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Bridging the Divide: A Proposal to Bring Testamentary Freedom to Low-Income and Racial Minority Communities

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Introduction

The Peruvian economist Hernando de Soto has written extensively on difficulties faced by the poor in developing countries.[1] One of these difficulties is that poor people in developing countries suffer from ill-defined property rights that undermine their ability to both protect their homes and invest in their communities. De Soto's argument is undoubtedly true, but in its application solely to the developing world, it is fundamentally underinclusive. The problem of ill-defined property rights and the bedraggling consequences of collective ownership also harms racial-minority and poor households in developed countries such as the United States, where socioeconomic immobility and polarization is an increasing problem. President Trump's tax-

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1. *See generally* HERNANDO DE SOTO, THE MYSTERY OF CAPITAL, WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2001).

reform legislation, the Tax Cuts and Jobs Act of 2017,[2] was described by conservatives as a needed tax reform that would spur economic growth.[3] The United States' problem, however, has not been the lack of growth per se, but that the benefits of this growth are skewed in favor of the highest income earners and wealth holders, such that the majority of the population has seen living standards stagnate notwithstanding modest economic growth and relatively low unemployment.[4]

This wealth inequality is worsened by the laws of inheritance and devise—the top 1% of incomes receive, in dollar terms, 35% of all inheritances, and the top 10% of income earners receive about 73% of wealth transmitted after death.[5] Contrary to the supposition of a broad-based and socioeconomically mobile middle class that benefits from intergenerational wealth transfer, only 20% of American households will ever receive a significant inheritance or *inter vivos* gift.[6] These inequalities are superimposed along racial lines because the vast majority of racial minority households, which typically have dramatically lower accumulated savings than their White counterparts, inherit very little.[7] This results in an intergenerational widening of the wealth

2. Tax Cuts and Jobs Act of 2017, Pub. L. No. 151-97, 131 Stat. 2054 (2017). *See* Joseph Lawler, *Republicans Forced to Give Tax Bill Outrageous New Name After Running Afoul of Senate Rules*, WASH. EXAMINER (Dec. 19, 2017, 6:07 PM), https://www.washingtonexaminer.com/republicans-forced-to-give-tax-bill-outrageous-new-name-after-running-afoul-of-senate-rules [https://perma.cc/66AN-B6T5]. The renaming of the bill to include the word "reconciliation" allows Congress to expedite the passage of tax laws and other mandatory spending programs on a "fast-track" basis, which requires only a simple majority for passage. *See id.*; *see also* BILL HENIFF, JR., CONG. RESEARCH SERV., RL 30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" 5, 18 (2016), https://fas.org/sgp/crs/misc/RL30862.pdf [https://perma.cc/LAT7-BXCG].

3. *See* Patricia Cohen, *A Tax Cut that Lifts the Economy? Opinions Are Split*, N.Y. TIMES (Nov. 2, 2017), https://www.nytimes.com/2017/11/02/business/economy/corporate-tax-economists.html [https://perma.cc/TQJ6-LGTS].

4. *See* Jay Shambaugh & Ryan Nunn, *Why Wages Aren't Growing in America*, HARV. BUS. REV. (Oct. 24, 2017), https://hbr.org/2017/10/why-wages-arent-growing-in-america [https://perma.cc/N8YG-ASUP]; CHAD STONE, DANILO TRISI, ARLOC SHERMAN & JENNIFER BELTRÁN, CTR. ON BUDGET & POLICY PRIORITIES, A GUIDE TO STATISTICS ON HISTORICAL TRENDS IN INCOME INEQUALITY 11 tbl. 1 (2018), https://www.cbpp.org/sites/default/files/atoms/files/11-28-11pov_0.pdf [https://perma.cc/4XK7-CFLT]; *United States–Nominal Gross Domestic Product*, MOODY'S ANALYTICS, https://www.economy.com/united-states/nominal-gross-domestic-product [https://perma.cc/4EY8-RLM3].

5. Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century*, 60 B.C. L. REV. 145, 158 (2019).

6. *Id.*

7. Palma Joy Strand, *Inheriting Inequality: Wealth, Race and the Laws of Succession*, 89 OR. L. REV. 453, 467 (2010). On average, nearly half of White individuals will receive an inheritance during their lifetime. *Id.* Meanwhile, only 16.7% of Black individuals will receive an inheritance. *Id.* Of those who do receive an inheritance, the median White inheritance is five and half times larger than the median Black inheritance. *Id.*

gap and a self-perpetuating cycle of reinforcing inequality that undermines social cohesion.[8]

Unless remediated by a change in estate planning laws, the problem of intergenerational inequality will increase with time for three reasons. First, low inheritance tax rates lead highly compensated individuals to seek larger pay packages for intergenerational conveyance purposes.[9] This worsens racial and socioeconomic inequality because these highly compensated and well-placed individuals are disproportionately White and already wealthy.[10] Second, because the growth rate of accumulated capital tends to be substantially higher than the economic growth rate, the income and racial-inequality problems will grow for each succeeding generation,[11] typically on a racially and socioeconomically endogamous basis.[12] Finally, because racial minorities tend, for socioeconomic and cultural reasons, to abjure estate planning, racial polarization will only increase because racial-minority wealth tends to be dissipated by intestacy-based fractionation and other problems inherent in co-ownership.

I have previously argued that this disturbing trend can be partly remediated by a stepped-up and revitalized tax code that increases the marginal tax rates on high incomes and dramatically increases the scope of the inheritance tax to apply to estates valued at above $2 million.[13] As my previous article points out, however, the reason that this will dramatically reduce inequality is not because taxes will substantially redirect income and wealth toward low-to-middle income and wealth households, but because well-positioned, high-income earners will no longer be incentivized to push for large-pay and benefit packages that deprive organizations of resources to either increase compensation levels for their average workers or increase employment opportunities.[14]

However, this does not go far enough. State legislatures should dramatically alter their approach to gratuitous transfers and the intergenerational transfer of wealth by adopting two simple policy changes to remedy the fact that estate planning is currently economically and culturally infeasible for most households. The first is to update state Wills Acts to democratize estate

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8. *Id.* at 465, 468.

9. The Tax Cuts and Jobs Act of 2017 followed a trend in dramatically reducing the estate tax such that it now applies only to combined estates valued at over $22.36 million at a rate of 40%.

10. Strand, *supra* note 7, at 487 (discussing how, currently, wealth passes freely at death with little imposition of taxes, further entrenching wealth inequality along racial lines).

11. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 26 (2014).

12. *See* Strand, *supra* note 7, at 465–67 (discussing how wealth structures reproduce themselves with each passing generation and noting that statistics on wealth distribution and inheritances show a strong racial skew).

13. Mohamed Akram Faizer, *Seven Steps to Truly Reform the Tax Code and Engender Socio-Economic Mobility*, 82 ALA. L. REV. 601, 626 (2019).

14. *Id.* at 620.

planning by allowing for the probate of electronic wills in view of the anachronisms that are handwriting, pen, paper, and printer. This change, which is consistent with changes in U.S. culture, will effectively end our reliance on paper and pen for estate planning purposes and facilitate estate planning by a larger segment of the population, including lower wealth households. Second, in recognition of the fact that the expanded and democratized Wills Act would still set too high a bar for effective estate planning for most Americans and because state intestacy laws undermine wealth creation and consolidation in socioeconomically distressed households, I propose to exempt estates worth less than $100,000 from state intestacy laws. Instead, I argue, we should have probate courts distribute these smaller estates based on an analysis of the decedent's most likely testamentary intent, under a multifactor, totality-of-the-circumstances approach.

Although my recommendation will initially increase the burdens placed on probate courts, it will protect low-wealth estates from the harmful effects of collective ownership and, over time, encourage these households to engage in effective estate planning. By protecting lower wealth estates from being dissipated by the bedraggling consequences of intestacy, my proposal will, given time, narrow the nation's wealth gap and, in the end, encourage work, thrift, savings, and economic literacy. This may stem the tide of authoritarian illiberalism that undermines national cohesion.

I. Income and Wealth Inequality—A Growing Problem

The French economist and public intellectual Thomas Piketty has demonstrated that the problem of wealth inequality grows over time in a market economy because the rate of return for accumulated capital outpaces that of earned income.[15] In other words, accumulated savings, including inherited wealth, grows faster than the economy as a whole. This means that living standards for those with inherited wealth will dramatically outpace that of those whose livelihoods are derived solely from earned income. Because aggregate wealth in the U.S. is nearing seven times the value of the annual national gross domestic product, and the wealthiest 10% of households own approximately 80% of the wealth, this means that the wealthiest 10% of Americans have portfolios that, in aggregate, are worth approximately $115 trillion, with the remaining 90% of the public holding assets worth only $25 trillion.[16] The broadest measure of wealth inequality, the Gini Coefficient,[17]

15. PIKETTY, *supra* note 11.

16. *See* STONE ET AL., *supra* note 4, at 14.

