Article

Law for the Rich

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With top incomes and wealth reaching historic highs, scholars and politicians have proposed new taxes and novel legal rules aimed at reversing the emergence of the new Gilded Age. Yet while new taxes target the rich directly by imposing greater burdens only on those with incomes or wealth above multi-million-dollar thresholds, none of the proposed legal reforms do anything of the sort. There appears to be no interest in changing property law, corporate law, antitrust law, or labor law, among others, to have special, more burdensome rules applicable only to the rich. This Article asks: Why not? Why shy away from a separate law for the rich if one supports both progressive taxation and distributionally informed legal rules in general?

This puzzle, it turns out, is surprisingly difficult to solve. Neither political philosophy nor economic analysis nor practical design considerations offer a plausible answer. Looking for clues outside of legal theory suggests that a separate law for the rich would be widely viewed as unfair because it imposes burdens that are obvious, highly concentrated, and possibly contrary to one of the fundamental elements of law itself. Redistribution through legal rules, it turns out, is limited in a way that redistribution through the tax law is not. Law for the rich is not a solution to

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the emergence of the new Gilded Age. Reformers must look for other ways of achieving a more prosperous and more just society.

INTRODUCTION

Too much in the hands of too few—it can really happen. One may believe that the United States has reached this point already, or is fast-approaching it, or is far enough away from it for now.[1] Either way, there is no doubt that, in theory, there is such a thing as too much income, wealth, and power at the top (and, correspondingly, too little at the bottom).[2] And as history shows, reaching this point in practice is not something that a wise government would want to do.[3]

For over a hundred years, the United States has used tax law to constrain the accumulation of excessive economic power at the top.[4] Yet the Internal Revenue Code as it stands today may not be up to the task going forward. Many American politicians and academics argue that U.S. tax policy has failed to stem the rise of high-end inequality.[5] They propose new, higher, more effective taxes on the rich.[6] All these proposals have the same

1. For a view that the United States has reached the point, see, for example, EMMANUEL SAEZ & GABRIEL ZUCMAN, THE TRIUMPH OF INJUSTICE: HOW THE RICH DODGE TAXES AND HOW TO MAKE THEM PAY 6–7 (2019). For the view that the United States is far from that point for now, see, for example, PHIL GRAMM ET AL., THE MYTH OF AMERICAN INEQUALITY: HOW GOVERNMENT BIASES POLICY DEBATE 1–2 (2022).

2. *See* Peter Diamond & Emmanuel Saez, *The Case for a Progressive Tax: From Basic Research to Policy Recommendations*, J. ECON. PERSPS., Spring 2011, at 165, 168–70 (arguing that when income is high enough, the marginal utility of the income earner may be disregarded completely).

3. *See, e.g.*, WALTHER KIRCHNER, A HISTORY OF RUSSIA 63 (2d ed. 1958) (describing the 1670 Razin rebellion, which promised "liberation to the peasants"); *id*. at 103 (describing the 1773 Pugachev rebellion, directed at the nobility who had prevented the "complaints of the poor from reaching the throne"); *id*. at 211 (describing the 1917 Bolshevik revolution, which promised the "elimination of the bourgeoisie").

4. *See* Ajay K. Mehrotra, *Why Atlas Hasn't Shrugged*, 21 FLA. TAX REV. 655, 660–64 (2018) (reviewing KENNETH SCHEVE & DAVID STASAVAGE, TAXING THE RICH: A HISTORY OF FISCAL FAIRNESS IN THE UNITED STATES AND EUROPE 3, 15, 63–76 (2016)) (pointing to the "dominant narrative of the politics of redistribution" and "increasing economic inequality" as the "received wisdom" explanations of the rise of progressive taxation while discussing an alternative explanation (quoting SCHEVE & STASAVAGE, *supra* at 63)).

5. SAEZ & ZUCMAN, *supra* note 1; *see* ABHIJIT V. BANERJEE & ESTHER DUFLO, GOOD ECONOMICS FOR HARD TIMES 236–41 (2019) ("Taxes are important for redistribution, but the increase in inequality is a much deeper phenomenon . . . .").

6. *See, e.g.*, *Issues: Tax on Extreme Wealth*, FRIENDS OF BERNIE SANDERS, https://berniesanders.com/issues/tax-extreme-wealth [https://perma.cc/6KUN

structure: if a person's income or wealth crosses a threshold—be it ten million,[7] fifty million,[8] one hundred million,[9] or a billion[10]—that person's income or wealth would be taxed under different, more burdensome rules. This structure—harsher tax rules only for those with economic resources above a threshold—is essential to achieving the reformers' objectives. It is this structure that permits the proposed reforms to target the rich and only the rich.

Yet no one has suggested similar reforms outside of tax law. No one has argued that just as we may change tax rules to impose an extra burden on the rich, we could change any other legal regime in the same manner. For example, why not have separate, more burdensome contract law, corporate law, antitrust law and so on—only for millionaires? We are facing a puzzle. Special taxes on the rich are widely discussed, but a special (non-tax) law for the rich is never even mentioned. Why not?

To be clear, the question is not if there is *any* reason to reject a special law for the rich (or LFR for short). Theories that oppose all redistribution, or all redistribution through legal rules, offer well-known answers.[11] Rather, the puzzle is why many

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-RP9Z] (proposing "an annual tax on the extreme wealth of the top 0.1 percent of U.S. households").

7. *See* Martin A. Sullivan, *The Build Back Better Act Will Be the First Tax Hike in Three Decades . . . or Not*, 173 TAX NOTES FED. 1466, 1468 (2021) (describing a tax hike above a ten million dollar threshold proposed by President Joseph Biden).

8. *See* Jeffrey N. Pennell, *An Alternative to a Wealth Tax: Taxing Extraordinary Income*, 171 TAX NOTES FED. 891, 891 n.4 (2021) (describing a wealth tax with a fifty million dollar threshold proposed by Senator Elizabeth Warren).

9. *See* Jeff Stein, *President Biden to Unveil New Minimum Tax on Billionaires in Budget*, WASH. POST (Mar. 26, 2022), https://www.washingtonpost.com/us-policy/2022/03/26/billionaire-tax-budget-biden [https://perma.cc/U827-YB4H] (describing a one hundred million dollar income threshold for the mark-to-market tax proposed by President Biden).

10. *See* Pennell, *supra* note 8 (describing a billion dollar wealth threshold for a three percent net wealth tax suggested by Senator Warren).

11. For a justification of libertarian opposition to all redistribution, see ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 168–71 (1974). For an efficiency-based reason to oppose all income-based redistribution through legal rules, see generally Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994) [hereinafter Kaplow & Shavell, *Why the Legal System Is Less Efficient*], and Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000).

contemporary thinkers endorse redistributive taxation and embrace the idea of distributionally informed legal rules in principle but have not come close to advocating anything like LFR.

This Article asks this question and considers a range of possible answers. Perhaps LFR is unattainable in practice. Or maybe a special LFR regime is unnecessary because ordinary legal rules may be modified to target the rich sufficiently well. Another possibility is that there is a fundamental theoretical objection to LFR that does not apply to tax law. For example, could it be that LFR violates the rule of law while a wealth tax on millionaires does not?

This Article's surprising conclusion is that none of these explanations suffice. The LFR idea is surely unusual, but it does not take long to see how LFR would work. For example, property law imposes all kinds of time limits, publication requirements, and other specifications aimed at giving notice to the world about property transactions.[12] All these requirements may be tightened to the detriment of a rich seller or buyer, as the case may be. Less specific rules may be just as easily revised to burden only the rich. Adverse possession, as every law student learns, must be "open and notorious."[13] But under LFR, this requirement may be dropped altogether if the owner is rich and the possessor is not. And, of course, public policy limitations on enforcement of real covenants and equitable servitudes may be made much stricter for rich property owners than they are for everyone else.[14]

Many more—and more impactful—LFR-style reforms are discussed later on.[15] LFR-style changes may be made to corporate law, antitrust law, labor law, and any other legal regime resting on the foundations of property and contract.[16] Just like we subject the rich to different tax rules (higher tax rates) and

12. *See infra* text accompanying notes 42–47 (discussing these unique features of property law as it relates to LFR).

13. *See* HERBERT HOVENKAMP ET AL., PRINCIPLES OF PROPERTY LAW 69 (2016) (describing the "open and notorious" requirement).

14. *See id*. at 355–56 (describing public policy limitations).

15. *See infra* text accompanying notes 80–93.

16. *See infra* text accompanying notes 80–93. For the reasons discussed below, I do *not* suggest LFR-type reforms to legal regimes dealing with bodily integrity, liberty, dignity, or anything of the kind. *See infra* Part II.B.2 (analyzing LFR through the lens of different political philosophy theories).

even different kinds of taxes (the estate tax,[17] the repatriation tax,[18] the newly proposed wealth tax,[19] mark-to-market tax[20] and so on), we could subject them to different rules in any non-tax legal regime. If there is a reason to reject LFR, impracticability is not it.

Even if LFR is practicable, could it be unnecessary? Scholars recently proposed a number of new distributionally informed legal rules *intended* to impose additional economic burdens on the top 1% or its upper fraction.[21] But none of the proposals go as far as to include an LFR-style income or wealth threshold. Without an explicit threshold, the proposed reforms miss their targets by an order of magnitude or more. Instead of redistributing from the rich (defined as the top 1%, or 0.1%, or an even smaller cohort of individuals with extremely high income or wealth), the proposals would place new burdens on a much broader segment of well-off Americans, something on the order of the top 10% or 20%.[22] Doing so may not be a bad idea,[23] but it has little to do with countering skyrocketing inequality, the emergence of the new Gilded Age, or the rise of the proverbial 1%. LFR offers a ready fix: aim all these proposals only at those with incomes or

17. I.R.C. §§ 2001–10.

18. I.R.C. § 877A.

19. Pennell, *supra* note 8.

20. Stein, *supra* note 9.

21. *See* Jonathan B. Baker & Steven C. Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. ONLINE 1 (2015); Matthew T. Bodie, *Income Inequality and Corporate Structure*, 45 STETSON L. REV. 69 (2015); Felix B. Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73 (2018); Glynn S. Lunney, *Copyright and the 1%*, 23 STAN. TECH. L. REV. 1 (2020); Rory Van Loo, *Broadening Consumer Law: Competition, Protection, and Distribution*, 95 NOTRE DAME L. REV. 211 (2019); Uri Weiss, *About Suffering and Law in the Labour Market*, 46 J. CORP. L. 385 (2021); Martin O'Neill, *Economic Justice Requires More than a Wealth Tax*, BOS. REV. (Apr. 7, 2020), https://www.bostonreview.net/forum_response/martin-oneill-economic-justice-requires-more-wealth-tax [https://perma.cc/UH8E-GBBM]; *see also* TOM MALLESON, AGAINST INEQUALITY: THE PRACTICAL AND ETHICAL CASE FOR ABOLISHING THE SUPERRICH (2023); Paul Krugman, *Why We're in a New Gilded Age*, N.Y. REV. BOOKS (May 8, 2014), http://www.nybooks.com/articles/archives/2014/may/08/thomas-piketty-new-gilded-age [https://perma.cc/F74A-N6XE]. For the explanation of these proposals, see *infra* Part I.C.

22. *See infra* Part I.C (exploring the impact various proposals would have on inequality).

23. *See* Alex Raskolnikov, *Taxing the Ten Percent*, 62 HOUS. L. REV. 57, 111–13 (2024) (arguing that concerns about the rise of high-end inequality should extend to the top ten rather than top one percent of income earners).

wealth above a legally specified threshold and the overbreadth problem goes away.

Finding no answer to the LFR puzzle among practical concerns, this Article turns to theory only to discover that theory has little to offer. No answer comes from the vast literature on political and moral philosophy. Conservative thinkers view all redistribution as violating the rule of law's generality principle.[24] That position rejects LFR, but it also rules out progressive taxes and all redistributive (non-tax) legal rules. Progressive philosophers rebuff any *a priori* constraint on redistribution,[25] and same is true of consequentialist theories generally because they are concerned only with outcomes.[26] LFR seems to be entirely unexceptional based on their views.

Economic analysis has no answer either. An influential view differentiates between redistributive taxes (which it supports) and redistributive legal rules (which it rejects).[27] But it has nothing to say on why there is something problematic about LFR compared to all other distributionally informed legal rules. The puzzle remains.

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24. *See* F.A. HAYEK, THE CONSTITUTION OF LIBERTY 232 (1960) ("[T]hose who pursue distributive justice will in practice find themselves obstructed at every move by the rule of law."); Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 N.Y.U. J.L. & LIBERTY 516, 520–21 (2008) (summarizing classical liberal opposition to redistribution).

25. *See* LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 32–33 (2002) (arguing that it is "logically impossible that people should have any kind of entitlement to all their pre-tax income"); Liam Murphy, *The Artificial Morality of Private Law: The Persistence of an Illusion*, 70 U. TORONTO L.J. 453, 481–83 (2020) (explaining that both property and contract law are purely conventional and thus can (and should) be changed to produce a more just society).

26. *See* Gerald F. Gaus, *What Is Deontology? Part One: Orthodox Views*, 35 J. VALUE INQUIRY 27, 27 (2001) (explaining that teleological theories, like consequentialism, "take good consequences as the decisive feature of morally approved behavior").

27. *See* Kaplow & Shavell, *Why the Legal System Is Less Efficient*, *supra* note 11, at 667 (developing "the argument that redistribution through legal rules offers no advantage over redistribution through the income tax system and typically is less efficient"). More precisely, and with some exceptions, all redistribution based on *income* should be tax-based primarily because redistributing through non-tax legal rules introduces the same distortion that redistributing through taxes does, but it also distorts the incentives that non-tax legal regimes aim to create. For an alternative but unrealistic way of redistributing without relying on individuals' income or wealth, see *infra* note 41.

Having found no answer in existing scholarship on the design of legal rules, this Article looks outside of law in search of an intuition that would shed light on the LFR puzzle. Specifically, the discussion turns to the structure of professional sports. While this move may seem unintuitive, fans' views of what is fair and unfair that shape decisions of professional leagues offer clues to the LFR puzzle.

Professional leagues have both redistributive taxes and redistributive non-tax rules. The latter share three distinct characteristics. First, redistributive effects of non-tax rules are not obvious, even though they are very likely to exist. Second, the costs of these redistributive rules are not highly concentrated. And third, redistributive non-tax rules in sports do not change the fundamental structure of the game.

General legal rules with progressive distributional effects recently proposed by several scholars[28] pass the three-prong test easily. Their redistributive effects are not obvious, their costs are not highly concentrated, and they do not violate the commitment to neutral law. The problem with these general legal rules is practical rather than conceptual. Given the goal of targeting only a narrow group of top earners, these rules are inevitably overbroad.

LFR, on the other hand, clearly flunks two and possibly all three prongs of the suggested three-part test. LFR is obvious, it leads to extremely concentrated costs, and it may violate the fundamental principle of neutrality of law. So, while we should surely not overemphasize the analogy between professional sports and the legal system, the intuition underlying the analogy is impossible to ignore. Distributional limits of legal rules are deeply embedded in contemporary cultural norms.

These insights are informative but hardly conclusive. They also raise deeper questions about the relationship between law and redistribution. Why is explicit, LFR-style redistribution acceptable through tax law but not any other law? Looking from the other side, if there is some fundamental objection to LFR-style redistribution through non-tax law, does the same objection constrain redistributive taxation, either in its extent or its form? In any case, what *is* this fundamental objection? These are not easy questions to answer and answering them remains a task for the future.

