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# WEALTH INEQUALITY AND FAMILY BUSINESSES

*Benjamin Means*\*

## ABSTRACT

*Wealth inequality endangers democratic values and calls for a public response. This Article contends that family businesses merit special scrutiny because they control vast amounts of private wealth and combine two of society's most important economic institutions: family and business. Accordingly, family businesses implicate concerns regarding both inherited wealth and the concentration of economic power made possible by the corporate form.*

*Despite their economic significance, little has been done to investigate whether family businesses contribute to wealth inequality. This Article offers the first legal, and one of the only academic, treatments of the topic and shows that family businesses play a double role. On the one hand, family businesses reinforce existing disparities in wealth and opportunity. Heirs, after all, stand to benefit from the hard work of previous generations. On the other hand, family businesses can be a powerful antidote to inequality, disrupting entrenched class hierarchies and creating opportunities for individuals, families, and ethnic communities.*

*This Article concludes that whether family businesses produce net social costs or benefits depends crucially on two principal factors. First, to the extent there is a lack of public investment in social mobility, family businesses can increase the distribution of wealth by providing needed investments in human capital. Second, to the extent the rewards of capitalism are not widely shared, family businesses can offer a source of opportunity for family members, employees, and the communities in which family businesses operate. Thus, family businesses should not be viewed in isolation; a comprehensive response*

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*to the problem of wealth inequality must involve the state, the family, and the market.*

## INTRODUCTION

Wealth inequality endangers democratic values and calls for a public response.<sup>1</sup> Acknowledging the problem, Janet Yellen, Chair of the Federal Reserve Board, recently presented evidence that “[t]he distribution of income and wealth in the United States has been widening more or less steadily for several decades, to a greater extent than in most advanced countries.”<sup>2</sup> This gap, she observed, is as wide as it has been in a hundred years and undermines efforts to achieve a meaningful equality of opportunity.<sup>3</sup> The nation’s top 0.1% alone is worth approximately as much as the bottom 90%.<sup>4</sup>

How did we reach this state of affairs? Although the Constitution prohibits inherited titles and other perquisites of nobility,<sup>5</sup> nothing in the logic of capitalism prevents the accumulation of vast, intractable disparities in wealth.<sup>6</sup> Indeed, concentrated economic power can be self-perpetuating.<sup>7</sup> This Article

<sup>1</sup> See Joseph R. Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution*, 94 B.U. L. REV. 669, 671 (2014) (“The constitutional problem of oligarchy is the danger that concentrations of economic power and political power may be mutually reinforcing—and that because of this, sufficiently extreme concentrations of power may threaten the Constitution’s democratic foundations.”).

<sup>2</sup> Janet L. Yellen, Chair, Bd. of Governors of the Fed. Reserve Sys., Keynote Address at the Conference on Economic Opportunity and Inequality: Perspectives on Inequality and Opportunity from the Survey of Consumer Finances (Oct. 17, 2014), <http://www.federalreserve.gov/newsevents/speech/yellen20141017a.htm>.

<sup>3</sup> *Id.* (“[I]t is appropriate to ask whether this trend is compatible with values rooted in our nation’s history, among them the high value Americans have traditionally placed on equality of opportunity.”).

<sup>4</sup> See Emmanuel Saez & Gabriel Zucman, *Exploding Wealth Inequality in the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Oct. 20, 2014), <http://equitablegrowth.org/exploding-wealth-inequality-united-states/> (“The share of wealth held by the top 0.1 percent of families is now almost as high as in the late 1920s, when ‘The Great Gatsby’ defined an era that rested on the inherited fortunes of the robber barons of the Gilded Age.”).

<sup>5</sup> U.S. CONST. art. 1, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States . . .”). Anti-nobility rules “were part of an American reaction to feudalism.” Richard Delgado, *Inequality “From the Top”*: Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice, 32 UCLA L. REV. 100, 110 (1984).

<sup>6</sup> See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 21 (Arthur Goldhammer trans., 2014) (2013) (“[T]here is no natural, spontaneous process to prevent destabilizing, inequalitarian forces from prevailing permanently.”).

<sup>7</sup> See *id.* at 27 (arguing that “the process by which wealth is accumulated and distributed contains powerful forces pushing toward divergence, or at any rate toward an extremely high level of inequality”). These forces “are potentially threatening to democratic societies and to the values of social justice on which they are based.” *Id.* at 571; see Yellen, *supra* note 2 (“[T]o the extent that opportunity itself is enhanced by access to economic resources, inequality of outcomes can exacerbate inequality of opportunity, thereby perpetuating a trend of increasing inequality.”).

contends that family businesses merit special scrutiny as a potential source of inequality because they combine two of society's most important economic institutions: family and business.<sup>8</sup> As such, family businesses implicate concerns regarding both inherited wealth and the concentration of economic power made possible by the corporate form.

Typically, owners seek to increase family wealth, to provide employment for family members, and, ultimately, to transfer control to a new generation of family owners.<sup>9</sup> Nor are these kinship preferences inconsequential.<sup>10</sup> The ten wealthiest families in the U.S. derive their fortune from a family-business venture.<sup>11</sup> Federal Reserve Chair Yellen further observes that the wealthiest Americans are much more likely than their fellow citizens to have shares in private, often family-owned businesses.<sup>12</sup> More general assessments of the prevalence of family ownership vary, but all commentators agree that family

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<sup>8</sup> See Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185, 1228 (2013) [hereinafter Means, *Nonmarket Values*] (“[F]amily businesses harness the shared commitment of family members to achieve both economic success and personal fulfillment . . .”). A family business may be defined, broadly, “to include businesses in which effective control rests in family hands and at least two family members are involved as owners or managers.” Benjamin Means, *The Contractual Foundation of Family Business Law*, 75 OHIO ST. L.J. 675, 676 n.1 (2014) [hereinafter Means, *Contractual Foundation*].

<sup>9</sup> See Marianne Bertrand & Antoinette Schoar, *The Role of Family in Family Firms*, J. ECON. PERSP., Spring 2006, at 73, 74 (“Family firms are characterized by a concentration of ownership, control and often key management positions among family members, even after the retirement of the firms’ founders.”); Peter Jaskiewicz et al., *Is Nepotism Good or Bad? Types of Nepotism and Implications for Knowledge Management*, 26 FAM. BUS. REV. 121, 121 (2013) (“Nepotism is a common hiring mechanism in (family) firms where families use their control to hire family members—therefore perpetuating family involvement over time and across generations.”).

<sup>10</sup> See *Business in the Blood*, ECONOMIST (Nov. 1, 2014), <http://www.economist.com/news/business/21629385-companies-controlled-founding-families-remain-surprisingly-important-and-look-set-stay> (“Founding dynasties run, or wield significant clout at, some of the world’s largest multinationals, from Walmart to Mars, Samsung to BMW.”).

<sup>11</sup> See Nick Kirkpatrick & Justin Moyer, *Meet America’s Richest Families*, *Courtesy of Forbes*, WASH. POST (July 11, 2014), <http://www.washingtonpost.com/news/morning-mix/wp/2014/07/11/meet-americas-richest-families/> (summarizing data). The list includes the Walton family (Wal-Mart), the Koch family (Koch Industries), the Mars family (Mars, Inc.), the Cargill-MacMillan family (Cargill, Inc.), the Johnson family (Fidelity), the Hearst family (Hearst Corp.), the Cox family (Cox Communications), the Pritzker family (Hyatt hotel chain), the S.C. Johnson family (S.C. Johnson, Inc.), and the Duncan family (Enterprise Products Partners). *Id.* Although the *Forbes* methodology leaves something to be desired, as journalists may overlook private fortunes invested in more diversified holdings, “[f]or the largest inherited fortunes, on the order of tens of billions of dollars or euros, one can probably assume that most of the money remains invested in the family firm.” PIKETTY, *supra* note 6, at 441.

<sup>12</sup> Yellen, *supra* note 2 (reporting that “slightly more than half of the top 5 percent of households have a share in a private business”). By contrast, “[o]nly 14 percent of families in the next 45 have ownership in a private business, but for those that do, this type of wealth constitutes a substantial portion of their assets.” *Id.* Yellen clarifies that “ownership of a private business . . . usually means ownership and sometimes direct management of a family business.” *Id.*

businesses play a major role in the economy.<sup>13</sup> According to one estimate, “[f]amily dominated businesses comprise more than 80 percent of U.S. enterprises, employ more than 50 percent of the nation’s workforce, and account for the bulk . . . of America’s gross domestic product.”<sup>14</sup>

Despite their economic importance, little has been done to investigate whether family businesses contribute to wealth inequality. This Article offers the first legal,<sup>15</sup> and one of the only academic, treatments of the topic,<sup>16</sup> and it shows that family businesses play a double role. On the one hand, family businesses can entrench existing disparities in wealth and opportunity. Heirs, after all, stand to benefit from the hard work of previous generations. On the other hand, family businesses can be a powerful antidote to inequality. By facilitating the accumulation of capital, family businesses can disrupt entrenched class hierarchies and create opportunities for individuals, families, and ethnic communities.<sup>17</sup> As one court observed, “small businesses . . . have been for many immigrant groups, and continue to be, the first rung on the ladder of American success.”<sup>18</sup>

This Article concludes that whether family businesses produce net social costs or benefits depends crucially on two principal factors. First, to the extent there is a lack of public investment in social mobility, family businesses can increase the distribution of wealth by providing needed investments in human

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<sup>13</sup> See, e.g., Joseph H. Astrachan & Melissa Carey Shanker, *Family Businesses’ Contribution to the U.S. Economy: A Closer Look*, 16 FAM. BUS. REV. 211, 217–18 (2003) (“No matter what criteria are used, family businesses represent a substantial portion of the U.S. economy and have a massive impact on the economy as a whole.”).

<sup>14</sup> DWIGHT DRAKE, BUSINESS PLANNING: CLOSELY HELD ENTERPRISES 274 (2d ed. 2008).

<sup>15</sup> In general, legal academics have paid little attention to the distinctive characteristics of family ownership. See Eric A. Chiappinelli, *Stories from Camp Automotive: Communicating the Importance of Family Dynamics to Corporate Law Students*, 34 GA. L. REV. 699, 710 (2000) (observing that “corporate law casebooks are astonishingly devoid of any systematic consideration of family dynamics”); Means, *Nonmarket Values*, *supra* note 8, at 1193 (noting that “the study of family businesses for U.S. legal scholars has remained in large part the specialized province of estate planners and tax lawyers”).

<sup>16</sup> See Paul Bingley, Miles Corak & Niels Westergård-Nielsen, *Equality of Opportunity and Intergenerational Transmission of Employers*, in FROM PARENTS TO CHILDREN: THE INTERGENERATIONAL TRANSMISSION OF ADVANTAGE 441 (John Ermisch, Markus Jäntti & Timothy Smeeding eds., 2012). Professor Bingley and his coauthors analyze data regarding the employment of sons in firms that had also employed the father and consider family-business ownership as one possible, partial explanation for the overlap. *Id.* at 458.

<sup>17</sup> See JOSEPH FISHKIN, BOTTLENECKS: A NEW THEORY OF EQUAL OPPORTUNITY 146 (2014) (arguing that “[a]s far as possible, there should be a plurality of paths leading to the valued roles and goods, without bottlenecks through which one must pass in order to reach them”). Even if family businesses restrict opportunities for the benefit of family members, they also represent a different path to success and thereby create opportunities for individuals who, for example, might perform poorly on standardized tests.

<sup>18</sup> EEOC v. Consol. Serv. Sys., 989 F.2d 233, 238 (7th Cir. 1993).

capital. Second, to the extent the rewards of capitalism are not widely shared, family businesses can offer a source of opportunity, not just for family members, but also for employees and the communities in which family businesses operate. Thus, family businesses should not be viewed in isolation; a comprehensive response to the problem of wealth inequality must involve the state, the family, and the market.<sup>19</sup>

This Article proceeds as follows. Part I describes the problem of wealth inequality but argues that proposals to curtail inherited wealth should not overlook the role family businesses play in creating opportunities. Part II evaluates family businesses from a market perspective, reviewing evidence regarding their competitiveness and offering suggestions for legal design to ensure that markets constrain value-destroying choices. Part III considers the extent to which family values can offer economic and social benefits for a wider set of stakeholders, as well as the risk that family conflict will spill over into the business environment. Part IV uses the remarkable story of the Market Basket supermarket chain's rise, near collapse, and subsequent resurgence to illustrate this Article's arguments regarding family business ownership and wealth inequality.

## I. WEALTH INEQUALITY

In the United States, the gap between rich and poor has widened to levels not seen since the 1920s.<sup>20</sup> More troubling, wealth inequality persists across generations; the social and economic status of a child's parents has a very strong influence on her future prospects.<sup>21</sup> Such pervasive, entrenched inequality is inconsistent with central tenets of the American Dream—that

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<sup>19</sup> See HAROLD JAMES, *FAMILY CAPITALISM* 1 (2006) (identifying as a central theme “the interplay of three powerful social constellations, families, states, and markets”); Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, J. ECON. PERSP., Summer 2013, at 79, 80 (“The interaction between families, labor markets, and public policies all structure a child’s opportunities and determine the extent to which adult earnings are related to family background . . .”).

<sup>20</sup> See Yellen, *supra* note 2. According to one commentator, a Nobel laureate in economics, “[W]e haven’t just gone back to nineteenth-century levels of income inequality, we’re also on a path back to ‘patrimonial capitalism,’ in which the commanding heights of the economy are controlled not by talented individuals but by family dynasties.” Paul Krugman, *Why We’re in a New Gilded Age*, N.Y. REV. BOOKS (May 8, 2014), <http://www.nybooks.com.proxy.library.emory.edu/articles/archives/2014/may/08/thomas-piketty-new-gilded-age/> (reviewing PIKETTY, *supra* note 6).

<sup>21</sup> See HARRY BRIGHOUSE & ADAM SWIFT, *FAMILY VALUES: THE ETHICS OF PARENT-CHILD RELATIONSHIPS* 2 (2014) (“[H]owever we frame or measure the inequality, it is clear that children born into different families face unequal prospects.”).

merit will be rewarded and that anyone who works hard can hope to achieve success.<sup>22</sup>

Yet, even if economic inheritances were sharply curtailed, successful parents would continue to give many other valuable advantages to their children.<sup>23</sup> For example, the child of an entrepreneur has an excellent chance to learn first hand the skillset necessary to run a business.<sup>24</sup> Short of abolishing families and raising children communally, we cannot prevent families from equipping their children for success in life, a task that they will perform more or less well with the economic, cultural, and social resources at their disposal.<sup>25</sup> Thus, to the extent families take primary responsibility for raising children, no liberal society can promise full equality of opportunity to each of its citizens.<sup>26</sup>

Only by appreciating this context can we usefully evaluate the impact of family businesses on wealth inequality. Specifically, this Part argues that the relevant issue is not whether family businesses would detract from an otherwise perfect meritocracy, but whether (and how) family businesses affect our society's overall opportunity structure.<sup>27</sup> Framed this way, as an example

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<sup>22</sup> The American Dream is not the only conception of equal opportunity. According to some scholars, intelligence, athleticism, beauty, and perhaps even mental dispositions constitute morally arbitrary advantages that should not entitle a person to claim more of society's resources. See John Rawls, *A Kantian Conception of Equality* (1975), reprinted in JOHN RAWLS: COLLECTED PAPERS 254, 264 (Samuel Freeman ed., 1999).

<sup>23</sup> As one scholar explains, "The basic problem arises because parents—and families more generally—act in ways that give their children advantages." FISHKIN, *supra* note 17, at 48. Yet, "[p]arents do this to different degrees and in different ways, creating inequalities of opportunity that begin early, run deep, and tend to persist." *Id.*

<sup>24</sup> See, e.g., Adam Bryant, *Three Keys to Hiring: Skill, Will and Fit*, N.Y. TIMES (Jan. 10, 2015), <http://www.nytimes.com/2015/01/11/business/corner-office-marla-malcolm-becks-three-keys-to-hiring-skill-will-and-fit.html> (detailing an interview with Marla Malcolm Beck, Chief Executive of Bluemercury, a beauty products and spa services retailer). "My dad was an entrepreneur. He started an insurance agency and a real estate company, and I worked in his office from the time I was 9. When I was in high school, I used to balance his books." *Id.*

<sup>25</sup> See BRIGHOUSE & SWIFT, *supra* note 21, at 2 (arguing that the problem is to provide for equal opportunity in even "the limited sense that people's chances of achieving desirable jobs should reflect their own merits rather their family background"). Professors Brighthouse and Swift contend that family autonomy and egalitarian justice can be reconciled only if we recognize limits to the principle that "parents should be free to act in ways that confer advantage on their children, without regard to any resulting inequalities between those children and others." *Id.* at 3.

<sup>26</sup> See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* 64 (1971) (stating that "the principle of fair opportunity can be only imperfectly carried out, at least as long as [some form] of the family exists").

<sup>27</sup> See JON ELSTER, *EXPLAINING SOCIAL BEHAVIOR: MORE NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 439 (2007) (arguing that it is false to believe that one necessarily achieves a better result by seeking "to approximate the optimum as closely as possible, on the apparently reasonable assumption that the more of the conditions for optimality that are satisfied, the closer one will get to the optimum").

of what economists call the theory of second best,<sup>28</sup> it is plausible that family businesses reduce inequality by providing ladders of opportunity. As a locus for entrepreneurship and social advancement, family businesses can offset inequalities that arise from other forms of inheritance, not to mention more pervasive background conditions of social inequality.

