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INCOMPLETE WILLS

Adam J. Hirsch*

This Article explores the problems that arise when a will fails to dispose of an individual's entire estate, so that she dies partially testate and partially intestate. The questions then raised include (1) whether provisions contained in the will purporting to redefine the individual's intestate heirs should supersede the statutory designations of those heirs, (2) whether inter vivos gifts to heirs should qualify as advancements on the inheritances of those heirs under conditions of partial intestacy, and, most broadly, (3) whether courts should fill in the incomplete portion of an individual's estate plan by extrapolating from the distributive preferences set out in the fragmentary will or by independent reference to the statutory rules of intestacy. The intent of testators is bound to vary on each of these points, this Article argues. In order to account for this predictable variation, lawmakers should grant courts limited discretion to resolve each of these issues on a case-by-case basis, taking into consideration both intrinsic and extrinsic evidence. Such an approach would differentiate the rules of partial intestacy from complete intestacy, which operates according to mechanical rules. This Article suggests policy reasons for drawing that distinction. The Article supports its analysis with empirical evidence drawn from data sets of published cases, a resource not previously exploited in connection with quantitative studies of inheritance law.

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INTRODUCTION

Anticipating the end of economic life, a will should leave no stone unturned and no property unaccounted for. One way or another, everything previously owned by a deceased person is going to pass into someone else’s hands. The textual device for ensuring completeness of wills is a residuary clause. After making discrete provisions for individual beneficiaries (if desired), a testator concludes with an inclusive bequest: “All the rest of my estate goes to A.” The dimensions of such a clause expand or contract as the testator accumulates or dissipates assets, covering whatever remains once all other bequests have been satisfied—no more and no less.

The problem arises that, every so often, testators fail to construct their wills in a manner producing a complete estate plan.1 Some neglect to include an elastic residuary clause in their wills. Others include one that is itself incomplete: it may subdivide the residue into fractions that fall short of bequeathing the whole estate,2 or the clause may create only one or more life estates, leaving unspecified the disposition of the remainder of the residue.3 Still other testators create residuary bequests that prove ineffective for one reason or another.4 In any such instance, the will becomes fragmentary, disposing of some, but not the sum, of the testator’s property.

When that happens, law must step in where the testator left off. Of course, the same is also true if a person executes no will at all. In that event, statutory law crafts an estate plan for the intestate decedent, determining the heirs and their shares according to a schedule of contingencies. Although the schedule that applies in any given state varies, rules of intestacy are universally designed to operate mechanically.5

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1. By completeness, I mean to refer strictly to dispositional completeness, as opposed to completeness of anticipated contingencies, a topic I have addressed elsewhere. See Adam J. Hirsch, Text and Time: A Theory of Testamentary Obsolescence, 86 Wash. U. L. Rev. 609 passim (2009).

2. For an example of such an arithmetically challenged testator, see Fed. Trust Co. v. Ost, 183 A. 830, 832, 836–38 (N.J. Ch. 1936), aff’d, 191 A. 746 (N.J. 1937) (disposing of fractional shares of the estate totaling only 85 percent). For the converse problem of an overcomplete will, where another dyscalculic disposed of fractional shares of his estate “greater than the whole,” see Estate of Heisserer v. Loos, 698 S.W.2d 6, 7 (Mo. Ct. App. 1985).

3. See infra note 129.

4. Invalidity typically results from “lapse,” where the residuary beneficiary predeceases the testator. See, e.g., infra note 76 and accompanying text.

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If a testator executes a will but leaves it incomplete, a so-called partial intestacy occurs: a decedent can be simultaneously testate (in part), and intestate (in part). Considered structurally, though, the problem of partial intestacy differs from "complete" intestacy, in that the author of an incomplete will has at least revealed something about her preferences in an executed writing. As a matter of policy, the key question is whether courts should have leave to consider testamentary context when confronted with an incomplete estate plan. Should lawmakers treat the stated terms of a will and the blank spaces that remain as isolated elements, filling in the blank spaces as if there were no will at all—that is, by recourse to the regular rules of intestacy? Or should lawmakers instead deem the terms of an incomplete will as relevant to the process of supplying the missing terms?

This problem arises with some regularity. Professor Sayre remarked in 1929 that "[e]ven a cursory examination of the current digests will disclose the large number of cases involving partial intestacy which appear in the reports every year," and that observation remains no less true today. Yet, the topic by and large has escaped notice by scholars. Until now, not a single work has perused the problem as a theoretical whole, and hardly any studies have addressed even bits of it. The instant study endeavors to fill this void.

In Part I, I reflect briefly on the characteristics of the problem and on the analytical tools with which I shall probe it, including an empirical methodology not previously applied in any inheritance study. I then proceed to the substantive issues at hand. In Part II, I consider the implications of provisions in a will that ostensibly speak to the division of the intestate portion of the estate—provisions disinheriting heirs, for example. I turn next, in Part III, to the interplay of gifts and partial intestacy—to wit, should inter vivos transfers to an heir diminish her eventual share by right of partial intestacy under the same rules that apply to complete intestacy? Finally, in Part IV, I examine the larger question, potentially subsuming the previous Parts, of whether a will that says nothing pertinent to a partial intestacy should nevertheless serve as a template for the disposition of property not covered by the terms of that will. My thesis, elaborated in the pages following, is that no mechanical approach to any of these issues produces an appropriate result in all instances. Therefore, I will make the case for allowing courts greater latitude to effectuate intent in instances of partial intestacy than when presented with a complete intestacy.

I. Theoretical Prologue

A. The Object

Wills are exercises in freedom of testation. When testators create an incomplete estate plan, they fail to take full advantage of the freedom they
enjoy. What policy ends should lawmakers strive to accomplish under such conditions? Orthodox default-rule theory dictates that when a citizen fails to execute a will, lawmakers should give effect to whatever distributive scheme they expect the citizen would prefer, given her circumstances. By doing so, lawmakers enable citizens to rely on the estate plan provided by the intestacy statute and thereby avoid the transaction cost of executing a will.8

This analysis breaks down in connection with an incomplete will. In essence, estate planning represents an all-or-nothing proposition. One cannot reduce the marginal cost of this endeavor by engaging an attorney scrivener to plan for fewer assets, leaving the rest to flow under the rules of intestacy. Because the dimensions of a will do not affect its cost, estate planners take pains to ensure that the wills they draft are all-inclusive as a matter of course. Hence, wills are hardly ever incomplete by design.9 Incompleteness typically stems from planning errors, often encountered in wills produced by lay drafters.10 Transaction-cost efficiency offers no justification for attention to probable intent in this context.

Still, we can justify an intent-focused policy in connection with incomplete wills on other grounds. Because incompleteness comprises a problem that mainly plagues homemade wills, it is one largely confined to testators of lesser means. Economics aside, by effectuating probable intent, lawmakers extend to less fortunate testators who do their own drafting the advantages enjoyed by more affluent ones who can afford to pay for a professional product. Lawmakers thereby heed the principle of "equal planning under the law," a policy norm with divers and diverse applications in the


9. See Fid. Union Trust Co. v. Robert, 178 A.2d 185, 191 (N.J. 1962) ("A testator, by the act of the making of a will, casts grave doubt on any assumption that he expressly intends to chance dying intestate . . . . The idea of anyone deliberately purposing to die testate as to a portion of his estate and intestate as to another portion is so unusual in the history of testamentary disposition as to justify almost any construction to escape it." (quoting earlier cases) (internal quotation marks omitted)); In re Estate of Crater, 689 N.Y.S.2d 605, 607 (Sur. Ct. 1999) ("[I]n cases where, as here, there is no residuary clause, the presumption that a testatrix who took the trouble of making a will did not intend to dispose of only a small part of her estate and to die intestate as to a major part thereof, is strengthened."); see also, e.g., Kimley v. Whitaker, 306 A.2d 443, 445 (N.J. 1973) (comparable observation); In re Astor's Will, 162 N.Y.S.2d 46, 60 (Sur. Ct. 1957) (same), aff'd, 172 N.Y.S.2d 780 (App. Div. 1958); Coddington v. Stone, 9 S.E.2d 420, 424 (N.C. 1940) (same); Kaufhold v. McIver, 682 S.W.2d 660, 665 (Tex. App. 1984) (same); Arnold v. Groobey, 77 S.E.2d 382, 387-88 (Va. 1953) (same). One can, however, identify apparent, albeit rare, exceptions where testators leave their wills incomplete on purpose. See, e.g., Williams v. Gooch, 44 So. 2d 57, 58-59 (Miss. 1950); see also Lyon v. Safe Deposit & Trust Co., 87 A. 1089, 1093-94 (Md. 1913) (observing the phenomenon).

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That said, how can lawmakers gain insight into the probable preferences of a decedent who fails to elaborate her wishes under the terms of a will? In some number of situations, we may be able to make logical inferences about intent. Judicial opinions occasionally venture such deductions. Ultimately, though, probable intent is both a function of, and revealed by, statistics. To answer statistical questions, we need data. Yet the sources of data open to study shrink alarmingly once we shift our gaze from the living to the dead.

Until quite recently, some law reformers were prepared to brush the problem aside. Reacting to criticism that the National Conference of Commissioners had failed to justify a provision of the Uniform Probate Code with empirical evidence, the Reporter for the Code retorted that its authors included "not only leading scholars in the field but also nationally known estate planners of considerable insight and experience . . . . Their cumulative experience suggests that they have a pretty good idea of what most clients want." This claim, pronounced just a decade and a half ago, already sounds quaint today. In the interim, the current of empirical analysis has entered the mainstream, and legal commentators now appreciate that expert impressions afford no substitute for hard data. And this desideratum becomes even stronger with respect to issues such as testamentary incompleteness, which arise out of planning errors. Seasoned estate planners know better than to make those errors and hence have little or no experience with the wishes of

11. Professor Fellows coined the phrase. Mary Louise Fellows, In Search of Donative Intent, 73 Iowa L. Rev. 611, 613 (1988). For a further discussion, see Hirsch, supra note 8, at 1051–52. For British data on homemade wills, which are statistically associated with smaller estates, see JANET FINCH ET AL., WILLS, INHERITANCE, AND FAMILIES 45-46 (1996).

12. In construing a will, to recall Chancellor Kent’s famous metaphor, intent-effectuation represents “the pole-star by which the courts must steer.” 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW *537. For further references, see Adam J. Hirsch, Inheritance and Inconsistency, 57 Ohio St. L.J. 1057, 1114 nn.170–72 (1996).

13. See, e.g., cases cited supra note 9.


15. For discussions, see, for example, Robyn M. Dawes et al., Clinical Versus Actuarial Judgment, in Heuristics and Biases: The Psychology of Intuitive Judgment 716, 723–26 (Thomas Gilovich et al. eds., 2002); Hirsch, supra note 8, at 1070–74 (citing psychological studies and noting an example of evidence demonstrating the superiority of empirical data over expert judgment within the inheritance field); Hirsch, supra note 1, at 656–58; and William Meadow & Cass R. Sunstein, Statistics, Not Experts, 51 Duke L.J. 629 passim (2001). For a similar observation in connection with default rules in contract law, see Yair Listokin, The Meaning of Contractual Silence: A Field Experiment, 2 J. Legal Analysis 397, 400 (2010).
testators who leave their wills incomplete; the wills that experts draft never are.

No shortcuts, then, to the discovery of probable intent lie at our disposal. And barring a breakthrough in Ouija technology, we cannot readily tally the preferences of those who have passed from the scene. None of the available sources of data concerning their wishes comes without drawbacks of various sizes and shapes, threatening to compromise the data's reliability.

Many of the extant studies rely on surveys of the living as surrogates for decedents. These studies have collected information by distributing questionnaires or by conducting interviews over the telephone. Some researchers have solicited information about subjects' actual estate plans or distributive preferences. Others have posed hypothetical questions to subjects, eliciting their reactions to imaginary scenarios.