28. *See* sources cited *supra* note 21 (identifying such scholars).

At the same time, while this Article's theoretical implications are provisional, its practical payoff is clear. Real-world policymakers face a choice between redistributive taxes and redistributive legal rules. Getting legislation through gridlocked Congress is an arduous task, and the same is true even in states where one party controls the executive and legislative branches.[29] Those who believe that extreme incomes and wealth are bad for the American economy and American democracy need to prioritize.[30] Do they focus on redoubling their effort to raise taxes on the rich? Do they turn to non-tax legal rules as an alternative? Or should they treat tax and non-tax reforms as more or less interchangeable and pursue whichever strategy seems most likely to bear fruit at the moment? This Article's answer is unambiguous: when it comes to high-end inequality, LFR is not a plausible alternative to taxes.

Part I introduces law for the rich and explains why general changes to non-tax legal rules suggested in the literature are not nearly as effective as LFR in targeting top incomes and wealth. Part II looks for theoretical reasons to reject LFR while supporting progressive taxes and distributionally informed legal rules in general and finds none. Part III suggests that the redistribution taking place in professional sports reveals an intuition that begins to explain the LFR puzzle. A brief conclusion follows.

I. LAW FOR THE RICH—THERE IS NOTHING LIKE IT

Elon Musk spent $44 billion to buy Twitter without emptying his bank account.[31] American billionaires are snatching every professional sports team available for sale on either side of

29. *See, e.g.*, Jesse McKinley, *Hochul Vetoes "Wrongful Death" Bill, Heightening Tensions with Lawmakers*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/31/nyregion/hochul-wrongful-death-bill-veto.html [https://perma.cc/9B4J-NZDT] (describing the conflict between New York's Democrat governor and Democrat-majority senate).

30. For arguments about the dangers of extreme incomes and wealth, see, for example, LARRY BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 23–28 (2008), JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER–AND TURNED ITS BACK ON THE MIDDLE CLASS 6–7 (2010), and SAEZ & ZUCMAN, *supra note* 1, at 6.

31. Kate Conger & Lauren Hirsch, *Elon Musk Completes $44 Billion Deal to Own Twitter*, N.Y. TIMES (Oct. 27, 2022), https://www.nytimes.com/2022/10/27/technology/elon-musk-twitter-deal-complete.html [https://perma.cc/RK4L-A9BW].

the Atlantic.[32] And Bernie Sanders wants to eliminate billionaires altogether.[33] It is not hard to see why high-end inequality is at the forefront of American politics, public opinion, and academic inquiry.[34]

This Part considers a new approach to reducing the accumulation of income, wealth, and economic power at the top. The idea is enticingly simple: pattern redistributive legal reforms on tax law. From the graduated tax schedule,[35] to the estate tax,[36] to the expatriation tax,[37] to the multiple wealth tax,[38] to the mark-to-market tax,[39] to other reform proposals, the way tax law targets the top is in the most direct way possible. All the tax rules just mentioned incorporate explicit numerical income or wealth thresholds and impose greater burdens on those whose income or wealth exceeds the cutoffs.[40] Why not do the same in property law, contract law, corporate law, antitrust law, and so on—why not adopt LFR?

As this Part shows, implementing LFR would not be especially difficult. At the same time, eschewing the LFR approach inevitably leads proponents of redistribution to devise reforms

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32. Andrew Beaton, *As the Washington Commanders Accept $6 Billion Bid, Here Are the Top Valued Sports Teams*, WALL ST. J. (Apr. 13, 2023), https://www.wsj.com/story/the-10-most-expensive-sports-team-sales-38c9acff?page=1 [https://perma.cc/F3A6-4CQ5]; Carlie Porterfield, *Billionaire Todd Boehly-Led Group Completes $5.4 Billion Purchase of Chelsea FC*, FORBES (May 31, 2022), https://www.forbes.com/sites/carlieporterfield/2022/05/30/billionaire-todd-boehly-led-group-completes-54-billion-purchase-of-chelsea-fc/?sh=3c0787ca327e [https://perma.cc/K6NM-JHB8].

33. *See* Chris Cillizza, *Bernie Sanders Wants to Get Rid of Billionaires. All of Them,* CNN (Sept. 24, 2019), https://www.cnn.com/2019/09/24/politics/bernie-sanders-ultra-wealth-tax-billionaires/index.html [https://perma.cc/U96H-4PBR] (citing a tweet in which Sanders said "[t]here should be no billionaires").

34. *See generally* BANERJEE & DUFLO, *supra* note 5; BARTELS, *supra* note 30; HACKER & PIERSON, *supra* note 30; SAEZ & ZUCMAN, *supra* note 1.

35. *See* Rev. Proc. 2023-34, 2023-48 I.R.B. 1287, § 3.01 (specifying income tax brackets that rise with income).

36. *See id*. § 3.41 (specifying the estate tax exclusion at $13,610,000).

37. *See id*. § 3.37 (specifying the $201,000 threshold for application of the expatriation tax).

38. *See* Pennell, *supra* note 8, at 891 nn.4–5 (describing wealth tax proposals by Senators Sanders and Warren that would apply to those with wealth exceeding $32 million and $50 million respectively).

39. *See* Stein, *supra* note 9 (describing President Biden and Senator Ron Wyden's proposals to tax unrealized gains of billionaires).

40. *See supra* notes 35–37 (collecting relevant portions of the tax code).

that miss their targets by a wide margin. General changes to legal rules—such as those discussed in Part I.C—may be redistributive and progressive, but they are no substitute for LFR.

A. LAW FOR THE RICH

The LFR concept is as straightforward as it is unconventional. It does not call for radically new, unfamiliar legal rules. To the contrary, implementing LFR would require modifications of existing rules in ways that are both recognizable and intuitive. Assuming that the goal is to reduce economic power of the top 1% (or 0.1%, or whatever threshold one prefers to delineate "the rich"), these modified, more onerous legal rules would apply only to the members of targeted group.[41]

Let us start with two foundational regimes of private law: property and contract. Property law imposes numerous time limits on all sorts of filings, recordings, mailings, and the like.[42] For instance, many states have marketable title acts that extinguish nonrecorded property claims after thirty or forty years.[43] Many property sales are subject to specific requirements regarding the number of times the notice of sale must be published, the continuity of publication, and the number of days or weeks between

41. A well-known alternative to basing legal (generally, tax) consequences on incomes is to rely on "tags," or immutable characteristics that correspond with what one would like to tax, typically ability to pay. Yet even in tax law—the legal regime where redistribution is less controversial than elsewhere—the use of the best-known tag for high earning ability (height) is nothing more than a theoretical curiosity. *See* N. Gregory Mankiw et al., *Optimal Taxation in Theory and Practice*, J. ECON. PERSPS., Spring 2009, at 147, 161–64 (describing the theoretical benefits of "tagging" in tax law). Another possibility is to target industries where many rich people work, such as finance. But the scholars who took this idea seriously concluded that doing so would mean targeting everyone employed in the industry without any income-based cutoffs. *See* Benjamin B. Lockwood et al., *Taxation and the Allocation of Talent*, 125 J. POL. ECON. 1635, 1672–75 (2017) (arguing that "[o]ptimal tax rates are highly sensitive to which professions generate what externalities" rather than what income is earned by individuals occupied in any given profession, and also finding that optimal taxes "are not radically different from the US federal income tax schedule").

42. *See, e.g.*, *Nickels v. Scholl*, 117 N.E. 34, 36 (Mass. 1917) (ten-day recording requirement for sale of goods attached to real estate).

43. RESTATEMENT (FOURTH) OF PROP. § 4.6 (AM. LAW INST., Tentative Draft No. 3, 2022); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1877 (2007).

the first publication and the sale.[44] The idea is to give notice to the world. Any of these time limits can be shortened or lengthened, as needed, if the negatively affected party happens to be rich.

The law of adverse possession offers more opportunities to implement LFR. That law has its own time limit that a party in possession must exceed in order to claim ownership, usually ten to twenty years.[45] Adverse possession must also be open and notorious, exclusive, and continuous.[46] Under LFR, when a party against whom adverse possession is claimed is rich, all these requirements can be relaxed. The possession would not need to be exclusive, or continuous, or open; and perhaps just a few years—not ten or twenty—would be enough to divest rich plaintiffs of their ownership.[47]

LFR reforms of contract law may also rely on that law's well-established concepts. For example, the parole evidence rule and the statute of frauds might be relaxed to advantage a non-rich plaintiff suing a rich defendant.[48] Generally unenforceable boilerplate disclaimers may be made binding on the rich.[49] Many other rules found in the Uniform Commercial Code and the Restatement of Contracts may be adjusted along the same lines.

Legal regimes that build on the foundations of property and contract may also be reformed, LFR-style, possibly with greater impact. Two important legal devices are often used by the rich to accumulate and protect their wealth: nonrecourse debt[50] and

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44. *See* 3 JOSEPH RASCH & ROBERT F. DOLAN, NEW YORK LAW & PRACTICE OF REAL PROPERTY § 41:181 (2d ed. 1990), Westlaw NYLPRP (database updated May 2024) (summarizing statutory requirements for posting a notice of sale).

45. *See id.* § 22:68; Merrill & Smith, *supra* note 43, at 1877.

46. HOVENKAMP ET AL., *supra* note 13, at 68–70.

47. The laws of several countries vary the required time interval to establish adverse possession, though the variation is based not on the owner's wealth but on the possessor's good faith. Merrill & Smith, *supra* note 43, at 1877 n.130.

48. For a description of both rules, see, for example, Morris G. Shanker, *In Defense of the Sales Statute of Frauds and Parole Evidence Rule: A Fair Price of Admission to the Courts*, 100 COM. L.J. 259, 260–63, 267–69 (1995).

49. *See, e.g.*, Tatiana Melnik, *Can We Dicker Online or Is Traditional Contract Formation Really Dying? Rethinking Traditional Contract Formation for the World Wide Web*, 15 MICH. TELECOMM. & TECH. L. REV. 315, 320 n.17, 328 n.46, 332 n.64 (2008) (describing multiple cases where courts found various boilerplate clauses to be unenforceable).

50. For a description of non-recourse debt, see Frederick H. Robinson, *Nonrecourse Indebtedness*, 11 VA. TAX REV. 1, 2–8 (1991). For an example of

limited partnership liability.[51] Both devices shield one's assets from personal liability,[52] and both may be eliminated under LFR. Of course, the rich would look for different legal mechanisms to regain liability protection. Insurance of all kinds would become more widespread. But insurance is also a legal regime which may be later adjusted using LFR principles.

Intellectual property is another area where the riches of the rich may be easily curtailed. If, for example, copyright law tends to favor the rich (as some scholars argue),[53] we may dramatically expand the fair-use doctrine only for the works of rich creators.[54] In fact, we may deny them copyright protection altogether. While we are at it, we can do the same for patent and trademark protection as well. Of course, one may wonder what these kinds of measures would do to the incentives of authors, artists, and inventors. But this is not the question we are pondering here. High taxes have their own negative incentive effects.[55] The question before us is whether LFR is possible in principle. And there is little doubt that the answer is yes. Reform specifics would surely

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pervasive use of non-recourse debt in the real estate industry, see Guy Rolnik & Asher Schechter, *Donald Trump and the Political Economy of Real Estate Tax in the US: Q&A with Professor Kleinbard*, PROMARKET (Oct. 14, 2016), https://www.promarket.org/2016/10/14/donald-trump-political-economy-real-estate-us [https://perma.cc/KU4D-FKL5].

51. *See* Patrick Villanova, *Do Only Rich Families Have a Family Limited Partnership?*, YAHOO!FINANCE (Nov. 8, 2023), https://finance.yahoo.com/news/only-rich-families-family-limited-144028133.html [https://perma.cc/7KMZ-A7AX] (describing the benefits of family limited partnerships typically owned by the wealthy, including limited liability).

52. *See* Richard M. Lipton, *Tribune Media: A Split Decision for the Chicago Cubs' Leveraged Partnership Transaction*, J. TAX'N, Feb. 2022, at 6, 10 (explaining liability-limiting effects of nonrecourse debt and limited partner status).

53. *See, e.g.*, Lunney, *supra* note 21, at 3 (discussing how copyright law favors superstars in the music industry).

54. Curiously, while Oren Bracha and Talha Syed advocate reforming copyright law to counter growing high-end inequality by, among other things, "directly factoring in the defendant's income as relevant to fair-use analysis," they aim this reform to benefit the poor, not to take away from the rich. *See* Oren Bracha & Talha Syed, *Beyond Efficiency: Consequence-Sensitive Theories of Copyright*, 29 BERKELEY TECH. L.J. 229, 306–08 (2014).

55. *See* Mark P. Gergen, *How to Tax Capital*, 70 TAX L. REV. 1, 14–16 (2016) (explaining distortions caused by taxes).

need to be worked out.[56] But no serious obstacles with changing the law along these lines appear to exist as a technical matter.

The greatest technical challenge facing LFR designers is the existence of the corporate form. Corporations play an important role in the American economy, and corporate ownership is an important part of wealth at the very top.[57] This fact is why progressive politicians talk so much about "rich corporations."[58] But corporations are legal constructs. They can exist and dissolve, they can act as legal persons, but they cannot bear burdens—only people can.[59] Who are these people?

The first and most obvious answer is shareholders. How wealthy are they overall? One estimate finds that the top one percent by wealth held 38.9% of all stock in 2019.[60] At the same time, the next nine percent (ninetieth to ninety-ninth percentiles) held even more—46.1%.[61] Another recent study paints a similar picture by estimating unrealized capital gains from corporate equities.[62] The estimate is lower for the top one percent than for the next nine.[63] Clearly, redistributing from

56. For example, we would need to decide whether to treat limited liability companies like partnerships or like corporations for LFR purposes. Fortunately, if no satisfactory answer is found, the rich may simply be prohibited from investing in LLCs!

57. In fact, individuals at the top of the Forbes 400 list all derive their wealth from publicly traded companies. *See Forbes 400 The Definitive Ranking of America's Richest People 2024*, FORBES (Sept. 1, 2024), https://www.forbes.com/forbes-400 [https://perma.cc/PM3C-YVCN].

58. *See, e.g.*, Sara Schweiger, *Of Wall Street and Toasters: Warren Speaks at Worcester State*, TELEGRAM & GAZETTE (Apr. 28, 2014), https://www.telegram.com/story/news/local/worcester/2014/04/28/of-wall-street-toasters-warren/37484242007 [https://perma.cc/BLM7-42PB] (quoting Senator Warren to assert that "this country is bleeding millions into loopholes and subsidies that go to rich corporations").

59. *See Who Bears the Burdens of Corporate Income Tax?*, TAX POL'Y CTR. (Jan. 2024), https://www.taxpolicycenter.org/briefing-book/who-bears-burden-corporate-income-tax [https://perma.cc/S74L-ZG5B] (discussing how shareholders and other investors bear the burdens of corporate income tax).

60. Edward N. Wolff, *Household Wealth Trends in the United States, 1962 to 2019: Median Wealth Rebounds . . . but Not Enough* 56 (2021) (Nat'l Bureau of Econ. Rsch., Working Paper No. 28383, 2021) (on file with Minnesota Law Review).

61. *Id.*

62. Jeff Larrimore et al., *Recent Trends in US Income Distributions in Tax Record Data Using More Comprehensive Measures of Income Including Real Accrued Capital Gains*, 129 J. POL. ECON. 1319, 1346–50 (2021).