17. The "Gini Coefficient," named after the Fascist-era Italian economist Corrado Gini, "is the most commonly used measure of inequality." JAMES FOSTER, SUMAN SETH, MICHAEL LOKSHIN & ZURAB SAJAIA, A UNIFIED APPROACH TO MEASURING POVERTY AND INEQUALITY: THEORY

evidences that the U.S. has, by far, the highest level of income and wealth inequality among mature democracies, and this framework is getting more pronounced with time.[18]

The problem manifests itself on racial lines, such that White households in 2014 had, on average, thirteen and ten times more wealth than Black and Hispanic households, respectively.[19] The racial-wealth gap continues to grow. Based on one think-tank's analysis, in 2018 "the median [W]hite family [had] 41 times more wealth than the median black family and 22 times more wealth than the median Latinx family."[20] This problem is even more pronounced within communities of color, such that the income and wealth gap within minority communities is substantially more pronounced than that found in the broader population.[21] Much of the country's racial-wealth imbalance is due to the legacy of coercion and social exclusion, including slavery, segregation, and other forms of institutional racism that are beyond this paper's scope.[22] What is less discussed is that much of the wealth inequality that undermines social cohesion is born of a cultural disinclination by the poor to draft wills for estate conveyance purposes. This cultural tendency is, in turn, due to a perception that hiring a lawyer for estate planning purposes is too costly in view of estate size, and that probate courts are altogether unfriendly to people of color. To illustrate, while only four in ten Americans

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AND PRACTICE 93 (2013), https://openknowledge.worldbank.org/bitstream/handle/10986/13731/9780821384619.pdf?sequence=1&isAllowed=y [https://perma.cc/Y2CT-EGUJ]. "It measures the average or expected difference between pairs of incomes in the distribution, relative to the distribution size." *Id.* at 13. The Gini Coefficient lies between 0 and 1. *Id.* at 94. A measure of 1 would be complete inequality, whereby all income would go to one person, whereas a measure of 0 would be complete equality, whereby all income was equally divided. *Id.* at 94, 120. By way of example, according to the CIA World Factbook, the United States has a Gini Coefficient of .450, Canada's Gini Coefficient is .321, and Sweden's is .249. *The World Factbook: Country Comparison: Distribution of Family Income–Gini Index*, CENT. INTELLIGENCE AGENCY, https://www.cia.gov/library/publications/the-world-factbook/fields/223rank.html [https://perma.cc/2B36-QCJK].

18. *See* Kenneth Scheve & David Stasavage, *Wealth Inequality and Democracy*, 20 ANN. REV. OF POL. SCI. 451, 457 (2017) (comparing the concentration of wealth in the top 1% of several mature democracies); *GINI Index (World Bank estimate)*, THE WORLD BANK, https://data.worldbank.org/indicator/SI.POV.GINI?locations=US [https://perma.cc/LN6P-AD3R].

19. Tanvi Misra, *White Households Are Now 13 Times Richer than Black Ones*, BLOOMBERG CITYLAB (Dec. 12, 2014, 4:13 PM), https://www.bloomberg.com/news/articles/2014-12-12/white-households-are-now-13-times-richer-than-black-ones [https://perma.cc/4S3W-68ZX].

20. CHUCK COLLINS, DARRICK HAMILTON, DEDRICK ASANTE-MUHAMMAD & JOSH HOXIE, INST. FOR POLICY STUDIES, TEN SOLUTIONS TO BRIDGE THE RACIAL WEALTH DIVIDE 7 (2019) https://ips-dc.org/wp-content/uploads/2019/04/Ten-Solutions-to-Bridge-the-Racial-Wealth-Divide-FINAL-.pdf [https://perma.cc/4GVA-JJMU].

21. *See* Yuval Elmelech, *Determinants of Intragroup Wealth Inequality Among Whites, Blacks, & Latinos*, *in* WEALTH ACCUMULATION AND COMMUNITIES OF COLOR IN THE UNITED STATES: CURRENT ISSUES 91, 100 tbl. 3.2 (Jessica Gordon Nembhard & Ngina Chitegi eds., 2006).

22. *See generally* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA (2017).

have a will,[23] this number drops to three in ten for African-Americans.[24] If estate planning is simplified to allow more Americans to feasibly convey their estates on death, the nation's racial and wealth gaps can be narrowed.

II. A Proposal for Intergenerational Wealth Transfer—Expanding the Wills Act to Allow for the Probate of Electronic Wills and Exempting Lower Value Estates from the Wills Act

The Wills Act should be greatly expanded to allow for the probate of electronic documents, in addition to traditional wills that are printed, signed, and witnessed on paper. This expansion of the Wills Act is consistent with cultural changes in our society that have transformed our means of written communication beyond what has been dubbed the Gutenberg paradigm. It is a necessary first step to democratize estate planning.

A. Will Formalities, Holographic Wills, and the Curative Doctrines of Substantial Compliance and Harmless Error

Nationwide, state laws require compliance with Wills Act formalities for a document to be validated by a probate or surrogate court as the decedent's last will and testament.[25] These formalities are that the decedent sign the document intended to be her will with sufficient mental capacity and that it be witnessed by at least two individuals.[26] Some states go further and require that testator and witnesses be in each other's presence when the will is signed.[27] Some require testators to declare to the witnesses that the document they are signing is their will,[28] and others require testators to sign the will at the bottom or foot of the document.[29]

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23. *See* Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009) (noting that 68% of Americans are without wills); *2020 Estate Planning and Wills Study*, CARING.COM, https://www.caring.com/caregivers/estate-planning/wills-survey [https://perma.cc/TY3Z-F576] (in a survey conducted with YouGov in 2019, 40% of people said they had a will, while in 2020 that number was 32%).

24. Kimberly Wilson, *Why It's Important for Every Black Person to Have a Will*, ESSENCE (May 23, 2019), https://www.essence.com/news/money-career/why-black-people-need-a-will/ [https://perma.cc/LSH8-GLM3].

25. The U.K. Parliament's Wills Act of 1837 set forth will formality requirements that have been adopted by U.S. jurisdictions and largely remain in effect.

26. All fifty U.S. states have adopted a Wills Act detailing the specific formalities necessary for will validity within the jurisdiction.

27. *E.g.*, Stevens v. Casdorph, 508 S.E.2d 610, 612 (W. Va. 1998) (per curiam); *see also* Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 601 (2014); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 490 (1975).

28. *E.g.*, N.Y. EST. POWERS & TRUSTS LAW § 3-2.1(a)(3) (McKinney 2019).

29. ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 156 (10th ed. 2017).

The purposes behind will formalities are manifold. First, they serve an evidentiary function by demonstrating that the testator intended the document in question to be her will.[30] Second, they serve a protective function by reducing the likelihood of fraudulent wills or actions by the unscrupulous to undermine testamentary intent.[31] They also serve a signaling function by providing an effective method of communicating intent, and a cautionary or ritualistic function by reminding the testator that she is about to execute a legally binding document that, if unrevoked or unamended, will dispose of her probate estate on death consistent with the will's terms.[32] To this, Professor Langbein added that will formalities serve a channeling function by funneling all wills into a substantially similar form that makes it easier for probate courts nationwide to efficiently determine whether a testamentary document was indeed intended as a valid will.[33]

Courts have historically taken a strict compliance approach to validating wills such that a failure to comply with Wills Act formalities results in a will being denied probate regardless of whether the document actually reflected the testator's wishes.[34] Under strict compliance, any error in will execution invalidates the will, notwithstanding the fact the court has conclusive evidence that the decedent intended the document to serve as a will.[35] *In re Groffman* is paradigmatic. The case involved a testator, Groffman, who died three years after the will's execution.[36] The will, which was drafted by an attorney, provided that the testator's second wife would share Groffman's accumulated estate with his son, daughter, and stepchild.[37] By contrast, if the will was invalidated and intestacy were to apply, the second wife would inherit everything.[38] On the evening of the will's execution, Mr. and Mrs. Groffman and Mr. and Mrs. Leigh were visiting Mr. and Mrs. Block.[39] The three families were all in the lounge of the Blocks' home when Groffman, gesturing towards his coat, asked Messrs. Block and Leigh to witness his will.[40] The folded will, which Groffman had already signed, was in his coat's

30. Glover, *supra* note 27, at 606.

31. *Id.* at 617.