One difficulty with this technique is that the subset of persons who agree to participate in a study may be biased in ways that skew the results. What is more, we have no assurance that subjects will even report their estate plans or preferences accurately. To the extent that her preferences deviate from perceived social norms, a subject might prevaricate to avoid embarrassment in her interaction with the researcher. And even assuming subjects do state their preferences honestly, responses to a hypothetical vignette remain just that—hypothetical. Subjects may lack insight into


18. This problem, known technically as nonresponse bias, has received considerable attention within the theoretical literature of polling. For a review, see Robert M. Groves, Nonresponse Rates and Nonresponse Bias in Household Surveys, 70 PUB. OPINION Q. 646 passim (2006). For example, volunteerism is statistically associated with a willingness to be polled. Katharine G. Abraham et al., How Social Processes Distort Measurement: The Impact of Survey Nonresponse on Estimates of Volunteer Work in the United States, 114 AM. J. SOC. 1129 passim (2009). This association suggests the possibility that surveys of persons' propensities to make charitable bequests would yield distorted data. See id. at 1134, 1162 (suggesting such a polling distortion for charitable contributions). For some other demonstrated influences on survey participation, see Groves, supra, at 664. Among these influences, socioeconomic status "appears[s] to have variable effects over modes, topics, or sponsors of surveys." Id. In recent decades, nonresponse rates to surveys have increased, see Richard Curtin et al., Changes in Telephone Survey Nonresponse over the Past Quarter Century, 69 PUB. OPINION Q. 87 passim (2005), enhancing the potential for nonresponse bias, although nonresponse levels appear to have no direct relationship to nonresponse bias, see id. at 97 (citing studies); Groves, supra, at 669–70.

19. This phenomenon is well known to sociologists, see TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION (1995), and to pollsters, see Roger Tourangeau & Ting Yan, Sensitive Questions in Surveys, 133 PSYCHOL. BULL. 859 passim (2007).
scenarios alien to their experiences, and they might offer snap judgments that differ systematically from the more reflective choices made by actual testators. In this regard, eliciting data on how subjects would prefer to fill in the incomplete terms of an imaginary will appears futile—subjects would have no factual foundation on which to predicate their answers. Nor is a search for living testators who actually have an incomplete will practically feasible. Testators in this predicament rarely are aware of the fact; typically, evidence of incompleteness only comes to light in a probate proceeding.

The other traditional source of raw data for empirical inheritance studies is probate records. Data gathered from this source provide trustworthy evidence of how testators behave in practice. What is more, unlike living subjects, decedents who make wills cannot refuse to contribute data to researchers. As collections of all wills submitted for probate, the records are comprehensive, and they also constitute public documents.

Still, skewing could result from the data set’s limitation to decedents whose estates are probated. Poorer persons are disproportionately likely to execute no will, and, whether they leave one or not, their estates are more likely to be settled informally. At the same time, wealthier persons appear more inclined to rely on will substitutes that avoid probate and, unlike probated wills, remain private documents. Probate records would seem a particularly unpromising resource for the study of incomplete wills.

20. One pair of researchers attempted to respond to this problem by limiting their analysis to “persons who could easily relate to the scenario.” Johnson & Robbennolt, supra note 16, at 495–96.


24. The two most recent empirical studies found the proportion of decedents’ estates undergoing probate proceedings to range between 20% and 34% (and as low as 16% in one outlier year) of total deaths, depending on the state. Jeffrey A. Schoenblum, Will Contests—An Empirical Study, 22 Real Prop. Prob. & Tr. J. 607, 611–13 (1987) (noting earlier studies); Robert A. Stein & Ian G. Fierstein, The Demography of Probate Administration, 15 U. Balt. L. Rev. 54, 60–62 (1985). For another possible distortion relating to any data set of wills, see Hirsch, supra note 8, at 1073 n.172 (suggesting that some subset of testators may rely on existing default rules and express preferences within wills only when they run counter to those default rules).

25. For discussions of the statistical correlation between poverty and intestacy, see Hirsch, supra note 8, at 1051 n.72, and Stein & Fierstein, supra note 24, at 82–83.

26. On the tendency of smaller estates to forego probate, see Schoenblum, supra note 24, at 612 n.29, and Stein & Fierstein, supra note 24, at 62.

27. The tendency of wealthier estates to pass via living trusts and other nonprobate will substitutes is less pronounced, although some data support the proposition. Stein & Fierstein, supra note 24, at 92–95.
Incompleteness may not appear on the face of the wills preserved in the probate records in those instances where residuary clauses are void (rather than absent). And recorded wills may also fail to illuminate how testators would have preferred to round out their estate plans.

This Article mines a third vein of data for the quantitative analysis of probable intent—a source not previously exploited in any existing studies in connection with inheritance law. Although this source of data will play just a part in the analysis presented here, its potential for enriching other inheritance studies bears noting; we should pause to remark its comparative advantages, as well as its disadvantages.

The data set developed in this Article derives from legal cases appearing in published law reports. One useful feature of this resource is its cumulative size, accreting over some two centuries in the United States. Although these cases represent only a drop in the ocean of estates cataloged in the surviving probate records, this mass of cases is easier to explore empirically. The cases are helpfully collected in electronic databases that the researcher can search by algorithm to pinpoint pertinent units of data. What is more, those cases may make available information not found in probate records. Often enough, judicial opinions reproduce sworn testimony, along with other factual details not divulged within the language of a will. Opinions can therefore furnish evidence of incompleteness and of intent missing from the leaner probate records while featuring greater reliability than evidence harvested from an off-the-cuff survey.

No less importantly, the researcher can conduct such a study cost-efficiently. The Reporter for the Uniform Probate Code excuses its failure (and the parallel failure of the Restatements) to rely on empirical evidence on the grounds that neither the National Conference of Commissioners nor the American Law Institute has the means to sponsor the requisite studies. Because an empirical analysis of legal cases requires no archival research or field interviewing, a model lawmaking body—substantially composed of academics—could undertake the study without obtaining a grant. The instant study, pursued within an academic setting, relied on student research assistants to help collect and code the data, drawing on a budget for student assistants made available in some amount to professors at all major American law schools.

The concern remains that the data set of legal cases provides a relatively small sample of the universe of all estates. In one respect, the data set of published cases surpasses the range of probate records, in that these cases also cover litigation over living trusts (whose terms, although private, remain subject to discovery). Still, only a fraction of probate proceedings

28. See, e.g., infra notes 102–103.
29. Peter Siegelman & John J. Donohue III, Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases, 24 LAW & SOC’Y REV. 1133, 1166 (1990). Karl Llewellyn was an early advocate of behavioral studies based on this data source. Id. at 1136 n.9.
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degenerate into a will contest, only a fraction of those contests culminate in a decision rather than a settlement, and only an (apparently shrinking) fraction of those decisions ultimately appear, in print or in silica, as disseminated opinions.

Accordingly, the sample of estates represented by all legal cases, however accessible, wide-ranging, and rich in factual data, could again suffer from selection bias. For example, theory suggests that litigation is more likely to ensue and to result in a published case where greater sums lie at stake. Other biases may also exist, and further concerns could crop up specifically in connection with the analysis of incomplete-will cases, as noted hereinafter. To the extent that this data set—along with survey evidence and probate records—is subject to economic skewing, the researcher


36. Of course, even within a biased sample of published cases, the sample may remain representative for some, but not for other, characteristics. Susan M. Olson, Studying Federal District Courts Through Published Cases: A Research Note, 15 JUST. SYS. J. 782, 795–96 (1992); Siegelman & Donohue, supra note 29, at 1136–37, 1145. For example, links between publication decisions and the characteristics of the judge sitting on a case, see, e.g., Ahmed E. Taha, Publish or Perish? Evidence of How Judges Allocate Their Time, 6 AM. L. & ECON. REV. 1, 18–19, 21–23 (2004), should remain independent of the distribution of testamentary preferences, assuming random assignment of cases. For discussion concerning other factors related to publication, see, for example, Brian N. Lizotte, Publish or Perish: The Electronic Availability of Summary Judgments by Eight District Courts, 2007 WIS. L. REV. 107, 138–43 (citing studies); Olson, supra, at 784–95; Siegelman & Donohue, supra note 29, at 1150–56; Karen Swenson, Federal District Court Judges and the Decision to Publish, 25 JUST. SYS. J. 121, 135–36 (2004); and Taha, supra, at 20–21, 23–25.

37. See infra notes 93–98 and accompanying text, and text following notes 98, 274.

38. See supra notes 18, 25–27, 35 and accompanying text.
can compensate by using more sophisticated techniques of stratified or quota sampling, although not without adding to the cost and complexity of the task at hand.39 But we cannot control so easily for other biases,40 let alone those that remain obscure to the researcher.41

Ultimately, then, we should rate a data set composed of published cases in the inheritance realm as suggestive, rather than definitive, and we cannot ignore the possibility that results gleaned from published cases comprise an artifact of the data set. Like other potential sources of data available to us, we have recourse to this one for better and for worse. Prudence thus demands that we remain modest in our claims about the import of the data. In fact, this diffidence can figure into the substance, as well as the strength, of our conclusions, as we shall presently see.42 In light of our reservations about this and other sources of data, the ideal (albeit most costly) approach may be to study, and then to cross-examine, multiple data sets—published cases, and survey evidence, and probate records—in order to render our empirical conclusions more (or less) persuasive.43 I have not endeavored to test my data in this manner in the instant study, largely because survey and probate studies appear so lacking in promise as windows into incomplete wills. Worthless data is not worth its cost.

But all of this is just by way of introduction. We turn now to the doctrinal issues of incomplete wills. The first of these concerns the effectiveness of provisions in a will that purport to operate on the missing parts through means other than outright bequests.

39. STEVEN K. THOMPSON, SAMPLING 141–54 (3d ed. 2012); Groves, supra note 18, at 653. Cases typically reveal the approximate size of the estate at issue, along with some other information about the testator that would facilitate quota sampling.

40. The variable causing bias may go unreported in the data set and bear no statistical correlation with other variables that are reported. See, e.g., Abraham et al., supra note 18, at 1134, 1162–63 (noting the problem in connection with survey response rates).

41. Although several studies have sought to isolate factors that have historically influenced the selection of cases for publication, see supra notes 35–36, scholars have yet to develop a general behavioral model, comparable to the economic model of settlement, with which to predict patterns of publication, see Olson, supra note 36, at 796–97 (suggesting the need for such a model).

42. See infra text following notes 99, 107, 145.

43. Studies have identified inconsistencies between alternative data sets that only come to light upon comparative analysis. See e.g., Siegelman & Donohue, supra note 29, at 1150–56 (studying data sets of published and unpublished employment discrimination cases). At least two inheritance studies rely on multiple sources of data. See SUSSMAN ET AL., supra note 16, at 44–45 (probate records and survivor interviews); Contemporary Studies Project, A Comparison of Iowans' Dispositive Preferences with Selective Provisions of the Iowa and Uniform Probate Codes, 63 IOWA L. REV. 1041, 1045 (1978) (probate records, survivor interviews, and a random survey); cf. Johnson & Robbennolt, supra note 16, at 485 (using a single source of data to gather evidence of both actual estate plans and attitudes toward hypothetical scenarios).
II. REDEFINITIVE WILLS

Testators typically express their intent by providing items or sums to beneficiaries. When testators leave incomplete wills, those items and sums fail to account for the entire estate. At this point, under current law, we look to the intestacy statute to furnish the balance of the estate plan. By tradition, intestacy statutes establish mechanical rules of distribution on the basis of contingencies, mainly concerning who the decedent’s surviving family members are and how closely related they were to the decedent. Courts cannot consider evidence of intent when they apply rules of intestacy.

It happens that some testators express intentions about the distribution of their estates that do not take the form of explicit bequests. Occasionally, a will includes a statement that can be read to redefine who the testator’s intestate heirs are. Such a redefinitive provision could become relevant if the will proves incomplete. But is such a provision recognized as legally effective? This issue has generated a fair bit of interest among lawmakers and among model lawmaking bodies. Or, to be more exact, part of it has.