63. *See id.* (displaying such differences in Figure 5 and 7).

corporations would affect many shareholders who are not at the very top in any sense of the word.[64]

Shareholders are not the only ones who would be negatively affected by greater redistribution from firms. Workers' wages may fall if corporate profits decline due to LFR-type reforms affecting corporations. While no consensus exists, a recent study found that U.S. workers (more specifically, high-skill U.S. workers) get roughly one-half of significant excess (or windfall) returns captured by U.S. firms.[65] So it is highly likely that redistributing from corporations will put downward pressure on the compensation of affluent workers in the tech, finance, legal, and medical industries. Given all these findings, it is fairly clear that if one wanted to target the rich—and *only* the rich—redistributing from corporations writ large is not a promising strategy. So how could LFR apply to firms?

The answer is to focus on companies owned predominately by the rich. Two types of firms are good candidates: privately held firms above a certain size and portfolio companies owned by private equity funds. As for the former, there are many of them, and they are larger than they have ever been.[66] There is now even a special term to describe the largest of them—unicorns.[67] These are privately owned firms with market valuation in excess of one billion dollars.[68] By recent count, there are over six hundred unicorns,[69] and the valuation for one of the largest unicorns of all, SpaceX, has recently approached $175 billion.[70] In

64. A reasonable estimate of the ninetieth percentile of the income distribution corresponds to income of about $150,000 a year. Adrian Dungan, *Individual Income Tax Shares, Tax Year 2018*, STAT. INCOME BULL., Fall 2021, at 9.

65. *See* Thibaut Lamadon et al., *Imperfect Competition, Compensating Differentials and Rent Sharing in the US Labor Market*, 112 AM. ECON. REV. 169, 171–72 (2022) ("[T]otal rents are divided relatively equally between firms and workers.").

66. *See* Daria Davydova et al., *Why do Startups Become Unicorns Instead of Going Public* 44 fig.1A (Nat'l Bureau of Econ. Rsch., Working Paper No. 30604, 2021) (on file with Minnesota Law Review) (showing a growth of unicorn firms over several quarters).

67. *Id.* at 1.

68. *Id.*

69. *Id.* at 46 fig.1A.

70. *See* Kia Kokalitcheva, *SpaceX Reportedly Seeking $175 Billion Valuation via Tender Offer*, AXIOS (Dec. 7, 2023), https://www.axios.com/2023/12/07/spacex-valuation-175-billion-starlink-elon-musk [https://perma.cc/2JV7-LL7P].

addition to unicorns, there are many more private firms valued in hundreds of millions.[71] Their owners (including venture capital investors) are very likely to be rich.[72]

As for private equity, securities law conveniently (for our purposes) separates the rich from the rest.[73] While details can get complicated, the general idea is that in order for an individual to invest in a typical private equity firm, that individual must be a millionaire, and often a multi-millionaire.[74] Given that the wealth threshold for the top one percent is about $3.5 million,[75] these cutoffs are close enough.

Granted, things are more complicated than they appear at first glance. For example, rich individuals are not the only investors in private equity.[76] Large institutions like pension funds are major investors as well.[77] And workers whose savings pension funds invest are by no means rich.[78] So adopting LFR for companies owned by private equity firms would harm these workers. But there is a fix: exempt private equity firms whose only

71. *See* Gary Gensler*, Testimony Before the Subcommittee on Financial Services and General Government, U.S. House Appropriations Committee,* U.S. SEC. & EXCH. COMM'N (May 26, 2021), https://www.sec.gov/newsroom/speeches-statements/gensler-2021-05-26 [https://perma.cc/HT86-B8WJ] (showing the growth of private funds in numbers and assets).

72. James Garrett Baldwin et al., *What Is the Structure of a Private Equity Fund?*, INVESTOPEDIA (Aug. 29, 2024), https://www.investopedia.com/articles/investing/093015/understanding-private-equity-funds-structure.asp [https://perma.cc/8K5G-NJVP].

73. *See* William W. Clayton, *The Private Equity Negotiation Myth*, 37 YALE J. REG. 67, 89 (2020) (noting that securities law establishes minimum net worth requirements for investing in private equity funds).

74. *See id.* (describing income and wealth thresholds for investing in private equity).

75. Matthew Smith et al., *Top Wealth in America: New Estimates Under Heterogeneous Returns*, 138 Q.J. ECON. 515, 551 tbl.1 (2023).

76. *See* Clayton, *supra* note 73, at 89 (identifying pension funds, endowments, and foundations as institutional investors in private equity).

77. *See id.* ("[T]he ten institutions with the greatest exposure to private equity in 2017 *each* had between $21 billion and $52 billion allocated to the private equity asset class and total assets in the hundreds of billions.").

78. *See generally 73 Percent of Civilian Workers Had Access to Retirement Benefits in 2023,* U.S. BUREAU OF LABOR STAT. (Sept. 29, 2023), https://www.bls.gov/opub/ted/2023/73-percent-of-civilian-workers-had-access-to-retirement-benefits-in-2023.htm#:~:text=In%20March%202023%2C%2073%20percent,was%2077%20percent%20in%20March [https://perma.cc/RC5R-6YQG] (reporting on the distribution of access and participation in retirement benefits in 2023).

investors are tax-exempt institutions from LFR, and let investors sort themselves into institution-owned and individual-owned private equity funds.[79] Other tweaks would be needed as well, but no unsolvable obstacles appear to exist. Properly designed LFR for large privately owned and private-equity-owned firms (let us call these two types "rich firms" for short) would do a reasonably good job of reaching only the rich.

This solution opens up a plethora of opportunities to expand LFR. Corporate governance and labor law are obvious places to start. Conveniently, there is no need to reinvent the wheel. Long-debated reform ideas offer a ready-made list of candidates for corporate LFR. One such idea is worker representation on corporate boards.[80] LFR would require such representation for rich firms and may even give worker representatives veto rights over certain matters. Corporate profit-sharing is another policy long advocated by the left.[81] LFR would require profit sharing between rich firms and their workers. The merits and demerits of anti-takeover protections are well-trodden ground in corporate governance literature.[82] LFR would prohibit rich firms from using these protections if the putative buyer is not a rich firm itself. And, of course, the decades-long decline of labor unions is one of the key reasons for the rise of inequality.[83] LFR would require rich firms to have labor unions, and perhaps even to fund them at specified rates. Putting this all together would not be too

79. This would not be radically different from the common brother-sister structure that allows some tax-preferred U.S. investors like pension funds to invest in hedge funds without paying unrelated business income tax. *See* Amy Erenrich Heller, *Structuring Hedge Fund Investments for Charitable Remainder Trusts to Avoid UBTI and PFIC Concerns*, J. TAX'N, Dec. 2008, at 344, 344 (describing the use of so-called offshore blockers).

80. *See* Leo E. Strine, Jr. et al., *Lifting Labor's Voice: A Principled Path Toward Greater Worker Voice and Power Within American Corporate Governance*, 106 MINN. L. REV. 1325, 1330–33 (2022) (arguing in favor of board codetermination and describing proposed legislation by Senators Baldwin and Warren).

81. *See* JOSEPH R. BLASI ET AL., THE CITIZEN'S SHARE: PUTTING OWNERSHIP BACK INTO DEMOCRACY 10–11 (2013) (introducing the case for broad-based profit sharing among business owners and workers).

82. *See, e.g.*, Lynn A. Stout, *Do Antitakeover Defenses Decrease Shareholder Wealth? The Ex Post/Ex Ante Valuation Problem*, 55 STAN. L. REV. 845, 846–50 (2002) (summarizing arguments in favor of and against anti-takeover defenses).

83. *See* Kate Andrias, *The New Labor Law*, 126 YALE L.J. 2, 21–25 (2016) (describing the decline of labor unions).

different from simply adopting the relevant provisions of political platforms of progressive politicians only for rich firms.[84]

Antitrust is another area where LFR-style reforms may be quite effective. Again, these reforms would build on ideas already debated in the academic literature and even in courts. For example, courts disagree about "whether wage-fixing and (vertical or horizontal) no-poach agreements constitute per se violations" of antitrust law.[85] LFR need not suffer from this uncertainty—it would make all such agreements illegal for rich firms. Courts also disagree about the use of the less restrictive alternatives test in antitrust analysis.[86] LFR would adopt the strong version of this test (or even go further and adopt the *least* restrictive alternative test[87]) for evaluating potentially anticompetitive behavior of rich firms. Scholars urge courts to treat covenants not to compete as presumptively illegal.[88] Again, LFR may go further and prohibit these covenants for rich firms outright.[89] Collective bargaining by independent contractor workers with firms that purchase their services is per se illegal today.[90] LFR would allow such negotiations between workers and rich firms. No doubt, antitrust experts would find it easy to continue with this list. High-profile antitrust controversies may create the impression that antitrust enforcement involves only publicly traded mega-firms in tech, communications, transportation, and

84. *See, e.g.*, *Corporate Accountability and Democracy*, FRIENDS OF BERNIE SANDERS, https://berniesanders.com/issues/corporate-accountability-and-democracy [https://perma.cc/VL2Z-AHFH] (discussing Bernie Sanders's plan to "shift the wealth of the economy back to the workers who create it").

85. Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: The Rule of Reason Does Not Allow Counting of Out-of-Market Benefits*, 90 U. CHI. L. REV. 273, 274 (2023) (discussing litigation surrounding no-poach agreements).

86. *See* Thomas B. Nachbar, *Less Restrictive Alternatives and the Ancillary Restraints Doctrine*, 45 SEATTLE U. L. REV. 587, 591–92 (2022) (comparing the strong, Ninth Circuit version of the test to its weaker use by other circuits).

87. *See id*. at 593.

88. *See* Eric A. Posner, *The Antitrust Challenge to Covenants Not to Compete in Employment Contracts*, 83 ANTITRUST L.J. 165, 165–68 (2020) (advocating making noncompete agreements presumptively illegal under antitrust law).

89. Eric Posner's reason for using a presumption rather than an outright prohibition is that there may be cases where noncompetes may benefit workers. *Id.* at 167. Knowing how good businesses are at finding seemingly plausible reasons to support whatever benefits the business, it may be better to impose an outright prohibition.

90. Alexander & Salop, *supra* note 85, at 278–79.

the like. But the actual cases underlying two of the reforms just suggested were rich firms: one owned by a wealthy family and another by a private equity fund.[91] LFR-style antitrust could make a real difference.

Numerous other legal regimes may be reformed LFR-style as well. Rich firms may face stricter environmental laws, stricter employee safety laws, weaker bankruptcy protection, and so on. They may lose the ability to force (certain) disputes into binding arbitration when the adverse party is not another rich firm. Rich firms may even be legally prevented from becoming too large.[92] And when large-enough rich firms go public to continue their growth, restrictions may be put on dual-class stock and any other device that concentrates decision-making power in the hands of the firm's rich founders.[93]

Some of these reforms would surely have negative economic effects, just like higher taxes would.[94] But if the overriding goal is to reduce economic power at the top, and if the idea of distributionally informed legal rules is accepted in principle (as it surely is—both in academia[95] and now in federal government[96]), these reforms offer the most effective and well-targeted solution.

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91. The covenant not to compete used as a motivating example by Posner involved Jimmy John's, a private-equity-owned sandwich chain. *See* Posner, *supra* note 88, at 165–66; *Jimmy John's*, WIKIPEDIA, https://en.wikipedia.org/wiki/Jimmy_John%27s [https://perma.cc/746W-6YXQ]. One of the no-poaching agreements discussed by Alexander and Salop involved Little Caesar's, a privately owned company. *See* Alexander & Salop, *supra* note 85, at 276; *Ilitch Holdings*, WIKIPEDIA, https://en.wikipedia.org/wiki/Ilitch_Holdings [https://perma.cc/TL4A-BQPJ].

92. The details here would be tricky, but the possibility is worth considering. For example, if a large private firm completes a funding round with an implied valuation above a certain amount, no more equity funding will be allowed except through an initial public offering.

93. For a description of dual-class shares, see, for example, Zohar Goshen & Richard Squire, *Principal Costs: A New Theory for Corporate Law and Governance*, 117 COLUM. L. REV. 767, 806–08 (2017).

94. For example, Goshen and Squire explain that dual-class share structure "may be well-suited to firms in complex industries," so prohibiting it would be costly for such firms. *Id*. at 807.

95. See *infra* Part I.C for examples of academic arguments in favor of distributionally informed legal rules.

96. The Office of Management and Budget recently adopted revised Circular A-4 that expressly embeds distributional considerations in the cost-benefit analysis of new federal regulations. *See New Circular A-4: A Revolution in Cost-Benefit Analysis*, *SIDLEY AUSTIN LLP* (Nov. 20, 2023), https://www.sidley.com/

Yet no one has considered these kinds of reforms, let alone advocated them. One possible explanation is that scholars view these admittedly drastic changes as unnecessary. Perhaps changes to general corporate and antitrust rules, to take two examples, would suffice to redistribute from the rich.

B. INCHING TOWARD LFR?

While no scholars have explicitly advocated LFR-style reforms, it is worth discussing several ideas that gesture in that direction. Joshua Blank and Ari Glogower have written a series of articles arguing for more stringent procedural rules, information reporting requirements, and penalties for wealthy taxpayers.[97] Implementing these proposals would lead to a well-targeted (in a sense of burdening just the intended group) redistribution from the top. It would also clearly depart from the current law.[98]

Anticipating a likely objection, Blank and Glogower explain that their proposal would not violate the principle that legal rules should be uniform.[99] They start by pointing out that tax law has a core distributional function.[100] They then explain that tax compliance rules are unique because they support that core function.[101] So the proposed changes would, in essence, adjust tax rules rather than legal rules.[102] And given few objections to the principle of progressive taxation, there should be nothing controversial about their idea. Importantly, Blank and Glogower are very clear that the special tax compliance rules for the rich they propose are as far as they are willing to go in the LFR direction.[103]

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en/insights/newsupdates/2023/11/new-circular-a4-a-revolution-in-cost-benefit-analysis [https://perma.cc/W4MP-5MJX].

97. *See, e.g.*, Joshua D. Blank & Ari Glogower, *When Should Means Matter? The Case of Tax Compliance*, 42 VA. TAX REV. 241, 244–45 (2023) (discussing means-based adjustments to tax compliance rules). See *id.* at 244 n.13, for a list of other works by Blank and Glogower discussing similar tax reforms.

98. *See id.* at 259.

99. *See id.* at 243 (noting that the U.S. federal tax system already represents an exception to the rules favoring uniformity).

100. *Id.*

101. *Id.* at 244.

102. *See id.* at 244–45.

103. Specifically, they state: "As a result of their endogenous role in implementing the substantive tax rules, means-based adjustments to the tax

Another idea comes from Clinton Wallace and Shelley Welton, who propose a carbon tax on luxury emissions such as those from yachts and private jets.[104] A carbon tax is a form of environmental regulation rather than a revenue-raising tool (although, of course, it raises revenue as well).[105] Limiting this tax-cum-regulation only to those who can afford to use luxury goods does have some LFR flavor, but only some. The policy proposed by Wallace and Welton is still a tax that has a lot in common with sales taxes on luxury purchases.[106] Indeed, Wallace and Welton emphasize the tax-like character of their proposal themselves.[107] So their idea is still a long way from an argument in favor of LFR.