32. *Id.* at 619, 621.

33. Langbein, *supra* note 27, at 493–94; *see* Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 382 (2017).

34. *Id.* at 340.

35. *See, e.g.*, In re Groffman, [1969] 1 W.L.R. 733 (Eng.), [1969] 2 All E.R. 108 at 108 (Eng.); *see also* Langbein, *supra* note 27, at 489; Glover, *supra* note 27, at 602.

36. *In re Groffman*, 2 All E.R. at 108.

37. *Id.* at 109.

38. *Id.* at 108.

39. *Id.* at 109.

40. *Id.* at 111; *see also* SITKOFF & DUKEMINIER, *supra* note 29, at 147.

inside pocket.[41] Since the coffee table was "laden with coffee cups and cakes," Messrs. Block and Groffman went into the adjacent dining room, where Block signed as a witness.[42] After Block returned to the lounge, Leigh went to the dining room to sign as a second witness.[43]

The ensuing litigation focused on whether the witnesses were present together at the same time when Groffman acknowledged his signature on the will.[44] This was highly relevant to the court because the English Wills Act of 1837 provided that "[N]o will shall be valid unless . . . it shall be signed at the foot or end thereof by the testator . . . ; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time . . . ."[45] The court invalidated the will such that Groffman's estate was distributed via intestacy to his second wife because Groffman, who acknowledged his signature to each witness separately, failed to satisfy the statutory requirement that he do so before both witnesses at the same time.[46] In short, even though the court was "perfectly satisfied that [the] document was intended by the deceased to be executed as his will and that its contents represent[ed] his testamentary intentions," it refused to admit the will to probate for failure to comply with the strict compliance rule.[47]

Although intended to ensure testamentary intent for all probated wills, the strict compliance rule results in numerous wills being denied probate, notwithstanding clear manifestation of testamentary intent.[48] Professor John Langbein's 1975 article *Substantial Compliance with the Wills Act* highlights the doctrine's failures. In the article, Langbein criticizes strict compliance based upon a functional analysis demonstrating how it systematically and inappropriately invalidated wills that clearly manifested testamentary intent.[49] Langbein concluded that strict compliance is "mistaken and needless" because adherence to the rule undermines valid attempts at intergenerational

41. *In re Groffman*, 2 All E. R. at 111.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 113.

47. *Id.* at 109, 113; *see also* Stevens v. Casdorph, 508 S.E.2d 610, 613–14 (W. Va. 1998) (per curiam) (concluding that testator's will was invalid and that intestacy should apply merely because testator, who was handicapped and on a wheelchair, neither signed nor acknowledged his will before the two bank employees who witnessed his will notwithstanding the obvious fact the documents were intended by testator to be his will).

48. *See, e.g.*, *Stevens*, 508 S.E.2d at 613–14; *In re Groffman*, 2 All E. R. at 109, 113.

49. Langbein, *supra* note 27, at 489.

wealth transfer.[50] This is especially so with low-wealth households that consequently abjure estate planning altogether.[51]

The reform movement sought to take a more lenient approach to the will execution process for purposes of furthering testamentary intent. The most successful reform so far has been the elimination of ancillary formalities, such as the requirement that testators and attesting witnesses be in each other's simultaneous presence and the further requirement that testator announce to the attesting witnesses that the document before them is her will.[52] The 1969 Uniform Probate Code ("UPC") recommended this reform by requiring, for probate purposes, simply a written document, the testator's signature, and two witnesses without either publication or presence.[53] Langbein supported this reform on the grounds that the publication and presence requirements resulted in too many wills being invalidated on defective compliance grounds in view of the rule's purpose.[54] Examples of these ancillary reforms include taking a broad interpretation to the meaning of "presence" in the will signing ceremony,[55] allowing a mark, proxy, or assistance by another to satisfy the testator's signature requirement,[56] allowing for discrepancy in the order of signing during the will execution ceremony,[57] allowing for delayed attestation by the witnesses to the will signing,[58] and allowing for attestation by interested witnesses who are beneficiaries under the will.[59]

Despite these ancillary reforms, many wills were still invalidated, notwithstanding clear manifestations of testamentary intent.[60] This prompted the second stage of reform, which focused less on whether formalities were

50. *Id.*

51. *See* DiRusso, *supra* note 23, at 54 (describing how intestacy more often affects lower socioeconomic classes).

52. Glover, *supra* note 27, at 608.

53. *Id.*

54. *Id.* at 608–09.

55. *See* UNIF. PROBATE CODE §2-502(a) (UNIF. LAW COMM'N 1969) (amended 2019); Groat v. Sundberg, 73 A.3d 374, 385 (Md. Ct. Spec. App. 2013); In re Estate of Fischer, 886 A.2d 996, 998 (N.H. 2005).

56. *See* Taylor v. Holt, 134 S.W.3d 830, 833–34 (Tenn. Ct. App. 2003) (allowing a typed computer signature in cursive font that was printed and subsequently witnessed and notarized to be probated as a validly executed will).

57. SITKOFF & DUKEMINIER, *supra* note 29, at 156.

58. *Id.* at 157.

59. *Id.* at 157–58. Under the purging rule, beneficiaries under the will can be the attesting witnesses provided that the bequests they receive under the will's terms can be no greater than what they would take under the state intestacy statute. UPC 2-505 and a minority of jurisdictions no longer require that witnesses be disinterested; therefore, an interested witness's devise is no longer subject to purging.

60. For example, instances of switched wills, incorrectly signing self-proving affidavits in lieu of wills, etc.

observed and more on whether a will signing was intended.[61] The two suggested alternatives were Langbein's curative doctrines of substantial compliance and harmless error.[62] Under substantial compliance, probate courts can probate wills that fail to satisfy statutory formalities if the testator intended to execute a will and the will's form adequately served the purposes of will formalities.[63] The high point for the substantial compliance doctrine was *Matter of Will of Ranney*,[64] where the testator's lawyer had meant to include a one-step self-proving affidavit at the end of the will, but mistakenly used a two-step affidavit, such that the testator and the attesting witnesses signed affidavits under oath ostensibly averring that the will had already been executed in compliance with the Wills Act, when the only signatures were found in the affidavit and not the will. In other words, the testator and witnesses inadvertently made a false declaration in the affidavit that they had actually signed the will.[65] The New Jersey Supreme Court, applying Langbein's two-part substantial compliance test, allowed for probate of the improperly executed will, on the grounds that it substantially complied with the Wills Act.[66] The substantial compliance doctrine has only been adopted by a small number of courts.[67]

Due to judicial and legislative recalcitrance, the doctrine reached its low point in *In re Will of Ferree*,[68] a case involving a deceased testator whose body was found in an apparent suicide.[69] The testator's last will and testament, dated 1999 and filled in by hand on a preprinted will form, was found near his body.[70] The form was signed by the testator and notarized, but not attested by two witnesses.[71] The New Jersey court refused to probate the will and concluded that its manner of execution did not sufficiently comply with the Wills Act because it lacked the required two witnesses for an attested will and was insufficiently handwritten to be probated as a holograph.[72] Similarly, in *Martina v. Elrod*,[73] the court concluded that a will was not self-proved

61. Glover, *supra* note 27, at 609.

62. *Id.*

63. *Id.* at 610.

64. 589 A.2d 1339 (N.J. 1991).

65. *Id.* at 1339–41; *see* SITKOFF & DUKEMINIER, *supra* note 29, at 171.

66. SITKOFF & DUKEMINIER, *supra* note 29, at 171.

67. *Id.*; Stephanie Lester, *Admitting Defective Wills to Probate, Twenty Years Later: New Evidence for the Adoption of the Harmless Error Rule*, 42 REAL PROP., PROB. & TR. J. 577, 580 (2007).

68. 848 A.2d 81 (N.J. Super. Ct. Ch. Div. 2003), *aff'd*, 848 A.2d 1 (N.J. Super. Ct. App. Div. 2004).

69. SITKOFF & DUKEMINIER, *supra* note 29, at 172.

70. *Id.*

71. *Id.*

72. *In re Will of Ferree*, 848 A.2d at 82, 89.

