that the only institutions eligible to act as trustee are those located in jurisdictions that are certain to tax on the basis of the trustee's conduct of business in that jurisdiction. In this scenario, one might see a "race to the top," a jurisdictional competition to implement an income tax in states that do not have one, so that institutions in that jurisdiction could be eligible to serve as trustees of family trusts.[267] But if private individuals were prohibited from acting as trustees, institutions might raise their fiduciary fees, knowing that the grantor must select one of them. Some would say that this is a small price to pay, and one paid by people who can afford it anyway, for increased public confidence in the integrity of family trusts.

A seventh option could be to eliminate all family trusts. A transfer for a minor beneficiary would have to be made via the Uniform Gifts to Minors Act, Uniform Transfers to Minors Act, or a formal guardianship.[268] Disabled, drug addicted, improvident, or tortfeasing beneficiaries (intentional or accidental) would be left to their own devices to manage their assets, hire someone to do so, and—along with donees of family assets who experience divorce—lose some or all of their money. Advantages of a no-trust legal landscape would be the absence of doubt about who pays tax on any income from the assets. As the outright owner, the beneficiary would be liable for the income tax. And if at the time of the gift, the beneficiary lived in a state with no income tax, the beneficiary could be required to move to a jurisdiction that does impose a tax, as a condition of taking ownership of the gift. If the beneficiary declined to do so, the property would escheat to the state. Or, instead of requiring the beneficiary to change domiciles, the property could continue to be taxed to the transferor (assuming the transferor resided in a jurisdiction with an income tax). If neither the transferor nor the donee were subject to income tax, the beneficiary could be required to calculate a tentative annual state income tax equivalent, at the highest rate imposed by any state, and to pay that amount to a collective fund devoted to assistance of the poor (without receiving any income tax charitable contribution deduction for doing so).

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[267] *Cf.* Sterk, *supra* note 215 (calling repeal of rule against perpetuities a "race to the bottom").

[268] *See, e.g.*, Cornelius W. Coghill III & Mark B. Edwards, *Transfers to Minors: Basic Techniques*, 4 PROB. & PROP. 20 (1990) (explaining different vehicles typically used for transferring property to minors, and recommending transfers under the Uniform Gifts to Minors Act or the Uniform Transfers to Minors Act, but discouraging the use of a court-appointed guardian because of restrictions on investments by the guardian, among other reasons).

Such a proposal likely would be met with widespread disapproval, as it infringes on personal liberty (i.e., a personal decision about where to live). It is probably unconstitutional as well. But if critics want to eliminate all state tax arbitrage loopholes, some sort of universal state income tax or its equivalent would be a necessary feature of a no-trust landscape (however unwelcome by those who live in states that impose no income tax).

There are multiple problems with each of these specific options for a drastically different legal landscape for trusts, and no doubt, there are countless other ways to reform substantive trust law—separate and apart from the tax law—and those would have drawbacks, too. The seven suggestions in this Part are unworkable for many reasons, but each does in fact address one or more concerns raised by critics of family trusts. To be sure, these suggestions are an exercise in magical thinking, just as trusts themselves are the product of magical thinking. So, too, is the hope that courts will play an active role in dismantling wealth inequality, because courts are not free, on their own initiative, to disregard hundreds of years of law that treats trusts as valid property arrangements and the tax laws that have developed to address trusts.[269] But by contemplating unrealistic and even undesirable changes to trust law, family trusts' salutary functions may become clearer.

If the reaction to the seven suggestions is that an alternate legal landscape with limited (or no) trusts is unfathomable, that reaction can help pinpoint the contexts in which a critic might tolerate or even encourage family trusts, notwithstanding the large national wealth gap. Similarly, if particular limitations or modifications appeal or seem reasonable in some way, critics of family trusts will be better able to focus on specific objectionable trust features, without condemning all family trusts. Dialogue about dialogue might sharpen future dialogue. This may be too precious a claim. But perhaps not.

VII. CONCLUSION

The development of trust law intertwines with tax-minimization (and even tax-avoidance) strategies.[270] That is a matter of historical fact.[271] It is equally true that trusts are effective management devices to hold property for the benefit of those whom the grantor has decided, for whatever reason,

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[269] *See* Crawford, *supra* note 13 and accompanying text; Spivak, *supra* note 152 and accompanying text.