#### A. *The Great Gatsby Curve*

Inheritance practices contribute substantially to wealth inequality.<sup>29</sup> Moreover, the consequences of inheritance are likely to be cumulative, as invested capital outperforms the overall economy, a trend that shows no sign of abating.<sup>30</sup> Unfortunately, the most accurate predictor of a person's future earnings is the socio-economic status of his or her parents.<sup>31</sup> Although inequality is a global problem, "there is now less social mobility in the United States than in other advanced countries."<sup>32</sup> Wealth inequality is disturbing, not only because of its magnitude but also because it often reflects family background more than individual merit.<sup>33</sup>

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<sup>28</sup> The economic theory of second best contends that in an imperfect world the best available outcome might result from fulfilling fewer of the conditions that would pertain in a perfect world. *Id.*; see also R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11, 11 (1956) (offering first articulation of the theory).

<sup>29</sup> See Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2182–83, 2183 n.7 (2011) (citing William G. Gale & John K. Scholz, *Intergenerational Transfers and the Accumulation of Wealth*, J. ECON. PERSP., Fall 1994, at 145, 146–47, 156–57). "Economic studies have found that a large fraction (possibly in the range of eighty percent) of household wealth in the United States traces to gifts and inheritances, as opposed to participation in the labor economy." *Id.*

<sup>30</sup> PIKETTY, *supra* note 6, at 377–78 ("Whenever the rate of return on capital is significantly and durably higher than the growth rate of the economy, it is all but inevitable that inheritance (of fortunes accumulated in the past) predominates over saving (wealth accumulated in the present).") Piketty describes the relation as  $r > g$ . *Id.*

<sup>31</sup> See, e.g., KARL ALEXANDER, DORIS ENTWISLE & LINDA OLSON, *THE LONG SHADOW: FAMILY BACKGROUND, DISADVANTAGED URBAN YOUTH, AND THE TRANSITION TO ADULTHOOD* (2014) (summarizing results of a twenty-five-year study that tracked almost 800 individuals in west Baltimore from childhood to early adulthood).

<sup>32</sup> FISHKIN, *supra* note 17, at 42 (citing Bingley et al., *supra* note 16; PEW CHARITABLE TRS., *DOES AMERICA PROMOTE MOBILITY AS WELL AS OTHER NATIONS?* 2 (2011)).

<sup>33</sup> See BRIGHOUSE & SWIFT, *supra* note 21, at 2 ("The egalitarian challenge demands an account of why families should be permitted to create inequalities between children . . ."). Among other concerns, such inequalities seem inconsistent with the meritocratic underpinnings of democracy. PIKETTY, *supra* note 6, at 241 ("[D]emocratic modernity is founded on the belief that inequalities based on individual talent and effort are more justifiable than other inequalities . . ."). One commentator argues, however, that we should not assume that all lasting inequalities can be attributed to a lack of opportunity. See N. Gregory Mankiw, *Defending the One Percent*, J. ECON. PERSP., Summer 2013, at 21, 25 ("[P]arents and children share genes, a fact that would lead to intergenerational persistence in income even in a world of equal opportunities. . . . Smart parents are more likely to have smart children.").



In remarks presented at the Center for American Progress on January 12, 2012, Alan Krueger, then-chair of the American Council of Economic Advisors, explained the link between current income inequality and future opportunities:

Higher income inequality would be less of a concern if low-income earners became high-income earners at some point in their career, or if children of low-income parents had a good chance of climbing up the income scales when they grow up. In other words, if we had a high degree of income mobility we would be less concerned about the degree of inequality in any given year. But we do not. Moreover, as inequality has increased, evidence suggests that . . . economic mobility has decreased.<sup>34</sup>

When grouped by nation, measurements of income inequality and “mobility across generations” align, creating what Krueger described as a “Great Gatsby Curve”: “The points cluster around an upward sloping line, indicating that countries that had more inequality across households also had more persistence in income from one generation to the next.”<sup>35</sup> Put more simply, if your parents are poor, that fact speaks volumes about your own life prospects.<sup>36</sup> In the United States, income inequality has gone up considerably, and Krueger concludes that “[i]t is hard to look at these figures and not be concerned that rising inequality is jeopardizing our tradition of equality of opportunity.”<sup>37</sup>

Recent survey data confirms not only that the rich are “getting richer” but that “[t]he typical American has been getting poorer, too.”<sup>38</sup> In the wake of the Great Recession, households at every income level lost wealth, but “households at the bottom of the wealth distribution lost the largest share of

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<sup>34</sup> Alan B. Krueger, Chairman, Council of Econ. Advisers, *The Rise and Consequences of Inequality in the United States*, Remarks Before the Center for American Progress (Jan. 12, 2012), [http://www.whitehouse.gov/sites/default/files/krueger\\_cap\\_speech\\_final\\_remarks.pdf](http://www.whitehouse.gov/sites/default/files/krueger_cap_speech_final_remarks.pdf).

<sup>35</sup> *Id.* (citing the work of economist Miles Corak). The reference is, of course, to F. Scott Fitzgerald’s 1925 novel *The Great Gatsby*.

<sup>36</sup> See JAMES S. FISHKIN, *JUSTICE, EQUAL OPPORTUNITY, AND THE FAMILY* 31 (1983) (“The basic intuition is that it seems unfair that we should be able to predict eventual positions in a society merely by knowing the strata into which children are born.”).

<sup>37</sup> Krueger, *supra* note 34, at 4 (“The fortunes of one’s parents seem to matter increasingly in American society.”). Or, in one journalist’s pithy formulation, “The American Dream isn’t dead—it just moved to Denmark.” Matthew O’Brien, *The Great Gatsby Curve: Why It’s So Hard for the Poor to Get Ahead*, ATLANTIC (June 18, 2013), <http://www.theatlantic.com/business/archive/2013/06/the-great-gatsby-curve-why-its-so-hard-for-the-poor-to-get-ahead/276943/>; see also JOSEPH E. STIGLITZ, *THE PRICE OF INEQUALITY* (2013).

<sup>38</sup> Anna Bernasek, *The Typical Household, Now Worth a Third Less*, N.Y. TIMES (July 26, 2014), <http://www.nytimes.com/2014/07/27/business/the-typical-household-now-worth-a-third-less.html>.

their total wealth.”<sup>39</sup> According to some measures, wealth inequality “roughly doubled” in the decade from 2003 to 2013.<sup>40</sup> Taking a longer view, from 1984 to 2013, the picture looks even worse: those in the 95th percentile saw their wealth double; in the 75th percentile, wealth increased by approximately one-third; at the median, though, wealth declined by 20%; and, in the bottom quartile, wealth declined more than 60%.<sup>41</sup> In part, the differences may be attributable to the fact that the wealthy have more diverse investment portfolios and are better able to navigate market anomalies.<sup>42</sup>

This is not to suggest that only a radically egalitarian society will suffice,<sup>43</sup> or even that inequality is always harmful. To the contrary, “[n]o one denies that it is important for society to have entrepreneurs, inventions, and innovations. . . . The problem is simply that the entrepreneurial argument cannot justify all inequalities of wealth, no matter how extreme.”<sup>44</sup> At some point, the increased incentive for the already wealthy to work hard in order to accumulate more capital must be outweighed by the diminishment of opportunity for those in the bottom rungs of the economy, who may never have the chance to contribute to the full extent of their abilities. Moreover, to the extent that returns to capital outpace the overall economy, the wealth disparities produced by useful entrepreneurial activity can lead to entrenched inequality over generations, well beyond the initial justification for rewarding the entrepreneur.<sup>45</sup>

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<sup>39</sup> FABIAN T. PFEFFER, SHELDON DANZIGER & ROBERT F. SCHOENI, RUSSELL SAGE FOUND., RESEARCH SUMMARY: WEALTH LEVELS, WEALTH INEQUALITY, AND THE GREAT RECESSION 2 (2014), [http://web.stanford.edu/group/scspi/\\_media/working\\_papers/pfeffer-danziger-schoeni\\_wealth-levels.pdf](http://web.stanford.edu/group/scspi/_media/working_papers/pfeffer-danziger-schoeni_wealth-levels.pdf).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See id.* at 1 (“Affluent households are more likely than other households to hold stocks and have large portfolios, which allowed them to benefit from the gains in the stock market.”).

<sup>43</sup> If individual liberty and family autonomy are also foundational values, and equality is not the sole end of a just society, then there may be necessary tradeoffs. *See* ISAIAH BERLIN, *Two Concepts of Liberty*, in LIBERTY: INCORPORATING *FOUR ESSAYS ON LIBERTY* 212 (Henry Hardy ed., 2002) (distinguishing value pluralism from the reductive simplicity of monism: “This ancient faith rests on the conviction that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another”). Notably, some scholarly treatments of inequality do not seek to accommodate competing values. *See* Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 472 (2007) (“[R]evisit[ing] the topic of inheritance taxation to see whether a single-minded focus on equality of opportunity, interpreted as resource equality, can shed new light on questions of legal design.”).

<sup>44</sup> PIKETTY, *supra* note 6, at 443.

<sup>45</sup> *See id.* (“[N]o matter how justified inequalities of wealth may be initially, fortunes can grow and perpetuate themselves beyond all reasonable limits and beyond any possible rational justification in terms of social utility.”).

## B. *Family Autonomy*

Although the phenomenon of wealth inequality is clear, it resists easy answers. This section summarizes a “trilemma” identified by the philosopher James Fishkin and elaborated in a recent book by the law professor Joseph Fishkin.<sup>46</sup> In brief, it is not possible to stipulate simultaneously that social goods are to be awarded according to a principle of merit, that each individual will have a fair chance to compete, and that families are free to “pass on advantages to their children.”<sup>47</sup> Nor is it clear whether society would benefit from more modest efforts to advance the principles of merit and equality by restricting economic inheritances without intruding upon the core principle of family autonomy. Such restrictions on inheritance would leave untouched the vast disparities in cultural and educational resources that replicate inequality across generations. Moreover, as discussed in the following section, an incomplete approach could produce perverse results by reinforcing the existing class structure.

### 1. *How Families Create Inequality*

The horns of the trilemma may not always be apparent<sup>48</sup> because liberalism tends to focus on autonomous individuals and to ignore family life.<sup>49</sup> Thus, the familiar tension between liberty and equality has not “systematically incorporated” “the role of the family in generating inequalities.”<sup>50</sup> For example, equality of opportunity might offer a useful compromise between liberty and equality, but it cannot be achieved without serious intrusions into

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<sup>46</sup> In light of this Article’s inquiry into the transmission of opportunities across generations, the reader may not be surprised to learn that James is Joseph’s father, and that Joseph credits his upbringing for his own development as a scholar. FISHKIN, *supra* note 17, at 260. In the spirit of disclosure, the author of this Article acknowledges the tremendous advantages provided to him by his own parents, including legacy consideration for admission to an Ivy League college—whether or not that legacy status was decisive might be debated by the reasonable observer and the author’s mother.

<sup>47</sup> FISHKIN, *supra* note 17, at 53.

<sup>48</sup> Perhaps the appropriate visual image here is a triceratops? My four-year-old would approve.

<sup>49</sup> See FISHKIN, *supra* note 36, at 2 (“Liberalism presents us with a picture of isolated, atomic individuals who seem to spring from nowhere in order to experience utility or claim rights or enjoy liberties and then vanish.”).

<sup>50</sup> *Id.* at 2.

the autonomy of family life.<sup>51</sup> Families are a crucial source of inequality, and inherited financial resources are only one aspect of this inequality.<sup>52</sup>

Consider a recent *New York Times* profile of Michael Brantley, a professional baseball player.<sup>53</sup> Brantley plays for the Cleveland Indians and has one of the best slugging percentages in the league, powered by a “smooth left-handed swing.”<sup>54</sup> As it happens, Brantley’s father was a hitting coach for the New York Mets, and so Brantley grew up around professional players and had access to professional coaching.<sup>55</sup> According to Brantley’s account, the advantages went beyond the opportunity to perfect the mechanics of his swing: “Being around major league players at that young age, seeing how they acted, seeing how they prepared, it just made me want to get better and kind of showed me how to carry myself.”<sup>56</sup>

The importance of connections and background extends to professions of every kind. The family acculturation that causes the daughter in one family to pursue acting or directing<sup>57</sup> may cause another to contemplate joining a family business selling used books.<sup>58</sup> Moreover, entry into a specialized business is easier when, for instance, you have spent half a lifetime watching your parents set prices for books<sup>59</sup> or select the right kind of herring.<sup>60</sup> And the same could

<sup>51</sup> *Id.* at 4 (“Once the role of the family is taken into account, the apparently moderate aspiration of equal opportunity produces conflicts with the private sphere of liberty—with autonomous family relations—that are nothing short of intractable.”). The autonomy of family life includes a parental right “to substantially influence the development of their children.” *Id.* at 5.

<sup>52</sup> *See id.* at 1 (“The family is the one crucial source of inequality in modern society that has gone largely unexamined in the theory of distributive justice.”).

<sup>53</sup> *See* Tyler Kepner, *A Paternal Touch Yields a Smooth Swing: Cleveland’s Brantley Succeeds at the Plate with Help from His Father*, N.Y. TIMES (Aug. 9, 2014), <http://www.nytimes.com/2014/08/10/sports/baseball/clevelands-brantley-succeeds-at-the-plate-with-help-from-his-father.html>.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* Later, scouts took this background into account as a reason to take a chance on Brantley. *Id.* (“The Indians, notably the scout Don Poplin, liked Brantley for his swing, athleticism, *bloodlines* and, perhaps most of all, his approach to the game.” (emphasis added)).

<sup>57</sup> *See* ADAM BELLOW, IN PRAISE OF NEPOTISM: A NATURAL HISTORY 498 (2003) (noting the many members of the Coppola family, including Sofia, who have established careers in Hollywood).

<sup>58</sup> *See* Janet Malcolm, *The Book Refuge: Three Sisters Keep a Family Business Going*, NEW YORKER (June 23, 2014), <http://www.newyorker.com/magazine/2014/06/23/the-book-refuge>.

<sup>59</sup> *See id.* (“To prepare my daughters for a bookselling career, I conducted classes in the bookstore by going over new acquisitions with them,” [the bookstore’s founder] wrote in his autobiography. ‘I would take center position and comment on each book as I handled it. Later each of the girls took turns pricing the books, with me on the sidelines watching and only occasionally correcting. They have often corrected me, and justifiably.’”).

<sup>60</sup> Sometimes, the transition from generation to generation leaves something to be desired in the execution:

be said for commercial fishing,<sup>61</sup> cheesemaking,<sup>62</sup> book selling,<sup>63</sup> hardware,<sup>64</sup> jewelry,<sup>65</sup> or the operation of resort hotels.<sup>66</sup>

As long as family remains the institution primarily responsible for raising children, the odds that a talented child will realize his or her potential will depend in large part upon the economic, cultural, and social resources of the family. Therefore, “unless we are willing to destroy the family and move to a system of collective childrearing, like the one contemplated in Plato’s *Republic* or in mythologized versions of early Israeli kibbutz experiments, life chances will never be completely independent of circumstances of birth.”<sup>67</sup>

Alternatively, if families are permitted to convey advantages to children, teaching the values and life skills necessary for professional success, then affirmative action programs undertaken as a corrective measure to preserve fair life chances would violate the merit principle “by placing individuals who have faced disadvantages based on their birth circumstances in educational places and jobs for which they are less formally qualified.”<sup>68</sup> Accordingly, tradeoffs

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When I decided to stop practicing law and go into the family business full-time, I asked my father to teach me how to tell a good fish from a bad fish. “No problem,” he said. “I’ll teach you the same way your grandfather taught me. First, we’ll go to the smokehouses and you’ll watch how I look at, feel, and taste the fish. . . . [A]fter ten years, maybe you’ll know how to tell a good piece of fish from a bad one.” Soon after this conversation, my father was forced by ill health to retire. Not long after that, he died.

MARK RUSS FEDERMAN, *RUSS & DAUGHTERS: REFLECTIONS AND RECIPES FROM THE HOUSE THAT HERRING BUILT 127* (2013).

<sup>61</sup> CARL COREY, *FOR LOVE AND MONEY: PORTRAITS OF WISCONSIN FAMILY BUSINESSES 48* (2014) (“At age eight, Alvin Anderson . . . was the first deckhand . . . . A generation later his son Dan . . . slept in a net box on the boat while his parents, Alvin and Sandy, worked. Dan . . . returns every spring to fish with his father in the original boat.”).

<sup>62</sup> *Id.* at 68 (“Master cheesemaker Sid Cook began making cheese as a child but his cheesemaking lineage goes back much further—more than 125 years.”).

<sup>63</sup> *Id.* at 88 (“Janke Book Store, run by Carl Janke’s grandchildren, Jim Janke and Jane Janke Johnson, is known for its community involvement and knowledgeable staff members.”).

<sup>64</sup> *Id.* at 90 (noting that Lullof Hardware was established in 1920 and is today owned and operated by two sons and a grandson who “run a true old-fashioned hardware store, providing service and selling goods from washing machines to feed”).

<sup>65</sup> *Id.* at 54 (“Siblings Karen Nelson and Dale Nummi run Nummi Jewelers, which was founded by their father, Harry, a watchmaker.”).

<sup>66</sup> *Id.* at 98 (noting that the Afterglow Resort, established in 1949, is now owned and operated by the son and daughter-in-law of the founder).

<sup>67</sup> FISHKIN, *supra* note 17, at 53.

<sup>68</sup> *Id.* So-called “leveling up” strategies give additional resources to those who are disadvantaged but cannot fully compensate for the “rich, iterative early interactions between children and parents.” *Id.* at 55.

are unavoidable; we cannot guarantee simultaneously that merit will be rewarded, equal opportunities afforded, and family autonomy respected.