73. 748 S.E.2d 412 (Ga. 2013).

because the affidavit signed by the witnesses and notary did not conform with the State of Georgia's statutory requirements for a valid self-proving affidavit.[74] The court rejected the will proponent's claim of substantial compliance, concluding, pedantically, that to do so would require actual compliance.[75] The substantial compliance doctrine, though benevolently motivated to remedy the harsh effects of the strict compliance rule, has proved altogether ineffective at expanding the rate of testacy because courts have applied the doctrine too narrowly.[76]

Langbein later backed the adoption of a broader dispensing power statute, known in the U.S. as the harmless error rule,[77] which was first adopted in the Australian state of Queensland.[78] Harmless error relaxes the formal compliance standard to allow for probate of a defectively executed will, provided the court is satisfied that the decedent, by clear and convincing evidence, intended the document to be her will.[79] Unlike the substantial compliance doctrine, the harmless error doctrine requires no second prong of fulfilling a will's formality requirements.

In re Estate of Hall[80] involved the application of Montana's harmless error statute.[81] In *Hall*, the testator Jim Hall and his wife, Betty Hall, were finalizing a proposed joint will's terms at the office of their lawyer, Ross Cannon.[82] After agreeing on the joint will's terms, Jim and Betty signed an interim version after Cannon incorrectly advised them that the draft will at his office would satisfy the will formality requirements if they signed it and he notarized the document.[83] When Jim and Betty returned home, Jim, thinking the interim draft will was a valid testamentary document, had Betty tear up and therefore revoke a prior 1984 will on the assumption the draft interim will was validly executed.[84] When Jim died before Cannon had finalized the joint will for execution purposes, Betty applied for informal probate of the draft joint will.[85] The lower court admitted it to probate notwithstanding the fact that Montana law requires two witnesses and does not accept the probate

74. SITKOFF & DUKEMINIER, *supra* note 29, at 174.

75. *Id.*; *see also* Smith v. Smith, 348 S.W.3d 63, 67 (Ky. Ct. App. 2011) (concluding that a will signed by one witness and not the statutorily required two witnesses could never be in substantial compliance with the Wills Act).

76. SITKOFF & DUKEMINIER, *supra* note 29, at 175.

77. UNIF. PROBATE CODE § 2-503 (UNIF. LAW COMM'N 1969) (amended 2019).

78. SITKOFF & DUKEMINIER, *supra* note 29, at 174.

79. *See* Lester, *supra* note 67, at 580.

80. 51 P.3d 1134 (Mont. 2002).

81. *Id.* at 1135.

82. *Id.*

83. *Id.* (noting that Montana law requires two witnesses to the signing of a will).

84. *Id.*

85. *Id.*

of a document that has only been notarized by the drafting attorney.[86] The Montana Supreme Court, however, affirmed the lower court's decision to probate the joint will under the harmless error rule because Betty demonstrated, by clear and convincing evidence, that decedent intended the document to be his will.[87] The high evidentiary burden was satisfied by uncontroverted testimony from the testator's widow that she believed the draft joint will was valid and would stand as a will for probate purposes until a finalized version was prepared and executed.[88]

While both the UPC and the Third Restatement of Property have adopted the harmless error rule, only eleven states have done the same.[89] Additionally, states that have adopted curative doctrines have also been reluctant to allow for their potentiality. *In re Probate of Will and Codicil of Macool*[90] is paradigmatic. In *Macool,* Louise and Elmer Macool were married for forty years. Although they had no biological children together, Elmer had seven children from his first marriage that Louise helped raise as her own.[91] Attorney Kenneth Calloway drafted wills for both Elmer and Louise and on September 13, 1995, Louise executed a will that named Elmer as her sole beneficiary and Elmer's descendants as contingent beneficiaries.[92] On May 23, 2007, Louise executed a codicil to her will naming two of her stepchildren as co-executors. Elmer died on April 26, 2008.[93] Less than a month later, Louise went to Calloway's law office with the intent of changing her will.[94] She gave Calloway a handwritten note that demonstrated her desire to have her niece, Mary Rescigno, receive a share of the estate.[95] Calloway, in turn, after discussing the matter with Louise and using her handwritten notes as a guide, dictated the entire will while she was at his office.[96] A short while thereafter, Calloway's secretary typed a draft version of Louise's will, with the word "rough" handwritten on the document's top left corner.[97] When asked to explain the word "rough," Calloway indicated that the document was "rough" in that it "had not been reviewed by me to make changes if I deemed any changes had to be made from what I believed I dictated."[98] Unlike the

86. *Id.*
87. *Id.* at 1136.
88. *Id*.
89. SITKOFF & DUKEMINIER, *supra* note 28, at 176.
90. 3 A.3d 1258 (N.J. Super. Ct. App. Div. 2010).
91. *Id.* at 1261.
92. *Id.*
93. *Id.* at 1262.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*

previous will and codicil that left the entirety of Louise's estate to Elmer's blood relatives, the draft will named Louise's nieces, as well as all of her stepchildren, as residuary beneficiaries.[99] Louise, who left Calloway's office with the intention of having lunch nearby, died unexpectedly an hour later without having the opportunity to approve the draft will.[100] Mary Rescigno sought to probate the draft will and invalidate the 1995 will and 2007 codicil.[101]

The New Jersey Court of Appeals concluded that although the draft will substantially reflects Louise's handwritten note, "it does not provide a statement naming Angela Rescigno's two children as contingent beneficiaries of Rescigno's share of the estate" and "the draft makes only an oblique reference to the provision in the handwritten document to keep the house" with the Macool family.[102] The trial court subsequently rejected plaintiff Mary Rescigno's argument that the draft will be probated in lieu of the 1995 will and 2007 codicil because it found Rescigno failed to demonstrate that decedent intended the draft will to be her dispositive will.[103] In so doing, the trial court construed New Jersey law as requiring that any purported will must be executed or signed in some fashion by the testator.[104]

The New Jersey Court of Appeals affirmed the trial court and concluded that while Louise clearly intended to alter her testamentary plan to include her own blood relatives as beneficiaries, Rescigno failed to demonstrate Louise intended the "rough" draft to be her last and binding will.[105] In so doing, the Court of Appeals concluded that a proponent of a document intended to be a testator's will must prove, by clear and convincing evidence, that 1) decedent actually reviewed the document; and 2) thereafter expressed final assent to it.[106] The court concluded that because Louise died before having a chance to review the draft will, it therefore could not be probated. However, the court conceded that this resulted in the probate of her estate, per the 1995 will and 2007 codicil, which clearly contradicted her testamentary wish to provide for her own nieces.[107] In short, notwithstanding the availability of the harmless error rule, the Court chose to disregard Louise's manifest testamentary intent.

Macool demonstrates how will formalities continue to serve as a hard barrier to fulfilling testamentary intent, notwithstanding the availability of

99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.* at 1263.
104. *Id.*
105. *Id.* at 1264.
106. *Id.* at 1265.
107. *Id.* at 1266.

curative doctrines. It illustrates how courts lamentably tend to use the will formality barrier to not only deny probate to documents that are consistent with testamentary intent, but probate documents that demonstrably contradict testator's wishes. This hard barrier to the probate of documents that reflect testamentary intent has three main unintended consequences. First and most obviously, it leads courts to deny probate to many documents intended to govern decedents' estate at death. Second, it raises the cost of estate planning, which leads many Americans, especially low-wealth households, to abjure estate planning altogether. Finally, it serves to undermine the whole premise behind the Anglo-American system of intergenerational wealth transfer, namely the fulfillment of testamentary intent to further society's goal of raising productivity by means of savings and investment.

By setting a high threshold for estate planning to protect against fraud and abuse, estate planning laws effectively act as a disincentive to savings and investment by low-wealth households, especially racial minorities, who have historically been excluded from socio-economic and cultural power and therefore have had less access to legal representation. This, of course, results in state intestacy laws being the means forced on most Americans for intergenerational wealth transfer. This worsens the country's wealth and racial inequality problem because intestacy laws, as detailed below, dissipate wealth over time. This is why I prophylactically recommend exempting low-wealth households from intestacy laws as a means of remediating intergenerational socio-economic inequality. The first step, however, is to democratize estate planning by allowing for the probate of electronic documents that are not printed on paper.