A. Negative Wills

Consider a will that makes various bequests and then continues, “Under no circumstances shall my child, A, receive any portion of my estate,” or words to that effect. In the context of a complete will, a statement along these lines is superfluous. The will itself provides all the information the court needs to distribute the entire estate to beneficiaries who the will affirmatively names. Any identification of beneficiaries excluded from the estate plan serves merely to add an exclamation point.

But suppose instead that the will fails to dispose of the testator’s entire estate. The testator’s child, A, comprises one of the heirs entitled to inherit, all else being equal, under the intestacy statute, which now controls that part of the estate to which the will failed to speak. The issue then arises whether the so-called “negative will” operates to bar the disinherited heir from taking by right of intestacy—that is, whether the negative will redefines the statutory heirs. Similarly, a will could provide that a beneficiary receive a

44. UNIF. PROBATE CODE § 2-101 cmt. (amended 2010), 8 pt. 1 U.L.A. 43 (Supp. 2012). Although found only occasionally in the cases, this term may trace to phrasing in Vachell v. Breton, (1706) 2 Eng. Rep. 527 (H.L.) 528; 5 Bro. P.C. 51, 54 (“the express negative words of the testator’s will”).

45. The validity of negative wills need not arise exclusively in connection with cases of partial intestacy. If a testamentary instrument makes no bequests at all or makes only invalid bequests, then a negative will set out in the instrument would operate in conjunction with a complete intestacy. E.g., Kimley v. Whittaker, 306 A.2d 443, 444-45 (N.J. 1973) (concerning a testamentary instrument whose sole affirmative bequest was invalid due to lapse); In re Hefner’s Will, 122 N.Y.S.2d 252, 253-54 (Sur. Ct. 1953) (concerning a testamentary instrument composed of nothing more than a negative will); see also UNIF. PROBATE CODE § 1-201(57) (amended 2010), 8 pt. 1 U.L.A. 19 (Supp. 2012) (expressly validating a will that serves merely to exclude heirs). In connection with complete wills, negative wills raise issues of standing by disinherited heirs to challenge affirmative bequests. See infra Part II.A.3. Finally, the presence of a negative will can figure in a construction proceeding, influencing the court’s
certain sum "and nothing more of my estate," or words to that effect—not a pure negative will but, we might say, a limiting will. Again, the issue arises in connection with an incomplete will whether the limit established in that document also carries over to intestacy to block any statutory inheritance rights over and above the capped bequest.

British courts faced this "perplexing question" for the first time early in the eighteenth century. Before long, those courts were hopelessly divided over the issue. Some gave effect to negative wills. Others declined to do so. And still others sought to reconcile these lines of cases by drawing doubtful distinctions between them. The most recent British case on point, dating to 1983, takes the view that negative wills are enforceable, a position also accepted elsewhere in the Commonwealth.

In the United States as well, this issue has produced a steady trickle of published cases. The first American cases, dating to the early nineteenth century, cited to British authorities and soon echoed their lack of consensus. Over time, however, the view that negative wills are ineffective gained determination of whether the will in which a negative will appears is complete. In a recent case, where the validity of a will turned on whether oral instructions referred to in a will were mandatory or precatory, the court cited the inclusion of a negative will to justify a construction rendering the will valid. Glenn v. Roberts, 95 So.3d 271, 274 (Fla. Dist. Ct. App. 2012); see also Bakos v. Kryder, 543 S.W.2d 216, 219–20 (Ark. 1976) (pointing to a nominal bequest to all heirs as evidence of an implied residuary bequest). For additional cases, see infra note 249.

47. E.g., Vachell, 2 Eng. Rep. at 528; Ramsay, 1 L.R.Eq. at 134 (dicta); Bund v. Green, (1879) 12 Ch.D. 819 at 821–22.
49. E.g., Lett v. Randall, (1855) 107 Rev. Rep. 26 (Ch.) 29–32; 3 Sm. & G. 83, 87–91 (giving effect to a negative will, per the rule of Vachell, and seeking to distinguish Pickering on the ground that the negative will in that case was less "comprehensive" than in the will at issue), aff'd, (1860) 45 Eng. Rep. (Ch.) 671; 2 D.F. & J. 388; Holmes v. Holmes (Re Holmes), (1890) 62 L.T. 383 (Ch.) at 383–84 (denying effect to a negative will, seeking to distinguish Vachell on the ground that there the beneficiary was put to an election to take what was offered under the will or under the intestacy statute, and seeking to distinguish Bund on the ground that there the words of exclusion of some heirs amounted to a gift to the other heirs).
50. Landolt v. Wynn (Re Wynn), [1983] 3 All E.R. 310 (Ch.) at 313–14. For Canadian cases, compare Bateman v. Bateman, [1941] 3 D.L.R. 762, 763 (Can. N.B. S.C.) (barring a negative will, citing Re Holmes), with Re Sharpe (1985), 18 D.L.R. 4th 421, 425–28 (Can. Nfld. S.C.) (giving effect to a negative will, citing Re Wynn, rejecting Bateman, and dismissing Re Holmes as a case whose "reasoning defies logic, ignores the unmistakable intention of the testator and is totally at variance with the common law").
51. Compare Jackson ex dem. Bogert v. Schauber, 7 Cow. 187, 197 (N.Y. Gen. Term 1827) (citing British authority in holding a negative will ineffective), rev'd on other grounds, 2 Wend. 13 (N.Y. 1828), and Boisseau v. Aldridges, 32 Va. (5 Leigh) 222, 237–41 (1834) (same), with Bender v. Dietrick, 7 Watts & Serg. 284, 287 (Pa. 1844) (asserting in dicta that a negative will is effective for personal property, citing to different British authority). See also, e.g., Doe ex dem. Hoyle v. Stowe, 13 N.C. (2 Dev.) 318, 323–24 (1830) (asserting in dicta that negative wills are effective, without citing authority).
acceptance within American common law, and modern cases have overruled most contrary precedents without smothering them entirely.

In more recent years, statutory law in a number of jurisdictions has supplanted the common law to give effect to negative wills. In 1967, New York became the first state to enact such legislation. The original version of the Uniform Probate Code, promulgated two years later, failed to address the issue. In 1990, though, as part of a general revision of the substantive articles of the Code, the Commissioners added sections explicitly validating negative wills. Fifteen states have since enacted statutes based on this language; four others have enacted nonuniform legislation to the same effect. Finally, in 1999, the third Restatement of Property chimed in, urging courts to reverse the common law nullification of negative wills in jurisdictions where statutory law fails to govern the issue.

52. By 1960, a court could overrule a prior state case giving effect to negative wills on the ground that it ran counter to "the general rule" of the United States. Conlon v. Douglas (In re Estate of Brown), 106 N.W.2d 535, 537 (Mich. 1960). For a collection of cases, see J. Kraut, Annotation, Effect of Will Provision Cutting off Heir or Next of Kin, or Restricting Him to Provision Made, to Exclude Him from Distribution of Intestate Property, 100 A.L.R.2d 325 passim (1965).

53. See Succession of Allen, 20 So. 193, 198 (La. 1896) (giving effect to a negative will in the face of statutory silence and never reversed by a state case), aff'd, 22 So. 319 (La. 1897), rev'd on other grounds, 173 U.S. 389 (1899); Kimley v. Whittaker, 306 A.2d 443, 444-45 (N.J. 1973) (suggesting the same in dicta), subsequently codified by N.J. STAT. ANN. § 3B:5-2 (2005); Staaben v. Jabs (In re Estate of Farber), 204 N.W.2d 478, 480-82 (Wis. 1973) (giving effect to a negative will when supplemented by a positive statement naming the statutory heirs who were to take), superseded by statute, Wis. STAT. § 852.10 (2012) (validating negative wills generally). There was some uncertainty as to the state of the law in New York at the time when it adopted its pathbreaking statute approving negative wills in 1967. See In re Estate of Potter, 327 N.Y.S.2d 680, 682-83 (Sur. Ct. 1971).

54. N.Y. EST. POWERS & TRUSTS LAW § 1-2.19 (McKinney 1967).


58. RESTATMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.7 (1999). Prior iterations of the Restatement of Property had not dealt with the issue.
Restatement as an independent voice, however, since both the Restatement and the Uniform Probate Code share the same Reporter.59 At any rate, no cases reconsidering the common law of negative wills have yet appeared. Altogether twenty states today give effect to negative wills either by statute or case law.60 Twenty-five do not, and the issue has yet to arise in the remaining five.61

The argument repeatedly offered in favor of honoring negative wills is simple enough: doing so accords with the intent of the testator. The medium through which testators express their intent should make no difference, critics have urged: “[A] clearly expressed negative intention is entitled to equal weight with a positive one.”62 New York’s pioneering statutory reform of the law of negative wills in 1967 was premised on this rationale.63 In unison, the Uniform Probate Code and the Restatement both opine that the American common law rule “defeats a testator’s intent for no sufficient reason.”64

Courts in turn have defended the traditional rule on several grounds. One venerable rationale is formalistic in nature: courts assert that, whereas a testator is free to bequeath under a will, “no man can institute a law of descent [i.e., intestacy] for his own property, in conflict with the general law.”65 In other words, a will can supersede the statutory rules of intestacy


60. See statutes cited supra note 57; Succession of Allen, 20 So. 193, 198 (La. 1896), aff’d, 22 So. 319 (La. 1897), rev’d on other grounds, 173 U.S. 389 (1899).

61. The issue has never appeared in a published case in Idaho, Oregon, Washington, or Wyoming.

62. In re Estate of Weissmann, 243 N.Y.S. 127, 132 (Sur. Ct. 1930), aff’d, 247 N.Y.S. 901 (App. Div. 1931) (criticizing in dicta the invalidity of negative wills); see also In re Estate of Damann, 191 N.E.2d 452, 454 (N.Y. 1963) (observing in dicta that “we reach a point where a clearly and unmistakably expressed negative is as complete and unavoidable a statement of intent as if cast in the affirmative”).


but cannot modify them; once we proceed to the statute to apportion property not distributed by will, the will no longer operates. A negative will purports to redefine shares during this second stage, after the mechanical rules of intestacy have come into effect. In this dimension, however, intent becomes irrelevant, and any expressions of authority emanating from a will comprise (in the delightful words of one early court) "a perfect brutum fulmen"—inert thunder.

As a matter of policy, obviously, this argument begs the question. Negative wills could easily enough become part of the "general law" of intestacy if a legislature viewed their enforcement as expedient. Even as a doctrinal matter, the suggestion that the intestacy statute takes precedence over negative wills is questionable. Testators can negate other statutory default rules by virtue of individualized provisions in their wills. For example, a testator's statement in a will that "any child of mine omitted from this will receives no share of my estate under the pretermitted child statute," suffices to preempt that statute. This special type of negative will is universally acknowledged as valid because, in every jurisdiction, the statute expressly bows to contrary expressions of intent within a will. Although they likewise comprise default rules, traditional intestacy statutes make no such express allowance for a negative will—but neither do they expressly disallow one as a means of ousting the default rule. The treatment of negative wills therefore represents a lacuna in most intestacy statutes, which courts could claim the right to fill with common law. Courts inclined to give effect to negative wills have brushed aside the suggestion that they lacked the power to do so.

governed by [the] will, but by another rule having its origin in another source, in the application of which the intent of the testator is not the governing rule, and can have no influence." Bray v. Bray, 269 N.E.2d 452, 453 (Mass. 1971) (citation omitted) (internal quotation marks omitted); see also, e.g., Cook v. Estate of Seeman, 858 S.W.2d 114, 115 (Ark. 1993).