## 2. *Curtailing Inherited Wealth*

Conceding that our fundamental values conflict does not leave us powerless to enact policies that will improve our current circumstances. Rather than let the perfect be the enemy of the good, we can take concrete steps to create greater equality of opportunity where it is possible to do so without encroaching upon other important values. For example, some argue that we should reduce disparities in life opportunities by limiting the transfer of economic resources across generations. In his 2015 State of the Union address, President Obama called for Congress to “close the loopholes that lead to inequality by allowing the top one percent to avoid paying taxes on their accumulated wealth.”<sup>69</sup> To that end, the White House has advocated for an end to tax exemptions that often permit heirs to take wealth accumulated by their parents without paying any taxes.<sup>70</sup> The President’s proposal, which closely resembles arguments advanced by the tax scholar Victor Fleischer,<sup>71</sup> would make the transfer of accumulated capital gains at death a taxable event—for capital held in a business, often the first time any taxes would have been paid.<sup>72</sup>

More aggressively, some legal scholars have argued that inheritance and estate taxes should be used to restrict or even abolish the transfer of economic resources.<sup>73</sup> Inheritance law might be restructured to achieve both a “leveling

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<sup>69</sup> Barack Obama, U.S. President, Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2015).

<sup>70</sup> Julie Hirschfeld Davis, *Obama Will Seek to Raise Taxes on Wealthy to Finance Cuts for Middle Class*, N.Y. TIMES (Jan. 17, 2015), <http://www.nytimes.com/2015/01/18/us/president-obama-will-look-to-reduce-taxes-for-middle-class.html> (“The centerpiece of the plan . . . would eliminate what Mr. Obama’s advisers call the ‘trust-fund loophole,’ a provision governing inherited assets that shields hundreds of billions of dollars from taxation each year.”).

<sup>71</sup> See Victor Fleischer, *Taxing Founders’ Stock*, 59 UCLA L. REV. 60, 60 (2011) (arguing that “[t]axing founders at a low rate is a conspicuous loophole in the fabric of our progressive income tax system, uniquely undermining our shared commitment to equal opportunity and distributive justice”); see also *infra* Part II.C.2 (discussing Professor Fleischer’s proposal).

<sup>72</sup> Equally important, the proposed rules would level the playing field by requiring heirs to pay taxes on all earnings that would have been taxable to the testator. Under existing rules, heirs take a “stepped up” basis so that their eventual tax bill, whenever the transferred asset is sold, includes only changes in valuation since the heirs acquired ownership. See *infra* Part III.C.2

<sup>73</sup> See, e.g., Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 71 (1990) (rejecting the metaphor of a level playing field: “For no particularly good reason, we allow some players, typically those

down” to reduce unequal private inheritances and a “leveling up” to ensure everyone receives adequate resources “to start adult life from a position of equality.”<sup>74</sup> As these commentators observe, a society based on merit alone will not achieve substantial equality of opportunity since it “leave[s] uncorrected the brute luck that affects early development and the resources to which one has access.”<sup>75</sup> Indeed, it might be argued that “[c]hildren lucky enough to have been raised, acculturated, and educated by wealthy parents need not be allowed the additional good fortune of inheriting their parents’ property.”<sup>76</sup> Embracing one horn of the trilemma, these scholars insist upon the priority of individuals, not families.<sup>77</sup>

However, setting aside the merits of achieving a formal equality of economic resources through obliterating levels of taxation,<sup>78</sup> such measures would prevent only direct transfers of financial resources and leave untouched the features of family life that make it easier for privileged children to replicate their parents’ success. Whatever the merits of eliminating economic inheritances (which would, among other things, preclude the direct transfer of family businesses from generation to generation),<sup>79</sup> a system of taxation would not purport to regulate directly “the core of parent–child relations, namely,

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most culturally and educationally advantaged, to inherit huge amounts of wealth, unearned in any sense at all”).

<sup>74</sup> Alstott, *supra* note 43, at 472. In addition to the inheritance tax, Professor Alstott’s approach to achieving equal opportunity would include “a social inheritance, meaning a government expenditure program that would pay a universal, public inheritance.” *Id.*; see also BRUCE ACKERMAN & ANNE ALSTOTT, *THE STAKEHOLDER SOCIETY* 3–5 (1999) (proposing that each U.S. citizen receive \$80,000 at adulthood to be used for any purpose).

<sup>75</sup> Alstott, *supra* note 43, at 486.

<sup>76</sup> Ascher, *supra* note 73, at 74; see also Rawls, *supra* note 22, at 264 (“Those favored by social and natural contingencies regard themselves as already compensated, as it were, by advantages to which no one (including themselves) had a prior claim.”); Alstott, *supra* note 43, at 488 (“Being born to rich (or poor) parents is a matter of brute luck, and so the conventional equal opportunity prescription is to tax material inheritance heavily, perhaps even to confiscate it.”).

<sup>77</sup> Alstott, *supra* note 43, at 518 (refusing to “view the family rather than the individual as the real unit”).

<sup>78</sup> For example, some scholars worry that estate taxation can create a disincentive for wealth creation and that wealth equality should be pursued through other means. See Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 *YALE L.J.* 283, 288 (1994) (identifying “likely consequences of a strengthened transfer tax, such as reduced work, reduced savings, and increased inequality in consumption”).

<sup>79</sup> See Ascher, *supra* note 73, at 73 (“My major premise is that all property owned at death, after payment of debts and administration expenses, should be sold and the proceeds paid to the United States government.”). Professor Ascher would resist the label “confiscation” as it is his position that property rights terminate at death. *Id.*

consensual efforts to influence child development.”<sup>80</sup> As long as the family endures in its current form, true social equality cannot be realized.

### C. *The Risk of Piecemeal Reform*

Not only would policies designed to curtail economic inheritances fail to achieve their social goals, such policies would risk reinforcing the very inequalities they sought to combat. That is, even if those “lucky enough to have been raised . . . by wealthy parents need not be allowed the additional good fortune of inheriting their parents’ property,”<sup>81</sup> it does not follow that taking away those inheritances would produce a more egalitarian society. Consider the implicit logic: (1) in a society governed exclusively by the principle of equality, children would inherit no special advantages from their parents; (2) given the importance of liberty in our society, it is not possible to intrude upon the parent–child relationship so as to block the transmission of all such advantages; (3) restricting economic inheritances does not violate any core interest of family autonomy; (4) therefore, to best approximate conditions of equality, we ought to curtail economic inheritances. Or, more simply, doing something is better than doing nothing.

The fatal flaw in the logic is that it assumes that the best course of action is that which most closely approximates the outcome under ideal circumstances.<sup>82</sup> Yet, if the surrounding circumstances *also* depart from the ideal, the correct course of action may be quite different because of the influence of other variables. Jon Elster recounts that “when Mao Tse-tung decided to eliminate sparrows because they ate grain, he had to reimport them later from the Soviet Union when the pests they kept down flourished, with catastrophic ecological results.”<sup>83</sup> Mao Tse-tung’s edict has a similar apparent logic: (1) in a perfect world, crops intended for human consumption would never be eaten by birds, insects, or animals; (2) it is not possible to destroy all such culprits; (3) it is possible to kill sparrows; (4) to best approximate a world in which crops are eaten only by humans, we should kill the sparrows. Of

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<sup>80</sup> FISHKIN, *supra* note 36, at 38. Professor Fishkin argues that the principle of family autonomy he espouses should “not be construed to protect nepotism, the buying of positions, or large-scale inheritance.” *Id.* at 37 (“Such practices would raise obvious conflicts with any attempts to fully institutionalize merit.”).

<sup>81</sup> Ascher, *supra* note 73, at 74.

<sup>82</sup> To be clear, the use of the term “ideal” refers to a society in which each person has an equal set of opportunities (however measured) and does not imply any endorsement of a society that would relentlessly pursue a single value at the expense of all others.

<sup>83</sup> ELSTER, *supra* note 27, at 441.



course, Mao Tse-tung overlooked the fact that sparrows are one part of a complex ecosystem.

Piecemeal reforms enacted without consideration of their systemic context can make matters worse. In the formal language of economics, this is known as the problem of second best:

The general theory of second best holds that where it is not possible to satisfy all the conditions necessary for an economic system to reach an overall optimum, it is not generally desirable to satisfy as many of those conditions as possible. Rather, the failure to satisfy optimality conditions on one variable means that other variables must take on suboptimal values as well, in order to compensate for the initial failure.<sup>84</sup>

If one or more variables outside our control are suboptimal, the variables that we do control may need to counterbalance those other variables.<sup>85</sup> The goal is to make the overall system work as well as possible. Adjusting any particular variable—say, the taxation of inherited wealth—should not be an end in itself. Still, it could be the case that curtailing inherited wealth would be a highly desirable strategy for curbing wealth inequality. The theory of the second best does not tell us whether to kill sparrows; it simply cautions us to base our judgment on real-world conditions.

By applying the theory of second best to family businesses, we can better appreciate why the advantages family businesses confer on family members (and, sometimes, members of a wider ethnic community) might compensate for other background conditions of inequality.<sup>86</sup> In particular, wealth amassed over generations may enable families to propel their children and grandchildren from wage labor into professional occupations.<sup>87</sup> Family ties can

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<sup>84</sup> Adrian Vermeule, *The Supreme Court, 2008 Term—Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 17 (2009).

<sup>85</sup> The poet Seamus Heaney explores a similar idea when he describes a “solid iron” weight of “socket-ripping[]/Life-belittling force” only to note that once balanced “[a]gainst another one placed on a weighbridge[]/ . . . everything trembled, flowed with give and take.” SEAMUS HEANEY, *Weighing In*, in *THE SPIRIT LEVEL* 17, 17 (1996). Heaney contends that “this is all the good tidings amount to . . . just having to/Balance the intolerable in others/Against our own.” *Id.*

<sup>86</sup> In general, “[i]ndividuals’ opportunities to pursue different combinations of forms of flourishing that they choose for themselves depend in a significant way on the structure of work and the broader structure of capitalism.” FISHKIN, *supra* note 17, at 220.

<sup>87</sup> To be sure, entrepreneurship is not the only route to success. Blue-collar jobs used to provide security for families, although recent increases in corporate profitability have often come at the expense of wages and security for middle-class families. See TIMOTHY NOAH, *THE GREAT DIVERGENCE: AMERICA’S GROWING*

help newer immigrants establish businesses when traditional bank loans and non-family labor would otherwise be impossible to secure.<sup>88</sup> Also, family businesses may provide employment for those who lack conventional qualifications or who are discriminated against.<sup>89</sup> For these reasons, kinship and ethnic preferences in family businesses arguably amount to a form of private affirmative action that facilitates integration by moving families and communities into the middle class.<sup>90</sup>

While it might be that redistributing wealth each generation would create a more level playing field, a ban on inherited wealth could also have the perverse effect of locking into place existing class distinctions. After all, the children of accountants, dentists, doctors, lawyers, and other professionals do not need to inherit their parents' wealth in order to replicate their accomplishments. Equally talented children from working-class backgrounds lack comparable opportunities for success, not just because they are poorer, but because they do not have access to the same educational, cultural, and social resources.<sup>91</sup> In this regard, the accumulation of capital facilitated by family businesses can reduce inequality by creating additional pathways for success.<sup>92</sup>

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INEQUALITY CRISIS AND WHAT WE CAN DO ABOUT IT 25 (2012). For some individuals, military service may be tempting because of the longer-term health and education benefits available to veterans and their families.

<sup>88</sup> See Lan Cao, *Looking at Communities and Markets*, 74 NOTRE DAME L. REV. 841, 923 (1999) (discussing informal systems of community credit); Lan Cao, *The Diaspora of Ethnic Economies: Beyond the Pale?*, 44 WM. & MARY L. REV. 1521, 1531 (2003) [hereinafter Cao, *Diaspora*] (“For members of these transitional or marginal groups especially, who may lack mainstream advantages, turning inward and utilizing available ethnic resources to engage in community ethnic preferences within the ethnic economy will be crucial for their economic well-being.”).

<sup>89</sup> See Cao, *Diaspora*, *supra* note 88, at 1612 (“For non-English speakers . . . the barriers to entering the general labor force are often quite high.”); Daina C. Chiu, Comment, *The Cultural Defense: Beyond Exclusion, Assimilation, and Guilty Liberalism*, 82 CALIF. L. REV. 1053, 1092 (1994) (arguing that “the American labor market . . . includes Asian Americans, but only in lower-tier jobs with poor pay and dim advancement prospects, and only while retaining structural barriers to exclude Asian Americans from primary-sector jobs with better compensation, benefits, and upward mobility”).

<sup>90</sup> See Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1195 (2002) (arguing that the central, if sometimes misunderstood purpose of affirmative action is to achieve “racial integration”).

<sup>91</sup> See, e.g., *America's New Aristocracy*, ECONOMIST (Jan. 24, 2015), <http://www.economist.com/news/leaders/21640331-importance-intellectual-capital-grows-privilege-has-become-increasingly> (noting that “America is one of only three advanced countries where the government spends more on schools in rich areas than in poor ones”).

<sup>92</sup> Even when a family business is illegal, the founders may use their ill-gotten resources to support a “quiet and determined push toward respectability” for subsequent generations. See Malcolm Gladwell, *The Crooked Ladder: The Criminal's Guide to Upward Mobility*, NEW YORKER (Aug. 11, 2014), <http://www.newyorker.com/magazine/2014/08/11/crooked-ladder>. By the fourth generation, most members of one family known for its involvement in organized crime “were firmly planted in the American upper middle class.” *Id.*

Perhaps, rather than restricting economic inheritances in order to better approximate the conditions of economic equality that would pertain in a perfect meritocracy, we ought to focus on a smaller set of outsized fortunes. Even if mom and pop businesses reduce wealth inequality, family-controlled capital beyond a certain scale may tend to entrench inequality rather than to relieve it.<sup>93</sup> But this qualification only reinforces the point: we should not assume that economic redistribution will invariably produce a more equal society; instead, we should seek to identify policies that will, in fact, produce that result.

## II. THE ROLE OF MARKETS

To the extent family businesses provide entrepreneurial opportunities that reduce wealth inequality, we should consider whether family businesses, having served that function, are likely to ossify into dynastic wealth. To address the concern, this Part examines the market context in which family businesses operate.

Markets have both inegalitarian and egalitarian implications. In a competitive marketplace, wealth inequality is inevitable. For example, if a company decided to pay all its workers the same wage, either the more skilled labor would leave for other firms, or the cost of raising salaries for less skilled workers would make the business uncompetitive, and “it [might] no longer be possible to compete for buyers or capital against efficiently inegalitarian firms.”<sup>94</sup> The adverse reaction to an entrepreneur’s recent decision to set a \$75,000 minimum salary for all his employees reflects both kinds of concerns.<sup>95</sup> Also, market outcomes reflect inputs; if one competitor begins with more capital to invest in the market, she has a significant advantage.

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<sup>93</sup> For example, in South Korea “[a]bout 20 families run the huge conglomerates or *chaebol* that make up 60% of the country’s stockmarket value and most of its exports.” *To Those that Have: The Dark Side of Family Capitalism*, *ECONOMIST* (Apr. 18, 2015), <http://www.economist.com/news/special-report/21648178-dark-side-family-capitalism-those-have>. To be sure, inequality is not the only relevant consideration; for example, tax policy must also consider the effect on incentives to generate wealth. See McCaffery, *supra* note 78, at 288. A poorly designed policy could reduce social wealth.

<sup>94</sup> DOUGLAS RAE ET AL., *EQUALITIES* 26 (1981) (“This point provides an almost ineluctable restraint against equality in unregulated market systems.”).

<sup>95</sup> See Patricia Cohen, *A Company Copes with Backlash Against the Raise that Roared*, *N.Y. TIMES* (July 31, 2015), <http://www.nytimes.com/2015/08/02/business/a-company-cope-with-backlash-against-the-raise-that-roared.html> (describing how a “swashbuckling blow against income inequality” led some of a company’s most valuable employees to leave “spurred in part by their view that it was unfair to double the pay of some new hires while the longest-serving staff members got small or no raises”). Some customers left, as well, because they expected their fees to go up to cover the cost of the raise. *Id.*

Nevertheless, the market mechanism itself provides a neutral test of merit, one that is not overawed by inherited privileges. For a family business to survive, it must actually be the case that “family processes contribute to the efficient and effective functioning of the company.”<sup>96</sup> Notably, very few family businesses continue into a second generation, let alone a third or fourth.<sup>97</sup> Thus, by rewarding merit, well-regulated markets can help to ensure that successful family businesses avoid the worst sorts of nepotistic abuses and that they contribute to society.

#### A. *How Markets Discipline Businesses*

In a family business, the concerns of family must be balanced against the demands of the marketplace. Properly harnessed, the discipline imposed by the marketplace provides a useful, if imperfect, mechanism for ensuring a sensible distribution of societal resources.<sup>98</sup> The mechanism is imperfect because market outputs reflect inputs; if certain individuals or groups inherit unwarranted advantages, the state may be justified in undertaking redistributive measures.<sup>99</sup>

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<sup>96</sup> Harvey S. James Jr., *What Can the Family Contribute to Business? Examining Contractual Relationships*, 12 *FAM. BUS. REV.* 61, 61 (1999).

<sup>97</sup> See Michael Gilding, *Families and Fortunes: Accumulation, Management Succession and Inheritance in Wealthy Families*, 41 *J. SOC.* 29, 35–36 (2005).