B. Use of Electronic and Non-Typewritten Documents to Democratize Estate Planning

Although no jurisdiction insists that a valid will be memorialized on paper,[108] nearly all U.S. jurisdictions insist that probated documents be handwritten in a fixed physical format, which, by implication is almost always paper.[109] Although this is how nearly all humans have conveyed written information since the advent of Johannes Gutenberg's printing press in the 15th century, this requirement is increasingly an outdated relic in the current information age, which allows most of us to abjure paper in our written correspondence. Indeed, most of us, especially lawyers, prefer not to use paper correspondence due to filing and breach of confidentiality concerns. For example, at my former law firm, attorneys seldom used paper correspondence, and instead communicated almost exclusively by email or voice. Although some emails were printed and filed in paper form, this was rare, especially since the firm tended to be understaffed and secretaries tended to fall behind in their filing duties. At my law school, faculty and staff seldom correspond by paper. Not only is it less convenient and effective than email, but paper correspondence is ill-advised in view of the confidentiality concerns that bedevil higher education, and high faculty-staff ratios make timely filing altogether infeasible.

My classes reflect this trend. When I was in law school twenty years ago, professors would often issue paper handouts before class. Today, my colleagues and I seldom issue paper handouts and typically post documents to an online platform that students can review electronically before class. This is paradigmatic nationwide. However, due to paper's long history as the sole means of memorializing an estate plan, the courts have been loath to consider alternatives to paper wills, notwithstanding the fact that no jurisdiction specifically requires that testamentary documents be memorialized on paper.

Indeed, although paper correspondence in hard copy form remains vital to many individuals, electronic records and devices provide efficiency and capabilities that are altogether lacking with paper. In 2011, for instance,

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108. For example, Florida has granted blanket approval to electronic writings in the very first section of the Florida Statutes. FLA. STAT. § 1.01(4) ("The word 'writing' includes handwriting, printing, typewriting, and all other methods and means of forming letters and characters upon paper, stone, wood, or other materials. The word 'writing' also includes information which is created or stored in any electronic medium and is retrievable in perceivable form."). So, anything that I can call up on my computer screen is a writing. It does not matter what kind of electronic file it is, if I can retrieve it and perceive it, it appears to satisfy the definition of a writing in Florida.

109. *See* Adam J. Hirsch, *Technology Adrift: In Search of a Role for Electronic Wills*, 61 B.C. L. REV. 827, 846 (2020) (noting that as of 2020, four states—Arizona, Florida, Indiana, and Nevada—have enacted legislation expressly validating electronic wills).

President Obama issued a Presidential Memorandum directing all federal agencies to "transition[] from paper-based record management to electronic records management where feasible."[110] In university classrooms across the country, the norm is for students to take notes via laptop computers or tablets, with pens and notepads being relics of the past. When taking public transportation to and from work, newspapers are typically read on smartphones as opposed to in print. Walk over to a local coffee shop, restaurant, or bar, and customers will typically be reading their smartphone or electronic device. Menus now come on iPads with built-in finger signature functions. Going further, personal checks have become near obsolete. Today I pay nearly all my bills online and seldom, if ever, execute a document requiring my personal signature. Even the act of transferring real property has gone from paper to digital. In the past, it would have been unthinkable to buy or sell a home without the thick packet of documents requiring personal signatures. Today, there is an e-Closing system that provides for a single electronic signature to be affixed to all the necessary documents.

In view of this paradigm shift away from executing documents via signature on paper toward reliance on electronic means of communication, legislatures and courts should reform the Wills Act accordingly. For example, all jurisdictions require a testator's signature for Wills Act compliance purposes because a handwritten signature on paper serves a ritualistic and cautionary function by making sure a testator becomes fully aware of the finality of her actions.[111]

This supposition no longer holds and is belied by our decreasing use of paper correspondence such that written signatures have become a cultural nullity. Most of my students seldom use written signatures in their day-to-day lives and instead correspond via text message, email, or messaging apps, and, like me, pay their bills online. In short, the electronic "send" feature has overwhelmed the functional utility of handwritten signatures, which are increasingly irrelevant to millennials and the younger generation. Rather than insist on a handwritten signature on paper to signal assent to the disposition of one's assets at death, a far better approach would be to expand the Wills Act's scope and allow for electronic conveyances, which, in turn should allow for message conveyance by "send" to be substituted for handwritten or e-signatures.[112] According to Professor Grant:

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110. Presidential Memorandum: Managing Government Records, 76 Fed. Reg. 75,423, 75,424 (Dec. 1, 2011).

111. Gökalp Y. Gürer, Note, *No Paper? No Problem: Ushering in Electronic Wills Through California's "Harmless Error" Provision*, 49 U.C. DAVIS L. REV. 1955, 1964 (2016).

112. *See, e.g.*, FLA. STAT. § 668.004 (providing that "an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature").

> As a society, we have moved from the printing press, to typewriters, and now to computer word processing. Paralleling this shift in society, law has moved from an oral tradition, to a print tradition, and now to an electronic tradition. "Any understanding of legal culture is necessarily incomplete without some real appreciation of the role played by its modes of communication, whether oral, scribal, print, or electronic." Laws should not be static but evolutionary by nature. Human nature requires that we look back and honor tradition; but evolution requires that we look forward and innovate to embrace the future and not be hampered and shackled by our past.[113]

Grant writes that because generations of lawyers have been trained to view wills as requiring a printed writing on paper, the estate planning world is basically operating under what he calls the Gutenberg Paradigm, after the 15th century inventor of the printing press.[114] Grant proposes a model electronic will statute that has at its purpose facilitation of the use and enforcement of electronic and other emerging technology in memorializing decedent's intent with regard to the disposition of their estate.[115] It broadly defines a signature to include any symbol or mark that is used to sign or authenticate an electronic will. And unless the document is a holographic will, it still requires witnessing by two individuals, each of whom must attest that they saw the testator sign the document.[116] This is certainly an advancement on the current Wills Act, but it still leaves at issue the problem of low-income households' inability to effectuate a will electronically and effectively comply with the Wills Act's terms. Grant's proposal to update the Wills Act by including a broad array of electronic wills is long overdue. It will laudably increase the number of probatable wills and reduce the number of estates that are forced to go through intestacy. Ideally, it dramatically reduces the incidence of intestacy by allowing courts to probate documents that currently fail to comply with Wills Act formalities.

A plausible scenario going forward is *In re: Estate of Javier Castro, Deceased*,[117] which involves a petition to probate a document saved on a Samsung Galaxy tablet composed on a touchscreen via stylus pen.[118] In *Castro,* testator, who was taken to the hospital in need of a blood transfusion,

113. Joseph Karl Grant, *Shattering and Moving Beyond the Gutenberg Paradigm: The Dawn of the Electronic Will*, 42 U. MICH. J.L. REFORM 105, 112–13 (2008) (quoting Ronald K.L. Collins & David M. Skover, *Paratexts,* 44 STAN. L. REV. 509 (1992)).

114. Grant, *supra* note 113, at 115.

115. *Id.* at 127.

116. *Id.* at 129–30.

117. 27 QUINNIPIAC PROB. L.J. 412 (2013).

118. *Id.* at 414.

declined the procedure for religious reasons.[119] In anticipation of death, testator discussed preparing a will with his two brothers, Albie and Miguel, who composed its terms on Miguel's Galaxy tablet because paper was unavailable to them.[120] The brothers testified that testator would say what he wanted in the will and Miguel would handwrite what he had said using a stylus.[121] Each section would be read back to testator and subsequently the whole document was read back as well.[122] Testator subsequently signed the will on the tablet in the presence of his two brothers and his nephew Oscar DeLeon.[123] The brothers testified that the paper copy of the will presented to the court for probate was an exact duplicate of the document stored on the tablet, which was never altered after testator's death.[124] The brothers' testimony was supported by testator's niece, Dina Cristin Cintron, who testified that testator told her he had signed the will on the tablet, and Marelisa and Steve Leverknight, who testified that testator signed the will on the tablet and it reflected his wishes.[125] The court, after framing the issue presented as whether the will was a signed writing that was testator's last will and testament for purposes of Ohio's Will Act, concluded as follows:

> I believe that the document prepared . . . on Albie's Samsung Galaxy tablet constitutes a "writing" under section 2107.3. To rule otherwise would put restrictions on the meaning of writing that the General Assembly never stated. . . . The tablet application also captured the signature of Javier. The signature is a graphical image of Javier's handwritten signature that was stored by electronic means on the tablet. Similarly, I believe that this qualifies as Javier's signature under section 2107.3. Thus, the writing was "signed" at the end by Javier.[126]

Furthermore, the court accepted that the document was validly witnessed notwithstanding the fact it lacked an attestation clause, because the document was signed in the "conscious presence" of the witnesses.[127]

Castro evidences the potential democratizing benefits of probating electronic documents in addition to paper wills. It also takes a laudably broad approach to the signature and witnessing requirements to allow for the probate of an electronically composed and filed document consistent with Ohio's

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* DeLeon testified that he did not see testator sign the will, but that testator acknowledged in his presence that he had signed the will on the tablet.