Looking past the American experience, one finds an enforcement mechanism that comes closest to LFR. Many countries have so-called day fines that set monetary penalties based on the daily income of the violator.[108] Occasional news stories about six-figure fines paid by rich speeding drivers remind everyone that traffic violations are much costlier to the rich than to an average

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compliance rules should be analyzed differently under the principles favoring uniform legal rules." *Id*. at 264. Revealingly, Blank and Glogower do *not* suggest that enforcement focus on high-income offenders should extend beyond tax, see *id.* at 245 (limiting their argument to tax reforms), even though white-collar crime is currently scrutinized (and, most likely, deterred) much less than street crime. *See* Alex Raskolnikov, *Criminal Deterrence: A Review of the Missing Literature*, 28 SUP. CT. ECON. REV. 1, 10–16 (2020).

104. *See* Clinton G. Wallace & Shelley Welton, *Taxing Luxury Emissions*, 109 CORNELL L. REV. 1153, 1153 (2024).

105. *See generally* Govinda R. Timilsina, *Carbon Taxes*, 60 J. ECON. LIT. 1456 (2022) (reviewing the literature on environmental and revenue effects of carbon taxes).

106. *See* Wallace & Welton, *supra* note 104, at 1200 n.241 (noting that some sales tax regimes utilize variable tax rates and complex exemptions).

107. *See id.* at 1199 (explaining that a tax is the most politically promising redistributive tool in the U.S.).

108. Forty-three countries have these fines. Giuseppe Dari-Mattiacci et al., *Fines for Unequal Societies* 8 (Amsterdam Ctr. for L. & Econ., Working Paper No. 2022-08, 2022) (on file with Minnesota Law Review). These fines are calculated as the number of days specified for each type of violation times the daily earnings of the offender. *See* Edwin W. Zedlewski, *Alternatives to Custodial Supervision: The Day Fine*, NAT'L INST. OF JUST. 2 (Apr. 2010), https://www.ojp.gov/pdffiles1/nij/grants/230401.pdf [https://perma.cc/WC3Y-65E7]. For a review of the gradual adoption of these fines in Europe, and unsuccessful experiments with these fines in the United States, see Michael Tonry, *Parochialism in U.S. Sentencing Policy*, 45 CRIME & DELINQ. 48, 52–54 (1999).

citizen.[109] Day fines are typically found in vehicular codes, but some countries impose them for theft, discrimination, tax evasion, and even sexual assault.[110]

Two points are worth noting. First, while day fines certainly have an LFR flavor, they are not LFR. The content of legal rules is the same for all citizens, only sanctions differ.[111] Second, in most countries, day fines punish criminal conduct, and U.S. pilot projects involving income-dependent sanctions were limited to criminal violations as well.[112] The underlying view appears to be that income-dependent sanctions are an extraordinary measure that may be justified only for serious violations.[113] In contrast, LFR is designed to change civil law rules aimed at redistribution rather than punishment. In that context and to the best of my knowledge, no legal regime—actual or proposed—comes close to LFR.

C. NO LFR RESULTS WITHOUT LFR

While LFR is a novel idea, the underlying goal is not. Scholars of antitrust law, corporate law, copyright law, and other areas have recently advocated reforms aimed at arresting the rise of high-end inequality.[114] Yet while these scholars make clear that they target only the very top echelon, their proposals would

109. *See* Dari-Mattiacci et al., *supra* note 108, at 2–3 (describing a €116,000 fine paid by a Nokia director).

110. *Id*. at 8–9.

111. *See* Tonry, *supra* note 108, at 48 (explaining day fines' application at the sentencing phase). Granted, the distinction is not water-tight. If we keep a legal rule unchanged but eliminate all remedies for rich victims of the rule's violation, the result would be the same as eliminating the rule's protection for the rich. But this is an extreme example. It is no accident that, while day fines are common outside of the anglophone world, separate rules for the rich appear not to exist at all.

112. *See id.* at 52–54.

113. For an alternative explanation in law and economics, see generally Dari-Mattiacci et al., *supra* note 108. However, it is unlikely that such analysis drove the decisions of actual policymakers. The U.S. refusal to adopt income-dependent fines is especially revealing given that sanctions for violating state and federal laws vary among many other dimensions. *See* Alex Raskolnikov, *Six Degrees of Graduation: Law and Economics of Variable Sanctions*, 43 FLA. ST. U. L. REV. 1015, 1017–25 (2016) (describing the six dimensions along which penalties may vary).

114. *See, e.g.*, Baker & Salop, *supra* note 21, at 24–28 (discussing reforms in antitrust law); Bodie, *supra* note 21, at 84–89 (corporate law); Lunney, *supra* note 21, at 56–66 (copyright law).

have a much broader negative impact. General changes to legal rules, it turns out, are no substitutes for LFR.

Let us start with antitrust—an area where the neoliberal approach has come under especially heavy criticism from the left. Jonathan Baker and Steven Salop recently proposed several reforms in order to address the "divergence in economic fortunes between those at the very top and the rest of society" evidenced by the rising income and wealth shares of the top 1% and 0.1%.[115] Baker and Salop warn their readers that their boldest proposals are "provocative" and "would be highly controversial."[116] Their most provocative proposal is to adopt reduction of inequality as an explicit antitrust goal.[117]

The idea is that the same conduct would violate antitrust law or not depending on who benefits from it. For example, Baker and Salop would allow non-governmental organizations representing low-income borrowers to collude in order to keep down interest rates on payday loans.[118] But if hospitals colluded to keep down nurses' salaries, hospitals would face the full wrath of antitrust law.[119] So payday lenders would lose arguing against monopsony while hospitals would lose for maintaining one.

It is easy to see that Baker and Salop's proposal would reduce inequality. But would the reduction be of a kind that Baker and Salop aim for?[120] What does it mean to redistribute from "payday lenders" and "hospitals," to take their examples? Who are the people affected by this redistribution?

Some payday lenders are large public companies, but some are tiny pawnshops whose owners are not rich by any measure.[121] Many hospitals are non-profits, so redistributing from them means taking from executives, doctors, and possibly nurses

115. Baker & Salop, *supra* note 21, at 2–3.

116. *Id.* at 5, 14.

117. *See id.* at 14, 24.

118. *Id.* at 20, 26.

119. *Id.* at 26.

120. Motivating their proposals, Baker and Salop emphasize the rise of the income of the top 1%, see *id.* at 1–2, and 0.1%, see *id.* at 3, as well as the "economic fortunes [of] those at the very top," *id.* at 2.

121. *See* James R. Barth et al., *Do State Regulations Affect Payday Lender Concentration?*, 84 J. ECON. & BUS. 14, 19 (2016) (describing payday loan industry and its largest players); *see also* Mark J. Flannery & Katherine A. Samolyk, *Scale Economies at Payday Loan Stores* 1–2 (June 2007) (on file with Minnesota Law Review) (same).

and patients as well. Some hospitals are owned by for-profit public companies, just like large payday lenders are.[122] Reducing the profits of public companies may lower the incomes of their executives. But corporate governance literature suggests that the executives would keep making their millions no matter what.[123] Instead, it is the shareholders and possibly the workers who would shoulder the burden of additional redistribution.[124] And as already discussed, there are many shareholders outside of the top one percent of income earners, and these shareholders hold more corporate wealth than one percenters do.[125] Most workers are surely outside of the top one percent of income earners as well. So if one wanted to target the rich—and *only* the rich—even the most radical among Baker and Salop's antitrust reforms is not a promising strategy.

Corporate and labor law are two other legal regimes that come to mind as possible instruments of reducing high-end inequality. Tom Malleson considers both in *Against Inequality: The Practical and Ethical Case for Abolishing the Superrich*.[126] Matthew Bodie does the same with the goal of "chang[ing] norms about the acceptability of sky-high compensation for CEOs, high-level executives, and those advisors and professionals who service the corporation's financial needs."[127] Martin O'Neill explains that "while billionaires may provide an easily identifiable group at the very top of the wealth distribution, the problems of wealth inequality . . . reach much further down . . . ."[128] How much further? To "deca-millionaires and centa-millionaires."[129]

All three scholars emphasize their goal of changing legal rules in addition to, rather than instead of, raising taxes on the rich. Bodie's main suggestion is to put employees on corporate

122. *See Publicly Traded Hospitals Companies*, FINTEL, https://fintel.io/industry/list/hospitals [https://perma.cc/JX4J-ABJB].

123. *See generally* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE (2004) (critiquing contemporary executive compensation arrangements and the corporate governance processes that have allowed pay to be decoupled from performance).

124. *Cf. id.* at 53–58 (discussing the inadequacy of market forces as a control on executive compensation).

125. *See supra* text accompanying notes 60–64.

126. *See generally* MALLESON, *supra* note 21.

127. Bodie, *supra* note 21, at 88.

128. O'Neill, *supra* note 21.

129. *Id.*

boards.[130] Malleson agrees and also wants to strengthen unions and give shareholders a say on CEO pay.[131] O'Neill argues for "giving workers in large firms a share in capital returns and a voice in decision making."[132] Several other scholars advocate similar reforms.[133]

To the extent these proposals would only impact executive compensation, their effect on inequality would be minor. Top company executives are only a small fraction of America's rich,[134] and their earnings are an even smaller fraction of corporate profits.[135] For the proposed reforms to have meaningful distributional effects, shareholders, not just CEOs, must shoulder the additional burden. And as we have already seen, many shareholders are nowhere close to being centa-millionaires, deca-millionaires, or rich in any plausible sense of the word.

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130. *See* Bodie, *supra* note 21, at 88 (noting that placing employee representatives onto boards of directors would force those directors to consider the impact of their decisions on the workforce).

131. *See* MALLESON, *supra* note 21, at 33–37, 43, 51–53 (advocating for the strengthening of unions to reduce inequality, proposing "say-on-pay" legislation to give shareholders a right to vote on executive compensation, and discussing democratizing practices to give voice to employees in determining executive compensation).

132. O'Neill, *supra* note 21.

133. Uri Weiss wants to combat "extreme inequality" by strengthening organized labor. Weiss, *supra* note 21, at 427, 436. Rory Van Loo's idea is to reform consumer law to reduce overcharge, that is windfalls captured by firms due to their monopoly or monopsony power. Van Loo, *supra* note 21, at 213. Both proposals would redistribute from public companies, leading to mistargeting discussed in this Section.

134. In 2014, for example, "the 10,700 top public company executives earned a total of $33 billion . . . in salary and options," adding up to average earnings of about $3.2 million. Wojciech Kopczuk & Eric Zwick, *Business Incomes at the Top*, J. ECON. PERSPS. Fall 2020, at 27, 30. "In contrast, the 14,900 business owners in the top 0.01% of the income distribution received more than $100 billion in income from S-corporations and partnerships," adding up to average earnings of about $6.7 million. *Id.* The top 0.1% consist of over one hundred thousand households, and the minimum income cutoff for this group is about $2 million. *See* Raskolnikov, *supra* note 23, at 73. Corporate executives are clearly a small part of the top 0.1% cohort, and an even smaller share of the proverbial top 1%.

135. While "the 10,700 top public company executives earned a total of $33 billion in 2014 in salary and options," Kopczuk & Zwick, *supra* note 134, corporate profits that year were about $7.790 trillion. *See Corporate Profits After Tax*, FED. RSRV. ECON. DATA, https://fred.stlouisfed.org/series/CP [https://perma.cc/9LDV-6GAV].

Perhaps targeting the rich through legal rules would be more successful if policymakers focused on legal regimes that the rich tend to use. Trust law seems to fit the bill. Two types of trusts are especially problematic from the distributional point of view.[136] The first is a dynasty (or perpetual) trust.[137] Its self-explanatory name gives away its objective—to create a dynasty by circumventing the Rule Against Perpetuities.[138] The second type is an asset protection trust (APT).[139] Its goal is to shield assets from creditors, possibly ranging from former spouses to the victims of the opioid epidemic.[140]

Felix Chang suggests reforms related to both types of trusts in response to skyrocketing incomes at the top.[141] His solutions to the dynasty trust problem, however, turn out to be mostly of the tax rather than a legal rule variety.[142] His ideas for reforming APTs are modest.[143] More importantly, it turns out that the use of APTs is by no means restricted to the rich. "[T]he depletion

136. *See* MICHAEL HELLER & JAMES SALZMAN, MINE!: FROM PERSONAL SPACE TO BIG DATA, HOW OWNERSHIP SHAPES OUR LIVES 221–28 (2022) (discussing types of trusts).

137. *See id.* at 221–24 (explaining the development of perpetual or dynasty trusts following the abolishment of the Rule Against Perpetuities); *see also* Chang, *supra* note 21, at 94 (presenting perpetual or dynasty trusts as those that can last in perpetuity in states that have abolished the Rule Against Perpetuities).

138. *See* Chang, *supra* note 21, at 94–95 (discussing ways to strengthen the Rule Against Perpetuities following the development of dynasty trusts).

139. *See* HELLER & SALZMAN, *supra* note 136, at 223–24 (describing the development of asset protection trusts); Chang, *supra* note 21, at 99–100 (providing background information on asset protection trusts).

140. *See* William Organek, *"A Bitter Result": Purdue Pharma, a Sackler Bankruptcy Filing, and Improving Monetary and Nonmonetary Recoveries in Mass Tort Bankruptcies*, 96 AM. BANKR. L.J. 361, 406–07 (2022) ("[A]sset protection trusts . . . are typically established to improperly block creditor access to trust assets.").

141. *See* Chang, *supra* note 21, at 118 ("Dynasty trust and APT reform[s] are attractive in that distribution would emanate from the very wealthy.").

142. Chang suggests reinstating the Rule Against Perpetuities in states that repealed it. *Id.* at 94–95. Another proposal is to tax these trusts. *Id.* The second proposal is clearly a tax law change. It turns out that the first one is as well. *Id.* at 96. The main advantage of dynasty trusts is the elimination of taxes on intergenerational wealth transfers. *Id.* at 98. If these taxes were repealed, the reinstatement of the Rule Against Perpetuities would have few distributional effects. *Id.*

143. *See id.* at 102–04 (suggesting an expansion of recovery for additional types of creditors, including involuntary creditors, as an alternative to putting up procedural barriers for APTs).

of assets [using APTs] either to pay for long-term care directly or to become eligible for Medicaid-paid care is a distinctly middle-class phenomenon."[144] The American Bar Association recommends APTs to individuals in "high risk occupations," specifically mentioning doctors.[145] So, while Chang's proposal would likely lower incomes and wealth at the top, it would also impose new burdens on the upper middle class, perhaps to a significant degree.

Cost-benefit analysis (CBA) of regulation is an important area where debates about the role of distributional considerations have a long history.[146] Joining the debate, Daniel Hemel recently asked: "Especially as the top 1% and top 0.1% capture an increasing share of national income, how can defenders of CBA continue to justify its indifference toward matters of distribution?"[147] His answer is that, while indifference is indeed unjustified, we should not start redistributing through the CBA whole hog.[148] Hemel also compiles a list of twenty-four major rules promulgated by federal agencies between 2001 and 2018.[149] Here are the top five rules on the list: corporate average fuel economy standards for light duty trucks, mercury and air toxic standards, clean air fine particle implementation rule, national ambient-air-quality standards for ozone, and light-duty greenhouse gas standards.[150] No matter how one designs any of

144. John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection*, 27 CARDOZO L. REV. 2621, 2680–81 (2006).

145. *Asset Protection Planning: Estate Planning Information & FAQs: Asset Protection Planning*, A.B.A., https://www.americanbar.org/groups/real_property_trust_estate/resources/estate-planning/asset-protection-planning [https://perma.cc/GB39-9V64].