<sup>98</sup> Admittedly, the market mechanism leaves room for private benefits that do not contribute to general welfare. Competitive slack in some industries may enable firms to hire and overpay family employees who are less capable than other available workers. See, e.g., THOMAS MANN, *BUDDENBROOKS: THE DECLINE OF A FAMILY* 271 (H.T. Lowe-Porter trans., The Modern Library 1952) (1924) (noting of the business owner’s brother, who had been hired as chief clerk despite reservations regarding his competence, “[u]nfortunately [his] zeal for commerce began to dwindle after his first week on the job, and even more decisively after his second”).

<sup>99</sup> For the most important articulation of a contrary view, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 230 (1974), arguing in response to John Rawl’s theory of justice that so long as a “set of holdings is properly generated, there is no argument for a more extensive state based upon distributive justice.” Nozick concedes, however, that redistribution may be required to rectify the continuing impact of previous injustices assuming “that those from the least well-off group in the society have the highest probabilities of being the (descendants of) victims of the most serious injustice who are owed compensation by those who benefited from the injustices.” *Id.* at 231. In the United States, a legacy of mistreatment of native populations, slavery, segregation, and de jure discrimination ought to preclude any argument that the current distribution of wealth is sacrosanct. Thus, Nozick’s defense of the minimal state cannot be used to support the status quo of wealth inequality in the United States. See BERNARD WILLIAMS, *ESSAYS AND REVIEWS, 1959–2002*, at 107, 114 (2014) (reviewing NOZICK, *supra*) (contending that Nozick’s “theories do not, except in a very general and associative manner, offer any particular comfort to contemporary capitalism”).

Nevertheless, to the extent family owners internalize the consequences of their choices,<sup>100</sup> they have a strong incentive to avoid unwise hiring and promotion decisions.<sup>101</sup> Over time, market pressures may cause family-business enterprises to transition away from family control in order to raise capital or to benefit from highly skilled, professional management.<sup>102</sup> In any case, only a small fraction of family firms survive long enough to count as dynasties, and, from the standpoint of social equality, “shirtsleeves to shirtsleeves in three generations”<sup>103</sup> may be more of a blessing than a curse.

In light of market constraints, it should be unsurprising that many family businesses adopt hiring policies that require family members to develop adequate credentials in terms of education and experience before consideration for a position with the family business. Likewise, a business might require new employees to start on the proverbial shop-room floor before moving into managerial positions.<sup>104</sup>

In his novel, *Gain*,<sup>105</sup> Richard Powers describes the implementation of a strict apprenticeship in a family-owned soap factory:

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<sup>100</sup> If a family-controlled business is publicly traded, there is a danger that the family will use its majority position to extract private benefits at the expense of the other shareholders.

<sup>101</sup> On the other hand, family owners will want to avoid causing family dissension, and choices made to satisfy a family’s expectation of equitable treatment may create business problems. See Ivan S. Lansberg, *Managing Human Resources in Family Firms: The Problem of Institutional Overlap*, 12 ORGANIZATIONAL DYNAMICS 39, 41 (1983) (“Founders often find themselves in the difficult situation of having to choose between either hiring (or firing) an incompetent relative or breaking up their relationship with some part of the family.”).

<sup>102</sup> See ALFRED D. CHANDLER, JR., *SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM* 335 (1990) (arguing that continued family ownership harmed “British organizational capabilities” and led those firms to underperform when compared to American rivals). However, some scholars argue that family businesses, in a variety of settings, can outperform non-family businesses. See *infra* Part III.A. For present purposes, the answer is less important than the existence of a market mechanism capable of producing an answer.

<sup>103</sup> George Stalk & Henry Foley, *Avoid the Traps that Can Destroy Family Businesses*, HARV. BUS. REV., Jan.–Feb. 2012, at 25 (citing “a familiar aphorism”).

<sup>104</sup> See Galen Moore, *Market Basket List: 11 Management Tips from ‘Artie T.’*, BOS. BUS. J. (Oct. 9, 2013, 8:25 AM), [http://www.bizjournals.com/boston/blog/mass\\_roundup/2013/10/arthur-t-demoulas-management-style.html](http://www.bizjournals.com/boston/blog/mass_roundup/2013/10/arthur-t-demoulas-management-style.html) (“We do all of our promoting from within. We start out bagging groceries and shagging carriages and cutting boxes in the back room and doing the things you do in a supermarket—99 percent of our people come from within the ranks.” (quoting Market Basket CEO and third-generation family owner Arthur T. Demoulas)).

<sup>105</sup> RICHARD POWERS, *GAIN* (1998) (tracing the fortunes of several generations of the fictional Clare family and the soap company that they establish as a private partnership, later incorporate, and eventually take public).

Though born to run the firm, Douglas Clare I came up through the ranks. While still a child, he cleaned and swept his father's offices. Learning to write, he spent a year as a copyist. At thirteen, he drove a horse-drawn dray back and forth between Roxbury and the Boston docks. Later, he shoveled rosin at the factory for his uncle Resolve, eleven hours a day. . . .

. . . .

Douglas's patrimony was never in doubt. But the distance he traveled, from shoveler to president, never failed to impress those he did business with. Inside the firm and out, he emanated an authority grounded on calluses.<sup>106</sup>

Whether the heir apparent begins at the bottom, as in the fictional Clare Inc., or at a lower-level managerial position, familiarity with the business and establishment of merit seem essential as a precondition to effective leadership.<sup>107</sup>

When the expectations of family life conflict with business needs, some accommodation must be reached if the business is to remain viable.<sup>108</sup> In one case, an uncle's dislike for his nephew undermined the potential for a smooth transition of control and led the nephew to found a competing business, taking with him key customers and employees.<sup>109</sup> Ironically, a clearer commitment to continued family ownership might have saved the business by assuring the nephew that he would eventually assume control.<sup>110</sup> Instead, the uncle warned his nephew that the nephew's right to inherit the business would depend upon

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<sup>106</sup> *Id.* at 217–18.

<sup>107</sup> See Moore, *supra* note 104 (describing how a CEO seemed to know each of his employees and also “knew intimate details of the 138,000-square-foot store—like the price of a special, the length of the chicken case . . . and the weekly revenue from a new kind of snack-food display piloted there”). As the CEO explained,

Dad taught us, God rest his soul, my dad Mike Demoulas, you know, he carried a notebook and a pad of paper and a pencil, and you walk around the store—just what we're going to do. We're going to talk to customers, talk to our great associates here and make a note of things that happen and you follow up on it.

*Id.*

<sup>108</sup> See MANFRED F.R. KETS DE VRIES, RANDEL S. CARLOCK & ELIZABETH FLORENT-TREACY, FAMILY BUSINESS ON THE COUCH: A PSYCHOLOGICAL PERSPECTIVE 25 (2007) (“Unresolved personal conflicts, lack of trust, difficult interpersonal relationships, sibling rivalry, generational issues, the family's demands on the business—any or all of these issues can affect a family firm's success.”).

<sup>109</sup> See *Hamburger v. Hamburger*, No. 93-3359-E, 1995 WL 579679, at \*1, \*2 (Super. Ct., Mass. Sept. 29, 1995); see also CHARLES R.T. O'KELLEY ET AL., CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS (6th ed. 2010) (discussing *Hamburger*).

<sup>110</sup> Moreover, as a matter of equity, the child who had done the work building the business would seem to have a legitimate claim as against outsiders, even meritorious outsiders.

whether the uncle or his brother, the nephew's father, lived longer.<sup>111</sup> Evidently, the uncle intended to fire his nephew at the first opportunity, and the nephew's incentives altered accordingly.<sup>112</sup>

Market considerations also apply when a business transitions from one generation to the next because the older generation needs to find an economic exit strategy. If the business is to stay in the family, the capital demands of the retiring generation must be in keeping with what the business can afford to pay. There are, of course, many insurance and tax strategies for managing these transitions.<sup>113</sup> For present purposes, it is enough to observe that continued family ownership is possible only if each generation can generate sufficient profits through the business for a succession strategy to work.<sup>114</sup>

When a family falters, the markets will wrest control away, one way or another. For example, if a family business squanders its capital, it will need to obtain more, either by taking on debt or bringing in equity investors.<sup>115</sup> In either case, the contributors of capital will take steps to protect their investment, thereby diminishing the benefits of family control.<sup>116</sup> Unless there are barriers to entry that permit undue market power, kinship preferences within an organization do not preclude others from establishing competing firms: “[D]eveloping a business . . . may require only that one learn the relevant skill, obtain some capital, and find willing customers; no particular

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<sup>111</sup> See *Hamburger*, 1995 WL 579679, at \*1.

<sup>112</sup> See *id.* Note that a related issue can arise when the younger generation relies upon promises of inheritance, performing labor for a family business in order to achieve a future reward, only to find that the older relative has made other arrangements for the disposition of the estate. See Means, *Contractual Foundation*, *supra* note 8, at 721–22; see also HENDRIK HARTOG, *SOMEDAY ALL THIS WILL BE YOURS: A HISTORY OF INHERITANCE AND OLD AGE 150*, 158 (2012) (noting that when an older person promised a younger person inheritance in exchange for services, but does not formally include the promise in a will, “when these young (or no longer young) persons sued for a compensation or a legacy that had not come . . . they would have detailed the work that had been required as the older person fell apart”).

<sup>113</sup> Several tax provisions are also designed to “protect family businesses from forced sales.” Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 *TAX. L. REV.* 1, 57 (2009).

<sup>114</sup> See, e.g., FEDERMAN, *supra* note 60, at 87 (“Contrary to what most people assume, I didn’t simply ‘inherit’ Russ & Daughters. After years of working six days a week, ten hours a day, I earned the right to buy the business from the preceding generation of Russes.”). The parents “actually seemed relieved; they had no other exit plan.” *Id.* at 69. And, in turn, the third generation has sold the business to the fourth: “In the Russ family, every generation inherits the right to buy out the preceding generation.” *Id.* at 73.

<sup>115</sup> Ronald J. Gilson, *Controlling Shareholders and Corporate Governance: Complicating the Comparative Taxonomy*, 119 *HARV. L. REV.* 1641, 1667 (2006) (noting that for poorly managed businesses, “internally generated funds will be insufficient, requiring recourse to the capital market”).

<sup>116</sup> *Id.* at 1677 (“[E]xternal suppliers of debt or equity can be expected to insist on a means to dissipate the controlling shareholder’s influence if poor performance threatens the new investment.”).

decision-maker or small set of decision-makers has authority over the question of who can pursue that path.”<sup>117</sup> A business that fails to make room for outside talent may be forced to compete with it.

### *B. The Competitiveness of Family Businesses*

Conventional wisdom once held that family businesses were nothing more than a faltering first step on the path toward professional management.<sup>118</sup> In a family business, “policy and direction are subject to significant influence by one or more family units . . . through ownership and sometimes through the participation of family members in management.”<sup>119</sup> In a non-family business, by contrast, the “managers and key decision makers come from the professional labor market rather than the family.”<sup>120</sup> The distinction is often significant. Even though they are governed by the same formal legal rules, “[f]amily firms differ from nonfamily businesses in that the norms, principles, and obligations of the family overlap with those of the business.”<sup>121</sup>

For several reasons, scholars have long considered family to be a relatively undesirable form of economic organization. First, when other stakeholders are involved, there is reason to worry that family owners will find ways to benefit from control, putting family interests ahead of the business.<sup>122</sup> Second, if managerial leadership must be drawn from the family’s ranks, the talent pool may be too thin to replicate the successes of a first-generation entrepreneur.<sup>123</sup> Third, in seeking to placate family concerns, business leaders may fail to

<sup>117</sup> FISHKIN, *supra* note 17, at 130.

<sup>118</sup> See DAVID S. LANDES, *DYNASTIES: FORTUNES AND MISFORTUNES OF THE WORLD’S GREAT FAMILY BUSINESSES* xii (2006) (“[T]he current economic orthodoxy sees family enterprise as inappropriate, ineffective, and essentially finished as a major economic engine.”).

<sup>119</sup> Peter Davis, *Realizing the Potential of the Family Business*, 12 *ORGANIZATIONAL DYNAMICS* 47, 47 (1983).

<sup>120</sup> James, *supra* note 96.

<sup>121</sup> *Id.*; see also Means, *Nonmarket Values*, *supra* note 8, at 1210.

<sup>122</sup> See Belen Villalonga & Raphael Amit, *How Do Family Ownership, Control and Management Affect Firm Value?*, 80 *J. FIN. ECON.* 385, 387 (2005) (“The large shareholder may use its controlling position in the firm to extract private benefits at the expense of the small shareholders.”). Where minority shareholders are concerned, the law constrains abuse of control, regardless of family ownership. See Benjamin Means, *A Voice-Based Framework for Evaluating Claims of Minority Shareholder Oppression in the Close Corporation*, 97 *GEO. L.J.* 1207, 1217 (2009).

<sup>123</sup> See Jon I. Martinez, Bernhard S. Stöhr & Bernardo F. Quiroga, *Family Ownership and Firm Performance: Evidence from Public Companies in Chile*, 20 *FAM. BUS. REV.* 83, 93 (2007) (arguing that managerial professionalization helps family firms to achieve success).



maximize profits.<sup>124</sup> Finally, if a family ethos becomes associated with a particular way of doing business, the family may find it difficult to innovate.<sup>125</sup>

However, recent empirical investigations suggest that these concerns are overstated and often invalid: “Much research concludes that family businesses not only last longer, but drive greater profits than their non-family counterparts.”<sup>126</sup> Studies have shown that family ownership can produce significant value, especially in founder-managed companies.<sup>127</sup> If family members are loyal to each other and appreciative of the business, they may work harder and take a flexible view of their role, contributing financial and human resources where needed.<sup>128</sup> From an early age, family members have an opportunity to learn how the business works and to develop expertise that an outside manager could not hope to match.<sup>129</sup> Thus, a business embedded in a family system can leverage family support to lower the cost of capital and labor, thereby producing goods and services more efficiently.<sup>130</sup> Also, in industries where personal connections matter, there is often no effective substitute for the credibility that family ownership provides. Family businesses may seek to capitalize on their perceived virtues, advertising family stewardship as a signal of quality and trustworthiness.<sup>131</sup> Finally, family-owned

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<sup>124</sup> See Lansberg, *supra* note 101, at 41.

<sup>125</sup> See Sharon Belenzon, Andrea Pataconi & Rebecca Zarutskie, *Married to the Firm? A Large Scale Investigation of the Social Context of Ownership*, STRATEGIC MGMT. J. (forthcoming 2016) (manuscript at 2), <https://faculty.fuqua.duke.edu/~sb135/bio/Family%20Final%20with%20Names%20August%202015.pdf>

(“Lone owners, or owners with no affective ties to other shareholders, may be more willing to take on risk and adopt strategies of growth. By contrast, family owners, through repeated interactions and exposure to each other’s needs, may come to perceive themselves as ‘family nurturers’. They may want the firm to generate stable, secure income to family members, and preserve family control.” (citations omitted)).

<sup>126</sup> AMY SCHUMAN, STACY STUTZ & JOHN L. WARD, FAMILY BUSINESS AS PARADOX 2 (2010).

<sup>127</sup> See, e.g., Villalonga & Amit, *supra* note 122, at 387–88.

<sup>128</sup> Means, *Nonmarket Values*, *supra* note 8, at 1190–91.

<sup>129</sup> See Khai Sheang Lee, Guan Hua Lim & Wei Shi Lim, Note, *Family Business Succession: Appropriation Risk and Choice of Successor*, 28 ACAD. MGMT. REV. 657, 658 (2003) (noting that family businesses often depend on “personal business contacts and networks” that an outsider to the business will have difficulty accessing).

<sup>130</sup> See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 232 (1991) (“[I]f family-owned ventures reduce the agency costs of management, there will be gains for all to share.”).

<sup>131</sup> See Isabel C. Botero et al., *Understanding Multiple Family Firm Identities: An Exploration of the Communicated Identity in Official Websites*, 4 J. FAM. BUS. STRATEGY 12, 13 (2013); Marylyn Carrigan & Joan Buckley, ‘What’s So Special About Family Business?’ *An Exploratory Study of UK and Irish Consumer Experiences of Family Businesses*, 32 INT’L J. CONSUMER STUD. 656, 657 (2008); Ulrich R. Orth & Mark T. Green, *Consumer Loyalty to Family Versus Non-Family Business: The Roles of Store Image, Trust and Satisfaction*, 16 J. RETAILING & CONSUMER SERVS. 248, 251 (2009).

firms may take a longer view of success than their peers, avoiding a counterproductive focus on quarterly returns.<sup>132</sup>

The sheer prevalence of family businesses should count as some evidence of their fitness. Otherwise, the continuation of a defective, fundamentally flawed institution would be hard to explain, at least in a society that has stable legal and market institutions to support business dealings among strangers as well as kin.<sup>133</sup> In such a legal environment, kinship-based business arrangements are a choice rather than a necessity. From the standpoint of economically rational choice, an investment in a family business makes sense only if other available investments do not present a better value.<sup>134</sup>

Admittedly, some of the claims made in favor of the competitiveness of family firms have been too anecdotal. Even if family businesses outperform their peers, as a general proposition, it is still important to understand whether family attributes matter and, if so, in what contexts and in what ways.<sup>135</sup> Analytic methodologies vary, in part, because family businesses have been studied by “[s]cholars trained in psychology, sociology, law, accounting, economics, organizational behavior, strategic management, entrepreneurship, and numerous other disciplines.”<sup>136</sup> More recent studies have begun to address these methodological concerns, for instance by distinguishing public corporations from smaller, closely held businesses.<sup>137</sup> In sum, not only are

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<sup>132</sup> See LAWRENCE A. CUNNINGHAM, *BERKSHIRE BEYOND BUFFETT: THE ENDURING VALUE OF VALUES* 85 (2014) (describing how the legendary investor Warren Buffet likes to acquire family businesses whose owners have adopted a long-term perspective).