124. *Id.* at 415.

125. *Id.*

126. *Id.* at 417.

127. *Id.* at 417–18.

Wills Act. However, expanding the number of probatable estates by allowing for electronic wills does not go far enough. It still leaves the majority of decedents intestate in view of the demonstrated correlation between testacy and wealth.[128] More is needed if we truly want to democratize estate planning and allow for intergenerational wealth protection. Beyond Grant's well-crafted recommendation to expand the Wills Act to probate electronic wills, Professor Weisbord has ingeniously proposed for the probate of optional testamentary schedules on state income tax returns that could be updated electronically as needed.[129] Although this proposal is a dramatic improvement over the status quo, it still relegates a huge proportion of estates to intestacy because many low-wealth households will lack the ability or inclination to either complete or pay for preparation of their testamentary schedules. Professor Boni-Saenz focuses on distributive justice and donative intent and recommends maintaining Wills Act formalities, but also recommends expanding the dispensing power of probate courts to allow for a far greater proportion of estates that fail to comply with the strict compliance rule to be probated.[130] Although this would increase the proportion of testate estates by probating a higher proportion of wills, it would not go far enough because lower wealth households have been acculturated to abjure estate planning altogether.

Although holographic or handwritten wills, which are currently allowed in roughly half of U.S. jurisdictions, have historically democratized estate planning, they have never resulted in a complete democratization of estate planning—even in jurisdictions that have interpreted holographs broadly to probate preprinted forms with minimal handwriting.[131] In any event, with the

128. *See* DiRusso, *supra* note 23, at 41 (noting that 68% of the survey participants lacked wills, "support[ing] the finding that the majority of Americans are intestate"); CARING.COM, *supra* note 23 (finding in its annual nationwide survey that 68% of U.S. adults don't have estate planning documents). *See also infra* notes 138–47 and accompanying text.

129. *See* Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 879 (2012) ("Unlike other acts of legal significance, such as entering into a marriage or consumer contract, the will-making process is unfamiliar to most individuals and requires legal draftsmanship and compliance with testamentary formalities.").

130. Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 328–29, 371–72 (2018).

131. *See In re* Estate of Gonzalez, 855 A.2d 1146, 1150 (Me. 2004) (holding that "printed portions of a will form can be incorporated into a holographic will where the trial court finds a testamentary intent"); UNIF. PROBATE CODE § 2-502 (UNIF. LAW COMM'N 1990) (amended 2019) (advocating for the probate of preprinted forms as holographs so long as material portions are in the testator's handwriting); Meredith Murphy, *The Validity of Handwritten Wills*, JD SUPRA (Jan. 22, 2020), https://www.jdsupra.com/legalnews/the-validity-of-handwritten-wills-89819/ [https://perma.cc/H8ST-PV6T] ("Roughly half of the states recognize holographic wills and will admit a holographic will to probate.").

collapse of paper, pen, handwriting, and handwritten signatures, holographs will increasingly become relics of the past.

Accordingly, my recommendation is to encourage jurisdictions to recognize that Wills Act compliance requirements are, in effect, systematically undermining socioeconomic and racial equality and exempt lower valuation estates from its requirements. This is for three reasons. First, the requirement of strict Wills Act compliance has made estate planning both too costly and infeasible for the majority of American households.[132] Second, it results in the bulk of estates being distributed via state intestacy laws that are inconsistent with the estate planning needs of poorer and racial minority communities.[133] Finally, it results in problems related to collective ownership that undermine wealth.[134] Expanding the Wills Act to countenance electronic, non-paper documents that lack a handwritten signature and attestation clauses is a good start to democratize estate planning. However, it does not go far enough. As such, my proposal is to recognize the baneful effects of outdated intestacy laws and therefore exempt low-value estates from intestacy altogether. If the probate court can, by a propensity of the evidence, infer testator's intent using a totality of the circumstances approach, it should do so. Although this will dramatically increase the demands placed on probate courts, such a reform will, over time, engender racial and socio-economic equality. It is to this subject that the paper turns.

III. Intestacy: The Wills Act's Chosen Estate Plan

The laws of intestacy, which are state enactments, determine how an intestate's estate is distributed on death absent a valid will. Because a large majority of Americans die without a will, this means that the majority of decedent's estates are distributed according to state laws of intestate succession that purport to provide a simple and straightforward inheritance.[135] These default rules generally privilege spouses, children, and biological relatives.[136] If there are no biological relatives or legal heirs, then the intestate's property escheats to the state.[137] Intestacy has become a paradigmatic means of estate planning for most Americans.[138] To see why, only 20% of Americans have

132. *See* DiRusso, *supra* note 23, at 41.

133. *Id.* at 41, 54–56.

134. Strand, *supra* note 7, at 476–77.

135. Danaya C. Wright, *Inheritance Equity: Reforming the Inheritance Penalties Facing Children in Nontraditional Families*, 25 CORNELL J. OF L. & PUB. POL'Y 1, 10 (2015).

136. *Id.*

137. *Id.*

138. *See* DiRusso, *supra* note 23, at 41 (noting that 68% of the survey participants lacked wills, "support[ing] the finding that the majority of Americans are intestate"); CARING.COM, *supra* note 23.

wills drafted by an attorney, 11% have self-drafted wills, and 68% die intestate.[139] Of those who lack wills, a disproportionate number are racial minorities.[140] Being female also correlates with intestacy and lack of access to professional estate planning.[141] Similarly, low education levels correlate with intestacy, such that those with only a high school education have only a 22.7% likelihood of having a will.[142] The rate jumps to over 55% for those with advanced university degrees.[143] Unsurprisingly, income levels also correlate with testacy such that those with annual incomes below $25,000 have only an 18.5% chance of testacy, whereas those whose incomes are over $100,000 have a greater than 40% likelihood of having executed a will.[144]

According to DiRusso, the will/non-will divide is superimposed onto racial, sex and socioeconomic hierarchies that have been systematized throughout American history.[145] Although her primary goal is demonstrating the correlation between cultural dominance and testacy for purposes of social awareness and legal recognition, she also recommends various changes to intergenerational-wealth transfer laws to not only "save" individuals from intestacy, but to recraft intestacy statutes because they disproportionately apply to "members of less empowered classes."[146]

DiRusso's scholarship unequivocally demonstrates that the testate/intestate distinction is reflective of broader social hierarchies that persist in a White-male-dominated culture. This is supported by Weisbord, who writes that intestacy is largely explained by the inaccessibility of the will-making process and the fear of dealing with a lawyer for reasons related to culture, cost, and privacy.[147]

Such findings are problematic because the testate/intestate divide reinforces the cultural legacy of domination suffered by women, minorities, and the poor and because most intestacy statutes—which were enacted from a majoritarian perspective—do not consider the life circumstances of racial minorities and low-wealth households.[148] For example, nontraditional families,

139. DiRusso, *supra* note 23, at 41.

140. *Id.* at 43–44. While over 35% of White survey participants reported having executed wills, only 16% of non-White participants reported the same. *Id.* at 44.

141. *Id.* at 46 (finding that of those who had wills, over 47% of women drafted their own wills compared to 28% of men). Also, 38% of men report having a will compared to 26% of women and of those with wills, a far higher proportion of men report having their estate plans drafted by an attorney. *Id.*

142. *Id.* at 49.

143. *Id.*

144. *Id.* at 51.

145. *Id.* at 76.

146. *Id.* at 78.

147. Weisbord, *supra* note 129, at 879.

148. *See id.* at 892–93.

unmarried cohabitants, and racial minority communities that disproportionately rely on extended family networks are not benefited by intestacy statutes that convey estates to statutory heirs-at-law, as opposed to intended beneficiaries.[149]

IV. The Woeful Inadequacy of Harmful Intestacy Laws

The vast majority of state inheritance laws only benefit spouses and blood relatives and exclude nontraditional families.[150] For example, most probate codes define "child" for purposes of intestate succession to be a biological or formally adopted child, and exclude equitably adopted children, stepchildren, foster children, or other minors raised by the intestate.[151] This means that absent a will, a non-adopted minor that is raised by the intestate and treated as her child in all ways will be denied inheritance rights altogether.[152] This frustrates the intestate's most likely testamentary wishes and contradicts many state family law codes that recognize non-natural, non-adopted children as functional children for purposes of child support, visitation, and parental decision-making.[153] Among other groups, "[n]onmarital children, children born from assisted reproductive technologies, . . . [and] children living with stepparents" all potentially suffer from this legal infirmity.[154] Indeed, the majority of American children live with single or cohabiting parents. These households tend to be unstable, such that more than three in ten children younger than six experienced a major change in their family or household structure in the form of divorce, separation, marriage,

149. *Id.*

150. *See id.* at 878.