66. Holmes v. Holmes (Re Holmes), (1890) 62 L.T. 383 (Ch.) at 383 (Eng.).

67. Boisseau, 32 Va. at 243; see also supra text accompanying note 65.

68. An analogous argument that spendthrift trusts operated to "repeal" the statutory law of creditors' rights persuaded only a small number of courts. See Adam J. Hirsch, Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives, 73 Wash. U. L.Q. 1, 56 (1995).


70. E.g., Tabor v. McIntire, 79 Ky. 505, 506-07 (1881) ("While the testatrix had no right to alter the laws of descent, yet she had the right to dispose of her property as she wished, and might ... exclude ... persons who would otherwise inherit."). overruled by Todd v. Gentry, 109 Ky. 704 (1901).
More purposefully, several early courts asserted that by nullifying negative wills, at least those directed at descendants, lawmakers advanced social policy. Because "[the] act of disinheriting a child . . . is one which the law cannot regard very favorably," courts felt justified in insisting that testators accomplish their intent through the limited channel of affirmative bequests. Viewed from this perspective, a law invalidating negative wills would make the default rule in favor of inheritance by descendants a "sticky default," in theoretical jargon, allowing testators to override the default but only by following the appropriate "altering rule." Sticky defaults become difficult to condone in the realm of inheritance, however, because they inevitably discriminate against more poorly counseled testators. If the social policy at issue is important enough, then lawmakers should make rules that promote it mandatory and applicable to all. Sticky defaults merely set traps for the unwary. At any rate, lawmakers no longer strive to reinforce the rights of descendants—if anything, lawmakers have eased the task of overriding intestacy statutes, for example, by streamlining the formalities of will execution. The notion that invalidating negative wills serves to protect the interests of descendants is plainly outdated, and it has not reappeared in modern cases.

Still other courts have defended the common law rule invalidating negative wills as potentially consistent with testators' intent. These courts point out that because few testators anticipate partial intestacy, intending rather to execute a complete will, they do not ordinarily contemplate that negative wills serve any distributive function. When some unforeseen circumstance subsequently renders a will incomplete, its author might well prefer that a disinheriting provision remain insignificant. As one court explained, "The will was made in view of conditions existing at the time of its execution . . . . What [the testator's] actual intent may have been after the conditions were changed by the death of [a residuary beneficiary, causing a partial intestacy], we have no means of knowing . . . ."

71. Stewart v. Pattison, 8 Gill 46, 58 (Md. 1849) ("If the will be so explicit that [children be disinherited], let it be so . . . . but a mere intention will not defeat [such] children."); see also Phillips v. Phillips, 20 S.W. 541, 542 (Ky. 1892) ("[W]hen [a testator] leaves a part of [his estate] undisposed of, it is the object of the law to cast the descent so as to equalize all his descendants, his intention to the contrary notwithstanding.").
73. For a fuller discussion, see Hirsch, supra note 8, at 1042–52.
75. See In re Estate of Weissman, 243 N.Y.S. 127, 131–32 (Sur. Ct. 1930) (rejecting in dicta the notion that heirs' rights are "semivested" and urging that negative wills should be held effective), aff'd, 247 N.Y.S. 901 (App. Div. 1931).
76. Hittell v. Greer (In re Estate of Hittell), 75 P. 53, 54 (Cal. 1903); see also cases cited infra notes 82, 120.
1. Analysis

How confident can we be, then, about a testator’s intent to redefine heirs by virtue of a negative will? That is the crux of the matter, which lawmakers bent on giving effect to such language appear to have breezed over a trifle too quickly. The best way to pursue the problem is to consider what might prompt testators to make a negative will and then to gauge their probable intentions in that light. Upon investigation, one discovers several possible inspirations for these provisions, all found regularly in the published cases.

One obvious stimulus for a negative will is feelings of hostility toward the identified family member (or members). Testators sometimes couch a disinheriting provision expressly in such terms: “[These heirs] never bother about me in life. So I remember them in Death.” Logic suggests that when sentiments of this sort inform an estate plan, the testator would prefer that a negative will govern the distribution of the estate, to the extent that the intestacy statute becomes relevant. Intervening events that might render it relevant—such as invalidity of the residuary bequest because the residuary taker predeceases the testator—appear unlikely to ameliorate the testator’s expressed antagonism toward particular heirs who do survive.

At least one court has assumed that a negative will implied “dislike” of the disinherited heirs, even though the will failed to say so; perhaps model lawmakers who advocate giving effect to disinheriting provisions make the same assumption. Examination of the cases reveals other explanations for negative wills, however. Some testators indicate that they have already provided for disinherited heirs by lifetime gifts. Others assert that disinherited heirs have less need than the loved ones that testators have chosen to benefit under their wills. In neither instance can we reliably infer that a testator would want a negative will to become operative if and when a will proves incomplete. If a partial intestacy occurs because a residuary beneficiary unexpectedly predeceased the testator, then that beneficiary no longer needs the testator’s largesse in priority over the disinherited heir. This change of circumstance raises the specter that the testator might want to revisit the share going to the disinherited heir. Even if a testator dies partially intestate

77. Eulitt v. Little Sisters of the Poor (In re Estate of McKay), 98 N.W.2d 604, 605 (Mich. 1959); see also, e.g., In re Estate of Beu, 333 N.Y.S.2d 858, 858–59 (Sur. Ct. 1972) (imposing a negative will on a daughter because “she has been disobedient and ungrateful”), aff'd, 354 N.Y.S.2d 600 (App. Div. 1974).

78. See, e.g., McElligott v. Murray (In re Estate of Connolly), 222 N.W.2d 885, 886-87, 891–92 (Wis. 1974) (asserting the “attractiveness” of a power to give effect to a negative will where the one at issue stemmed from hostility).


81. E.g., In re Hittell, 75 P. at 53; In re Young, 232 N.Y.S. 427, 428 (Sur. Ct. 1928).

82. See, e.g., Kinahan v. Malone (In re Estate of Fritze), 259 P. 992, 993–94 (Cal. Dist. Ct. App. 1927) (“[T]he testatrix did not anticipate the invalidity of her gift. . . . What her actual intent may have been in [that] event . . . we have no means of knowing. . . . [S]he might
because she set out no residuary clause to begin with, this fact suggests that she failed to foresee the value of the estate, part of which the testator may have acquired after the will was executed. Reevaluation of the distribution of the property unaccounted for by the will might cause the testator to amend the amount going to the disinherited heir on the assumption that the will covered everything. In the absence of hostility, such amendments of intent grow more likely. Of course, in such a case, the will itself is unlikely to reveal what revisions, if any, the testator would have made, but at least these circumstances bring intent into question.

Still another explanation for negative wills in some instances is mistake. Testators are now and then anxious to preclude unknown or as yet unborn children from taking a share of an estate governed by a complete will under pretermitted child statutes; in most states, these statutes set aside a share (traditionally, an intestate share) of the estate for any child born after the will is executed, or, in a minority of states, for any child, whenever born, omitted without mention in the will. A testator can override these statutory directives by explicit provision in the will, but in seeking to do so some testators express themselves imperfectly, using broader language that transforms the provision into a negative will. Hence, one can discover in the case law a disinheriting provision that reads, "I have intentionally omitted to provide herein for any of my heirs who are living at the time of my demise, and to any person who shall successfully claim to be an heir of mine . . . I hereby bequeath the sum of ONE DOLLAR . . . ." Quite possibly, the testator would not have intended this clause to pertain to known heirs, in the event of a partial intestacy.

Bizarrely, the will of Vickie Lynn Marshall (also known as Anna Nicole Smith) included such a provision, stating that "I have intentionally omitted to provide for my spouse and other heirs, including future spouses and children and other descendants now living and those hereafter born or adopted," even though she, as a woman, was incapable of having unknown children. When her sole beneficiary (a son, Daniel) predeceased her at the age of twenty, her afterborn, infant daughter, Dannielynn, was barred from perhaps have given [the excess] to her sisters," whom she negatively disinherited because "‘each of them has plenty of this life’s possessions.’"); Bray v. Bray, 269 N.E.2d 452, 453 (Mass. 1971) (“The court is left to conjecture as to whether the testatrix would have favored cousins over her sister [who was disinherited by the will since she was not in need] had she anticipated that her husband would predecease her.”); see also, e.g., Kurrie v. Ky. Trust Co. of Louisville, 194 S.W.2d 638, 640 (Ky. Ct. App. 1946) (suggesting that disinheriting language should not be construed as intended to “inhibit any of [the] estate from going to . . . the persons named,” when the testator stated that “the reason that he devised nothing to them was because he knew bountiful provision already had been made for them”).

83. William M. McGovern et al., Wills, Trusts and Estates § 3.5 (4th ed. 2010).
84. Tomlinson v. Jennings (In re Estate of Tolman), 104 Cal. Rptr. 3d 924, 925 (Ct. App. 2010).
86. Perhaps Smith’s Hollywood attorney had routinely included such clauses in the wills he drafted for male actors and repeated the practice, unthinkingly, in this instance.
her estate under the language of the will. But Dannielynn was lucky: she could still take by intestacy, because negative wills are ineffective in California, where Smith was domiciled.87 Doubtless, any other result would have left Smith spinning in her grave.

Courts have had to confront these matters directly with regard to a related issue. Suppose a beneficiary named in a will predeceases the testator. Under modern antilapse statutes, if the late beneficiary was a close family member, the bequest goes instead to her descendants if any survive, and otherwise to the residuary beneficiary, unless the will provides for this contingency. Now, suppose the will contains no contingency clause naming an alternative taker in the event that a beneficiary predeceases the testator; but the will does include a separate clause expressly disinheriting the descendant of a beneficiary who, as events unfold, predeceases the testator. Because a testator’s will can countermand orders of distribution dictated by an antilapse statute,88 courts have a clear mandate to give effect to a negative will insofar as it speaks to the distribution of the testamentary estate. But do courts construe such clauses as intended to supersede the rules of antilapse?

In fact, most courts have ruled to the contrary. Some have observed that a provision of this sort is not dispositive, because the beneficiary’s premature death changes intent.89 Others have dismissed disinheriting clauses in this situation as intended only to override pretermitted child statutes.90 The inference that a beneficiary’s death would cause a testator to withdraw a negative will applicable to the beneficiary’s descendant gains strength, logically in this scenario, because the testator must have realized that if the beneficiary had survived, then (at least ordinarily) her descendant would benefit indirectly from the bequest. When directed at the descendant of a named beneficiary, a negative will can rarely serve any purpose other than to underscore the testator’s wish that the named beneficiary take first.91 Negative wills potentially applicable in instances of partial intestacy are not confined to descendants of beneficiaries, of course, but the possibility (albeit not a logical necessity) that changes of circumstance would have altered


91. Not so, however, if the beneficiary is estranged from her descendant, obviously an exceptional case. For a case raising this possibility, see In re Estate of LeGates, 1979 WL 28986, at *1–2 (Del. Ch. Ct. Oct. 24, 1979).
intent once again arises in this context, assuming the testator expressed no hostility toward disinherited heirs.

All of which suggests that lawmakers toiling in this field have something to learn from empirical evidence. If hostility provokes the lion's share of negative wills, then lawmakers can justify enforcement of these provisions as a majoritarian, intent-effectuating rule. If hostility provokes only a minority of negative wills, however, their enforcement becomes problematic.

In order to gain insight into the distribution of motivations for negative wills, I have striven to assemble a comprehensive data set of published American cases, without restriction as to date, in which negative wills appeared. I then examined each of those cases to determine the testator's motive for disinheriting the heir (or heirs), as shown either by the will or other evidence.92 The cases broke down as follows:

<table>
<thead>
<tr>
<th>Hostility:</th>
<th>42 (20.4%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nonhostility:</td>
<td>53 (25.7%)</td>
</tr>
<tr>
<td>Unclear:</td>
<td>111 (53.9%)</td>
</tr>
<tr>
<td>Total:</td>
<td>206</td>
</tr>
</tbody>
</table>

And so, perhaps contrary to intuition, we find that hostility has figured in a minority of the published cases where an explanation for a disinheriting provision presents itself; other, benign considerations have induced more negative wills. Looking exclusively at the cases in which we can discern the testator's frame of mind, motivation proved nonhostile in 55.8 percent of the cases and hostile in 44.2 percent. We cannot, therefore, safely assume, pace the Uniform Probate Code and the Restatement, that a per se rule giving effect to negative wills is more likely to correspond with the typical testator's intent than the common law's per se rule invalidating negative wills. To make a blanket presumption here is, well, presumptuous.