<sup>133</sup> See BELLOW, *supra* note 57, at 469 (“[W]hile nepotism may indeed shelter some incompetent family members from the consequences of their failures, the record of family contributions to the history of capitalism has been overwhelmingly positive. If this hadn’t been true, the American economy would be a basket case instead of a thriving engine of prosperity.”).

<sup>134</sup> See EASTERBROOK & FISCHER, *supra* note 130, at 231 (“Each organizational form presents its own problems, for which people have designed different mechanisms of control. At the margin the problems must be equally severe, the mechanisms equally effective—were it otherwise, investors would transfer their money from one form to the other until the marginal equality condition was satisfied.”).

<sup>135</sup> See Timothy G. Habbershon & Mary L. Williams, *A Resource-Based Framework for Assessing the Strategic Advantages of Family Firms*, 12 *FAM. BUS. REV.* 1, 5–6 (1999) (arguing that “generalizations beg certain questions—for instance, What family firms have advantages and when? How long do these advantages endure? Are they the result of internal or external factors? Under what conditions do family firms have an advantage?”).

<sup>136</sup> *Id.* at 1.

<sup>137</sup> See, e.g., Danny Miller, Isabelle Le Brenton-Miller & Barry Scholnick, *Stewardship v. Stagnation: An Empirical Comparison of Small Family and Non-Family Businesses*, 45 *J. MGMT. STUD.* 51, 52 (2008) (observing that concerns about family-firm performance have often involved studies of public corporations to the exclusion of “more representative [family-owned businesses] in which there are multiple family members involved in owning and running the business, and where family ownership is complete or dominant”).

family businesses “the dominant form of organization in the world,” but “largely negative portrayals” of their performance “do not seem to hold up.”<sup>138</sup> Instead, “recent research . . . shows [family-owned businesses] to outperform and out-survive most companies.”<sup>139</sup>

To the extent family businesses contribute to aggregate social welfare by boosting economic productivity, creating jobs and benefiting consumers, legitimate worries about the distributive implications of family businesses should take into account their economic value. As discussed in the next section, the relevance of a market test depends upon whether the markets in question are fully competitive.

### C. *Regulating Markets*

Markets depend upon legal rules to function properly. At the most basic level that means a reliable method of identifying property rights and a court system capable of enforcing contractual claims. In addition, as this section describes, competitive markets may depend upon the regulatory structure of securities law, antitrust law, and licensing provisions. In some cases, legal rules can undermine market competition, and this section identifies potential problem areas involving family businesses, including protectionist set-asides for particular industries and tax exemptions for intra-family transfers.

#### 1. *Protecting Competition*

The competitive environment family businesses must negotiate depends upon a number of overlapping bodies of business law. Taken together, securities law, antitrust law, and, where applicable, licensing regulations, limit the ability of family business owners to preserve economic advantages without facing effective competition.

*Securities Law.* A well-developed market for corporate securities can provide an important test of the competitiveness of family-owned businesses. Even if a family business itself avoids the capital markets, it must be prepared to compete with other firms that will access public capital to grow.<sup>140</sup> Thus,

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<sup>138</sup> *Id.* at 73.

<sup>139</sup> *Id.*

<sup>140</sup> For example, to the extent public firms have a lower cost of capital, they have a competitive advantage that must be outweighed by other benefits of private control. *See, e.g.,* Luigi Zingales, *Insider Ownership and the Decision to Go Public*, 62 REV. ECON. STUDIES 425, 425–26 (1995) (noting that “less costly access to the capital market” is one of the traditional justifications for taking a private company public).

one author argues that “characteristics of the stock market help to explain how German and U.S. corporate experience began to diverge at the beginning of the twentieth century.”<sup>141</sup> German law responded to an agrarian movement resentful of modern capitalism by restricting securities trading; meanwhile, the U.S. began to develop “a securities culture.”<sup>142</sup> The result was that German companies relied upon bank financing more than equity markets.<sup>143</sup> By the time the German stock market rules were liberalized, “the damage had been done.”<sup>144</sup> Instead of using markets to allocate resources efficiently, “[i]nstitutional arrangements, syndicate agreements, and cartels had been deployed to reorganize German business and had set it on a path where the capital market mattered less.”<sup>145</sup> In an environment of business cooperation among a relatively small set of players, family continuity could be more important than efficiency.<sup>146</sup> Consequently, the prevalence of family-owned businesses in Germany may be explained by something other than their competitiveness.<sup>147</sup>

*Antitrust Law.* Laws designed to curb market power also have a role to play in protecting competition so as to test the fitness of family firms. That is, anti-collusion rules facilitate competition and therefore make close-knit, familial relationships among capitalists less important. Once again, Germany provides an interesting counter-example. At the beginning of the twentieth century, “German firms in the great industries began to work out sophisticated ways to cooperate in maintaining market share and profits.”<sup>148</sup> While U.S. firms had to comply with the Sherman Antitrust Act of 1890, which prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade” and any “monopoliz[ation], attempt[ed] . . . monopoliz[ation], or combin[ation] or conspir[acy] . . . to monopolize,”<sup>149</sup> German firms faced no such constraint.<sup>150</sup> Accordingly, “whereas the American story illustrated the emergence of

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<sup>141</sup> HAROLD JAMES, FAMILY CAPITALISM 117 (2006).

<sup>142</sup> *Id.* at 118.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See CHANDLER, *supra* note 102, at 500–01 (arguing that large, industrial “German firms differed from the American in that the family often continued to have a powerful, even a decisive, say in management”).

<sup>147</sup> Of course, the history of German corporate law cannot be summarized in a paragraph. For a more detailed review, see Peter Muchlinski, *The Development of German Corporate Law to 1990: An Historical Reappraisal*, 14 GERMAN L.J. 339 (2013).

<sup>148</sup> CHANDLER, *supra* note 102, at 501.

<sup>149</sup> 15 U.S.C. §§ 1–2 (2012).

<sup>150</sup> CHANDLER, *supra* note 102, at 501 (“[A]greements between firms as to price, production, and markets were legally enforceable in courts of law . . .”).

competitive managerial capitalism, the German story exemplifies the coming of cooperative managerial capitalism.”<sup>151</sup> Although family ownership declined somewhat by the end of the twentieth century, it was still “a significant force” and revealed “the persistence of family ownership in Germany and the impact it has had on accumulated wealth.”<sup>152</sup>

*Entry Requirements.* In addition to legal rules that structure markets, industry-specific licensing requirements create an external merit filter regardless of the family’s own predilections. For instance, children can practice law with a family law firm only if they attain the qualifications necessary for admission to law school, graduate in good standing, pass the state’s bar examination, and receive and maintain a license from the state. The same could be said of accounting, medicine, and other professions subject to licensing requirements. In certain sub-specialties—say, neurosurgery—the merit filter may be so stringent that family connections among practitioners become more a matter of curiosity than legitimate concern.<sup>153</sup>

## 2. *Market-Insulating Rules*

Sometimes the law structures markets in ways that seem to undercut the competitive pressures that would otherwise require family businesses to create value in order to survive. Market exceptions may be justified on other grounds, but, as this section shows, the slackening of market constraints necessarily

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<sup>151</sup> *Id.*

<sup>152</sup> Caroline Fohlin, *The History of Corporate Ownership and Control in Germany*, in A HISTORY OF CORPORATE GOVERNANCE AROUND THE WORLD: FAMILY BUSINESS GROUPS TO PROFESSIONAL MANAGERS 235, 236 (Randall K. Morck ed., 2005) (noting that nearly all of the largest German fortunes “derive from family-founded enterprises”).

<sup>153</sup> Of course, licensing requirements create artificial barriers to entry and some argue that informed consumers can make better choices for themselves as to whether to use the provider of a particular service. Even if licensing can help markets to function better by ensuring minimum standards, incumbent businesses have reason to lobby for licensing rules in order to limit competition—in which case, licensing rules could squelch entrepreneurship and create some of the problems that the antitrust rules were designed to prevent. For example, the Institute for Justice Clinic on Entrepreneurship at the University of Chicago Law School has advocated on behalf of food truck vendors whose business is inhibited by regulations that, arguably, do more to insulate established restaurants from competition than to protect public health. See Alex Levine & Beth Kregor, *IJ Clinic’s Beth Kregor’s Testimony About Proposed Amendments to Chicago Food Truck Legislation*, U. CHI. L. SCH. (July 20, 2012), <http://www.law.uchicago.edu/news/ij-clinics-beth-kregors-testimony-about-proposed-amendments-chicago-food-truck-legislation>.

reduces our confidence in family businesses and increases our concern that family-business wealth may simply reinforce existing inequalities.<sup>154</sup>

*Protectionism.* The most straightforward examples of market-insulating rules are those that involve the exemption of family businesses from ordinary competition. For example, in *Kotch v. Board of River Port Pilot Commissioners*, the Supreme Court upheld a Louisiana state law that allowed river pilots to restrict access to the profession to relatives and, occasionally, friends.<sup>155</sup>

In *Kotch*, the plaintiffs brought an equal protection challenge to Louisiana's requirement that pilots serve a six-month apprenticeship with a current pilot to receive a certification to pilot seagoing vessels along the stretch of Mississippi river that leads to the port of New Orleans.<sup>156</sup> Although the river boat pilots almost always restricted apprenticeships to kin, the Court noted that the "history and practice of pilotage demonstrate that . . . it is also a highly personalized calling."<sup>157</sup> While acknowledging the nepotism at issue,<sup>158</sup> the Court was unwilling to declare the practice unconstitutional.<sup>159</sup> Even the *Kotch* dissent conceded the value of a family business culture while concluding that it violates equal protection for "blood" to be made "the crux of selection."<sup>160</sup>

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<sup>154</sup> Cf. Gilson, *supra* note 115, at 1674 (arguing in the context of inefficient controlling shareholder structures that when markets do not perform their role, there is reason to alter "legal rules and supporting institutions to increase the exposure of control to the market").

<sup>155</sup> 330 U.S. 552, 564 (1947).

<sup>156</sup> *Id.* at 558 ("The pilot's job generally requires that he go outside the harbor's entrance in a small boat to meet incoming ships, board them and direct their course from open water to the port. The same service is performed for vessels leaving the port. Pilots are thus indispensable cogs in the transportation system of every maritime economy.").

<sup>157</sup> *Id.* ("A pilot does not require a formalized technical education so much as a detailed and extremely intimate, almost intuitive, knowledge of the weather, waterways and conformation of the harbor or river which he serves."); see also MARK TWAIN, LIFE ON THE MISSISSIPPI (Bos., James R. Osgood & Co. 1883).

<sup>158</sup> *Id.* at 562 ("Probably in pilotage more than in any other occupation in the United States the male members of a family follow the same work from generation to generation." (quoting DEP'T OF COMMERCE, SPECIAL AGENTS SERIES, PILOTAGE IN THE UNITED STATES 8 (1917)).

<sup>159</sup> See *id.* at 564.

<sup>160</sup> *Id.* at 566 (Rutledge, J., dissenting) ("Conceivably the familial system would be the most effective possible scheme for training many kinds of artisans . . . from the viewpoint of securing the highest degree of skill and competence."). Later courts have distinguished the unique setting of river pilots and have found that similar restrictions are without rational basis and therefore unlawful. See, e.g., *Backlund v. Hessen*, 104 F.3d 1031, 1034 (8th Cir. 1997) (holding that Minnesota fire department violated the Constitution's requirement of equal protection by failing to hire the best-qualified applicant in order to hire relatives of current department employees).

Whether the Supreme Court was correct that Louisiana had a rational basis for believing that nepotism protected the quality of its river pilots, the Court's holding ensured that the insularity of the profession would continue regardless of the truth of that assumption. Also, the nostalgia for family-business ownership seems misplaced because of the heavy involvement of the state in regulating the relevant market. In an industry dependent upon public regulation to create a demand for its services, to set fees, and to forestall outside competition, there is no way to know whether the river pilots offer a value commensurate with what they are paid.<sup>161</sup> Moreover, when the law permits families to erect barriers to entry, as in the case of the Louisiana river pilots, worries about the distributional consequences of kinship preferences are heightened.

Likewise, there is reason to worry about corporate farming restrictions enacted in nine states that have limited the ownership of agricultural land to closely held entities and that specially privilege family ownership.<sup>162</sup> According to one commentator, such laws leave “the food consumer . . . vulnerable to the political machinations of agrarian interest groups.”<sup>163</sup> The restrictions could be justified if family businesses are intrinsically valuable and merit extra protection: “[A] large corporation operating without any local owners in a given area may care less about costs it imposes on neighbors in the form of, for example, environmental damage, than firms that are locally owned and operated.”<sup>164</sup> Again, however, the assumed benefits are locked in by legislation and no longer open to market verification—for instance whether consumers are willing to pay more for the benefit of a family-owned brand.<sup>165</sup>

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<sup>161</sup> Interestingly, one commentator notes that traffic in the New Orleans port has declined sharply since 2008, a decline largely explained by price competition from other ports. The political power of the river pilots and the lack of direct competition for setting prices may have led to overreaching and, perhaps, a political correction driven by a broader market impact. See Jeffrey Kenneth Prattini, Comment, *Louisiana's 2004 River Pilot Reform Muddies the Water*, 52 LOY. L. REV. 369 (2006).

<sup>162</sup> See Anthony B. Schutz, *Corporate-Farming Measures in a Post-Jones World*, 14 DRAKE J. AGRIC. L. 97, 98 (2009). The nature of the family preference varies from state to state. See *id.* at 112 & n.52 (citing IOWA CODE § 9H.1(8)(a) (2007) (requiring that family hold majority of stock)); OKLA. STAT. ANN. tit. 18, § 951(A)(1), (A)(3) (2012) (creating exception to ten shareholder maximum for family members).

<sup>163</sup> Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 877 (1995) (arguing that “[a]grarian self-dealing” harms the stability of agricultural farming).

<sup>164</sup> Schutz, *supra* note 162, at 101.

<sup>165</sup> It is possible that market failures make it difficult to price the intangible benefits of community or that these values lie outside the market and are worth pursuing. Ultimately, the agricultural laws might be justified, but they have a cost, which is the diminished incentive for family farms to ensure that kinship preferences are defensible on the merits.

*The Trust-Fund Loophole.* When business founders receive compensation in the form of stock, they can structure the investment to defer taxation on capital gains until the business is sold.<sup>166</sup> However, if a founder leaves her stock to heirs rather than selling it, the transfer is subject to a large estate-tax exemption. Furthermore, the heirs are not obligated to pay taxes when they receive the stock. Even if the heirs sell the stock later, they can exclude any appreciation of value that occurred between the time of the founder's initial investment and her death—the stock transfers to the heirs at a “stepped-up” basis and only further appreciation, if any, is subject to a capital gains tax.<sup>167</sup> Hypothetically, if a founder turned a \$100,000 investment into a \$100,000,000 company, almost none of that appreciation would ever be taxed.<sup>168</sup> This is not a small matter: “Founders’ stock—not high executive salaries and bonuses—accounts for a significant part of the growing inequality of wealth in the United States.”<sup>169</sup>

As Professor Fleischer explained recently, defending President Obama's plan to subject inherited wealth to taxation,

The White House proposal is . . . efficient. . . . By taking away the largest incentive to hold on to appreciated assets—the step up in basis at death—the proposal significantly reduces the lock in effect and will improve economic efficiency. In other words, if Junior is not the best person to run the business, taxing the founder's gains at death will make him more likely to sell the business earlier to someone who is.<sup>170</sup>

Some exemptions might nevertheless be warranted to protect the family owners of smaller-scale businesses from incurring an unmanageable tax burden at a time—succession of ownership—that is already highly stressful. However,

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<sup>166</sup> Fleischer, *supra* note 71, at 62. For an explanation of how ordinary income can be transformed into capital gains, see *id.* at 64.

<sup>167</sup> For an explanation of stepped-up basis, and a critique of the practice in the context of accrued capital gains, see generally Philip E. Heckerling, *The Death of the “Stepped-Up” Basis at Death*, 37 S. CAL. L. REV. 247 (1964).

<sup>168</sup> *Id.* at 66 (“As it stands, this entrepreneurial wealth is taxed at a low rate or not at all, allowing founders to leave behind a legacy of dynastic wealth subject only to the rather dodgy application of the estate tax.”).

<sup>169</sup> *Id.* at 64.

<sup>170</sup> Victor Fleischer, *Echoes of Piketty in Obama Proposal to Address Income Inequality*, N.Y. TIMES: DEALBOOK (Jan. 20, 2015), <http://dealbook.nytimes.com/2015/01/20/echoes-of-piketty-in-obama-proposal-to-address-income-inequality/>. *But see* Ronald J. Gilson & David M. Schizer, *Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock*, 116 HARV. L. REV. 874, 910 (2003) (defending tax rules as subsidy for high-tech investment).



the continuation of a family business should reflect something other than tax arbitrage.