151. *See, e.g.*, UNIF. PROBATE CODE § 1-201(5) (UNIF. LAW COMM'N 2010) (amended 2019) (expressly excluding stepchildren, foster children, and grandchildren from its definition of "child"); FLA. STAT. § 731.201 (2019) (excluding from the definition of child a "stepchild, a foster child, a grandchild, or a more remote descendant"); NEB. REV. STAT. § 30-2209(3) (2014) (same); TEX. ESTATES CODE § 22.004 (Westlaw 2019) (including equitably adopted children, but generally not children without a "presumed father"); O'Neal v. Wilkes, 439 S.E.2d 490 (Ga. 1994) (specifically precluding use of equitable adoption to allow for inheritance by an African American woman who was raised by her extended family).

152. *See, e.g.*, *In re* Estate of Ford, 82 P.3d 747, 753 (Cal. 2004) (denying inheritance rights to a foster son, despite "a close and enduring familial relationship" between the claimant and the intestate decedent); Miller v. Paczier, 591 So.2d 321, 323 (Fla. Dist. Ct. App. 1991) (holding that a nephew of the decedent could not qualify as a virtually adopted son and therefore could not qualify for a larger intestate share); *In re* Estate of Thompson, 760 N.W.2d 208, 208 (Iowa Ct. App. 2008) (denying inheritance rights to a stepdaughter, despite a "close and loving mother-daughter relationship" between the claimant and the decedent); *In re* Estate of Hannifin, 311 P.3d 1016, 1019–20 (Utah 2013) (denying inheritance rights to a claimant raised by the clergy decedent even though "the two referred to each other as father and son and held themselves out to the community as such").

153. Wright, *supra* note 135, at 11.

154. *Id.* at 12.

cohabitation, or death in the past three years.[155] Family dislocation is becoming increasingly paradigmatic: four in ten and five in ten children will have a cohabiting mother by the ages of 12 and 16, respectively.[156] Although the majority of White, Hispanic and Asian children still live in two-parent families, less than half of Black children are living in a two-parent home.[157]

A typical manifestation of an inheritance problem involves a low-wealth blended family where each spouse has a child from a previous relationship and neither parent officially adopted their stepchild. When the husband dies intestate, the state intestacy law would apply to benefit his wife as his heir and exclude the couple's children. Notice, however, should the wife die intestate, the couple's joint estate will pass entirely to her child and exclude her late husband's child even if the wife had an excellent relationship with her stepchild and sociologically treated the child as her own. This is because the couple's joint property has been recharacterized as her property upon the husband's passing and will only pass to her lineal or collateral descendants, most likely in contravention of her wishes. What prevents courts from broadly applying equitable adoption doctrines and legislatures from expanding the definition of "child" to include functional children is the belief that failure to adopt manifests an intent not to adopt. The problem with this supposition is that there are other far more plausible reasons explaining the non-adoption, including: 1) the high cost of adoption, 2) legal obstacles to adoption, 3) decedent's procrastination followed by an unexpected death, 4) decedent's perception that adoption is unnecessary, 5) decedent's ignorance as to state intestacy laws and how they apply to stepchildren, and 6) decedent's complete disregard for inheritance laws altogether.[158]

Intestacy laws are, after all, written with the assumption that the objects of our affection are exclusively heirs at law. This is because they are premised on outdated notions as to our lived social networks and objects of affection. To illustrate, today's single lawyer in the United States is typically practicing law in a city that is an airplane flight away from her parents and blood relatives. The people that are operationally closest to the lawyer tend to be college and law school friends, work colleagues and other members of the lawyer's social network, including, perhaps, a cohabiting partner. State intestacy laws, however, which have become relics, disregard nonfamilial relationships such as these.

155. PEW RESEARCH CENTER, *Parenting in America: The American Family Today*, https://www.pewsocialtrends.org/2015/12/17/1-the-american-family-today/ [https://perma.cc/2YEE-B462].

156. *Id.*

157. *Id.*

158. *See* Wright, *supra* note 135, at 13, 72.

This failure inordinately affects racial minorities, women, and the poor. White people are far more likely to have higher incomes, wealth, and to die testate than Black people.[159] A huge component of this discrepancy is explained by the fact that White people tend to receive sizable devises during their lifetimes, while Black people and other racial minorities do not.[160] This feeds the cycle of inequality and racial polarization because White households use inherited wealth to further their economic well-being in a manner unavailable to minority households. Although much of this dynamic can be explained by the conjunction of cultural and economic oppression suffered by minority households, it is also attributable to state intestacy laws, which undermine communities of color.

To illustrate, imagine a higher income nuclear family household that includes a husband, a wife, a daughter, and a son. If the married couple has accumulated $500,000 in home equity and $500,000 in other assets, a typical estate plan would have the husband and wife each execute wills conveying the entirety of their estates to one another, with their children being equal contingent beneficiaries. It would name the other spouse as executor and one of the children as contingent executor to equally and expeditiously apportion the couple's wealth. Should the husband predecease the wife, the wife would receive the entirety of the estate that will, in turn, be conveyed to her two children to share equally upon her death. Accordingly, assuming the husband and wife's net estate remains at $1 million, the contingent executor will make arrangements to equally divide their parents' estate such that the two siblings are able to effectively and productively use their parents' bequest to advance their own households' financial well-being.

In this paradigmatic example, the children will be able to use the assets bequeathed to them to strengthen their financial wherewithal. The surviving children could, for example, fund their own children's higher education expenses, pay down a mortgage balance or other existing debt, fund their own retirement plans, or pay for a few luxuries such as a vacation or nice car. In short, the correlation between wealth and estate planning furthers the process of intergenerational wealth inequality by enabling the upper middle class to compound their wealth advantage over time. This is not the case for poorer households, which disproportionately include racial minorities. Strand writes that because the position of each generation is dependent on the position of

159. The average White household has about 10 times the net wealth of a black household. Tracy Jan, *White Families Have Nearly 10 Times the Net Worth of Black Families. And the Gap is Growing.*, WASH. POST (Sept. 28, 2017), https://www.washingtonpost.com/news/wonk/wp/2017/09/28/black-and-hispanic-families-are-making-more-money-but-they-still-lag-far-behind-whites/?noredirect=on [https://perma.cc/3PAV-8TFW].

160. Strand, *supra* note 7, at 476–77.

the preceding generation, minority households lack what she calls "the springs to give the succeeding generation an economic bounce."[161]

History and racial wealth inequality results in Black households inordinately relying on state intestacy laws for wealth transmission.[162] Intestacy laws are, however, poorly suited to the lived reality of low-wealth households, often resulting in clouds on title and suboptimal property use due to fractionated ownership interests.[163]

Humanizing the consequences of a typical intestacy law's effect on racial minority wealth, Strand provides a useful counterfactual of a Black household that includes a husband and wife who own a single-family home as tenants by the entirety. In a typical scenario where husband predeceased the wife, the now-widow continues living in the couple's home, typically with her children or other family members until her own intestate death.[164] This leaves things to the state intestacy law, such that the couple's heirs, typically their children, own the home collectively as tenants in common. In the case of a single-family home in a low-value neighborhood, the collective ownership in the home becomes fractionated over time such that taxes are not paid, needed repairs are not completed and the single-family home—which is typically an appreciating asset in middle class neighborhoods—systematically loses value and ceases to be an asset.[165]

This framework is worsened by the fact that the home's occupants—typically heirs who are part owners—find that securing legal assistance to open probate, locate heirs, and clear title is a logistical nightmare due to the family dislocation that is paradigmatic for economically distressed households.[166] Scholars such as Professor Way have proposed innovative and thought-provoking means of remediating the problem of collectively owned heirship property, including the reform of intestacy laws, tax reform and provision of government assistance to buy-out co-tenants' ownership interests.[167]

As set forth above, courts' continued tendency to abide by the strict compliance rule for will execution means that the majority of Americans will

161. *Id.*

162. *Id.* at 492–93.

163. *See id.* at 498; Weisbord, *supra* note 129, at 878, 895–97.

164. Strand, *supra* note 7, at 493.

165. *Id.* at 493–94.

166. *Id.* at 494–95.