Still, we must take care to note the limitations of these data. The data set of informative cases turns out to be relatively small: ninety-five in all. Assuming the cases account for a random sample of negative wills, the margin of error is ± 10 percent. Accordingly, the data are not statistically significant for the purpose of establishing that a majority of negative wills are nonhos-

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92. The raw data are available on request from the author. The study tabulates all cases in which a disinheriting provision for an heir appeared in the will, including those in which no partial intestacy ensued. The study nevertheless excludes "disinherison" cases from Louisiana in which testators have sought to deprive a descendant of the forced share (known as legitime) because the only statutory grounds for doing so involve misbehavior by the descendant, resulting in hostility. See La. Civ. Code art. 1621 (2012); see also, e.g., Succession of Czindula, 751 So. 2d 986, 987–88 (La. Ct. App. 2000) (omitted from the data set). The study counts cases, rather than individual disinherited heirs, as the units of data. In some instances, I have inferred motivation from suggestive evidence, see infra notes 101, 105–106, 119 and accompanying text, but where evidence has appeared inconclusive, or occasionally conflicting, see, e.g., In re Estate of Kearney, 9 N.Y.S.2d 290, 293 (Sur. Ct. 1939), aff'd, 16 N.Y.S.2d 526 (N.Y. App. Div. 1939), I have coded motivation as unclear.
Incomplete Wills

Furthermore, we have reason to doubt the perfect randomness of the data, even beyond the general sampling concerns raised earlier.93

First of all, quantitative reliance on manifestations of hostility or non-hostility could skew the results in unpredictable ways. In other words, hostility could prove unequally distributed between negative-will cases in which we can detect evidence of either hostility or nonhostility, and those cases in which we can detect nothing one way or the other about the motives driving the testator—the second group representing over 54 percent of the data set. One potential distortion arises from widespread estate-planning practices. Estate planners typically advise testators against stating hurtful rationales of any sort within the text of their wills.94 Hence, at least within professionally drafted wills, expressions of hostile motivation may prove underrepresented. At the same time, disinheriting provisions frequently appear within homemade wills, prepared without the coolheaded advice of counsel. Uncounseled testators might be less inclined to leave their motives unsaid when hostility inspires a negative will.95 In this regard, a data set consisting of cases should provide fuller information than one consisting of probated wills, since cases sometimes reveal evidence of motive beyond the four walls of the wills they adjudicate.96 Nevertheless, the cumulative impact of any tendencies to downplay hostile motives remains unknown and probably unknowable.

A second possible distortion is related to, but could tend to offset, the first. If expressions of hostility are underrepresented in the language of wills, they might prove overrepresented in cases about wills. Estate planners counsel against including such a statement in a will, precisely because they fear that the statement might trigger a contest once the will becomes a public document.97 This practical intuition commands some theoretical support. Cognitive psychologists posit that “equity seeking” can overcome rational economic incentives to settle cases, a phenomenon we would expect to see escalate in emotionally charged cases.98 The shock of a negative will coupled with an overt statement of hostility could disincline a contestant to settle a will contest, thereby increasing the likelihood that it generates an opinion included in the data set. This distortion is confined to a data set of cases, as opposed to probate records.

93. See supra notes 31–36 and accompanying text.
95. See, e.g., Eulitt v. Little Sisters of the Poor (In re Estate of McKay), 98 N.W.2d 604, 605 (Mich. 1959) (“[These heirs] never bother about me in life. So I remember them in Death.”). The court concluded from the language of this will that the “testatrix was poorly schooled in spelling and grammar...” Id. at 607.
96. See infra notes 102–103 and accompanying text.
97. McMullen, supra note 94, at 85–86.
All told, our confidence in these data as a precise indicator of the distribution of motives for negative wills remains open to doubt. Applied as a rough barometer, the data nonetheless suggest substantial scattering of testamentary motives. The absence of a predominant cause for negative wills gives rise to heterogeneity that neither the common law nor the model laws, located at either end of the doctrinal spectrum, make any attempt to cope with.

Can we locate a *via media* between the two extremes? Rather than follow a per se rule, why not grant courts authority to assess the impact of a negative will on a case-by-case basis, taking into account both intrinsic and extrinsic evidence? Such an approach offers the advantage of fine-tuning judicial outcomes to intent, which the data suggest is likely to vary from testator to testator. Such an approach also acknowledges our uncertainties about the reliability of the available empirical evidence, which weakens our ability to certify which of the fixed alternatives would comprise the majoritarian rule.

At the same time, evidence of testamentary intent concerning a negative will in a given case may emerge from any number of sources. In some instances, the will itself may disclose the presence (or absence) of hostile intent, whether expressly or by reasonable inference from the language used. When, for example, a testator stipulates that specified heirs “shall not receive one penny of my estate,” hostility appears manifest. If a will was professionally drafted, the attorney scrivener (or her notes) may provide insight into what led the testator to execute a negative will. Likewise, testimony by family members or other acquaintances could shed light on the

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99. Such a rule would also afford courts an opportunity to take into consideration evidence of changes in attitude, as where a testator and beneficiary, alienated from one another at the time when a will containing a disinheriting provision was executed, subsequently reconciled. See *Hammer v. Hammer*, 633 S.E.2d 878, 880–81 (N.C. Ct. App. 2006) (where such a reconciliation occurred, but where the disinheriting provision appeared only within an inoperative, conditional section of the will).

100. See *supra* note 77 and accompanying text.

101. *In re Hefner’s Will*, 122 N.Y.S.2d 252, 253 (Sur. Ct. 1953) (internal quotation marks omitted); see also, e.g., *Phelps v. Stoner’s Adm’r*, 212 S.W. 423, 424 (Ky. 1919) (similar language); *Nevada v. Palm (In re Estate of Melton)*, 272 P.3d 668, 671–72 (Nev. 2012) (similar language); *In re Estate of Stewart*, 304 A.2d 361, 362 (N.H. 1973) (exhorting the unrelated residuary beneficiary not to assign any part of her inheritance to any of the testator’s relatives). Some courts have drawn such inferences. E.g., *In re Estate of Alexander*, 395 N.Y.S.2d 598, 600 (Sur. Ct. 1977) (“There are no expressions of affection for the son in the testator’s will; indeed, he does not refer to his son as ‘beloved’ as he does his other legatees, including his chauffeur.”). Vice versa, the language in some wills supports the opposite inference. See, e.g., *Rosnow v. Rosnow (In re Will of Rosnow)*, 78 N.W.2d 750, 750 (Wis. 1956) (“I hereby mention the name of my son . . . in loving remembrance, it being my will that he shall share in no part of this my estate.”) (internal quotation marks omitted)); see also *In re Davies’ Will*, 185 N.W. 578, 579 (Iowa 1921) (similar language).

102. *E.g., In re Estate of Jetter*, 570 N.W.2d 26, 32 (S.D. 1997) (introducing the drafting attorney’s notes into evidence); *McElligott v. Murray (In re Estate of Connolly)*, 222 N.W.2d 885, 887 (Wis. 1974) (introducing the drafting attorney’s recollection of the decedent’s rationale into evidence).
testator's motives. Alternatively, aspects of the estate plan may themselves betray the testator's sentiments. If, for example, a testator makes a bequest to a beneficiary but then adds a direction that she is to receive "no more" than that—what we earlier distinguished as a limiting will—and the sum bequeathed is substantial, that fact alone bespeaks nonhostility. Otherwise, presumably, the testator would have left the beneficiary nothing. Similarly, if a testator imposes a negative will on an heir but nevertheless provides a bequest to her under some circumstances, that qualification can suggest the absence of hostility toward the heir.

Still, a court is left to decide how to treat nonhostile negative wills, whose enforcement might or might not reflect the testator's preferences. A court could again seek to ferret out intent case by case, but in the absence of any further evidence of how the circumstances that brought about the partial intestacy would have affected intent, what sorts of inferences might a court reasonably draw? Whatever the cause of a partial intestacy, where the alternative taker is less closely related genealogically to the testator than the disinherited heir, a court could reasonably assume the absence of intent to give effect to a nonhostile negative will, given the tendency of most persons to favor nearer relatives over more distant ones—an assumption made throughout intestacy law. So, for example, if a testator were expressly to disinherit one of two children, explaining the negative will not on the basis of hostility but rather on her relative lack of need or on prior transfers made to her, then the death of the beneficiary-child resulting in a partial intestacy should not trigger the negative will, in the absence of other evidence, if the alternative heir were, for instance, a cousin of the testator.

Lawmakers would still need to set a rebuttable presumption about the testator's intent to make a negative will effective vel non, where a court finds no evidence of intent one way or the other. Existing empirical evidence fails to reveal what the presumption should be because courts have not previously relied on case-specific indications of intent to resolve the effectiveness of


104. See supra text following note 45.

105. See, e.g., Marinos v. Marinos (In re Marinos' Estate), 102 P.2d 443, 444 (Cal. Ct. App. 1940) ("Four Thousand ($4,000.00) Dollars, and no more"); Doherty v. Grady, 72 A. 869, 870 (Me. 1908) ("forty thousand dollars, and no more").

106. See, e.g., In re Estate of Kronen, 496 N.E.2d 678, 679 (N.Y. 1986) (disinheriting children "for reasons best known to me," but adding that if the testator and his spouse died in a common calamity, those same children would take the entire estate). But cf. Graydon's Ex'rs v. Graydon, 25 N.J. Eq. 561, 562 (1874) (concerning a conditional negative will, where the beneficiary engaged in the behavior—marriage to a named party before a specified date—that triggered the negative will).

107. For a case featuring similar facts, see Bray v. Bray, 269 N.E.2d 452, 453 (Mass. 1971), quoted supra note 82.
negative wills. At least in the short term, the rebuttable presumption must be set arbitrarily. But once enough cases decided under the new rule accumulate, a follow-up empirical study might reveal patterns that could, on reevaluation, inform our formulation of the applicable presumption.

2. Ancillary Issues

a. Global Disinheritance

In the course of reforming the law of negative wills, states and model lawmakers have had to address a number of additional issues. One of these is the treatment of disinheriting provisions that apply not to discrete heirs but to all heirs: "I have intentionally omitted the names of any of my relatives from this . . . will,"108 or words to that effect. In such a case, enforcing a negative will in the event of a partial intestacy would cause a portion of the estate to escheat to the state.

Neither the Uniform Probate Code nor the Restatement distinguishes global from discrete negative wills.109 From the beginning, though, British courts electing to give effect to negative wills carved out an exception for those resulting in an escheat, which the courts invalidated. Hence, "by making the declaration of exclusion . . . too extensive, it becomes inoperative."110 One American court, construing a South Dakota statute authorizing negative wills, held that the statute—although based on the Uniform Probate Code—implicitly incorporated the British exception nullifying global negative wills.111 The Code's Reporter subsequently challenged this reading as "unfortunate[112] and, in his dual capacity as Reporter for the Restatement, he added language calling for the enforcement of a global negative will.113


110. Lett v. Randall, (1855) 107 Rev. Rep. 26 (Ch.) 30–31; 3 Sm. & G. 83, 89 (dicta). This distinction is reiterated in the most recent British case on point. See Landolt v. Wynn (Re Wynn), [1983] 3 All E.R. 310 (Ch.) at 314 (dicta). For early American discussions, see Doe ex dem. Hoyle v. Stowe, 13 N.C. (2 Dev.) 318, 323–24 (1830) (suggesting that a negative will is effective so long as other heirs exist to replace any disinherited heirs), and Blackman v. Gordon, 19 S.C. Eq. (2 Rich. Eq.) 43, 45 (App. Eq. 1845) (deeming a global negative will void).


112. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.7 reporter's note (1999). The court in In re Jetter emphasized (1) that the Code expressly authorizes courts to fill in gaps with "law and equity," (2) that the section giving effect to negative wills allows them to cover "an individual or class," and that the term "class" may not encompass a negative will directed at all heirs, and (3) that under another section of the Code adopted in South Dakota, escheat occurs only if no heir can be "found." 570 N.W.2d at 28–30 (internal quotation marks omitted). At least as a matter of statutory construction, the court's analysis is far from compelling and, as the dissent complained, contradicted the "plain language of [the statute]." Id. at 34 (DeVine, J., dissenting).

113. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 2.7 cmt. a (1999).
More recent cases applying negative will statutes in Colorado and Nevada have now taken that approach, enforcing negative wills that operated to disinherit all heirs apart from named beneficiaries. One of these holdings remains dependent on whether a partial intestacy ensues under the terms of a future interest created by the will. In the other case, where the negative will took effect at once, the court declared that the testator’s $3 million estate had escheated to the state, citing the Restatement’s contention that global negative wills should operate no differently from those covering discrete heirs.

From a policy perspective, we have cause to doubt whether scrupulous observance of global negative wills would likely correspond with testamentary intent. Clauses of this sort often look suspiciously like ones designed to avoid the application of a pretermitted child statute, as opposed to the intestacy statute. They may well reflect artless drafting, misstating intent. To the extent that the author of a global negative will did truly aim to exclude all heirs, and not just nonmarital descendants, it stands to reason that the provision ordinarily traces to feelings of hostility—what else could inspire a testator to disinherit all of her relations? Nevertheless, like other emotions, hostility is not unqualified; people experience gradations of hostility. As it diminishes, hostility shades into indifference, a phenomenon perceptible within negative wills. Some global negative wills have stemmed from little more than genealogical distance or from the absence of social interaction, as opposed to overt conflict: “I ... have no relatives who are more closely related to me than those of first cousins. I do not feel any particular affection for any of [them], ... nor do I feel that any of them is entitled to be the recipient of any of my bounty . . . .” A testator’s reluctance to


115. In re Walter, 97 P.3d at 190–92.

116. In re Melton, 272 P.3d at 671, 680–81. See also Feitler v. LaChance (In re Estate of Krockowsky), 896 P.2d 247, 249 n.2 (Ariz. 1995) (assuming in dicta that a global negative will can take effect under the Uniform Probate Code).

117. See supra notes 83–84 and accompanying text; see also Bank v. Union Bank (In re Estate of Bank), 56 Cal. Rptr. 559, 561–63 (Ct. App. 1967) (finding that a global negative will sufficed to override the pretermitted child statute); Benolken v. Johnson (In re Benolken’s Estate), 205 P.2d 1141, 1146–47 (Mont. 1949) (same); In re Jetter, 570 N.W.2d at 31–33 (suggesting that the clause was probably intended only to preclude claims by other “known and unknown relatives” that they were mistakenly omitted from the will).

118. But for an exception, see Eastminster Presbyterian Church v. Thompson (In re Estate of Jackson), 793 S.W.2d 259, 260 (Tenn. Ct. App. 1990) (quoting a will disinheriting “[a]ll of my relatives . . . because they are all financially secure in their own right and do not need any little thing I have to offer,” and maintaining that “[t]hey now have and always had my love . . . with many gifts at times during my days of living”).

119. In re Estate of Stoffel, 459 N.Y.S.2d 707, 709 (Sur. Ct. 1983) (emphasis omitted) (internal quotation marks omitted); see also, e.g., Chuhak v. First Nat’l Bank of Cicero (In re Estate of Cancik), 476 N.E.2d 738, 739–40 (Ill. 1985) (concerning a global negative will covering heirs who resided in Czechoslovakia); Iozzavichius v. Fournier, 308 A.2d 573, 574 (Me. 1973) (“[T]here is no suggestion that any contacts were ever established . . . .”); In re Martin’s Will, 95 N.Y.S.2d 260, 261 (Sur. Ct. 1949) (“I do not have any blood relatives that I
provide for such heirs is understandable. Still, when presented with a choice between leaving property to them or to the state, via the doctrine of escheat, when a will proves incomplete, how many testators would prefer to let stand a global negative will? Even in the presence of hostility, one court regarded such a preference as "bizarre." We cannot dismiss out of hand the possibility that the animosities of some testators run that deep, and for that reason lawmakers should not invalidate global negative wills as a matter of law. But given their draconian consequences, global negative wills should be viewed with a skeptical eye. Reflecting that skepticism, lawmakers should create a rebuttable presumption that a testator intends to withdraw a global negative will in the event of an (unanticipated) partial intestacy, whatever presumption they otherwise apply to negative wills covering discrete heirs.

b. Construction

Then there is the matter of textual construction. Both the Uniform Probate Code and the Restatement acknowledge that the language of negative wills can take many forms. Nevertheless, under both the Code and the Restatement, a court can enforce a negative will only if it appears "expressly" in a testamentary instrument; a court cannot find a negative will by implication.

This limitation appears too rigid to effectuate intent. Particularly when presented with estate plans drafted by laypersons, courts need a free hand to construe clumsy language more flexibly. A recent case applying a negative will statute based on the Uniform Probate Code illustrates the problem: a testator disinherited "[a]ll of my heirs not mentioned in this will." The

120. In re Jetter, 570 N.W.2d at 31 (quoting the heirs’ brief) (internal quotation marks omitted). The dissent, however, disagreed. See id. at 35–36 (DeVine, J., dissenting). See also Henderson v. Snow (In re Estate of Barnes), 407 P.2d 656, 659 (Cal. 1965) (observing that a testator might prefer to relax a global negative will had she anticipated that the sole beneficiary would have predeceased her). But cf. In re Walter, 97 P.3d at 192 (failing to explore the facts that prompted the testator to include the global negative will, and conceding that the testator “may not have intended that his estate would escheat,” but insisting that the court was “limited by the clear and plain meaning of his words”); In re Melton, 272 P.3d at 677 (failing to explore the facts and rejecting the suggestion that the prior death of the intended beneficiary would have changed the testator’s intent to disinherit his relatives as “speculat[ion]”).


123. Hartvickson v. Haugen (In re Estate of Haugen), 794 N.W.2d 448, 451 (N.D. 2011) (internal quotation marks omitted).
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testator’s sole heir under the intestacy statute was his spouse, whom the will did mention—but only by way of noting that the testator had filed for divorce from her, presumably to explain why the testator left her nothing under the will. The court acknowledged that this language “creates uncertainty” about whether the testator intended to exclude his spouse under the negative will. Nevertheless, the Code’s strict form of negative will statute “requires express language, not just uncertainty,” to disinherit an heir. The spouse was permitted to take under the intestacy statute, despite the testator’s insinuation that he intended—perhaps more adamantly than with regard to any other relative—to disinherit her.

Limiting wills raise similar construction problems. Under the Code and the Restatement, a bequest of “$50... and no more” disqualifies the beneficiary as an heir by partial intestacy; but “[w]ithout the phrase ‘and no more,’ the provision would not prevent [the beneficiary] from taking his intestate share.” In the first instance, the limiting will is express; in the second, it is not.

Once again, this approach is too literal to capture imperfect expressions of intent by lay drafters. Of course, if a testator bequeaths a substantial but specified sum, indicative of a benevolent intent, without including the phrase “and no more,” no inference of intent to limit the beneficiary’s inheritance in the event of a partial intestacy would be warranted. But if a testator bequeaths a nominal sum to a beneficiary—a few dollars or, proverbially, a single dollar—then tacking on the phrase “and no more” appears redundant. From the beginning, courts faced with nominal bequests have interpreted them as attempts in common discourse to create negative wills, whether or not valid under state law. Such a provision appears “not as a

124. Id.
125. Id.
126. Id.
127. Id. at 451-52.
129. Quattlebaum v. Simmons Nat’l Bank of Pine Bluff, 184 S.W.2d 911, 913 (Ark. 1945). Arguendo, an exception might be made in the case of a bequest of a life estate: the bequest of a life estate could imply an intent to exclude the life tenant from the remainder interest if it is distributed by partial intestacy, even without the words “a life estate and no more.” Compare, e.g., Walters v. Neafus, 125 S.W. 167, 169 (Ky. 1910) (“One could scarcely be a remainderman to his own life estate.”), and Bragg v. Litchfield, 98 N.E. 673, 675–76 (Mass. 1912) (finding an intent to exclude the life tenant from the remainder by “unavoidable inference”), with, e.g., Nat’l Shawmut Bank of Boston v. Zink, 196 N.E.2d 917, 918 (Mass. 1964) (finding no such inference), Langlois v. Langlois, 93 N.E.2d 264, 266 (Mass. 1950) (same), and Reid v. Whitfield (In re Estate of Reid), 399 So. 2d 1032, 1033 (Fla. Dist. Ct. App. 1981) (finding that the life tenant under a will could take the remainder by partial intestacy because “intent is no longer controlling” when intestacy ensues).
130. Denn v. Gaskin, (1777) 98 Eng. Rep. 1292 (K.B.) 1294; 2 Cowp. 657, 660 (constructing a bequest of ten shillings as a “disinheriting legacy” but holding that it was ineffective to foreclose inheritance by partial intestacy).
bequest, but as a token of disinheritance," as defined "by well-known custom and connotation." In some instances, wills including nominal bequests have gone on to spell out the testator’s hostility toward the nominal beneficiary in no uncertain terms, and the formula itself seems almost to breathe resentment—adding insult to penury. To deny that nominal bequests qualify as negative wills because they lack express words of disinheritance is to ignore this idiomatic reality.

To be sure, the distinction between a nominal and substantial bequest is one of degree, and where along the continuum of ascending bequests the implication of disinheritance disappears remains vague. But vagueness does not render a rule unworkable—it simply turns it into a standard applied with greater latitude. Courts have discretion to find negative wills as an implicit attribute of nominal bequests under nonuniform negative will statutes, none of which requires a testator to employ express language of


132. Trinity Methodist Church v. Moore (In re Estate of Moore), 33 Cal. Rptr. 427, 429–30 (Dist. Ct. App. 1963); see also, e.g., Rufty v. Brantly, 161 S.W.2d 11, 14 (Ark. 1942) (indicating that a nominal bequest is "the usual and ordinary means of disinherit[ing] one, who would otherwise be an heir"); Appeal of Scully, 98 A. 350, 353 (Conn. 1916) ("The gift of $5 in an estate of [these] proportions . . . is a method of practically disinherit[ing] . . ."); In re Estate of Skwarlo, No. 3135 K-33, 2001 WL 312451, at *1 (Del. Ch. Mar. 12, 2001) ("[T]his one dollar bequest appears to be a nominal sum which was intended to disinherit the individual named."); Lawnick v. Schultz, 28 S.W.2d 658, 660 (Mo. 1930) ("[T]he amount of the legacy [$5] . . . was tantamount . . . to a virtual disinheritance . . .").


c. Devolution

What alternative devolution ensues from enforcing a negative will? Under both the Uniform Probate Code’s statutory rule and the Restatement’s proposed judicial rule, disinherited heirs are treated as if they disclaimed their intestate shares; hence, they take nothing, apart from any capped bequest granted them under a limiting will. At the same time, under the law of disclaimers, any surviving descendants of disinherited heirs ordinarily take in their place, succeeding to their shares of the partially intestate estate.