*Dual-Class Stock.* Controversy regarding the use of dual-class stock provides another example of legal rules that limit the corrective power of markets.<sup>171</sup> In a typical dual-class stock scenario, founders reserve to themselves a class of stock with enhanced voting rights, ensuring that the founders will always be able to outvote public shareholders.<sup>172</sup> Although not mandated by law, the practice is authorized by state statutes that set the permissible boundaries for stock classification and by national stock exchanges that permit listed firms to have a dual-stock structure.<sup>173</sup>

Dual-class stock is commonly employed in family-owned businesses that have non-family equity investors<sup>174</sup> but has also been adopted in recent public stock offerings by major high-technology companies including Facebook and Google.<sup>175</sup> Because the founders reserve the voting power, among other things, to shut down any unwanted offer to buy the business, the market for corporate control cannot serve as a check on value-diminishing choices that may serve the private interests of the controlling family at the expense of other investors.<sup>176</sup> Nor can shareholders remove directors should the business

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<sup>171</sup> See Press Release, Elizabeth Warren, U.S. Senator, Senator Elizabeth Warren Urges NYSE, NASDAQ to Propose Rules Requiring “One Share, One Vote” Structures (June 5, 2013), [http://www.warren.senate.gov/?p=press\\_release&id=145](http://www.warren.senate.gov/?p=press_release&id=145) (“If a company goes to the public markets to raise money, long-term ordinary common stock investors—a category that includes directly or indirectly millions of retirees and workers—should be entitled to certain basic rights . . . . One of the most basic of those rights is one-share-one-vote.”); see also Paul Lee, Note, *Protecting Public Shareholders: The Case of Google’s Recapitalization*, 5 HARV. BUS. L. REV. 281, 282–83 (2015) (describing efforts by institutional investors to force change, either by refusing to invest in companies with dual-listed stock or by lobbying the stock exchanges to exclude such companies). Legal academics have long debated the appropriateness of dual-class stock. See, e.g., Joel Seligman, *Equal Protection in Shareholder Voting Rights: The One Common Share, One Vote Controversy*, 54 GEO. WASH. L. REV. 687, 688 (1986) (arguing that “disproportionate voting common stock is the corporate law equivalent to price-fixing”).

<sup>172</sup> See Jeffrey N. Gordon, *Ties that Bond: Dual Class Common Stock and the Problem of Shareholder Choice*, 76 CALIF. L. REV. 1, 4 (1988). Thus, insiders have voting rights that exceed their cash-flow rights. See Paul A. Gompers, Joy Ishii & Andrew Metrick, *Extreme Governance: An Analysis of Dual-Class Firms in the United States*, 23 REV. FIN. STUD. 1051, 1052 (2010).

<sup>173</sup> Gordon, *supra* note 172, at 5, 8, 64, 66.

<sup>174</sup> See, e.g., Gompers et al., *supra* note 172, at 1059, 1063.

<sup>175</sup> John Letzing, *Facebook Puts Dual-Class Stock Structure in Place*, WALL ST. J.: MARKETWATCH (Nov. 24, 2009, 4:26 PM), <http://www.marketwatch.com/story/facebook-adopts-dual-class-stock-structure-2009-11-24>.

<sup>176</sup> In dual stock forms, the market no longer provides any separate assurances that a corporation is well governed. As such, the important of good governance is heightened. See Deborah A. DeMott, *Guests at the Table?: Independent Directors in Family-Influenced Public Companies*, 33 J. CORP. L. 819, 822 (2008)

underperform market expectations. As one commentator observes, “The market for corporate control can force a widely held firm to internalize change; nothing plays a similar role in a controlling shareholder regime save the market mechanism.”<sup>177</sup>

In theory, non-family investors price in the potential costs of value-reducing choices family owners might make and cannot be heard to complain when founders use the control they have bargained for. At the same time, if the justification for dual-class stock is that it insulates a public corporation from short-term market pressures, enabling the corporation to behave more like a family-owned venture, it should be noted that the economic circumstances are not identical. In particular, the family does not fully internalize the costs of decisions that harm the business while benefiting the family’s private interests. Costs to the business are socialized among all investors, while the family enjoys the benefits. Kinship preferences may still provide value in businesses that also use a dual-stock structure, but the market context gives us less confidence that the family has the right incentives to make sure this is so.<sup>178</sup>

*Religious Exemptions.* In *Burwell v. Hobby Lobby Stores, Inc.*, the Supreme Court held that three closely held family businesses could claim protection under the Religious Freedom and Restoration Act (RFRA) because of the religious scruples of their family owners, even though the businesses had been organized as for-profit corporations.<sup>179</sup> The Court concluded that “Congress did not discriminate in this way against men and women who wish to run their businesses as for-profit corporations in the manner required by their religious beliefs.”<sup>180</sup> The scope of the Court’s ruling remains unclear, but it is difficult to imagine circumstances in which a public corporation with a diverse set of shareholders could plausibly assert an objection based on religious identity.<sup>181</sup>

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(“Transactions in control occur only through processes of negotiation and consent, which heightens the importance of governance mechanisms that operate within dual-class firms.”).

<sup>177</sup> Gilson, *supra* note 115, at 1678.

<sup>178</sup> For discussion of possible solutions to the dual-stock issue, see *id.* at 1673–78.

<sup>179</sup> See 134 S. Ct. 2751, 2759 (2014). The Court did not state explicitly whether other kinds of for-profit corporations might be eligible under RFRA.

<sup>180</sup> *Id.* The Court observed that “[a] corporation is simply a form of organization used by human beings to achieve desired ends.” *Id.* at 2768. However, since corporations have a separate existence at law and individual shareholders are not ordinarily exposed to liability for the debts of the corporation, it is not clear why the Court thought that the corporate artifice should be ignored in this context but not others.

<sup>181</sup> *Id.* at 2774 (“These cases . . . do not involve publicly traded corporations, and it seems unlikely that . . . corporate giants . . . will often assert RFRA claims.”). The ambiguity of the Court’s ruling has led a number of conflicting suggested interpretations. See, e.g., Letter from Katherine Franke et al. to the Ctrs. for

Therefore, the *Hobby Lobby* precedent seems to provide special competitive advantages to closely held businesses owned by religiously observant families because those businesses can assert a religious objection to compliance with costly regulations if the regulations encroach upon the families' sincerely held religious beliefs.<sup>182</sup>

As the preceding analysis illustrates, the presence or absence of market constraints matters; when multi-generational family businesses succeed in a competitive market, concerns about inequality may be muted, not because the family heirs fully deserve their advantages, but because the family's wealth can be tied to measurable, ongoing achievement.<sup>183</sup> In this regard, it is notable that family-business dynasties are rare and even great fortunes dissipate.<sup>184</sup> Indeed, the well-known pitfalls of family succession pose a challenge that motivates a prodigious academic literature focused on the management of family-owned businesses.<sup>185</sup> From a different perspective, though, the limited lifespan of most family businesses may be a feature rather than a bug. If

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Medicare and Medicaid Servs. (Oct. 21, 2014), [https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp\\_comments\\_on\\_proposed\\_regs\\_corp\\_law\\_prof\\_s\\_for\\_submission.pdf](https://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/prpcp_comments_on_proposed_regs_corp_law_prof_s_for_submission.pdf) (arguing that "the close ties between family members who share a religious faith and operate a religiously-influenced business are the best assurance of the close nexus on which religious rights depend") (citing Means, *Nonmarket Values*, *supra* note 8, at 1193–94). For a more expansive interpretation of the Court's ruling, see Lyman Johnson & David Millon, *Corporate Law after Hobby Lobby*, 70 *BUS. LAW.* 1, 10, 23 (2014–2015) (arguing that state corporate law does not require corporations to maximize profits and provides ample room to select other purposes, including the exercise of religion).

<sup>182</sup> The extent of the advantage would depend upon the costs associated with the objectionable regulation or regulations.

<sup>183</sup> To be clear, this is more (and less) than a utilitarian justification for inequality and does not proceed from any such foundational commitment. It involves, rather, a kind of social judgment, in which the success of a family business may generate respect for the work ethic and values of the owners, and, perhaps, a desire to emulate their accomplishments. It may also be the case that successful family businesses contribute more to general welfare than could be achieved through a more egalitarian distribution of resources, but the success of a particular business cannot prove as a matter of formal calculation that no alternative mode of distribution would have produced more value, all things considered.

<sup>184</sup> For instance, one commentator repeats "[t]he lament of the ancient Jewish retailer": "The first generation founds the business, the second generation builds the business, and the third generation kills the business." FEDERMAN, *supra* note 60, at 199. In any case, the relatively small number of family-owned mega-firms have little to do with the local "bakeries and barbecue joints, funeral homes and furniture builders, cheesemakers, fishermen, [and] ferry boat drivers" that may be more typical of family enterprise. See COREY, *supra* note 61 (book jacket).

<sup>185</sup> See FRED NEUBAUER & ALDEN G. LANK, *THE FAMILY BUSINESS: ITS GOVERNANCE FOR SUSTAINABILITY* 17 (1998) (stating that problems in "managing the process of ownership and management succession" are "the single most important reason for the fragility of family enterprises").

unfortunate for the families involved, business failures can be viewed, ecumenically, as an appropriate limitation of inequality.<sup>186</sup>

### III. FAMILY VALUES

The problem of wealth inequality is not that some people have more money than others, even if by many orders of magnitude.<sup>187</sup> Rather, there is a growing consensus across the political spectrum that inequality deserves serious attention because of its impact on opportunities.<sup>188</sup> In today's society, it is unrealistic to suppose that someone born into poverty will have a fair chance at success in life.<sup>189</sup> Without a ladder of opportunity, whether provided by the state or cobbled together by families and communities, many members of society will continue to be trapped by the circumstances of their birth.<sup>190</sup> In order to succeed, individuals and families need stable economic circumstances, access to education, and support networks.<sup>191</sup> Those who cannot save money or

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<sup>186</sup> See, e.g., Kerry A. Dolan, *How to Blow \$9 Billion: The Fallen Stroh Family*, FORBES (July 8, 2014, 8:00 AM), <http://www.forbes.com/sites/kerryadolan/2014/07/08/how-the-stroh-family-lost-the-largest-private-beer-fortune-in-the-u-s/> (reporting that although the company was once the third largest brewer in the U.S., “today the Strohs, as a family business or even a collective financial entity, have essentially ceased to exist. The company has been sold for parts. The Stroh Companies has doled out its last dividends to shareholders. The last remaining family entity owns a half-empty office building in Detroit. While there was enough cash flowing for enough years that the fifth generation Strohs still seem pretty comfortable, the family looks destined to go shirtsleeves-to-shirtsleeves in six”). In short, “[h]ard as it is to build a family business designed to last in perpetuity, it’s shockingly easy for any successor to tank it.” *Id.*

<sup>187</sup> See Jedediah S. Purdy, *Wealth and Democracy*, NOMOS (forthcoming 2016) (manuscript at 1), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2641121](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641121) (“Inequality, as a merely formal or statistical feature of the economy, is not good or bad; it becomes good or bad only as it affects those things that people value and have reason to value.”).

<sup>188</sup> See Amy Chozick, *Economic Plan Is a Quandary for Hillary Clinton’s Campaign*, N.Y. TIMES (Feb. 7, 2015), <http://www.nytimes.com/2015/02/08/us/politics/economic-plan-is-a-quandary-for-hillary-clintons-campaign.html> (“The debate [over income inequality] is extending beyond the Democratic Party as Republicans wade into the issues. ‘If Americans are working harder than ever, earning less than they once did, our government and our leaders should step up, offer a plan, fix what’s wrong,’ former Gov. Jeb Bush of Florida said in a speech in Detroit last week as he laid the groundwork for his potential 2016 candidacy.”).

<sup>189</sup> See Gary R. Solon, *Intergenerational Income Mobility in the United States*, 82 AM. ECON. REV. 393, 403–04 (1992) (discussing how empirical evidence suggests that America has a “dramatically less mobile society” than what previous studies had previously concluded).

<sup>190</sup> See Mankiw, *supra* note 33, at 24 (“Equality of opportunity is often viewed as a social goal in itself, but economists recognize that failure to achieve such equality would normally lead to inefficiency as well. If some individuals are precluded from pursuing certain paths in life, then they might be unable to contribute fully to growing the economic pie.”).

<sup>191</sup> See *id.* at 24–25 (“[I]f children from poor families are unable to continue their education because of financial constraints, they do not accumulate the optimal amount of human capital.”).

insure against risks cannot afford to take entrepreneurial risks, let alone defer income long enough to earn a professional degree.<sup>192</sup>

As this Article has already argued, when the state fails to invest adequately in social mobility, family businesses offer a second-best solution by enabling a family to advance the interests of its members over multiple generations, thereby breaking down an exclusionary class structure. However, private entrepreneurship and public support should not be perceived as binary alternatives. Rather, we should recognize that the structure of opportunity depends upon the interrelationship of three institutions: the family, the market, and the state. For example, food stamp programs that strengthen the social safety net can also provide the conditions necessary for business entrepreneurship that, in the long run, lifts individuals and families out of poverty.<sup>193</sup> The mechanisms may be complementary.

This Part focuses on the distinctive role families can play in broadening the distribution of wealth and opportunities. In some respects, family businesses offer an attractive vision of capitalism. A family's commitment to a business enterprise can reinforce family relationships, as family members work together to achieve a shared vision.<sup>194</sup> Consequently, family businesses are notably resilient; family owners have reason to invest resources during hard times when investors with a less personal investment would walk away.<sup>195</sup> Sometimes, these investments follow from a view that the biological family is part of a broader economic family that includes various other stakeholders.<sup>196</sup>

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<sup>192</sup> See James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 839 (2001) (noting that an "inability to invest in human capital traps many families in intergenerational poverty, thus slowing the nation's economic growth").

<sup>193</sup> See Carmen Nobel, *Food Stamp Entrepreneurs: How Public Assistance Enables Business Bootstrapping*, HARV. BUS. SCH.: WORKING KNOWLEDGE (Sept. 2, 2014), <http://hbswk.hbs.edu/item/7589.html> (interviewing Professor Gareth Olds regarding his empirical research into food stamp programs and his own parents' experience using public assistance to form a business).

<sup>194</sup> See, e.g., COREY, *supra* note 61, at 5 (documenting multi-generation family businesses in Wisconsin).

<sup>195</sup> See BETH MACY, *FACTORY MAN: HOW ONE FURNITURE MAKER BATTLED OFFSHORING, STAYED LOCAL—AND HELPED SAVE AN AMERICAN TOWN* (2014) (reporting efforts of third-generation family owner to preserve business and hundreds of jobs); Susan S. Kuo & Benjamin Means, *Corporate Social Responsibility After Disaster*, 89 WASH. U. L. REV. 973, 977 (2012) ("Businesses are economic enterprises situated in a broader web of social networks. When business owners live where their customers live, these social networks strengthen as business ties overlap with other networks (school, church, recreation) that together form the fabric of place.").

<sup>196</sup> See, e.g., R. Edward Freeman & David L. Reed, *Stockholders and Stakeholders: A New Perspective on Corporate Governance*, CAL. MGT. REV., Spring 1983, at 88, 89; Katharine Q. Seelye, *Across a Grocery Chain, a Labor Protest in Support of a Manager*, N.Y. TIMES (July 18, 2014), <http://www.nytimes.com/2014/07/19/us/across-a-grocery-chain-a-labor-protest-in-support-of-a-manager.html> (interviewing employees in connection with family-business dispute involving control of the Market Basket supermarket chain and the

Just as public safety nets create economic stability, family businesses can do much the same, helping members of a community accumulate wealth and provide opportunities for their children.<sup>197</sup>

On the other hand, family businesses are vulnerable to family dysfunction. Irrational feuds can destroy businesses that would otherwise enjoy an enviable market position. In the long run, the market should correct business failures caused by family disputes. Other competitors will emerge and thrive. However, for the families and other stakeholders involved in a needless business failure, the disruptions can be considerable. Moreover, there can be no guarantee that the values a family business seeks to advance will promote social equality. Family owners have tremendous power over the lives of their employees.<sup>198</sup> Whether driven by discriminatory animus or parochial religious conviction, family owners can exercise that power to impose their values on others.

#### A. *Potential Social Benefits*

Family businesses have social significance and are more than just a vehicle for transferring family wealth across generations. They can affect social welfare by facilitating economic growth, distributing wealth more widely than would otherwise be the case, and by serving as “a model for creative, humane capitalism.”<sup>199</sup> To the extent this is true, the involvement of multiple generations of a single family in the ownership and operation of a business offers social benefits that ought to be accounted for in any comprehensive assessment of wealth inequality.<sup>200</sup>

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removal of Arthur T. Demoulas, a third-generation family owner, from his role as president: “Several . . . employees spoke of Arthur T.’s generosity and compassion. ‘He’s been to my kids’ weddings, my mother’s funeral, his sisters came to my mother’s funeral, to my brother-in-law’s funeral,’ said Michael King, 57, the company’s controller”). For further discussion of the Market Basket dispute, see *infra* Part IV.

<sup>197</sup> See, e.g., Tom Moroney, *A Year After Upheaval, Market Basket Looks Stronger than Ever*, BLOOMBERG NEWS (July 31, 2015, 11:39 AM), <http://www.tablet.telegram.com/article/20150731/NEWS/150739818> (“[Arthur T. Demoulas, the family-business CEO] gives more than you put in,’ said Sean Morse, 45, assistant manager at the Market Basket in Londonderry, New Hampshire. ‘He wants us all to have a better life. I can take care of my family, they’re healthy and it’s all because of him.’”).

<sup>198</sup> See, e.g., Benjamin Means & Joseph Seiner, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. (forthcoming 2016) (arguing that the distinction between an independent contractor and an employee turns largely on the extent to which the worker must accommodate herself to a schedule and terms set by the business owner).

<sup>199</sup> Means, *Nonmarket Values*, *supra* note 8, at 1191.