[270] *See, e.g.*, F.W. Maitland, *The Origin of Uses*, 8 HARV. L. REV. 127, 130 (1894) (describing thirteenth-century English laws that prevented Franciscan monks from owning property that gave rise to a wealthy benefactor's establishment of a *use* for the benefit of the order).

[271] *Id.*

should not own the property outright.[272] Common reasons might include the legal incapacity of the beneficiary (for example, because of age, mental incapacity, or even sex—proxy for legal incapacity, historically speaking).[273] For hundreds of years, courts and legislators have treated as entirely valid and legally enforceable the magical thinking that a grantor splits legal and equitable title by making a transfer to a trustee for the benefit of one or more beneficiaries.

Theoretically speaking, the law's respect for trusts is based on the idea that if a grantor has no obligation to transfer any proverbial bundle of property-right sticks to a beneficiary, then it is perfectly within the grantor's discretion to transfer to the beneficiary less than the entire bundle of sticks.[274] Clever lawyers have developed multiple ways to whittle any individual stick in that bundle—prohibiting a beneficiary's creditors from reaching the trust assets, revising state laws so that trusts can last forever, and permitting trustees to move assets from one trust to another, for example.

In the twenty-first century, family trusts frequently contain multiple clauses that seem designed primarily to protect and preserve eye-popping levels of wealth. That makes it easy to lose sight of the fact that family trusts are not *per se* problematic. Trusts can serve valuable management functions—such as in the case of trusts for minors or disabled beneficiaries; or for jointly held or specialized assets—and even appropriately separate a beneficiary from outright ownership of assets so that a beneficiary will not become a drain on public resources. So, too, the ability to decant trust assets into a new trust may facilitate correction of harmless errors in trust

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[272] Consider again, for example, the infamous *Duke of Norfolk's Case*, 22 Eng. Rep. 931 (Ch.).

[273] Before the enactment of certain law reforms in the nineteenth century, married women, for example, could hold property only through separate estate trusts. *See, e.g.*, Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate*, 26 YALE J.L. & FEMINISM 165, 167 (2014) ("Although little-known in modern legal circles, the separate estate was, by and large, the sole form of married women's property before statutory enactments granted married women property rights in the nineteenth century. In its most basic form, a separate estate was any assets put in trust for a woman, such that it was for her "sole and separate use" and not available to her husband or his creditors.").

[274] During the early nineteenth century, most U.S. jurisdictions did not recognize restraints on alienation of beneficial trust interests. *See, e.g.*, Alexander, *supra* note 261, at 1198–99 (1985) (describing development of U.S. jurisprudence). Nevertheless, American jurisprudence developed in a direction that resulted in the recognition of spendthrift trusts. *See, e.g.*, Nicholas v. Eaton, 91 U.S. 716, 727 (1875) (expressing in dicta approval for testator's wishes "to use his own property in securing the object of his affection, as far as property can do it, from the ills of life, the vicissitudes of fortune, and even his own improvidence, or incapacity for self-protection, should not be permitted to do so, is not readily perceived"); Broadway Bank v. Adams, 133 Mass. 170 (1882) (upholding spendthrift provision of trust).

instruments or allow a trustee to relocate a trust to a jurisdiction with more flexible administrative rules, or allowing a trust to last without a specific termination date might protect against future beneficiaries' strategic behavior or improvidence. But loading trust instruments with so many provisions that large numbers of ultrawealthy families are almost certain to stay that way permanently may tip the balance of "traditional notions of fair play and substantial justice"[275] too far in favor of private inurement.

Unless one is willing to abolish trusts entirely (which is both impractical and unwise), one must engage in a difficult line-drawing project. It may be possible to achieve quick consensus that sham trusts are "bad" and that trusts for minors or legally incapacitated people are "good," but a vast area lies between the two poles. Engaging in a sincere dialogue about cases like *Kaestner Trust* invites interrogation of the role that trusts play in creating and sustaining inequality. These conversations might facilitate identification of allies—whether of the "top down" variety, like members of the American Law Institute or the Uniform Law Commission, or the "bottom up" kind like local lawyers and bankers[276]—who appreciate that wealth inequality is not good for the long-term stability of society.[277] Trust law reform can (and should be) made on a state-law level. Our collective future depends on reducing the wealth gap among all segments of society.

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[275] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945).

[276] *See supra* note 230.

[277] *See supra* notes 66–70 and accompanying text.