146. *See generally* MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS (2006) (defending CBA as a welfarist decision procedure, while highlighting and addressing various critiques rooted in distributive considerations).

147. Daniel Hemel, *Regulation and Redistribution with Lives in the Balance*, 89 U. CHI. L. REV. 649, 651–52 (2022).

148. "[T]he choice between nontax legal rules and the income-tax system as channels for redistribution depends upon situational details that defy one-size-fits-all summary," he concludes. *Id.* at 662.

149. *See id.* at 666–68 tbl.1.

150. *Id.*

these rules, the result would not affect extreme inequality and the arrival of the new Gilded Age.[151]

Even Glynn Lunney's article entitled *Copyright and the 1%* turns out to be about a group at least ten times as large.[152] The article focuses on the popularity of computer videogames on a platform called Steam.[153] Lunney discovers that a few games are extremely popular while most games are ignored.[154] Specifically, "the top 1% of the games capture 49.7% of the players. The top 10% of the games capture 89.28% of the players."[155] Extrapolating from Steam to copyrighted works as a whole, Lunney suggests two modest reforms for increasing redistribution from the few lucky winners like Taylor Swift whose financial success Lunney views as excessive.[156] But as his own numbers for the top 10% of most popular games reveal, games that capture 40% of the players are outside of the top 1% by popularity.[157] Why should their creators suffer?

What emerges from this look at recent reform ideas is a clear tension. Multiple scholars search for ways to overhaul a wide range of legal rules to counter extreme inequality. These scholars come up with a range of proposals that, the authors seem to believe, accomplish their goals. But the proposed reforms are all wide of the mark—their likely effects do not reflect the stated objectives. The reforms would burden cohorts that are larger—by one, two, or many orders of magnitude—than the upper crust whose great fortunes motivate the proposals in the first place. It is not entirely clear whether the authors appreciate the mismatch. The more important point is that the mistargeting this

151. For instance, if making light-duty trucks more fuel-efficient would increase their price, some top one percent earners would have to pay more to purchase them, but the same is true of many more drivers further down the income distribution.

152. *See* Lunney, *supra* note 21.

153. *See id.* at 38–41.

154. *See id.* at 44.

155. *Id.*

156. *Id.* at 58. The first reform is to incorporate cost recoupment into the fourth fair use factor. *Id.* This would call for a fact-sensitive case-by-case determination of "reasonable, risk-adjusted return on investment." *Id.* The second proposal is to shorten and narrow copyright overall. *Id.* at 64.

157. The top ten percent of most popular games capture 89.28% of players, while the top one percent captures 49.7%, so the difference is 39.58%, or approximately 40%, which is the share of players captured by games in the top ten percent but not the top one percent by popularity. *Id.* at 44.

discussion reveals appears inevitable. Or, more precisely, it is inevitable as long as we rule out LFR.

At the same time, all of the reforms just described may be easily tweaked LFR-style. Lunney's copyright changes may be made explicitly applicable only to one-percenters, or millionaires, or whatever thresholds one prefers, and the same is true of Chang's APT reforms. Likewise, corporate, labor, and antitrust law reforms just discussed may be enacted only for rich firms. These adjustments vividly confirm the power of LFR. If LFR is acceptable, redistributive legal engineering becomes rather easy. But this is a big "if."

Perhaps we are in a moment of transition. Perhaps papers embracing LFR are just around the corner. But then again, maybe not. Concerns about inequality are not new. That nothing like LFR has been advocated thus far suggests that there is something wrong with the idea. But what is it? It turns out that answering this question is much more difficult than asking it.

II. LAW FOR THE RICH—WHY NOT?

As soon as one grasps the LFR concept, one faces a puzzle. Many legal scholars would like to reverse the emergence of the new Gilded Age. LFR is a straightforward idea that, in essence, uses progressive taxation as a model for designing legal rules. No insurmountable difficulties appear to inhibit LFR reforms as a technical matter. Yet no one has proposed anything like it.[158] Why not? The next Section considers a few answers that easily come to mind but can be just as easily dismissed. The discussion then turns to more fundamental explanations but finds them lacking as well.

A. SIMPLE (NON)ANSWERS TO THE LFR PUZZLE

Whatever else can be said about LFR, it is an unconventional idea. So it seems that the reason to reject it may lie close

158. Some legal rules are applicable only to the rich, such as securities regulations. Clayton, *supra* note 73, at 89. These, however, are in place to protect the non-rich, not to burden the rich. One may also point out that contingent-fee-based part of our litigation system has an LFR flavor (though much of this litigation is against public companies and, as already discussed, their owners are not all rich). In response, one may note that only the rich have resources to hire the best experts and lawyers and thus take full advantage of the legal process for their benefit. In any case, none of these features impose a direct, targeted, and comprehensive burden similar to LFR.

to the surface. Yet one quickly discovers that several seemingly obvious reasons turn out to be unpersuasive.

One possibility is that LFR is simply too radical. And indeed, LFR is much more radical than the proposals discussed in Part I.C. But LFR's ambition cannot possibly be the answer. There are plenty of visions for economic organization of society that are surely more radical than LFR, socialism being the most prominent one.[159] LFR's radicalism is not a convincing explanation.

Another potential reason to embrace income- or wealth-based thresholds in tax and only in tax is that tax is special—it is a unique locus of redistribution. In the words of Blank and Glogower, "[b]ecause of its core distributive function, the progressive tax system represents a prominent exception to [the] principles favoring uniform legal rules."[160] But this explanation is problematic as well. The question we are facing is precisely *why* tax law is exceptional. If all it takes to justify a non-uniform tax law is to say that it is acceptable for it to be non-uniform, one may just as easily say the same about legal rules.

Rich people's mobility may be another reason for skepticism about LFR. Property, contract, and corporate law are state-specific. If New York enacts LFR while Florida does not, rich people may simply escape from Manhattan to Miami.[161] Yet this argument is unconvincing. Antitrust law, labor law, copyright law, and patent law are all set at the federal level. And if Congress wanted to intervene in a state-level legal regime such as corporate law, Congress knows how to do so as well.[162]

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159. *See, e.g.*, BERNARD HARCOURT, COOPERATION: A POLITICAL, ECONOMIC AND SOCIAL THEORY 163–72 (2023) (calling for replacement of capitalism with coöperism); MATTHEW T. HUBER, CLIMATE CHANGE AS CLASS WAR: BUILDING SOCIALISM ON A WARMING PLANET 20–21 (2022) ("I argue for a return to [an] explicitly Marxist approach to class rooted in production and ownership, precisely because the climate and ecological crisis is fundamentally rooted in these objective, material relations."); THOMAS PIKETTY, TIME FOR SOCIALISM: DISPATCHES FROM THE WORLD ON FIRE, 2016–2021, at 2 (2021) (arguing for "a new form of socialism, participative and decentralized, federal and democratic, ecological, multiracial, and feminist").

160. Blank & Glogower, *supra* note 97, at 241.

161. For an argument that this may, in fact, be happening, see Katherine Loughead, *Americans Moved to Low-Tax States in 2023*, TAX FOUND. (Jan. 9, 2024), https://taxfoundation.org/data/all/state/state-population-change-2023 [https://perma.cc/4SPR-9DNF].

162. *See, e.g.*, Katrina Hausfield et al., *The Corporate Transparency Act Is Coming: What You Should Know*, DLA PIPER (Dec. 6, 2023), https://www

Perhaps LFR makes little sense because it would be easy to avoid. This question, however, is not the relevant one. The real question is whether LFR would be easier to avoid than the tax rules aimed at the rich. And the answer is that it would not. Existing tax rules condition liabilities on taxpayers' incomes (annual[163] or multi-year[164]) or wealth,[165] and the newly proposed taxes do the same. LFR may rely on the exact same income and wealth thresholds, so the gaming opportunities around those thresholds would be identical. Congress has a lot of experience with countering these opportunities.[166]

Could LFR be uniquely problematic because it draws a sharp line between those who are subject to it and those who are not? Progressive income tax, in contrast, raises tax rates gradually, and everyone is subject to it, at least in principle.[167]

Yet this cannot be the answer either, both because there are bright lines in our tax-and-transfer system and because it is easy to introduce gradualism into LFR, if desired. Starting with income- or wealth-dependent bright lines, note that the estate tax applies only to estates above a fixed (and very high) threshold.[168] The same is true of the tax on U.S. taxpayers who decide to renounce their U.S. citizenship for tax reasons.[169] In fact, for the first several decades of its existence, the income tax itself had a strong LFR flavor—it was a class tax which became a mass tax

.dlapiper.com/en/insights/publications/2023/12/the-corporate-transparency-act-is-coming-what-you-should-know [https://perma.cc/J2FS-MRHJ] (describing new congressionally-mandated changes to confidentiality of corporate ownership under state law).

163. *See, e.g.*, I.R.C. § 1(a)–(d).

164. *See id.* § 877(a)(2)(A).

165. *See id.* § 877(a)(2)(B).

166. *See, e.g.*, *id.* § 267(a)(1) (defining related parties broadly for the purposes of loss disallowance rules).

167. *See id.* § 1(a) (specifying gradually increasing marginal rates).

168. *See* Rev. Proc. 2023-34, 2023-48 I.R.B. 1287, § 3.41 (specifying the estate tax exclusion at $13,610,000).

169. *See* I.R.C. § 877A. Importantly, while the estate tax is imposed only on estates above a certain threshold and only on wealth above that threshold and thus is a marginal tax in that sense, the expatriation tax is different. As long as the expatriating taxpayer's wealth exceeds $2 million, the punitive special rules apply to *all* of the taxpayer's assets (not just to the assets in excess of $2 million). *Id.* § 877(a)(2)(B).

only during the Second World War.[170] LFR's sharp income- and wealth-based cutoffs would be nothing unusual.

At the same time, if such cutoffs really do present a problem, LFR may be phased in. Time limits in property law may be gradually changed as the income of affected party rises. Adverse possession standards like "open," "continuous," and "exclusive" may all be tightened (or relaxed) gradually.[171] Employee representation on corporate boards of rich firms may gradually increase as the value of the firm rises. Nothing about LFR turns on the presence of a *single* line separating those subject to it from those who are not.

Another possible objection to LFR is more fundamental than the ones just considered. Adherents to a long-influential view in law-and-economics would explain that LFR is a bad idea because redistribution should be carried out only through the tax-and-transfer system.[172] There is a large literature debating the merits of this tax-only argument, but there is no need to delve into it here. That argument, after all, states that *no* legal rules should make distinctions based on individuals' incomes.[173] So it cannot explain why distributionally sensitive reforms of corporate and antitrust law are all good ideas while LFR is not.

There is, it appears, no easy answer to the LFR puzzle.[174] This is not to say that no answer exists. Perhaps one just needs

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170. *See* Lawrence Zelenak, *Tearing Out the Income Tax by the (Grass)Roots*, 15 FLA. TAX REV. 649, 659–60 (2014) (noting that as late as "1939, only one American in twenty paid the income or was a dependent of an income taxpayer. By the war's end, nearly three of every four Americans were covered by the income tax" (citations omitted)).

171. For example, as the possessor's wealth increases, the requirement that possession must be "open" may morph into "observable," then "discoverable," and then may be dropped altogether.

172. *See supra* note 27 and accompanying text.

173. *See generally* Kaplow & Shavell, *Why the Legal System Is Less Efficient*, *supra* note 11 (arguing that there are efficiency-based reasons to oppose all income-based redistribution through legal rules).

174. Although this Article does not focus on doctrinal analysis, it is worth noting that one additional possible objection to LFR would be that it is unconstitutional under the Due Process Clause, Equal Protection Clause, or Takings Clause. But such a claim is implausible. Due Process and Equal Protection claims concerning economic liberty face rational basis review, which functions as a "near per se validation" of the challenged law. Austin Raynor, Note, *Economic Liberty and the Second-Order Rational Basis Test*, 99 VA. L. REV. 1065, 1066 (2013) (quoting Jessica E. Hacker, Comment, *The Return to Lochnerism?*

to know where to find it. Political theory reflects a wide range of well-thought-out views about both the nature of law and the demands of fairness and justice. It is a natural place to look for the answer.

B. POLITICAL THEORY AND LFR

The nature of law and the demands of justice are both vast subjects, but focusing on the intersection between the two narrows the inquiry. A study of this intersection may start at either end. One can consider the essence of law and then ask how it reflects concerns about fairness. Or one can do the reverse. The following discussion starts with the first approach and then turns to the second.

1. LFR and the Rule of Law

Whatever else makes law different from ethics, social conventions, or a ruler's whim, the rule of law is certainly on the list. In fact, one view is that the rule of law *is* what makes law law.[175] If the rule of law incorporates distributional considerations, perhaps it would help resolve the LFR puzzle.

Are justice, fairness, and equality part of the rule of law? The answer that comes from what is known as the "thin view" is a decisive "no." Joseph Raz argued that "the rule of law is just one of the virtues which a legal system may possess . . . . It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or

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The Revival of Economic Liberties From David to Goliath, 52 DEPAUL L. REV. 675, 730 (2002)). Takings Clause claims against LFR will likely face regulatory takings analysis, which operates as an "almost unrebuttable presumption in favor of the government." Basil H. Mattingly, *Forum Over Substance: The Empty Ritual of Balancing in Regulatory Takings Jurisprudence*, 36 WILLAMETTE L. REV. 695, 699 (2000).

175. As Andrei Marmor explains:

> The key idea here is that governance by law is regulation of human conduct by general norms. As long as we can agree that at least one distinctive feature of governance by law consists in this normative form of regulation, namely, that it is essential to law that it purports to regulate human conduct by general norms, we may have all that we need to ground the ideal of the rule of law.

Andrei Marmor, *The Ideal of the Rule of Law*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 666, 668 (Dennis Patterson ed., 2010).

for the dignity of man."[176] In Raz's view, LFR cannot possibly violate the rule of law.

Friedrich Hayek could not have disagreed with Raz more strongly. Hayek claimed that equality before the law is an essential feature of the rule of law,[177] and his view prevailed. Today, "[e]quality in the sense of generality is probably basic to most ideas of law: law, in other words, means creating general rules to be applied 'without regard to persons,' and specifically without regard to any person's wealth or status."[178]

The principle of equality/generality of law lead Hayek and other classical liberals to a very strong conclusion about government redistribution: "any policy aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law."[179] Robert Nozick, a libertarian, was even more adamant. He argued that the only state that is justified is a minimal state that engages in no redistribution of any kind, whether to achieve distributive justice or any other aim.[180] So Hayek, Nozick, and other classical liberals and libertarians object to

176. JOSEPH RAZ, THE AUTHORITY OF LAW 211 (1979).

177. *See* HAYEK, *supra* note 24, at 316–18 (positing that "general and equal laws provide the most effective protection against infringement of individual liberty").

178. Maimon Schwarzschild, *Constitutional Law and Equality*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 160, 173 (Dennis Patterson ed., 2010). For a discussion of several interpretations of the generality concept, see Paul Gowder, *Equal Law in Unequal World*, 99 IOWA L. REV. 1021, 1028–29 (2014).

179. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 87–88 (1994). While Hayek did not go as far as libertarians in rejecting all forms of social safety net, later softening his categorical view of redistribution, he remained adamant in accusing modern welfare states of blurring:

> [The] line that separates a state of affairs in which the community accepts the duty of preventing destitution and of providing a minimum level of welfare [which Hayek found acceptable] from that in which it assumes the power to determine the 'just' position of everybody and allocates to each what it thinks he deserves.