<sup>200</sup> The concentration of economic resources in a single family may still be undesirable, from the standpoint of wealth inequality, but that conclusion should follow from a full consideration of the pros and cons of family business ownership. See Purdy, *supra* note 187 (manuscript at 2) (“To diagnose unequal

### 1. Reinforcing Kinship Ties

Family businesses often have special meaning for their family owners.<sup>201</sup> Just as we may respect the commitment to service of a fourth- or fifth-generation police officer or soldier, there is something ennobling about a new generation willing to take over a family business, even though higher-paying jobs might have been available elsewhere.<sup>202</sup> For example, one family-business owner left the practice of law at a major New York law firm to run his family's Lower East Side smoked fish establishment.<sup>203</sup> By continuing the family enterprise, family members embrace their own heritage and find meaning in commercial activity.<sup>204</sup>

In order for the younger generation to make such a commitment, the older generation must first take pains to build something worthy of the commitment. Although kinship preferences might be viewed as selfish from the perspective of those who do not benefit, the continuation of a family enterprise can also be characterized as an expression of generosity:

To the extent that nepotism takes place in the context of a family enterprise . . . the spirit of it requires that its benefits be passed on to the next generation. We therefore express our gratitude to our parents in the form of generosity to our own children. This view of life as a multigenerational project was very apparent to our immigrant forebears.<sup>205</sup>

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wealth . . . one must disaggregate its effects and relate them to a scheme of values and the institutions that embody those values . . .").

<sup>201</sup> The non-pecuniary benefits of ownership can sometimes explain the desire to maintain family control. See Gilson, *supra* note 115, at 1666 ("[O]ne would expect to find controlling shareholders in major newspaper companies because running a major national newspaper puts one at the center of major public and cultural issues, with the potential to influence the outcome.").

<sup>202</sup> See generally BELLOW, *supra* note 57, at 16 ("Because we live in what might be called a 'postkinship' society, we have forgotten what we once knew about the intimate connections between kinship and human community.").

<sup>203</sup> FEDERMAN, *supra* note 60, at 68–69.

<sup>204</sup> See, e.g., COREY, *supra* note 61, at 110 ("Owner and chef Jon Kaber says he is most proud of his grandmother's chilled beet recipe."); FEDERMAN, *supra* note 60, at xi–xii ("This is our yichis, the hard work and the satisfaction of selling herring: of getting the fish into the store each morning, of arranging the displays hundreds of times each day, of customers buying and counter-men selling, and, it is to be hoped, of making a profit in the process." (emphasis omitted)); Steven H. Hobbs & Fay Wilson Hobbs, *Family Businesses and the Business of Families: A Consideration of the Role of the Lawyer*, 4 TEX. WESLEYAN L. REV. 153, 158 (1998) ("Socially and culturally, the family business offers the opportunity to unify work and family concerns for the benefit of succeeding generations." (quoting DAVID BORK, FAMILY BUSINESS, RISKY BUSINESS: HOW TO MAKE IT WORK (1986))).

<sup>205</sup> BELLOW, *supra* note 57, at 472.

Put more formally, family businesses can create “generation-spanning continuities in the sociostructural position of families.”<sup>206</sup> In this regard, the family business “can play a symbolic, identity-creating role.”<sup>207</sup>

For a thoughtful exploration of one family’s identification with a business enterprise, consider *Jiro Dreams of Sushi*, a recent documentary film concerning a master chef, Jiro Ono, who trained his eldest son to take over his renowned Tokyo sushi restaurant.<sup>208</sup> At the time of filming, Jiro’s son was in his 50s, had long since completed his apprenticeship, and stood ready to carry on the family legacy.<sup>209</sup> No one else had the requisite qualifications for the role at a restaurant so exacting that chefs must apprentice for years before they are entrusted to prepare the tamagoyaki egg omelet.<sup>210</sup>

Inherited resources are also “a material foundation for family continuity” and “even for the middle class, transfers of wealth provide at least a partial buffer against the vagaries of the marketplace.”<sup>211</sup> Additionally, a family business can help achieve a “family’s goal of keeping the family located within close proximity of one another to accommodate their family values, one of which involves spending quality time together.”<sup>212</sup> In a national economy that frequently requires family members to relocate, these are not trivial benefits.

Over time, a family business can create opportunities for children to succeed in the broader economy and not just as business heirs. As one third-generation owner explained regarding his early education in the business,

At the time, I had no intention of growing up to be a fishmonger, nor, I’m equally sure, would my father have wanted me to “take over the business.” The plan was for me to go to college and become a

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<sup>206</sup> JENS BECKERT, *INHERITED WEALTH* 18 (Thomas Dunlap trans., Princeton Univ. Press 2008) (2004); BELLOW, *supra* note 57, at 472 (“The more such generational transactions there are, the healthier for society as a whole.”).

<sup>207</sup> BECKERT, *supra* note 206, at 19 (discussing inheritances).

<sup>208</sup> *JIRO DREAMS OF SUSHI* (Preferred Content 2011). For a review of the film, see Roger Ebert, *Jiro Dreams of Sushi*, ROGEREBERT.COM (Apr. 4, 2012), <http://www.rogerebert.com/reviews/jiro-dreams-of-sushi-2012>. For a synopsis of the film, see *Jiro Dreams of Sushi*, CURIOUS FILM DISTRIBUTION, [http://www.curiousdistribution.com/media/11154/jiro\\_final\\_curious.pdf](http://www.curiousdistribution.com/media/11154/jiro_final_curious.pdf) (last visited Sept. 15, 2015).

<sup>209</sup> *JIRO DREAMS OF SUSHI*, *supra* note 208.

<sup>210</sup> *Id.* Other employees, including a younger son, completed their apprenticeships and then opened restaurants elsewhere. *Id.*

<sup>211</sup> BECKERT, *supra* note 206, at 18. Thus family wealth “allows a better education, a higher risk tolerance, and improved living conditions.” *Id.*

<sup>212</sup> Bridgette K. Mulder, *A Model of Organizational Nepotism*, in *NEPOTISM IN ORGANIZATIONS* 219, 231 (Robert G. Jones ed., 2012) (noting as well that “an offer of nepotism” may not be forthcoming if the position would require the family member “to travel a great deal or live significant distances apart for the job”).



professional; that was the unstated but clearly understood trajectory for most Jewish boys growing up in the 1950s.<sup>213</sup>

The multi-generational continuity of family ownership in some industries may, therefore, reflect family pride and heritage rather than a lack of other options or the locking up of economic advantage.<sup>214</sup> The prevalence of family ownership (and ethnic association) even in countries, like the U.S., with robust economic and legal institutions that support business dealings among strangers indicates the “resilience of informal, personalized exchanges and in-group preferences.”<sup>215</sup>

## 2. *Strengthening Communities*

When family members work together on a daily basis, combining business and family values, they not only strengthen the family but may also make lasting contributions to their communities.<sup>216</sup> Family business can provide an anchor for widening circles of concern and responsibility. For example, by recognizing the connection between paid work and family life, family businesses may consciously include the families of employees who are not related to the owners.<sup>217</sup> As one family business owner explained, “[W]e’re not just a family business in that we’re family owned. We know and appreciate the needs of our employees and their families so we want to make sure we succeed for them as well.”<sup>218</sup>

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<sup>213</sup> FEDERMAN, *supra* note 60, at 62.

<sup>214</sup> *Cf.* Malcolm, *supra* note 58 (reporting that the Argosy bookstore owners “are proud of their success in carrying on the family business and aware of the mystique that attaches to the old-book trade. Children who inherit slaughterhouses or factories that manufacture incontinence products may not feel as blessed”).

<sup>215</sup> Cao, *Diaspora*, *supra* note 88, at 1563.

<sup>216</sup> *See, e.g.*, Means, *Nonmarket Values*, *supra* note 8, at 1190–91 (“[B]usiness ownership can provide nonmonetary benefits to family members such as stable employment, status in the community, and agreeable working conditions.”); Lizette Alvarez, *After 128 Years of Rolling Them, Tampa Is Close to No Cigars*, N.Y. TIMES (July 21, 2014), <http://www.nytimes.com/2014/07/22/us/after-150-years-of-rolling-them-tampa-is-close-to-no-cigars.html> (reporting on the J. C. Newman Cigar Company, currently owned by the grandsons of the founder, and notable as the last cigar manufacturing factory remaining in the Tampa area after a “tide of owners . . . moved to the Caribbean and Central America”).

<sup>217</sup> *See* Teresa J. Rothausen, *Management Work–Family Research and Work–Family Fit: Implications for Building Family Capital in Family Business*, 22 FAM. BUS. REV. 220, 226 (2009) (“If [family] leaders include employees’ families as well as their own families as members of the system, family businesses have the potential to play a prominent role in the policy arena on work–family in business.”).

<sup>218</sup> Annie Pilon, *From Humble Beginnings in a Garage, Family Business Thrives for 60 Years*, SMALL BUS. TRENDS (Aug. 29, 2015, 12:30 PM), <http://smallbiztrends.com/2015/08/family-business-through-generations.html> (quoting Joshua Kahn, Executive Vice President of Perfection Spring & Stamping Corp.).

These connections are especially important when the community is tested by hardship: “When business owners live in the same community as their customers, they have a deeper stake in the success of disaster recovery and the ability to influence not only the economic aspects of recovery but also the social connections that determine a community’s overall resilience—its spirit.”<sup>219</sup> In this regard, family businesses “exhibit much care about continuity, community and connection: specifically, about the long term preservation and nurturing of their business and its markets, the fostering of talent and effective deployment of employees, and an emphasis on growing and sustaining relationships with clients.”<sup>220</sup>

During a speech accepting his party’s nomination, President Obama lauded

a family business in Warroad, Minnesota, that didn’t lay off a single one of their 4,000 employees when the recession hit even when their competitors shut down dozens of plants, even when it meant the owner gave up some perks and some pay because they understood that their biggest asset was the community and the workers who had helped build that business.<sup>221</sup>

Although an anecdote does not establish that family businesses are more likely to exhibit socially responsible behavior, the business cited by President Obama illustrates how family values could be extended to employees and communities.

In a similar vein, consider the Wisconsin Historical Society’s book jacket description for a recent photography book about family-owned businesses in Wisconsin:

The businesses portrayed here—bakeries and barbecue joints, funeral homes and furniture builders, cheesemakers, fishermen, ferry boat drivers—have survived against all the odds, weathering tough economic times and big-business competition. The owners are loyal to their employees, their families, and themselves. And they are integral to their local economies and social fabric. The services and goods they provide are usually for neighbors and friends: generations

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<sup>219</sup> Susan S. Kuo & Benjamin Means, *After the Storm: The Vulnerability and Resilience of Locally Owned Business*, in *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* 95, 97 (Martha Albertson Fineman & Anna Grear eds., 2013). The authors contend that “business entities, especially those that are locally owned, are both susceptible to harm and capable of resilience—and, in both dimensions, linked economically and socially to a broader community.” *Id.* at 96.

<sup>220</sup> Miller et al., *supra* note 137, at 73.

<sup>221</sup> Barack Obama, U.S. President, Acceptance Speech at the Democratic National Convention (Sept. 6, 2012), <http://www.npr.org/2012/09/06/160713941/transcript-president-obamas-convention-speech#>.

serve generations, creating lasting relationships and strong, vibrant neighborhoods and rural communities.<sup>222</sup>

When family businesses successfully combine family and community values with a for-profit model, they can benefit a broader group of stakeholders.

### *B. Dysfunction, Discrimination, and Parochial Values*

Unfortunately, when families own and operate businesses, family pathologies can adversely impact the lives of many other people who depend on those businesses. Family relationships are not invulnerable, and the overlap of business and family concerns can prove enormously destructive both to family interests and other stakeholders.<sup>223</sup> Business problems poison family relationships, and unhealthy family dynamics infect the business.<sup>224</sup> It is not uncommon for putative heirs to war for control, wreaking havoc along the way.<sup>225</sup> Sometimes, family disputes can be settled without permanently damaging the business asset.<sup>226</sup> Often, though, a family business will not survive the infighting. Thus, the destructive downside of family-business ownership should be considered when evaluating the overall role of family business in society.<sup>227</sup>

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<sup>222</sup> COREY, *supra* note 61 (book jacket).

<sup>223</sup> See F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS § 2:2 (rev. 2d ed. 2012) (noting that "business relationships often overlap family relationships so that a squeeze often reflects dysfunctional family relations or is exacerbated by family relations").

<sup>224</sup> See Means, *Nonmarket Values*, *supra* note 8, at 1191–92 (noting that "[i]n a crisis, the close emotional bonds that once supported a family business can become obstacles to rational action").

<sup>225</sup> See Roxanne Roberts, *The Darcars Family Drama: Passed Over at Auto Business, A Daughter Sues*, WASH. POST (Apr. 1, 2015), [https://www.washingtonpost.com/lifestyle/style/the-good-daughter-tammy-darvish-and-the-darcars-family-drama/2015/04/01/70bb0834-d158-11e4-a62f-ee745911a4ff\\_story.html](https://www.washingtonpost.com/lifestyle/style/the-good-daughter-tammy-darvish-and-the-darcars-family-drama/2015/04/01/70bb0834-d158-11e4-a62f-ee745911a4ff_story.html).

<sup>226</sup> For example, the New Orleans landmark restaurant Brennan's nearly collapsed as a result of family dissension. See Michael Kunzelman, *Brennan's Family Squabble over New Orleans Eatery Scheduled for Court on Monday*, TIMES-PICAYUNE (May 12, 2013, 5:16 PM), [http://www.nola.com/crime/index.ssf/2013/05/brennans\\_family\\_squabble\\_sched.html](http://www.nola.com/crime/index.ssf/2013/05/brennans_family_squabble_sched.html) (reporting that one shareholder meeting was so contentious that the police were called to restore order). Eventually, one side of the family acceded to a buyout proposal. See Pete Wells, *Brennan's in New Orleans Walks the Tightrope of Tradition*, N.Y. TIMES (Jan. 20, 2015), <http://www.nytimes.com/2015/01/21/dining/brennans-in-new-orleans-walks-the-tightrope-of-tradition.html>.

<sup>227</sup> One might argue that the consequences of family-business disputes, when they arise, outweigh the many social contributions of healthier family businesses. The force of this objection would turn on empirical evidence regarding the prevalence of family disputes. The fact that family firms rarely survive a third generation of family ownership does not establish that business failures were caused by distinctively family troubles. First, a family firm may choose to sell to a competitor or outside ownership group, not as a mark of failure but as a means for unlocking value. Also, in a competitive market economy, a family-business failure does not require a special explanation. Businesses may fail to innovate or may fall victim to broader forces

Also, for a society stratified along lines of race and class, the insular hiring practices of family firms are of particular concern because they can cement existing disparities in opportunity.<sup>228</sup> African Americans who are not considered for employment, let alone managerial responsibility in family businesses, often lack comparable avenues for success because of “low rates of black entrepreneurship.”<sup>229</sup> The entrepreneurship gap, in turn, can be explained in part by poor credit traceable to segregated housing patterns,<sup>230</sup> to say nothing of the lasting effects of slavery and de jure discrimination.<sup>231</sup> Past discrimination continues to matter because “[b]usiness startups depend heavily on personal and family wealth, which is leveraged into lines of credit.”<sup>232</sup> If background conditions of inequality limit entrepreneurial opportunities, then, in the aggregate, the insular practices of family businesses might exacerbate racial division and inequality.

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beyond their control. See Isabell Stamm & Christina Lubinski, *Crossroads of Family Business Research and Firm Demography—A Critical Assessment of Family Business Survival Rates*, 2 J. FAM. BUS. STRATEGY 117, 118, 124 (2011) (arguing that assumptions regarding the relatively short lifecycle of family firms have not been adequately examined).

<sup>228</sup> See Jaskiewicz et al., *supra* note 9, at 121 (noting that “since nepotism discriminates against non-family members, it has been characterized as detrimental to society”).

<sup>229</sup> Anderson, *supra* note 90, at 1203; see also MELVIN L. OLIVER & THOMAS S. SHAPIRO, BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY 4 (2006) (noting “relatively low level of entrepreneurship”).

<sup>230</sup> See Ezra Rosser, *The Ambition and Transformative Potential of Progressive Property*, 101 CALIF. L. REV. 107, 137–38 (2013) (“Residential segregation dampens wealth growth among African American homeowners by ‘suppressing their home equity’ but has the opposite effect on white homeowners.” (quoting THOMAS M. SHAPIRO, THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY 121 (2004))); Anderson, *supra* note 90, at 1203 (“Because blacks are confined to less-desired neighborhoods, on average the value of their housing grows less than that of whites.”); see also Michael A. Fletcher, *A Shattered Foundation: African Americans Who Bought Homes in Prince George’s Have Watched Their Wealth Vanish*, WASH. POST (Jan. 24, 2015), <http://www.washingtonpost.com/sf/investigative/2015/01/24/the-american-dream-shatters-in-prince-georges-county/> (“Regardless of geography, if you own a home in a majority–minority neighborhood, you are going to get less value out of it than if you own a home in a homogeneous white neighborhood.” (quoting Dorothy A. Brown, associate vice provost and law professor at Emory University)).

<sup>231</sup> See Fletcher, *supra* note 230 (“The economic deck has been stacked against African Americans from the start. The vast majority of blacks emerged from slavery with no money. New Deal worker protections, from the Fair Labor Standards Act, which set a minimum wage, to Social Security, initially excluded the many African Americans who then labored as domestic workers and tenant farmers. The Federal Housing Administration’s loan policies excluded many of them from the homeownership deals that allowed many whites to move to the suburbs, helping them create wealth. Similarly, most African Americans were excluded from the GI Bill benefits that followed World War II.”).

<sup>232</sup> Anderson, *supra* note 90, at 1203–04 (“Residential segregation, by depressing housing appreciation and reducing access to credit, therefore depresses black business startups, upon which black communities disproportionately rely.”).