167. *See generally* Heather K. Way, *Informal Homeownership in the United States and the Law,* 29 ST. LOUIS U. PUB. L. REV. 113 (2009) (advocating for a broad reform of the formal legal systems surrounding homeownership, including strengthening informal ownership arrangements, lowering transaction costs to formalize title, and facilitating transfer of title to real estate for heirs to minimize tenancy in common ownership).

not execute valid wills and instead continue to rely on harmful state intestacy laws for intergenerational wealth transfer. This leads to a polarizing phenomenon whereby the wealthy and those with traditional, majoritarian familial structures see their wealth grow over time, while those from non-traditional backgrounds see their wealth dissipate.[168] This is because, while modest wealth transfer in the middle class enables wealth accumulation, the inevitable fractionation of assets among intestate heirs is destructive of wealth.[169] This is especially devastating for financially dependent intended beneficiaries because, according to Weisbord, "the cost of losing an anticipated inheritance is more economically harmful for those intended beneficiaries than the benefit of a modest windfall is economically helpful for unintended heirs."[170]

Facilitating the intergenerational transfer of wealth by exempting smaller estates from intestacy would be a useful means of protecting and growing wealth in poorer communities.

V. A Proposal for Intergenerational Wealth by Exempting Lower-Value Estates from the Wills Act

The final part of my proposal is therefore to exempt probate estates valued at less than $100,000 from state intestacy laws and instead order their distribution according to a totality of the circumstances analysis, such that a probate court can order the devise of decedent's estate according to a fact-based inquiry as to decedent's most likely wishes at death. This enables the estate beneficiaries to avoid the bedraggling consequences of intestacy-based collective ownership. It also recognizes the fact that intestacy laws are increasingly nonreflective of the needs of minority and nontraditional families who rely on extended families and broader social networks, as opposed to nuclear families.[171] This approach will certainly be more difficult for probate courts to administer in that it will force them to hold individualized hearings prior to distribution of low-value estates. However, it will not likely be as bedraggling as some might fear. Jurisdictions will prioritize investment in their probate courts, and recognition by low-wealth households that their estates are exempt from intestacy will incentivize many to actually engage in decipherable estate planning designed to satisfy a probate court's totality of the circumstances analysis. In the end, my proposal will massively reduce reliance on state intestacy laws and, over time, engender wealth transmission and growth in socioeconomically distressed communities.

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168. Weisbord, *supra* note 129, at 897–98.

169. *Id.*

170. *Id.* at 897.

171. *See, e.g.*, O'Neal v. Wilkes, 439 S.E.2d 490, 491 (Ga. 1994) (recounting the various relatives O'Neal lived with as a child, following the death of her single mother when O'Neal was eight years old).

VI. A Framework for Exempting Low-Wealth Estates from State Intestacy Laws

Probate of intestate estates serves three primary functions. It 1) makes the property marketable again by providing evidence of transfer of title to the new owners; 2) provides a procedure for payment of decedent's debts; and 3) distributes the remaining property to decedent's heirs at law.[172]

Because smaller estates correlate with complex, atypical family arrangements, often involving half and stepsiblings, the administration of the estate is typically court-supervised. Thus, the estate administrator is subject to costly and time-consuming probate court supervision while administering the estate.[173] Due to adversity between the heirs, the court must "approve [among other items] the inventory and appraisal of the estate, payment of debts, family allowance . . . , sale of real estate, [and] preliminary and final distributions."[174] Needless to say, this unnecessarily dissipates the intestate estate to the detriment of decedent's intended beneficiaries. Based on the huge legal, court, and administrative fees, the resulting ownership framework for beneficiaries, after creditors are made whole, is typically a minimal amount of cash, negligibly valued personal property, and collective ownership of decedent's real estate holdings—typically by the heirs-at-law as tenants in common. This, as detailed above, is a tried and true recipe for wealth destruction as opposed to wealth preservation.

My proposal would have decedent's heir-at-law be able, upon certifying that the intestate's estate is worth less than $100,000, be able to petition the probate court for an expedited hearing for which all interested parties would appear. Relying on a totality of the circumstances analysis—as opposed to the state intestacy law—the court would distribute the intestate's estate according to the intestate's most likely wishes. Under my proposal, the probate court would schedule a hearing and verify intestate's most likely testamentary wishes for her property. The court's analysis would be based on the testimony given and the evidence provided, which, in view of the expedited nature of the proceedings, can be informal such that typical rules of evidence can be dispensed with. Based on this conclusion and guided by an overall goal of preserving wealth for low-income households by avoiding the bedraggling consequences of collective ownership, the probate court would then issue an order, after ensuring that all debts are paid, conveying unencumbered title to intestate's property in fee simple, or tenancy-in-common in the case of heirs with aligned interests. If the circumstances make such a resolution infeasible, then the probate court would facilitate the parties to

172. SITKOFF & DUKEMINIER, *supra* note 29, at 44.

173. *Id.*; *see* UNIF. PROBATE CODE § 3-501 (UNIF. LAW COMM'N 2008) (amended 2019) (dictating the court-appointed supervision of an estate).

174. SITKOFF & DUKEMINIER, *supra* note 29, at 46.

negotiate a property disposition in line with the intestate's most likely wishes. This could be done by way of court-ordered mediation to save on attorney fees and costs. This approach, unlike the outdated and inefficient one forced on low-wealth households by the current intestacy laws, will, over time, protect and grow wealth in socioeconomically distressed communities. Due to the decreased barriers to creating a legally cognizable testamentary intent, low-wealth individuals will be incentivized to manifest some means for a court to decipher their wishes. Further, out of recognition that this revisited intestacy framework will impose greater burdens on probate courts, jurisdictions will be incentivized to invest more in their probate courts.

Conclusion

The Wills Act is designed to incentivize economically productive behavior throughout life by giving us a roadmap to transmit our accumulated wealth at death. The roadmap, which identifies the formalities to validly execute a will, is intended to serve ritualistic, cautionary, and channeling functions, while also assuring the testator and the broader public that the terms of the testator's will are consistent with testamentary intent. Despite the benevolent motivation behind these formalities, they have unfortunately resulted in a framework whereby estate planning is beyond the capacity of most American households, who, instead of wills, rely on state laws of intestacy for intergenerational wealth transfer. For many Americans, especially professional and business class White Americans with majoritarian family structures, this is not problematic because state intestacy laws, which convey intestate estates to heirs-at-law are consistent with their testamentary wishes. However, *many* does not mean *all*, or even a majority. For most Americans, especially the poor and those living in non-traditional families, will formalities, in conjunction with intestacy laws, effectively preclude estate planning and wealth consolidation because procurement of a valid will is infeasible and state intestacy laws fail to contemplate their nontraditional concerns.

Two reforms are needed. Recognizing that a staggeringly large majority of Americans forego estate planning for economic and cultural reasons, jurisdictions have historically sought to lower the threshold of what is considered a valid will to make estate planning more accessible to a broader percentage of the population. Such reform includes a provision for holographic or handwritten wills, which do not require witness authentication[175] and statutory authorization for courts to probate wills notwithstanding manifest execution and other defects.[176] The problem is that such reform does not go far

175. Holographic wills are authorized by roughly half of U.S. jurisdictions. *See supra* note 131 and accompanying text.

176. The statutorily authorized curative doctrines are substantial compliance and harmless error.

enough. This is because the reform movements have been hampered by the conservative disposition of probate courts, the anachronism of paper printed attested wills and holographs in a world where handwriting, written signatures and printers have become relics, and the continued perception that estate planning is unaffordable and infeasible. The Wills Act therefore needs to be updated to allow for the probate of electronic wills due to the increased reliance on electronic media and decreased use of paper for correspondence purposes. Second, in view of the inordinately high rate of intestacy for low-wealth and racial-minority households and because intestacy acts as an effective means of undermining wealth creation, estates valued at less than $100,000 should no longer be distributed via state intestacy laws. Rather, they should be distributed according to a probate court's determination of the decedent's most likely testamentary intent, taken from a totality of the circumstances approach. This would consider all evidence that is presented to the court, including writings on paper, electronic media, oral testimony, and the decedent's circumstances at death. While bringing about this reform will ask more of probate courts nationwide, it will both engender estate planning by low-wealth and racial-minority households and, ideally, facilitate wealth creation in distressed communities.

Per De Soto, this change in the laws of intestacy and devise will enable distressed communities in the United States to free themselves from ill-defined property rights and invest in their homes and communities. It may well, over time, facilitate a reduction in the nation's wealth gap, enhance economic vitality in racial minority communities, and engender a more integrated and less polarized country. In short, it may help bridge our divide.