HAYEK, *supra* note 24, at 405.

180. *See* NOZICK, *supra* note 11, 168–71; *see also* Bas van der Vossen & Billy Christmas, *Libertarianism*, STAN. ENCYC. OF PHIL. (Dec. 11, 2023), https://plato.stanford.edu/entries/libertarianism [https://perma.cc/5EDG-CMGX] (explaining that "taxation for the purposes of giving assistance to other members of society is ruled out" by libertarians).

redistributive taxes and redistributive legal rules alike.[181] They would find LFR as offensive as the current U.S. income tax. The bottom line is that neither Raz nor Hayek nor Nozick would consider LFR to be *uniquely* objectionable. Raz would find it unproblematic (at least from the rule-of-law perspective), while Hayek and Nozick would find it repulsive along with any other redistributive tax or legal rule.

The classical liberal opposition to progressive taxation on the rule-of-law grounds is not shared by many political philosophers. But most philosophers do share the belief that equal application of law to everyone is an essential feature of the rule of law.[182] It is also uncontroversial that "equal application" admits differentiating among individuals when appropriate. Special rules for children and people with disabilities are wholly unobjectionable.[183] However, income and wealth are never mentioned, as far as I can tell, as characteristics justifying unequal treatment.

The rule-of-law account that goes farther than most in incorporating distributional concerns comes from Paul Gowder. He argues that if the law prohibits people from stealing (food) and sleeping on sidewalks, the law must also provide people with reasonable means to comply with its demands.[184] On this view, the rule of law requires some redistribution to the very bottom—or abolition of legal rules that the poor cannot meet—at least in

181. As Paul Gowder points out, it is odd that Hayek viewed proportionate tax as general, given that this tax takes different amounts from people with different incomes. Gowder, *supra* note 178, at 1032. Only a poll tax (same dollars from everyone) would seem to comply with the generality requirement. *Cf. id.* ("[I]t is rather puzzling that one is allegedly general while the other is not. The point is that which tax counts as formally general under the similarity conception shifts under different descriptions of the same taxes.").

182. *Id.* at 1023 ("The principle that the law must be general—that it must apply equally to all—is a fundamental demand of legal morality, associated with the ideal of the rule of law.").

183. *See* Lord Bingham, *The Rule of Law*, 66 CAMBRIDGE L.J. 67, 73 (2007) ("[S]ome special legislative provision can properly be made for some categories of people such as children, prisoners and the mentally ill, based on the peculiar characteristics of such categories . . . ."); *see also* Gowder, *supra* note 178, at 1031 (highlighting that certain laws may permissibly differentiate based on disability where they may not permissibly differentiate based on race).

184. *See* Gowder, *supra* note 178, at 1062 ("The rule of law generates the demand to put a stop to extreme poverty or abolish the laws against theft; we cannot abolish the laws against theft, therefore the rule of law generates the demand to put a stop to extreme poverty.").

cases where circumstances made it impossible for people to avoid destitution.[185]

Gowder's account stimulated lively responses, including from Robin West who focused specifically on the inequality-reducing aspect of Gowder's vision.[186] But neither West nor Gowder have argued that income or wealth should be added to age and disability as justifying unequal treatment . . . except when it comes to taxation. "My sense is that in the real world, the rule of law rarely impedes states from redistributing wealth in the ways those of us on the left would like. Politics is a much more substantial impediment," Gowder writes.[187] An alternative view would be that, in the real world, progressive taxes do violate the rule of law and states levy them anyway. Another possibility is that—not only are progressive taxes consistent with the rule of law—but LFR is as well. Yet politics constrains both forms of redistribution, albeit to a different degree. As far as I can tell, neither Gowder nor any other political philosopher has considered why a more burdensome tax rate for the rich does not violate the rule of law, but a more onerous property or antitrust regime does.

Moving further to the left we find Critical Legal Studies (CLS) and Marxist scholars. Marx himself believed that "the rule of law is only another mask for the rule of a class."[188] CLS scholars agree that at least some aspects of the rule of law reinforce and perpetuate existing power structures.[189] Needless to say, adherents to these and similar views would have no trouble endorsing LFR. So their ideas would not help in resolving the LFR

185. *See id.*

186. *See* Robin West, *Paul Gowder's Rule of Law*, 62 ST. LOUIS U. L.J. 303, 308, 311 (2018) (analyzing Gowder's arguments as they relate to poverty in light of other scholars' perspectives, and endorsing an "idea of law as having an inclusive and generous meaning").

187. Paul Gowder, *Resisting the Rule of Men*, 62 ST. LOUIS U. L.J. 333, 338 n.18 (2018).

188. Edward P. Thompson, *The Rule of Law*, *in* MARXISM AND LAW 130–31 (Piers Beirne & Richard Quinney eds., 1982).

189. *See* Mark Tushnet, *Critical Legal Studies and the Rule of Law* (noting, as an example, how supporters of rule of law may "invoke it against radicals who seek to replace regimes that fall within [an ideologically defined] 'acceptable' range, while mounting no such objections to similar extralegal efforts to displace regimes outside that range"), *in* THE CAMBRIDGE COMPANION TO THE RULE OF LAW 328, 329 (Jen Meierhenrich & Martin Loughlin eds., 2021).

puzzle. And the same turns out to be true, as this discussion reveals, about other accounts of the rule of law as well.

2. LFR and Theories of Justice

What if we start from the opposite end—consider theories of justice and see if their implications for legal design shed some light on LFR? This plan would be laughable if it meant a detailed analysis of centuries of human thought about what makes a good society. But no such detailed analysis is needed for our purposes. We can get to the LFR puzzle in a few quick moves.

To start, it is useful to divide moral theories that are used to evaluate social arrangements into consequentialist and non-consequentialist (or deontological) ones.[190] Consequentialists assess various states of the world by the moral goodness of outcomes in each state.[191] Welfarism—a widely accepted (though by no means the only) type of consequentialism—evaluates goodness by reference to individual welfare.[192] There are many ways of performing this evaluation.[193] So different forms of welfarism—and, more broadly, consequentialism—would typically yield different assessments of any given regulatory scheme. But what unites all strands of consequentialist moral philosophy is that they perform their evaluation with no preconditions. Whatever set of rules yields the best outcome within a given ethical framework is the set a consequentialist would endorse.[194]

The implication for the LFR puzzle is clear: consequentialist moral philosophy has no answer for it, at least not a general one. That is because consequentialism does not rule out any

190. *See* MATTHEW D. ADLER, MEASURING SOCIAL WELFARE: AN INTRODUCTION 24–26 (2019) (providing a brief summary of the differences and debates between consequentialist and non-consequentialist theories).

191. *See* Matthew D. Adler, *Against "Individual Risk": A Sympathetic Critique of Risk Assessment*, 153 U. PA. L. REV. 1121, 1183–86 (2005) (defining a consequentialist moral view as one containing (1) "a criterion for ranking outcomes" and (2) "a rule for determining what choice an actor should make in any choice situation," then describing various manners of evaluating rankings of "goodness" in outcomes).

192. *See id.* at 1185 ("The moral goodness of outcomes hinges on their welfare goodness, their goodness for welfare subjects.").

193. For example, welfare consequences may be judged by adding everyone's utilities (utilitarianism), by equalizing utilities as much as possible (egalitarianism), or by making more complex evaluations (prioritarianism and others). *See id.* at 1185–86.

194. *See* Adler, *supra* note 191.

particular legal arrangement *a priori*, LFR included.[195] If LFR yields the best overall outcome, it should be adopted. If LFR produces a bad outcome, it should be rejected, but the same is true of progressive taxes and any other form of redistribution. Granted, it may turn out that a particular type of welfarist or consequentialist philosopher may deduce a reason to reject LFR while endorsing progressive taxes and generally redistributive legal rules. But no such reason has been offered so far.

Turning from consequentialism to deontology, we find a very different way of evaluating social policy. Deontological theories incorporate an overriding moral constraint against harming others.[196] Terms "overriding" and "moral" are meant to emphasize that even if harming another person would produce greater total wealth, welfare, wellbeing or whatever other metric of the good one prefers, deontological theories forbid such action. For example, a deontologist would find it unacceptable to kill one person in order to harvest body parts that would save five others destined to die otherwise.[197] Thus, these theories "erect moral barriers to the promotion of the good."[198]

The deontological concept of "harm" is potentially very broad. It may encompass, depending on a particular deontologist's view, being injured, deprived of liberty, dignity, or resources, lied to, or subjected to reputational damage.[199]

Different areas of law reflect deontological constraints to a different degree. Criminal law, as the organ harvesting example suggests, is more deontological; contract law less so.[200] This is

195. For example, rule consequentialism (one of several consequentialist theories) holds that "[a]n action is morally right if and only if it does not violate the set of rules of behavior whose general acceptance in the community would have the best consequences—that is, at least as good as any rival set of rules or no rules at all." William Haines, *Consequentialism*, INTERNET ENCYC. OF PHIL. (Jan. 25, 2024), https://iep.utm.edu/consequentialism-utilitarianism [https://perma.cc/A676-DG6C].

196. *See* SHELLY KAGAN, NORMATIVE ETHICS 71–73 (2018).

197. *Id*. at 71.

198. *Id*. at 73.

199. *See id*. at 106.

200. *See* Peter Benson, *Contract* ("Among contemporary theories of contract law, the economic approach . . . is currently the dominant academic theoretical perspective, particularly in the United States."), *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 29, 54 (Dennis Patterson ed., 2010); *see also* Murphy, *supra* note 25, at 453 ("[C]ontract and promise, no less than property, can only be justified instrumentally—by appeal to the social good that these

why first-year law students learn about efficient breach but not efficient assault.[201] So modifying criminal law to reflect LFR would be unwise. No matter how much one despises the rich, it is not hard to articulate a deontological objection to a legal system where assaulting a poor person is a crime but assaulting a rich person is not. In contrast, arguments for deontological constraints in corporate law, commercial law, competition law, and regulation in general are much weaker.[202] So those and similar areas are the ones where LFR should raise no objections. It is always possible that someone will construct a deontological theory that would reject LFR but endorse progressive taxes and redistributive legal rules. To my knowledge, no such theory exists.

We conclude this review of theories of distributive justice with two accounts that are especially focused on melding moral philosophy with law and redistribution. The first comes from Ingrid Robeyns. Not long ago, she offered a new way of evaluating social policy—a theory she calls limitarianism.[203] The idea is easy to grasp: "Limitarianism is . . . the view that it is not morally permissible to be rich."[204] Robeyns emphasizes that

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conventional practices produce."). This is not to say that deontological constraints have not been suggested in contract law, as the example of promise-breaking as a type of harm makes clear.

201. *See* Murphy, *supra* note 25, at 479 (pointing to a tight connection between criminal law and morality in contrast with property, contract, and bankruptcy law).

202. *See* Matthew D. Adler, *Regulatory Theory* ("[P]lausible and reasonably comprehensive nonwelfarist normative accounts of regulation have not yet been developed with any rigor."), *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 590, 593 (Dennis Patterson ed., 2010); *see also* Murphy, *supra* note 25, at 460 ("[I]nstrumentalism about promise and property is obviously consistent with non-consequentialist accounts of other parts of morality.").

203. *See* Ingrid Robeyns, *Having Too Much*, 58 NOMOS 1, 1 (2017) [hereinafter Robeyns, *Having Too Much*].

204. *Id.* at 4. Of course, Robeyns has more to say than a call for soaking the rich. For example, she explains:

> The whole point about introducing a focus on the upper side of the distribution is to enable us to ask and investigate what the distinct reasons are for worrying about extreme wealth. Excess wealth creates worries that concern all of the following elements: not asking enough about who will pay for the costs of redistribution; the undermining of democratic values by those who can do so at no significant cost to themselves; a radical waste of resources; power imbalances; the loss of moral autonomy; domination and the undermining of human dignity; and easy funding solutions to collective action problems not being seized.

limitarianism is both a moral and a political doctrine, and she justifies it with both virtue ethics and concerns about "the value of democratic equality and . . . social and distributive justice."[205]

Robeyns is still working out many important details of her theory.[206] So it is not surprising that we do not find a lot of specifics about how she would eliminate the rich in practice. But she does touch on the topic, and here is what she has to say: Limitarianism "means that the state should tax away any surplus that people have, or reform social and economic institutions in such a way that no one gains any surplus in the first place."[207] Robeyns may endorse LFR once she considers it, but it is not the first thing that comes to her mind.

The second account is developed by Liam Murphy and Thomas Nagel. In an influential book, the authors considered what tax liabilities are morally justified for people with different incomes, and they found the question ill-conceived.[208] The concept of a tax burden, Murphy and Nagel explain, relies on a comparison between pre-tax and after-tax income.[209] Yet that comparison—and in particular the concept of pre-tax income—has no moral significance.[210] Rather, the only way to evaluate the tax system is by evaluating the justice of the resulting distribution of resources and opportunities.[211] "There are no property rights antecedent to the tax structure,"[212] they explain, so it is incoherent to evaluate this structure by considering its effects on property rights.[213] If there is no property right to pre-tax income, any rate structure may be justified in principle.

Ingrid Robeyns, *Why Limitarianism?*, 30 J. POL. PHIL. 249, 267 (2022) [hereinafter Robeyns, *Why Limitarianism*?].

205. Robeyns, *Having Too Much*, *supra* note 203, at 30–31.

206. For example, she is still thinking about how to handle business entities. *See* Robeyns, *Why Limitarianism?*, *supra* note 204, at 250 n.3.

207. Robeyns, *Having Too Much*, *supra* note 203, at 30.

208. *See* MURPHY & NAGEL, *supra* note 25, at 32–33 (explaining how progressive philosophers rebuff any *a priori* constraint on redistribution).

209. *See id*. at 33.

210. *See id.*

211. *See id.* at 75 ("The justification may refer to considerations of individual liberty, desert, and responsibility as well as to general welfare, equality of opportunity, and so forth.").

212. *Id.* at 74.

213. *Id.*

But of course, if "there are no property rights antecedent to the tax structure," there are surely no property rights antecedent to property rights. These rights are themselves creations of a legal system.[214] So property rights may be independent of income in one system, while in another the opposite may be true. For instance, we can imagine a legal regime where property rights get progressively weaker as the property-holder's income goes up. Moreover, as Murphy argues in a more recent paper, the same logic applies to contracts as well.[215] And if property and contract are purely conventional, secondary regulatory regimes like antitrust, bankruptcy, securities regulation and corporate law surely are as well. There is no fundamental objection to LFR on this view. Yet neither Murphy nor Nagel nor anyone agreeing with them advocates anything like it.

One remaining possibility is that the problem with LFR is not that it violates the ideals of fairness and justice, nor that it is contrary to the rule of law, but that it inconsistent with conventional morality. Murphy points out that law works well when its rules align both with social practice and with conventional morality,[216] and other philosophers agree.[217] Perhaps this morality rejects the LFR, so the formal law is wise to eschew it as well.