Neither the Code nor the Restatement spells out the rationale for this rule, and we need to consider whether it is likely to correspond with the intent of the typical testator. Under the law of intestacy, when an heir (other than the decedent’s spouse) predeceases the decedent, her descendants inherit in her shoes by right of “representation,” under the theory that a decedent’s social bonds to heirs extend to family members of lower generations. Heirs of the higher generation supersede lower ones because decedents expect heirs to provide for their descendants in turn; but if heirs are unavailable to take, their descendants replace them in the eyes of the typical decedent. The question raised here is whether the opposite also holds true: In other words, if a decedent disinherits an heir, would the decedent’s expression of negative intent extend to that heir’s descendants, by virtue of their close association?

On the one hand, we might assume that if a testator wished to disinherit the descendants of heirs, she could convey that intent expressly, by expanding the scope of the negative will: “My child, A, and A’s descendants, are to take no part of my estate.” In that event, both A and A’s descendants are

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136. Estate of Flink, N.Y. L.J., Jan. 28, 2002, at 21 (Sur. Ct.); see also N.Y. EST. POWERS & TRUSTS LAW § 1-2.19 (McKinney 2012); TEX. PROB. CODE ANN. §§ 3(ff), 58(b)(1) (West 2012); Wis. STAT. ANN. § 852.10 (West 2002).
138. See UNIF. PROBATE CODE § 2-1106(b)(3)(B) (amended 2010), 8 pt. 1 U.L.A. 285 (Supp. 2012). If a testator disinherits her spouse, the spouse’s descendants who are also descended from the testator comprise alternative heirs, but the spouse’s descendants from another marriage or relationship do not, unless no other blood heirs survive. See id. § 2-103(a)(1) & (b), 8 pt. 1 U.L.A. 48 (Supp. 2012).
139. McGovern et al., supra note 83, § 2.2, at 54–55. For the sake of simplicity, I refer here (and hereinafter) to a predeceasing “heir.” Strictly speaking, she constitutes an “heir-apparent.”
140. E.g., In re Klopsch’s Estate, 125 N.Y.S.2d 320, 323 (Sur. Ct. 1951) (“The testatrix stated in her will a purpose to make no provision for her son . . . or his issue . . . .” (emphasis added)); Waller v. Sproles, 22 S.W.2d 4, 4 (Tenn. 1929) (“[O]ne dollar . . . each . . . is all that I intend for them or their heirs to have of my estate . . . .” (emphasis added) (internal quotation marks omitted)).
treated as if they disclaimed, reallocating the partially intestate estate to other lines of children, if any, or to collateral relatives. On the other hand, when negative wills appear in homemade testamentary instruments, as they so often do, we cannot count on unsophisticated drafters to express themselves that precisely. A lay testator might intend a provision disinherit ing an heir to excise her without substituting descendants in her place—implicitly expanding the negative will to cover descendants of disinherited heirs. At the very least, either this approach or the one advocated in the Code and Restatement appears a plausible way to read a negative will drafted by a layperson.

Courts have faced a similar issue when construing disinheriting provisions that operate to override pretermitted heir statutes. Under some of those statutes, if a child omitted from a will predeceases the testator, leaving descend ants, those descendants can claim the predeceasing child’s pretermitted share.

But if the will expressly disinherits a child who predeceases, without also referring to that child’s descendants, a majority of courts nevertheless have denied descendants the right to claim as pretermitted heirs. This rule extends disinheriting provisions for pretermitted heirs by implication to the descendants of those heirs.

Whether the same implication should accompany negative wills that reshape intestate shares demands analysis. Again, the best way to pursue the problem is to contemplate testators’ possible motives for making negative wills and the distributive preferences that seem likely to follow from those motives. If a testator harbors feelings of hostility toward an heir and disinherits the heir for that reason, it is entirely possible, albeit not certain, that those feelings would extend to the heir’s descendants. It all depends on the nature of their relationship. When the disinherited heir happens to be the testator’s spouse, and her descendants are also his descendants, we cannot assume that hostility toward the spouse would spill over to their children. But when the negative will covers a blood heir, and the testator has no independent connection with descendants of that blood heir, the prospect of hostility by association grows larger. The Uniform Probate Code makes a similar inference in connection with the implied revocation of bequests to former spouses. Under the Code, bequests to stepchildren and other relatives of a former spouse are likewise impliedly revoked, on the theory that those relatives “are likely to side with the former spouse, breaking down...[their] ties” to the testator. Is it not logical to assume, by analogy, that

141. Restatement (Second) of Prop.: Donative Transfers § 34.2 statutory notes 2, 4 (1992) (not addressed in the third Restatement).

142. For collections of cases, see E.W.H., Annotation, Disinheritance Provision of Will as Affecting Construction of Will as Regards Children or Descendants of Person Disinherited, 112 A.L.R. 284 passim (1938), and L.S. Tellier, Annotation, What, Other Than Express Disinheritance or Bequest, Avoids Application of Statute for Benefit of Pretermitted or After-Born Children, 170 A.L.R. 1317, at 1330–34 (1943). Professor Atkinson endorsed this approach. Thomas E. Atkinson, Handbook of the Law of Wills 143 n.23 (1953).

descendants of a disinherited blood heir will "side" with their parent in her feud with the testator?

If a negative will traces to the testator's inter vivos transfers to an heir or to the testator's assessment that one heir has less need than others, an implicit intent to broaden the negative will to include descendants of the disinherited heir again remains a distinct possibility, if not a certainty. Either way, the testator might well expect the disinherited heir to provide in turn for her descendants. Under that assumption, treating descendants of a disinherited heir as substitute takers would defeat the testator's purpose of achieving equality of distributions to, or greater material equality among, heirs. 144

In short, the rule establishing the consequences of a negative will advocated by the Code and the Restatement appears suspect. In New York, where negative wills are effective under less detailed nonuniform legislation, courts claim discretion to allocate the intestate shares of disinherited heirs either to their descendants or to the other heirs, as guided by the "facts and circumstances" of each case. 145 Given our uncertainty about intent when we examine the will alone, the approach taken in New York appears reasonable. At the outset, we would still need to establish an arbitrary default rule of construction concerning the consequence of a negative will where no evidence appears at all, but over time we might accumulate a sufficient data set of cases from which to make an empirical judgment about what default rule is more likely to effectuate intent with regard to the issue of devolution.

A subsidiary issue arises from the possibility that a disinherited heir might predecease the testator. In that event, under both the Code and the Restatement, the rules of representation in intestacy take precedence, and the negative will ceases to apply. 146 Once again, the model lawmakers fail to articulate any rationale for this wrinkle; and again, its conformity with intent appears doubtful.

Consider how the rule might operate in conjunction with the doctrine prevailing in New York that negative wills function, at a court's discretion, to excise a named heir, rather than treat her as a disclaimant. 147 If a negative will took effect under this rule, then the heir's whole line could lose its opportunity to inherit from the testator. But under the approach suggested by

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144. See Hittell v. Greer (In re Estate of Hittell), 75 P. 53, 53 (Cal. 1903) (quoting a will stating that "I give nothing to my brother... because I suppose him to be rich; I give nothing to any of his children... because he can provide for them" (internal quotation marks omitted)); Lane v. Patterson, 76 S.E. 47, 47 (Ga. 1912) (quoting a will stating that "[h]aving fully provided for my deceased daughter... in her lifetime... I make no provision or bequest to her children" (internal quotation marks omitted)).

145. E.g., In re Estate of Stoffel, 459 N.Y.S.2d 707, 710 (Sur. Ct. 1983); see also Maddock v. Haines, 88 F.2d 350, 352-53 (7th Cir. 1937) (assuming that a testator would want to include the descendants of a disinherited child within the scope of a negative will).


147. See supra note 145 and accompanying text.
the Code and *Restatement*, if a disinherited heir happened to predecease the testator, then we would ignore the negative will, and descendants of that predeceased, disinherited heir could still take as heirs of the testator by right of representation if a partial intestacy came to pass. Yet, once we determine that a negative will implicitly extends to descendants of the disinherited heir, we have little reason to assume that the testator’s intent to disinherit an heir of the lower generation would depend on the survival *vel non* of the disinherited heir in the higher generation.

To clarify this point, recall the empirically common explanations for a negative will. If the negative will stemmed either from the testator’s prior transfers to the heir or from the heir’s lack of need, then the testator can anticipate that heirs of the lower generation will inherit in turn from the heir of the higher generation. Heirs of the lower generation wind up in the same, superior financial position whether they inherit from their parent during the testator’s lifetime (by virtue of their parent’s prior death) or following the testator’s death. If the negative will stemmed from hostility toward the heir, we again have no reason to assume that the timing of the disinherited heir’s death would affect the testator’s ties to the descendants of that heir. To be sure, the death of the heir during the testator’s lifetime could conceivably lead to a rapprochement between the testator and the late heir’s descendants. But by treating the enforceability and distributive consequences of a negative will as issues to be decided case by case on the basis of extrinsic evidence, we would ensure that courts retain discretion to take such a healing of the family divide into account when ordering distribution of the estate.

None of this analysis changes fundamentally under the Code’s (and the *Restatement*’s) different rule that descendants substitute for disinherited heirs, although in most cases the issue dissolves into insignificance within the model laws. Under the Code, descendants take in place of a disinherited heir if she predeceases the testator, in which case the rules of representation apply, and also if she survives the testator, in which case the rules of disclaimer apply. At the same time, the shares going to descendants in each instance do not invariably correspond under the Code. When an heir predeceases the decedent under the rules of representation, the Code provides for an equal division among descendants at each generational level at which at least one heir survives. Hence, for example, suppose a decedent had two

148. See supra note 144 and accompanying text.
149. Again by analogy, if a testator executes a will making bequests to stepchildren or other relatives of the testator’s spouse, and the testator subsequently gets divorced from that spouse, under the Code we assume that the testator intends to disinherit the stepchildren and other affines included in the predissolution will. This assumption does not change under the Code if the former spouse predeceases the testator. See UNIF. PROBATE CODE § 2-804(b) (amended 2010), 8 pt. 1 U.L.A. 233 (Supp. 2012).
150. See supra note 99 and accompanying text.
children, A and B. A, in turn, had two children, C and D, while B had only one child, E. If A survived the decedent and B predeceased, then under the rules of representation A would receive one-half of the children's share of the intestate estate, while E (as B's representative) would also take one-half of that part of the estate. But if both A and B predeceased the decedent so that neither could take as an heir, then the Code would treat each grandchild equally, and C, D, and E would each take one-third of the children's share of the intestate estate.\textsuperscript{153}

That is not, however, how descendants "represent" disinherited heirs. Under the Code as well as the Restatement, surviving disinherited heirs are deemed not to have constructively predeceased the testator but rather to have constructively disclaimed their intestate shares.\textsuperscript{154} In the scenario just raised, if B predeceased the testator who also disinherited the surviving child A under an incomplete will, so that once again neither A nor B could take as an heir, A's one-half share would now be treated as if A had disclaimed, so that C and D would each take one-quarter, while E would take one-half. If, by contrast, the Code were to treat a disinherited heir as constructively predeceasing the testator, then the descendants of A would collectively take a greater fraction, totaling two-thirds, and the descendant of B would take less, \textit{viz.}, one-third.

The drafters of the Code appear intuitively to have surmised that this result would conflict with probable intent: by hypothesis, a testator who imposes a negative will on an heir is unlikely to want the heir's descendants potentially to inherit a larger share than they would eventually take if the testator had left standing the heir's intestacy rights. Yet, under the Code as currently structured, descendants of a disinherited heir (A) can inherit more if the disinherited heir predeceases the testator (one-third to C, one-third to D, and one-third to E, in our example) than if the disinherited heir survives the testator (one-quarter to C, one-quarter to D, and one-half to E, in our example). If the drafters of the Code contemplated this seemingly perverse disparity and have in mind a rationale to justify it, then they ought to articulate their reasoning in the accompanying comment.

3. Estate Planning Gimmickry

A review of negative will cases historically shows that they raise technical as well as policy issues. A negative will can figure into schemes to accomplish estate planning objectives separate and apart from the goal of disinherance. Focused on that goal, statutory drafters have almost certainly overlooked potential misapplications, and a well-drafted statute authorizing negative wills ought to preclude parties from using the device for any purpose other than the intended one of modifying substantive succession rights; lawmakers might sanction other purposes, of course, but they demand independent appraisal of public policy.