Moreover, the influence of “nonmarket” values in the workplace is not necessarily something to celebrate.<sup>233</sup> As noted earlier, businesses like Hobby Lobby may seek exemptions from generally applicable laws based on the religious convictions of their controlling shareholders. Yet, the religious values espoused by business owners can conflict with the interest of their employees in access to reproductive healthcare, or, conceivably, of customers in access to goods and services regardless of their gender, race, or sexual orientation.<sup>234</sup>

Even if business owners do not seek or obtain exemptions from otherwise applicable laws, the owners nevertheless have wide discretion to run their businesses in a manner consistent with their values. In doing so, they may intend to benefit their employees and other stakeholders by including them within the compass of the family’s own values. For example, Hobby Lobby’s mission statement of core values includes, among other things, “[s]erving our employees and their families by establishing a work environment and company policies that build character, strengthen individuals, and nurture families.”<sup>235</sup> However, when wealth empowers business owners to inscribe their values into the structure of the marketplace, requiring others to abide by values they may not share, the confluence of economic and social power exacerbates the problem of wealth inequality.<sup>236</sup>

On the other hand, so long as there are multiple businesses in the marketplace, and employees and customers are not forced to deal with a single player, there ought to be room for businesses to represent a variety of social views. In order to achieve a wider economic equality, it is important to ensure that the marketplace is open to everyone. Excluding religious individuals whose personal values conflict with society’s values would coerce a choice between deeply held principles and access to economic opportunities. Recognizing this trade-off does not require us to condone invidious discrimination, or to agree with the Supreme Court that Hobby Lobby need not

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<sup>233</sup> See generally Means, *Nonmarket Values*, *supra* note 8 (distinguishing market and nonmarket values in the context of family businesses).

<sup>234</sup> Two state courts recently rejected claims by small-business owners that they were entitled to refuse to provide services for same-sex weddings based on religious objections. See *Craig v. Masterpiece Cakeshop, Inc.*, No. 14CA1351, 2015 WL 4760453, at \*8 (Colo. App. Aug. 13, 2015); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 60–64 (N.M. 2013).

<sup>235</sup> *Our Story*, HOBBY LOBBY, <http://www.hobbylobby.com/about-us/our-story> (last visited Aug. 29, 2015).

<sup>236</sup> See Purdy, *supra* note 187 (manuscript at 1) (observing that wealth inequality relates to “the conception of citizenship implied in any picture of democracy: what it means to have standing in the political community and among other private individuals, and how wealth structures these relations”).

follow federal law regarding worker healthcare coverage.<sup>237</sup> Nevertheless, if the goal is to widen economic opportunities, the laws regulating access to the marketplace should find ways to accommodate even those whose values depart dramatically from accepted mainstream principles.<sup>238</sup>

#### IV. LESSONS FROM MARKET BASKET

While no single case study can represent the wide variety of family businesses, a recent dispute concerning the Market Basket supermarket chain illustrates some of the benefits and the perils of family ownership. Market Basket's experience shows that it is possible for family values to migrate over to the business side, supporting profitability while also taking into account the interests of other stakeholders. But Market Basket also illustrates how family businesses can be destroyed by conflicts rooted in family grievances, and how employees, suppliers, and customers may all be caught in the crossfire.

In 1917, Arthur and Efrasine Demoulas opened a grocery store in Lowell, Massachusetts.<sup>239</sup> In time, they sold the business to their sons, George and Telemachus,<sup>240</sup> and the single grocery store eventually became a chain “with 71 stores and 25,000 employees across Massachusetts, Maine, and New Hampshire.”<sup>241</sup> However, soon after George's death in 1971, relations between the two sides of the family broke down over allegations that Telemachus had used his control to siphon assets and deprive George's heirs of an equal stake in the business.<sup>242</sup> Litigation dragged on for almost a decade.<sup>243</sup>

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<sup>237</sup> See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774–79 (2014) (holding that the contraceptive coverage mandated by the Patient Protection and Affordable Care Act infringed upon the religious interests of Hobby Lobby under the Religious Freedom Restoration Act). For a defense of the Court's holding, see Johnson & Millon, *supra* note 181, at 31.

<sup>238</sup> The tension between accommodating and regulating the distinctive values advanced by particular family businesses seems to implicate Robert Cover's identification of “nomic” communities. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 31 (1983) (arguing that “private lawmaking takes place through religious authority, contract, property, and corporate law . . . [and] also that from time to time various groups use these . . . devices to create an entire *nomos*—an integrated world of obligation and reality from which the rest of the world is perceived”). The “norm-generating autonomy” of nomic communities can provide the “the germ of meanings alternative to those of the power wielders.” *Id.* at 32, 62. Professor Cover concludes, “We ought to stop circumscribing the *nomos*; we ought to invite new worlds.” *Id.* at 68.

<sup>239</sup> See *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 165 (Mass. 1997).

<sup>240</sup> *Id.*

<sup>241</sup> Evan Horowitz, *The Saga of Demoulas' Market Basket*, BOS. GLOBE (July 15, 2014), <https://www.bostonglobe.com/business/2014/07/14/the-saga-demoulas-market-basket/S1D7gi92dqfJYzr9FIBCJ/story.html>.

<sup>242</sup> See *Demoulas*, 677 N.E.2d at 165–66.

Conflict flared anew this past year because a family member who had aligned herself with the heirs of Telemachus shifted her vote, giving Arthur S. Demoulas (son of George) and his side of the family the majority needed to remove his cousin Arthur T. Demoulas (son of Telemachus) from his position as CEO.<sup>244</sup> According to some news accounts, the Arthur S. side of the Demoulas family wanted to make Market Basket more profitable, disapproved of overly generous wages and benefits, and was concerned about self-dealing transactions between Market Basket and entities controlled by Arthur T. or his family.<sup>245</sup> In response, Market Basket's employees and customers staged a highly vocal protest, involving "work slowdowns, protests, and boycotts," in order to convince the board to retain Arthur T. as CEO.<sup>246</sup>

Public pressure delayed<sup>247</sup> but did not prevent Arthur T.'s removal, which created further turmoil threatening the company's survival.<sup>248</sup> As the dispute dragged on, Market Basket's revenues dropped precipitously and the company's struggles impacted employees, distributors, suppliers, and customers.<sup>249</sup> The dispute may have "cost the Demoulas family as much as \$10 million per day while the stores remained closed or disrupted."<sup>250</sup> In the end, Arthur T. was able to buy out the other side of the family and to assume full

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<sup>243</sup> *Id.* at 159, 166.

<sup>244</sup> See Horowitz, *supra* note 241.

<sup>245</sup> See Casey Ross, *Legal Memos Trace Acrimony Between Demoulas Factions*, BOS. GLOBE (Aug. 2, 2014), <https://www.bostonglobe.com/business/2014/08/01/legal-memos-trace-acrimony-between-demoulas-factions-over-real-estate-deals/FPXxU0sANyOcyzmpzjISmO/story.html>.

<sup>246</sup> See Ben Mathis-Lilley, *New England Supermarket Employees, Customers (!) Take Sides in Corporate Power Struggle*, SLATE (July 28, 2014, 12:21 PM), [http://www.slate.com/blogs/the\\_slatest/2014/07/28/market\\_basket\\_empty\\_shelves\\_in\\_beantown.html](http://www.slate.com/blogs/the_slatest/2014/07/28/market_basket_empty_shelves_in_beantown.html).

<sup>247</sup> See Casey Ross, *Market Basket CEO Gets Reprieve*, BOS. GLOBE (July 18, 2014), <http://www.bostonglobe.com/2013/07/18/marketbasket/qKpk8JGaLsmUmlwJ0oltHL/story.html>.

<sup>248</sup> See Callum Borchers, *Constant Challenges, No Certainties for New CEOs at Market Basket*, BOS. GLOBE (Aug. 6, 2014), <https://www.bostonglobe.com/business/2014/08/05/constant-challenges-certainties-for-new-ceos-market-basket/TLtsq6IQ7sUMMW3abHO1VJ/story.html> ("As the Demoulas family supermarket spectacle drags through a fourth week, Gooch and Thornton, who were appointed in June, are trying to return Market Basket's 71 stores to normal operations while ownership of the company hangs in limbo, shelves are bare, and thousands of workers continue their crusade to bring back the ousted president, Arthur T. Demoulas.").

<sup>249</sup> Editorial, *Market Basket's Only Solution Is to Bring Back Arthur T. Demoulas*, BOS. GLOBE (Aug. 7, 2014), <https://www.bostonglobe.com/opinion/editorials/2014/08/06/market-basket-only-solution-bring-back-arthur-demoulas/FT2g89pXs8eOGsCI9zioLK/story.html> ("The family feud that led to Arthur T. Demoulas's dismissal may make for fascinating theater, but it's time to bring down the curtain. The showdown threatens to destroy thousands of jobs, a great local brand, and a community asset with it.").

<sup>250</sup> Margaret M. Blair, *Boards of Directors as Mediating Hierarchs*, 38 SEATTLE U. L. REV. 297, 303 (2015).

control over the business.<sup>251</sup> The business appears to have recovered from the disruption; it has opened several new branches and “on pace to do nearly \$5 billion in sales this year, according to company officials.”<sup>252</sup>

Whatever the merits of the dispute among the Demoulas family members, the business has thrived under Arthur T.’s leadership, and he appears to have adhered to a set of values associated with family ownership: “Family businesses are closely knit, with an integrated structure that makes employees feel as though they’re not just numbers.”<sup>253</sup> Despite Market Basket’s size, Arthur T. carefully maintained the ethos of family in his stewardship of the business: “[E]mployees have said he remembers their family members’ names and has helped those who need it.”<sup>254</sup> Without losing sight of the need to earn a profit, it appears that Market Basket’s business practices have been as enlightened as any advocate for corporate social responsibility could hope—it treats its employees (known as “associates”) fairly, sets its prices lower than would maximize profits, not just to build its brand but also to be a responsible member of the community.<sup>255</sup> Market Basket has also been entrepreneurial in its efforts to put stores in underserved, poorer neighborhoods.<sup>256</sup>

Perhaps overstating his case, one reporter compared Arthur T. to a benevolent character in a Charles Dickens novel:

Artie T. Demoulas is a modern-day Fezziwig, the big-hearted warehouse owner in Dickens’s “A Christmas Carol.” Fezziwig was a

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<sup>251</sup> See Kevin Cullen, *A Way of Life Prevails in Market Basket Saga*, BOS. GLOBE (Aug. 31, 2014), <https://www.bostonglobe.com/metro/2014/08/30/balancing-business-with-way-life/mkibZrZmz3Fdil2ROD58ol/story.html>.

<sup>252</sup> Moroney, *supra* note 197; Adam Vaccaro, *A Year Later, Things Are Going Pretty Well for Market Basket*, BOSTON.COM (Aug. 22, 2015, 10:52 AM), <http://www.boston.com/business/news/2015/08/22/year-later-things-are-going-pretty-well-for-market-basket/PqvTZ06w8W3yr4xvoZVNwL/story.html>.

<sup>253</sup> PRICEWATERHOUSECOOPERS, PLAYING THEIR HAND: U.S. FAMILY BUSINESSES MAKE THEIR BID FOR THE FUTURE (2012–2013), <http://www.pwc.com/us/en/private-company-services/publications/assets/pwc-family-business-survey-us-report.pdf> (quoting Robert Simon, CFO Contractors Steel Company).

<sup>254</sup> Grant Welker, *Sun Man of the Year Arthur T. Demoulas Puts Workers, Customers Ahead of Profits*, LOWELLSUN.COM (Jan. 14, 2014, 1:28 PM), [http://www.lowellsun.com/news/ci\\_24907193/sun-man-year-arthur-t-demoulas-puts-workers](http://www.lowellsun.com/news/ci_24907193/sun-man-year-arthur-t-demoulas-puts-workers); see also Moore, *supra* note 104 (observing that while Arthur T. glanced at employee name tags, “nowhere does the Market Basket name tag say, ‘my daughter just went to college,’ or, ‘my dad just died.’ Arthur T. knew details like these”).

<sup>255</sup> Welker, *supra* note 254 (“My interest is in continuing the legacy of my father, T.A. Demoulas, who built Demoulas Super Markets into what it is today on the simple principles of respect, fairness, honesty and sharing.”).

<sup>256</sup> That members of the Demoulas family appear to disagree about the value of these practices is a useful reminder that family ownership is no guarantee that a business will behave more ethically than a non-family business. At most, the identification of the business with the family and with family values may make it more likely that a business will operate responsibly and with concern for all its stakeholders.



capitalist, but he prided himself on not maximizing profits at the expense of his employees, or his own soul. When the man who eventually buys him out makes a bid, suggesting he'll never get a better offer, Fezziwig's response could be lifted right out of the Market Basket story: "It's not just for money alone that one spends a lifetime building up a business," Fezziwig says. "It's to preserve a way of life that one knew and loved."<sup>257</sup>

Yet, even if Arthur T.'s public image has been shrewdly cultivated, it remains true that he has used his position as CEO to advocate for the interests of his employees, customers, and the communities in which the Market Basket stores operate.<sup>258</sup> The sale of Market Basket to Arthur T. was remarkable because loyal employees and customers were prepared to destroy the company to prevent anyone else from running it.<sup>259</sup> Had it been otherwise, a number of outside companies might have been able to outbid Arthur T. because they saw opportunities to increase revenue by operating Market Basket along more traditional lines.<sup>260</sup>

Although Arthur T.'s grandiloquent gestures made him literally irreplaceable, Market Basket's shareholders ultimately bear the cost of foregone profits. Reportedly, Market Basket's governance crisis arose in part because some Demoulas family shareholders were unhappy with Market Basket's failure to focus on profitability, complaining for instance that Arthur T. "unilaterally rolled out a 4 percent discount on goods within the store late last year, arguing that customers could use the money more than his fellow shareholders."<sup>261</sup> However, even from a profit-maximizing perspective, one might hesitate to critique a management philosophy that can generate annual sales of \$4.6 billion while creating a loyal workforce and customer base.

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<sup>257</sup> Cullen, *supra* note 251.

<sup>258</sup> See, e.g., Welker, *supra* note 254.

<sup>259</sup> See Mathis-Lilley, *supra* note 246.

<sup>260</sup> See Katharine Q. Seelye & Michael J. de la Merced, *Grocery Chain Reels as Employees and Customers Rally for an Ousted President*, N.Y. TIMES (Aug. 5, 2014), <http://www.nytimes.com/2014/08/06/us/grocery-chain-reels-as-employees-and-customers-rally-for-an-ousted-president.html> ("Some prospective bidders have said that they could squeeze more profits out of the company, since management under Arthur T. Demoulas has shown little inclination to maximize profitability.")

<sup>261</sup> *Id.*; cf. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 670–71 (Mich. 1919) (involving allegations that Henry Ford improperly withheld dividends from shareholders). In a pre-trial interview, Henry Ford stated, "I do not believe that we should make such an awful profit on our cars. A reasonable profit is right, but not too much." M. Todd Henderson, *The Story of Dodge v. Ford Motor Company: Everything Old Is New Again*, in CORPORATE LAW STORIES 37, 61 (J. Mark Ramseyer ed., 2009). Although Ford lost the case, commentators have noted that this was also brilliant public relations. See *id.* at 1–2, 14.

As Market Basket illustrates, family businesses are distinctive in ways that can provide wider benefits, even though dependence upon family stability also has risks.<sup>262</sup> Scholars will no doubt continue to investigate the factors that promote healthy family-business enterprise, as well as the factors that can signal trouble.<sup>263</sup> The point for present purposes is that concerns about concentrated wealth and inequality should not cause us to caricature the contributions of family business or to ignore the disruption that would ensue if fortunes were fragmented each generation. Any form of business that can, on a good day, bring together owners, employees, customers, and other stakeholders has something of value to teach us.

### CONCLUSION

How can we create a meaningful equality of opportunity, while, at the same time, insisting upon individual freedom—including the prerogative of parents to use all available resources to give their children advantages in life? By their nature, families perpetuate inequality; children who come from wealth and privilege inherit advantages that threaten to make a mockery of equal opportunity. Accordingly, some commentators argue that we should curtail economic inheritances, and that the children of the wealthy should, at the very least, be required to earn their own fortunes. From this perspective, family businesses look like bastions of unearned privilege. Family heirs benefit not only from inherited wealth but also from access to employment opportunities reserved for them.

Yet, this Article has argued that family businesses can also serve as ladders of opportunity when society fails to invest adequately in social mobility. Just as affirmative action programs may reduce inequality by resisting a legacy of racial and gender discrimination, the kinship preferences that are characteristic of family businesses can create pathways to success for immigrants and other groups that are shut out of the existing social structure. Moreover, to the extent

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<sup>262</sup> Even during the period of apparent quiet preceding the latest legal battle for control, Market Basket board meetings were far from cordial: “Arthur S. and the board member appointees from his side of the family continually challenged Arthur T.’s authority to enter into sizeable real estate transactions without approval from the board, and were generally fearful and distrustful that the Arthur S. side of the family was being taken advantage of.” Blair, *supra* note 250, at 335.

<sup>263</sup> In this regard, legal scholars have begun to focus on the legal architecture that would best support family businesses. See Means, *Contractual Foundation*, *supra* note 8, at 731 (arguing that “family-business law should offer a resource—a set of principles that credit the parties’ negotiated bargain in full context that also compensate for what family members cannot anticipate or adequately address regarding their business venture”).

family values temper a focus on profitability with a sense of social responsibility, family businesses can contribute to the effort to build and sustain a more equal society.

In sum, family businesses should be evaluated in the context of a society that is already, and for other reasons, characterized by tremendous inequality. Wealth inequality is a problem that implicates the state, the family, and the market. A comprehensive response to wealth inequality must involve all three institutions. By compensating for state inaction and by tempering the harshest edges of the market, family businesses have the potential to play an important role in ameliorating inequality.