But this answer is rather conclusory. How can we tell if LFR violates conventional morality while progressive taxation and the general idea of redistributive legal rules do not? Appeals to conventional morality struggle to explain how it can be

214. *See* Murphy, *supra* note 25, at 474 ("I conclude that both promise and property are artificial, morally speaking, so that the law of the market—contracts and property—does not have individual rights at its foundation."); *see also* Andrew Sepielli, *The Law's "Majestic Equality"*, 32 LAW & PHIL. 673, 698 (2013) (accepting the view that "there are no natural, pre-political property rights; legal property rights are conventional"); *see also* Merrill & Smith, *supra* note 43, at 1851 (arguing for a conventional rather than a natural rights view of property, so that "the core of property law must rest on a simple foundation of everyday morality"); *cf.* Murphy, *supra* note 25, at 454 (acknowledging, but disagreeing with, the view that "many people think that contract and property are grounded in a natural morality of promissory and proprietary rights and obligations"). Curiously, Hayek agrees with Murphy. HAYEK, *supra* note 24, at 226.

215. *See* Murphy, *supra* note 25, at 474.

216. *See id.* at 486. Conventional morality is "the set of moral norms that are generally accepted in a society." *Id.* at 478. In order for norms to be generally accepted, they should be, at a minimum, generally understood. Merrill & Smith, *supra* note 43, at 1856. Few things about law are.

217. KAGAN, *supra* note 196, at 78.

discovered even regarding familiar and vigorously debated questions like the permissibility of abortion or the death penalty.[218] It is unrealistic in the extreme to expect that one may find an answer to the LFR puzzle in "contemporary community standards,"[219] or "community values,"[220] or "the moral consensus."[221] Thus, we are back to where we started.

The bottom line, then, is that political philosophy offers no solution to the LFR puzzle. Libertarians and classical liberals believe that all income- or wealth-based redistribution violates the rule of law.[222] Gowder argues that redistribution is consistent with the rule of law (and even required by it in some cases) but does not elaborate on the legal-versus-tax rules distinction and says nothing about redistribution from the top.[223] Consequentialists have no obvious *a priori* reasons to reject LFR. Deontological theories of justice would find it easy to explain why LFR is unacceptable if applied to matters of personal liberty and bodily integrity, but whether the same is true of economic regulation is an open question. Murphy (with and without Nagel) advances an argument that supports redistribution through taxes and through legal rules in any form, so he does not offer a reason to stop short of embracing LFR.[224] The puzzle persists.

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218. *See* Wojciech Sadurski, *Conventional Morality and Judicial Standards*, 73 VA. L. REV. 339, 355 (1987) (explaining that when communities are divided on the validity of a practice, no "underlying consensus" exists to determine conventional morality); *see also* John Hart Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 44–49 (1978) (analyzing contemporary Supreme Court cases and social issues to argue that there is no reachable moral consensus in law or society).

219. Sadurski, *supra* note 218, at 351 (quoting Roth v. United States, 354 U.S. 476, 489 (1957)).

220. *Id.* (quoting Commonwealth v. Balthazar, 318 N.E.2d 478, 481 (1974)).

221. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 187 (1976)). Merrill and Smith are surely correct in saying that for morality to effectively shape behavior, the moral rules must be "general, simple, and robust." Merrill & Smith, *supra* note 43, at 1851, 1856. No punching and no taking are their examples. *Id.* at 1851. Clearly, LFR does not fit the bill.

222. *See generally* NOZICK, *supra* note 11; van der Vossen & Christmas, *supra* note 180.

223. *See* Gowder, *supra* note 178.

224. *See generally* MURPHY & NAGEL, *supra* note 25; Murphy, *supra* note 25.

III. LAW FOR THE RICH AND THE GREAT AMERICAN PASTIME

Our inquiry has reached an impasse. Neither political philosophy, nor economic theory, nor institutional or practical design considerations explain why we should accept progressive taxation, embrace redistributive legal rules in general, but reject LFR. It is difficult to imagine that no one has ever thought of something like it. So why has no one described it, let alone defended it?

A plausible answer is that the objection to LFR is so basic and fundamental that anyone who thought of LFR rejected it out of hand. Given that no scholarly theory explains such unequivocal rejection, it is time to turn from analysis to observation.

A. FROM LAW TO BASEBALL

To test our intuitions about LFR, it is useful to strip away as much conceptual scaffolding as possible. Professional sports offer a useful testing ground for what is fair and unfair, acceptable and unacceptable on a visceral level.

To be concrete, consider baseball—the great American pastime. Baseball is a game, and only a game. It is absent from John Rawls's original position.[225] It does not involve dignity, liberty, autonomy, or any other fundamental value. Real human suffering is neither diminished nor worsened by home runs and strikeouts. The outcome of the World Series does not matter to a social planner designing a just and free society.[226] Yet millions of fans care deeply about their teams.[227] So it is useful to consider how Major League Baseball (MLB) structures its competition.

Baseball teams vary greatly in their financial prowess. The payroll of the New York Yankees, to take one example, dwarfs that of the Tampa Bay Rays, reflecting a vast disparity in financial strength of the two teams.[228] Yet the Yankees and the Rays

225. *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

226. Unless, of course, the planner is a fan of one of the teams involved.

227. *See* Maury Brown, *MLB Attendance Surpasses 70 Million in 2023, Scoring Its Largest Increase Since 1998*, FORBES (Oct. 2, 2023), https://www.forbes.com/sites/maurybrown/2023/10/02/mlb-2023-attendance-surpasses-70-million-largest-increase-since-1998/?sh=7d68c1829fa7 [https://perma.cc/X6BF-XKKP].

228. The payroll of the Yankees 2023 opening day roster was almost $280 million. The number for the Rays was close to $70 million. *See The Pay's the Thing*, BASEBALL PROSPECTUS, https://legacy.baseballprospectus.com/

not only play the same sport in the same professional league, they play in the same five-team division, so they face each other again and again.[229] In light of the teams' finances, their contests hardly seem like fair fights. What does MLB do about this? What should it do?

Both philosophers[230] and economists[231] have thought about fairness in sports, professional and otherwise. Great minds like Plato and Rawls used sports to sharpen their analyses and check their intuitions.[232] Yet no work that I am aware of considers what kinds of changes to the rules of the game (be it baseball or any other sport) should be adopted—or are already in place—to reflect differences in the financial strengths of competing teams.[233] Asking this question would lead one to plenty of highly illuminating examples in baseball and other professional sports

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compensation/cots [https://perma.cc/5LKT-KH29]. If, in addition, we compare the likely sponsorship revenue available to the players on each team, the gap would get much wider.

229. For example, the two teams played each other thirteen times in 2023. *See The New York Yankees Were 7-6 Versus the Rays This Season*, STATMUSE, https://www.statmuse.com/mlb/ask/yankees-record-vs-rays-this-season [https://perma.cc/VXS6-KGH9].

230. *See generally* ROBERT L. SIMON ET AL., FAIR PLAY: THE ETHICS OF SPORT (4th ed. 2018); ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF SPORT (Mike McNamee & William J. Morgan eds., 2015) [hereinafter ROUTLEDGE HANDBOOK].

231. *See, e.g.*, William W. Berry III, *Superstars, Superteams, and the Future of Player Movement*, 13 HARV. J. SPORTS & ENT. L. 199, 200 (2022); Peter J. Sloane, *The Economics of Professional Football Revisited*, 62 SCOTTISH J. POL. ECON. 1, 1 (2015); Stefan Szymanski, *The Economic Design of Sporting Contests*, 41 J. ECON. LITERATURE 1137, 1138 (2003); Allen R. Sanderson & John J. Siegfried, *Thinking About Competitive Balance*, 4 J. SPORTS ECON. 255, 255 (2003).

232. *See* Albert Piacente, *Reverse Play: Toward a Philosophy from Sport*, 9 SPORT ETHICS & PHIL. 58, 60 (2015) (referencing Plato's "appeals to sport" in REPUBLIC (Christopher Emlyn-Jones & William Preddy eds. & trans., 2013) and LAWS (Thomas L. Pangle trans., 1980), and Rawls' basketball analogy in A THEORY OF JUSTICE, *supra* note 225).

233. For example, the nearly five-hundred pages of the ROUTLEDGE HANDBOOK OF THE PHILOSOPHY OF SPORT say nothing on the subject, despite having chapters on *Fair Play*, *Competition*, *Sport as a Legal System*, and even *Sport, Commerce and the Market*. *See* Sigmund Loland, *Fair Play*, *in* ROUTLEDGE HANDBOOK, *supra* note 230, at 333; Paul Gaffney, *Competition*, *in* ROUTLEDGE HANDBOOK, *supra* note 230, at 287; John S. Russell, *Sport as a Legal System*, *in* ROUTLEDGE HANDBOOK, *supra* note 230, at 255; Adrian Walsh, *Sport, Commerce and the Market*, *in* ROUTLEDGE HANDBOOK, *supra* note 230, at 411.

alike. So it seems wise to take Ludwig Wittgenstein's advice from his study of games: "don't think but look!"[234]

Looking at MLB reveals that the league redistributes both through taxes and through non-tax means. The MLB has a luxury tax.[235] Rich teams with high payroll like the Yankees pay into a common pool, and the resulting revenue is transferred to poor teams like the Rays.[236] So the Yankees are burdened and the Rays get the benefit. The Yankees owners do not love this arrangement, but they understand MLB's concerns about competitive imbalance and support the system.[237]

In contrast, no one would think of suggesting that when the Rays play the Yankees, the Rays should have an extra fielder, or four outs in an inning against the Yankees' three. Changing the rules (as opposed to levying taxes) would undermine something fundamental about baseball. So redistributing through taxes is acceptable while redistributing by changing the rules of the game is not, even though either measure would pursue the same goal of compensating for competitive disadvantage resulting from financial disparity.[238]

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234. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 31e (G.E.M. Anscombe trans., Basil Blackwell Ltd. 3d ed., 1968). Needless to say, the great philosopher was not really urging his readers to stop thinking. He was simply pointing out that when one encounters a difficult conceptual problem, one would benefit from observing relevant real-world behavior.

235. *See* Berry, *supra* note 231, at 212 ("MLB does not have a salary cap, but imposes a luxury tax on teams that exceed a certain level of total compensation for their payroll in a given year. This results in an economic redistribution from the wealthy teams to the less wealthy teams.").

236. *Cf. id.* The use of "poor" here is a relative term, of course. For a discussion of a luxury tax, see Szymanski, *supra* note 231, at 1172.

237. *See* Ronald Blum, *Yankees' Steinbrenner Irked by A's and Other Low-spenders, Says It's 'Not Good for the Game'*, ASSOCIATED PRESS (June 13, 2023) https://apnews.com/article/hal-steinbrenner-yankees-athletics-las-vegas-de00f559ab7e31f83db439b3bc4e4893# [https://perma.cc/A6KB-GTEC] (describing how Yankees' owner Hal Steinbrenner supports both a salary cap and a payroll floor to preserve competition in the MLB).

238. *Cf.* Helmut M. Dietl et al., *The Effect of Luxury Taxes on Competitive Balance, Club Profits, and Social Welfare in Sports Leagues*, 5 INT'L J. SPORT FIN. 41, 41 (2010) (finding that a luxury tax "produces a more balanced league"). A luxury tax is just one of several mechanisms that professional leagues use to improve competitive balance. *See, e.g.*, Berry, *supra* note 231, at 212–14 (describing the reverse draft, the salary cap, and the luxury tax as tools to promote parity among teams); Ira Horowitz, *The Increasing Competitive Balance in Major League Baseball*, 12 REV. INDUS. ORG. 373, 374 (1997) (citing MLB's use of

But this conclusion is too simple. It turns out that some rule changes that harm the rich and favor the poor *are* acceptable after all. For some time, MLB has been expanding the number of teams eligible to play in the postseason and compete for the championship.[239] Under the rules in place between 1901 and 1968, the entire postseason consisted of two teams competing in the World Series.[240] MLB expanded playoffs to four, eight, ten, and eventually twelve teams by 2022.[241] Several considerations went into MLB's decision to expand,[242] but our focus is on its distributional effects.

There is little doubt that statistically, the wealthiest teams are most likely to win their divisions.[243] They can sign the best players and hire the best managers, physicians, analysts, and trainers. Especially given baseball's long, 162-game season, these advantages make all the difference.[244] Under the old playoff rules, a team like the Rays had a very slim chance of finishing ahead of the two financial behemoths playing in their division: the Yankees and the Boston Red Sox. So the Rays' chances of making the playoffs were almost nil.[245] Today,

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the reserve clause, the reverse-order draft, and league expansion as measures intended to improve competitive balance); Piacente, *supra* note 232, at 65 (making similar arguments about the National Football League).

239. *See* Young Hoon Lee, *The Impact of Postseason Restructuring on the Competitive Balance and Fan Demand in Major League Baseball*, 10 J. SPORTS ECON. 219, 221 (2009) (describing MLB playoff expansion from 1901 to 1994).

240. *See id.*

241. *See id.* (describing expansions from two teams, to four teams, to eight teams); Fred Bowen, *MLB Playoffs Expansion Aims for Fairness Without Killing the Fun*, WASH. POST (Oct. 6, 2022), https://www.washingtonpost.com/kidspost/2022/10/06/mlb-playoffs-expansion-aims-fairness-without-killing-fun [https://perma.cc/RL36-QLGE] (describing MLB's 2022 expansion from a ten- to a twelve-team playoff format).

242. *See* Sanderson & Siegfried, *supra* note 231, at 265 (noting that expanding playoff eligibility keeps more fans interested for longer during the regular season).

243. The Commissioner's Blue Ribbon Report on Baseball Economics reflects the same belief and backs it up with some highly suggestive correlations. *See id.* at 259.

244. *Cf.* Chad Jennings, *Is MLB's 162-Game Season Too Long? Players Are Split on Whether Changes Are Needed*, N.Y. TIMES (June 10, 2024), https://www.nytimes.com/athletic/5544091/2024/06/10/mlb-season-length-player-poll [https://perma.cc/4UAW-3MZC].

245. The Tampa Bay Rays (originally the Tampa Bay Devil Rays) joined the MLB in 1998. For the first ten years, they finished either fourth or fifth in their

however, the Rays may finish *fourth* in their five-team division and still make the playoffs.[246] And because playoff series are short, anything can happen.[247] Clearly, poor teams benefited from the postseason expansion.[248] That change indirectly redistributed playoff ticket revenue and advertising proceeds from the wealthy to the poor teams.

Yet when MLB expanded postseason eligibility, the change barely caused a ripple.[249] It certainly did not infuriate the fans while there is no doubt that giving the Rays a fourth fielder would spell the end of MLB. Why the difference?

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division and never made the playoffs. After 2008, they made the playoffs nine times, including after finishing third in 2022 and second on four occasions. *See Tampa Bay Rays Team History & Encyclopedia*, BASEBALL REFERENCE, https://www.baseball-reference.com/teams/TBD/index.shtml [https://perma.cc/UR4W-5CYZ].

246. Each of the American and National Leagues are separated into three five-team divisions. The winning teams from each division, as well as the three teams with the next-best overall record from each League, form the twelve teams that go the playoffs. There is no rule preventing the three teams with the next-best record from coming from the same division, meaning that as many as four teams from a five-team division could advance to the playoffs. *See* Anthony Castrovince, *MLB's Postseason Format, Explained*, MLB NEWS (Sept. 25, 2024), https://www.mlb.com/news/mlb-playoff-format-faq [https://perma.cc/C6DQ-QVKJ].

247. And, in fact, "anything" does happen. "In the nine seasons since MLB expanded the playoffs to include a wild-card game . . . the team with the best regular season record in its league has gone to the World Series less than half of the time (7 out of 18)." Bowen, *supra* note 241; *see also* Sanderson & Siegfried, *supra* note 231, at 271 ("Lengthening a series reduces the probability that the weaker opponent will win . . . .").

248. *See* Sanderson & Siegfried, *supra* note 231, at 271 (noting that increasing "the percentage of teams eligible for a championship reduces the chances that the best team will capture the championship"); Brian P. Soebbing, *Competitive Balance and Attendance in Major League Baseball: An Empirical Test of the Uncertainty of Outcome Hypothesis*, 3 INT'L J. SPORT FIN. 119, 124 (2008) (finding that the adoption of the wild card format "increase[s] the chances of teams reaching the playoffs" and increases MLB competitive balance).

249. *Cf.* Claire Smith, *Major League Survey Finds Support for More Playoffs*, N.Y. TIMES (Jan. 8, 1993), https://www.nytimes.com/1993/01/08/sports/baseball-major-league-survey-finds-support-for-more-playoffs.html?searchResultPosition=1 [https://perma.cc/AN5W-747U] (reporting on the results of a survey of more than 9,000 fans, which found that "60 percent of the first 1,100 people responding were receptive to an expanded playoff format").

B. DISTRIBUTIONAL LIMITS OF BASEBALL RULES

Three reasons come to mind. First, the distributional effect of a playoff expansion is much less obvious than that of allowing poor teams to field an extra player. One needs to think about probabilities and outcomes that are often months away and seem to be affected by endless contingencies unfolding over hundreds of games. In contrast, having an extra fielder gives a team an immediate and highly visible advantage.

Another difference is that the playoff expansion does not concentrate its costs nearly as much as an extra player allowance does. Great as the Yankees are, they do not win the pennant every year—no team does and none comes close.[250] So expanded playoffs benefit, rather than harm, the Yankees during seasons when they fail to win their division. In contrast, if, for example, the six poorest MLB teams are allowed to use an extra fielder when they play any of the six richest teams, the resulting costs would be concentrated with pinpoint precision.

In addition to having distributional effects that are more obvious and more concentrated, permitting poor teams to field an extra player would violate the basic structure of the game. In philosophical terms, doing so would be contrary to constitutive rules—rules that make baseball (or any game) what it is.[251] It would be like allowing a poor soccer team to have two goalies, or letting a poor basketball team shoot at a hoop twice the size of the regular one. All these changes are simply beyond the pale.

In contrast, a playoff expansion changes nothing about the game's basic structure, it only changes the consequences of winning and losing. Granted, these consequences—going to the playoffs and eventually winning the World Series—is what MLB

250. Since the creation of six baseball divisions in 1995, teams with the most division wins are the New York Yankees in the American League and the Atlanta Braves in the National League, with the Yankees winning sixteen and the Braves winning eighteen of the thirty races. *See Major League Baseball Division Winners*, WIKIPEDIA (Oct. 4, 2024), https://en.wikipedia.org/wiki/Major_League_Baseball_division_winners [https://perma.cc/MLL4-8RXE].

251. *See* SIMON ET AL., *supra* note 230, at 25–26 (defining constitutive rules as unnecessary obstacles that transform an ordinary task into a challenging game); Dolores Miller, *Constitutive Rules and Essential Rules*, 39 PHIL. STUD. 183, 184 (1981) ("Constitutive rules thus create or define new forms, or descriptions of, behavior so that behavior—or the description as that kind of behavior—is logically dependent on the rules—would not exist without them.").

teams and fans care about.[252] Still, changing the consequences of winning is very different from changing the basic rules of the game.[253]

Yet the analysis cannot stop here. That is because changing the basic, constitutive rules of the game is exactly what MLB just did! One of the most basic rules of baseball is that every half-inning begins with bases empty.[254] Except now it does not. To shorten games, MLB adopted a new rule allowing teams to place a runner on second base if the game goes into extra innings.[255] This is just one example. The constitutive rule of soccer is that each team has eleven players on the pitch.[256] Yet that is not quite true either. If a soccer player commits an egregious foul, the player will see a red card and exit the contest.[257] The offender's team will play the rest of the game with only ten players. Turning to basketball, the basic scoring rule was simple for many decades: one point for a made free throw, two points for a made field goal.[258] That is until the National Basketball Association (NBA) created a three-point shot just for fun![259]

Thus, even at the highest level, different sports leagues do change constitutive rules. They do it to enhance entertainment

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252. *See* Sanderson & Siegfried, *supra* note 231, at 257 (describing the concerns of MLB about fan interest declining if more teams did not have a chance at winning).

253. The underlying intuition is the same as that discussed in the context of day fines. *See supra* text accompanying notes 108–10 (describing day fines which set monetary penalties based on the violator's daily income).

254. *See* Off. of the Comm'r of Baseball, *Official Baseball Rules*, MAJOR LEAGUE BASEBALL r.5.06(a) (2023), https://img.mlbstatic.com/mlb-images/image/upload/mlb/wqn5ah4c3qtivwx3jatm.pdf [https://perma.cc/X4JM-ATQY] (explaining the conditions under which a runner can occupy a base).

255. *See id.* at v ("Amended Rule 7.01(b) . . . includes starting each half-inning following the ninth inning with a runner on second base.").

256. *See Laws of the Game*, INT'L FOOTBALL ASS'N BD. § 3.1 (2024), https://www.theifab.com/laws/latest/the-players/#number-of-players [https://perma.cc/HN8R-X97E] ("A match is played by two teams, each with a maximum of eleven players; one must be the goalkeeper.").

257. *See id.* § 12.3 (enumerating the offences for which a referee may issue a red card, which "communicates sending-off").

258. *NBA Rulebook*, NAT'L BASKETBALL ASS'N r.5.I, https://official.nba.com/rulebook [https://perma.cc/L7KS-SCUV].

259. *Cf.* Tania Ganguli, *He Thought He Made N.B.A. History. All He Got Was 3 Points*, N.Y. TIMES (Dec. 15, 2021), https://www.nytimes.com/2021/12/15/sports/basketball/nba-three-pointer-chris-ford.html [https://perma.cc/4APZ-DBTV] (describing the adoption of the three-point shot in the NBA).

value. They do it to impose penalties. But they do not—as far as I can tell—do it to redistribute.

C. FROM BASEBALL BACK TO LAW

We can now consider if the three factors just described—obviousness, concentrated costs, and changes to the basic rules—shed light on the LFR puzzle. Obviousness clearly does. Making adverse possession easier to establish for everyone is a non-obvious redistributive change to a legal rule. Even though the change is general, it would surely harm the rich on average. They are more likely to own property while the poor are more likely to occupy someone else's premises out of sheer necessity.[260] The same analysis applies to expanding the fair use doctrine,[261] restricting the benefits of asset-protection trusts,[262] adding employees to corporate boards,[263] and so on. In contrast, LFR-type changes are much more obvious: make adverse possession rules more burdensome only for those above an income or wealth threshold, require employees on corporate boards only for rich firms, and so forth. If obviousness of redistribution matters in law and not only in baseball, a general change to a legal rule is easier to accept than LFR.

Concentration of burdens also carries over from sports to law. Despite the redistributive probabilistic effect of making adverse possession easier to establish in general, we should keep in mind that middle- and some low-income people own property too.[264] One can think of scenarios where such property owners are absent (perhaps for medical reasons), and others establish adverse possession. If doing so becomes easier, some middle- and low-income owners will suffer from the legal change. So the costs of loosening adverse possession rules are somewhat dispersed.

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260. *See* Lewis M. Segal & Daniel G. Sullivan, *Trends in Homeownership: Race, Demographics, and Income*, ECON. PERSPS., June 1998, at 53, 58, 61 (reporting that home ownership rises with incomes).

261. *See supra* note 156 and accompanying text (describing proposed reforms which would expand the fair use doctrine).

262. *See supra* note 143 and accompanying text (describing proposed reforms to asset protection trusts).

263. *See supra* notes 80, 132 and accompanying text (describing proposed reforms which would give workers more say in corporate decisionmaking).

264. *See* Segal & Sullivan, *supra* note 260, at 58 (reporting that even for households with incomes below $10,000 a year, the rate of homeownership was above thirty percent in 1977 and 1997).

But if the revised adverse possession rules are part of LFR, the new burden will fall only on the rich. That, of course, is the whole point. Yet given the baseball comparison, an extreme concentration of burdens makes the reform less attractive. Again, LFR looks less appealing than generally redistributive legal rules.

Finally, what of changing the basic rules of the game? Here, too, sports may teach us some lessons. Distributional limits, it turns out, do not constrain only legal rules. They constrain the basic rules of baseball, football, and basketball as well. These basic rules are not cast in stone. Professional leagues change them for various reasons, although changes are infrequent. But basic rules are never changed to benefit financially weaker teams at the expense of financially stronger ones. Apparently, there is something deeply problematic with this strategy, whether in law or in sports.

Major professional leagues seem to view changes to the basic rules—for any reason—as measures of last resort. MLB considered increasingly lengthy games to be a serious problem.[265] It introduced several new rules to speed things up.[266] All these rules changed the way games are played, though none were as stark as starting an inning with a runner on second base. Most likely, MLB simply could not come up with less drastic changes that would shorten games. Similar arguments can be made about other examples of changes to basic rules.[267]

In contrast, if MLB wanted more redistribution, it would have several ways to achieve it while keeping the game intact. It may raise the luxury tax (and, in fact, it did so on several occasions).[268] It may give weak teams extra picks early in the

265. *See* Joe Drape & Tania Ganguli, *With Fans Ever More Fickle, Sports Leagues Warm to Rule Changes*, N.Y. TIMES (Oct. 28, 2023), https://www.nytimes.com/2023/10/28/business/baseball-rule-changes-pitch-clock.html [https://perma.cc/MV4U-U3LN] (describing how MLB commissioner, Rob Manfred, viewed rule changes to speed up games as "a long time coming").

266. *See id.* (referring to MLB's decisions to adopt a pitch clock and increase the size of the base pads to make base stealing easier).

267. When a soccer player commits an egregious foul, the player reveals him- or herself to be a danger to others on the pitch. The only means of eliminating the danger is to throw the player out of the game. As for the three-point shot, one can imagine other means of making basketball games more entertaining, but those are likely to change the basic rules of the game as well.

268. *See* Berry, *supra* note 231, at 212 n.56 (describing an increase in MLB's 2021 luxury tax from 20% for teams with payroll above $210 million to 62.5%

draft.[269] It may adopt a salary cap.[270] It may expand playoffs even more. There seems to be much less of a need to change the fundamental rules of baseball to help financially weak teams given all these options.

If one finds this analysis persuasive, it certainly informs the LFR puzzle. LFR involves a redistributive change to legal rules that is both obvious and highly concentrated in its burdens. Moreover, tax law is available as an alternative means of redistribution. Given this alternative, LFR is undesirable. To put it another way, if, purely hypothetically, the Supreme Court decides tomorrow that the only tax allowed by the Sixteenth Amendment is a flat tax at a single rate without exemptions, LFR may become much less objectionable.

The MLB analogy is informative in another way as well. Recall that it is not at all controversial that the generality prong of the rule of law allows exceptions for certain categories such as children and the disabled.[271] Whether income or wealth may be viewed like age and disability for this purpose is uncertain. Curiously, this uncertainty does not exist in baseball. It is clear that giving a poor team an extra player would be roundly rejected by the fans. But if an adult team played a squad of fourteen-year-olds, most people would accept allowing the latter team to field not just one but multiple extra players. So in sports, age *is* different from income and wealth in deciding what adjustments are acceptable even if they violate the basic structure of the game.[272]

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for teams with payrolls over $250 million); Szymanski, *supra* note 231, at 1172 n.78 (describing an increase in MLB's luxury tax from 17.5% to 40% between 2003 and 2006).

269. "Extra" because weak teams already pick early. *See* Sanderson & Siegfried, *supra* note 231, at 270 (explaining that "[r]everse-order rookie drafts" have long been a "staple in many leagues").

270. Both football and basketball use a salary cap as another form of a tax-and-transfer-type redistribution. *See* Berry, *supra* note 231, at 213 (explaining that the NFL and NBA both impose a salary cap as a form of a tax-and-transfer-type redistribution that avoids changing the rules of the game).

271. *See supra* text accompanying note 183.

272. The same is true of disability. Because age and disability are often easily observable and largely immutable while income is not, welfare economics explains the distinction easily. *See* Mankiw et al., *supra* note 41, at 162–64 (describing some of the issues that arise in a tax scheme based on immutable characteristics rather than income). My intuition, however, is that the distinction between wealth and age has much more to do with a sense of fairness than with deadweight loss.

On the other hand, one cannot imagine a team of fourteen-year-olds with extra players joining Major League Baseball.

We should not get carried away with the baseball analogy. Great as baseball is, it can never solve the LFR puzzle. But it does offer useful clues. And if one happens to believe that baseball reveals some deep intuitions about human perceptions of fair play, there are reasons to think that LFR is, indeed, uniquely problematic. Perhaps there is a more robust theoretical support for this conclusion. If so, it is yet to come.

CONCLUSION

This Article has considered an unconventional idea: why not model redistributive legal rules on redistributive taxes? If it is acceptable to have special taxes imposed only on the rich, and if it is also acceptable to change legal rules to reflect distributional concerns in general, why not also have special, extra-burdensome law just for the rich?

It turns out that LFR is practicable and unquestionably better at achieving distributional goals than the general changes to legal rules that scholars have widely discussed. No theoretical objections to LFR are to be found in the literature as long as one accepts redistributive legal rules in principle, as many do. Yet no one has proposed or even considered LFR. Does this reveal a lack of imagination or a levelheaded judgment? It is hard to tell.[273]

Having considered LFR for the first time, this Article asked the opening question: Is there an obvious reason why no one has suggested it thus far? While the Article answers this question, it raises number of others.

First, is there anything different about tax law compared to other areas of law? Given the obvious, highly visible LFR example of the graduated income tax schedule, are similar LFR-type rules outside of tax absent because tax is special? If so, in what way? Second, does the baseball analogy reveal an intuition that carries over into law? If so—and given that we learned from baseball that distributional considerations do not justify

273. Having presented this paper at five faculty workshops with no fewer than a hundred legal academics and philosophers in the audience, I have encountered a single person who thought that LFR is a good idea, and even she might have been joking. This experience suggests that lack of imagination is not the issue.

changing the fundamental rules of the game—what are the fundamental rules of law that explain LFR's absence? And why are these fundamental rules consistent with redistribution through the tax system?

These are not easy questions to answer. Finding the answers will require new insights about the interplay between fairness and law, tax and otherwise. Given that volumes written on this subject by brilliant thinkers offer no off-the-shelf solution to the LFR puzzle,[274] the task of solving it is formidable. It is the task for the future.

In contrast with its conceptual challenges, the practical implications of this Article's inquiry are straightforward. LFR remains beyond the pale of what even the most pro-redistribution theorists and policy advocates are willing to endorse.[275] So academics and policymakers worried about the rise of inequality and the emergence of the new Gilded Age must look for other ways of achieving a more prosperous and more just society.

274. *See, e.g.*, HAYEK, *supra* note 24; NOZICK, *supra* note 11; RAWLS, *supra* note 225.

275. Unless, of course, one is ready to consign capitalism to the dustbin of history. *See* HARCOURT, *supra* note 159, at 163–72 (urging societies to replace capitalism with coöperism); HUBER, *supra* note 159, at 7 ("Capital, and its associated ideologies, are blocking the changes needed."); PIKETTY, *supra* note 159, at 2 (arguing for a "new form of socialism").