\textsuperscript{153} See id. § 2-106 & cmt.

\textsuperscript{154} See supra note 137.
The principal unsanctioned use of negative wills is to deprive parties of standing to contest an estate plan. In New York for many years, a mortmain statute barred testators from bequeathing more than half their estates to charity if a parent or child survived them and contested the will, unless the parent or child would derive no benefit from doing so under the terms of the will or by intestacy.155 Testators sought to circumvent this limitation by imposing negative wills—effective in the state since 1967156—on heirs. Given that they were added to complete estate plans, these negative wills served no substantive purpose; but they did operate ostensibly to sustain otherwise unsustainable estate plans by precluding parents or children from benefitting in a caveat proceeding. In a line of opinions, courts in New York upheld this technique,157 despite misgivings that it served to undermine legislative intent.158

Although mortmain is now a thing of the past,159 testators today might attempt a similar maneuver to give effect to other objectionable estate plans.160 A testator could create a trust for a (voidable) capricious purpose, or for an otherwise valid noncharitable purpose that the testator wishes capriciously to overfund,161 and then disinherit all heirs in the hope of denying standing to anyone who might challenge the legality of the terms of the trust. Whether this expedient would work remains to be tested;162

156. See supra note 54 and accompanying text.
158. In re Estate of Rothko, 335 N.Y.S.2d 666, 670 (Sur. Ct. 1972) (observing that negative wills exploit a "loophole" in the statute); In re Estate of Norcross, 325 N.Y.S.2d 477, 481 (Sur. Ct. 1971) ("If a testator can defeat the statute by clever craftsmanship . . . the statute can be rendered futile."). But cf. In re Eckart, 348 N.E.2d at 907–10 (pointing out that the legislature had already made it possible "to easily avoid" the statutory requirement by other expedients).
160. Obviously, no such maneuver can help a wrongdoer give effect to a will procured by undue influence or fraud, since an heir could challenge the effectiveness of the whole testamentary instrument that disinherits heirs; if the challenge succeeded, the negative will would fall with the rest of the estate plan. In re Estate of Lippner, 429 N.Y.S.2d 839, 842–43 (Sur. Ct. 1980). The strategy to deny standing only has potential to forestall challenges based on substantive objections to an estate plan. See id. at 841–43.
162. See In re Estate of Stoffel, 427 N.Y.S.2d 720, 721 (Sur. Ct. 1980) (concluding that where a testator bequeathed the residue of his estate for the care of his mausoleum, a provision disinheriting certain heirs deprived them of standing to challenge the reasonableness of the size of the bequest), aff’d, 437 N.Y.S.2d 922 (App. Div. 1980). In that case, though, the purpose trust statute giving effect to trusts for the care of graves made them charitable under state
Incomplete Wills

the answer depends on (1) whether by virtue of its right of escheat, the state would then succeed to a right to challenge the trust, an issue on which cases have offered conflicting authority, and (2) if not, whether the bar on capricious-purpose trusts is self-executing, empowering a court to intervene sua sponte. The relevant statutes generally fail to speak to either question, opening the prospect of literal, hence costly, trial and error.

Testators might also assay negative wills as a means of avoiding the forced share for a surviving spouse. In some states, the forced “elective” share is structured to provide benefits only out of the testamentary estate, on the assumption that intestacy statutes offer a surviving spouse even greater benefits. Yet, if a testator can use a testamentary instrument simply to impose a negative will on her spouse as heir, and the elective share does not apply to the intestate portion of the estate, then an all-too-simple expedient for circumventing mandatory inheritance rights would become available. As a practical matter, courts might be unwilling to acknowledge such a loophole, whatever the statutes say. Nevertheless, the possibility of success (however improbable) could occasion litigation, unless precluded by statutory text.

B. “Positive” Wills

In a sense, all of this is just the beginning. A negative will redefines a testator’s heirs in the event of partial intestacy by excluding one or more of them. By the same token, a testator might positively redefine her heirs by including others. Hence, a will might read: “My stepchild, A, is to be treated as my child for all purposes under my estate.” If the testator dies

law, N.Y. EST. POWERS & TRUSTS LAW § 8-1.5 (McKinney 2012), so the state attorney general had standing to oppose (and might also have brought) the challenge. See In re Stoffel, 427 N.Y.S.2d at 721.


166. See, e.g., IND. CODE ANN. § 29-1-3-1(a), (d) (West 2012); MD. CODE ANN. EST. & TRUSTS § 3-203 (LexisNexis 2011).

partially intestate, can a court regard the stepchild as equivalent to a natural child, sharing equally with natural children as heirs?\textsuperscript{168}

As a structural matter, such a positively redefined category of heirs represents the mirror image of a negatively redefined category. Addition and subtraction are alternative mathematical operations, and in each instance we have the same evidence of testamentary intent, formalized in the same way. If anything, in the case of a “positive” will, we can have even greater confidence in our ability to reconstruct intent. Negative wills may or may not reflect hostility, as we have seen,\textsuperscript{169} making intent to enforce them under unanticipated conditions potentially unclear. But a “positive” will unequivocally reflects benevolence. In the presence of such a clause, we can readily infer a testator’s preference for redefining heirs in the event that a partial intestacy ensues.

Unsurprisingly, most of the few American cases raising this issue at common law\textsuperscript{170} have dealt with “positive” wills in the same way they dealt with negative wills—by holding them ineffective. In one such case, the court even cited to the law of negative wills for support.\textsuperscript{171} Neither the Uniform Probate Code nor the Restatement addresses the issue of “positive” wills,\textsuperscript{172} but nothing in the language of either suggests that a court can give effect to such provisions.

That is unfortunate. Once we validate wills that redefine heirs in a negative way, public policy demands that we extend the principle to redefinitions of all sorts. Such a rule would operate in harmony with another provision of the Code, allowing a decedent to define whether posthumously conceived or implanted children qualify as heirs under the intestacy statute.\textsuperscript{173} Under the Code, a court can even consider extrinsic evidence to determine a decedent’s intent to establish the definition of heirs in this one context; the definition need not appear within an executed writing.\textsuperscript{174}

\textsuperscript{168} No prior academic discussion has raised or addressed this issue.
\textsuperscript{169} See supra Part II.A.1.
\textsuperscript{170} Under late Roman civil law, however, for a will to take effect it had to designate an heir of the testator, as distinct from beneficiaries of bequests. Alan Watson, Roman Law & Comparative Law 78–81 (1991).
\textsuperscript{171} Dorsett v. Vought, 98 A. 248, 249 (N.J. 1916); see also Fid. Union Trust Co. v. Laise, 12 A.2d 882, 890 (N.J. Ch. 1940) (“Of course, the fact that the testator referred to [a beneficiary] as his son, although not legally adopted, does not bestow upon him any right to inherit as heir . . . .”).
\textsuperscript{173} Id. One may observe another structurally similar rule of redefinition that arises under judicial doctrine. Under the doctrine of equitable adoption, an unadopted child whom the testator promised to adopt qualifies as an heir. See id. § 2-122, 8 pt. 1 U.L.A. 79 (Supp. 2012) (providing that the Uniform Probate Code does not preempt the doctrine); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 2.5 cml. k (1999). In theory, this doctrine does not operate to effectuate intent, although in practice it would appear
Hence, a decedent can define posthumously conceived or implanted children as heirs *vel non* in cases of complete intestacy, not just in cases of partial intestacy. Were lawmakers to grant testators a broader power to define heirs within the confines of a testamentary instrument, the authenticity and meaning of such a clause would admit of even less doubt than under the limited power envisioned by the drafters of the Code.

A British court was first to put forward the possibility of enforcing a positive will in a broadly framed dictum published in 1936.175 A few American courts have also seen the merits of such a doctrine, albeit too obscurely to have elicited any scholarly notice before now. In a Georgia case from half a century ago, a testator stated in his will that his stepson "shall also have an equal share with all the heirs."176 The state supreme court ruled that because "it was the intent of the testator . . . that [his stepson] was to be treated as one of his heirs as if he were his own child," he would be so treated when a partial intestacy occurred.177 The court offered no analysis and cited no authority to defend this result; the opinion seems in essence an intuitive *ipse dixit*. More recently, a lower court in New York reached the same result for a partially intestate estate on the basis of language in the will "provid[ing] that the testator's stepchildren are included as beneficiaries of any bequest made to his . . . children."178 The court grounded its decision on New York's nonuniform statute permitting negative wills.179 As in the Georgia case, the court in the instant case sensed that giving effect to "positive" wills extends the doctrine of negative wills in a sensible way. Still, the statute in New York contains no textual pronouncement expressly supporting the court's construction.180

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175. Said the court,

> [W]hen you have ascertained what interest has been undisposed of by the testator you then look at the will to see whether as regards that interest he has given any directions, and, if he has, those directions must be attended to. For instance, . . . a testator . . . might insert a direction something to this effect in his will: "In the event of any of my property being undisposed of by this my will and the provisions of [statutory rules of partial intestacy] taking effect I direct that any such property shall be dealt with" in a particular way . . . .

Crabtree v. Thornber (*In re Thornber*), [1937] 1 Ch. 29 at 36–37. This dictum has never been cited by an American court.


177. *Id.* at 732.


179. *Id.* at *3.

180. *See* N.Y. EST. POWERS & TRUSTS LAW § 1-2.19 (McKinney 2012) ("A will is an . . . instrument . . . whereby a person disposes of property or directs how it shall not be disposed of . . . .").
But one other nonuniform statute contains just such a pronouncement.181 Under an obscure section of the Texas Probate Code,182 a testator can by will either “disinherit an heir”183 or “direct the disposition of property or an interest passing under the will or by intestacy.”184 By its plain text, this statute permits both “positive” and negative wills. Although not yet applied in any published cases, the Texas statute lays out a path toward doctrinal reform in this area of inheritance law.185

III. GIFTS AND INCOMPLETE WILLS

A different problem arises when a benefactor makes inter vivos gifts to parties who also qualify as beneficiaries under a will or as intestate heirs. If a benefactor leaves no will, the doctrine of advancement applies. Under this doctrine, if the benefactor intended an inter vivos gift to comprise an advance on a child's inheritance, as shown by any evidence, the administrator must factor in the gift when calculating the child's intestate share, thereby equalizing the total gift and estate distributions that each child receives.186 In some states, under certain circumstances, the law presumes intent to treat a gift as an advancement.187 Under the Uniform Probate Code, by contrast, no such presumption ever applies, and the benefactor must formalize an advancement in a contemporaneous writing.188

181. In two additional states, Arkansas and Ohio, a testator can appoint an heir in a judicial proceeding. Ark. Code Ann. § 28-8-102 (2012); Ohio Rev. Code Ann. § 2105.15 (LexisNexis 2011); see also Ricketts v. Ferrell, 671 S.W.2d 753, 753–54 (Ark. 1984). These proceedings are functionally similar to antemortem probate proceedings, also made available to testators in both of these states. Ark. Code Ann. § 28-40-202 (2012); Ohio Rev. Code Ann. § 2107.081 (LexisNexis 2011). The statutes in these states make no provision for the designation of an heir under a will, however, and the Ohio statute has been construed as not allowing such a designation. See Moon v. Stewart, 101 N.E. 344, 347 (Ohio 1913) (dicta); In re Will of Williamson, 5 Ohio N.P. 1, 3–4 (Prob. Ct. 1897), rev'd on other grounds, 6 Ohio N.P. 79 (C.P. 1898).

182. Until now, the section has escaped notice or discussion by any commentator, academic or otherwise.


184. Id. § 58(b)(2) (emphasis added).

185. The model lawmakers overlooked the statute, as well as the doctrine it establishes: neither Texas’s nor Wisconsin’s nonuniform statute appears on the tabulation of American negative-will statutes found in the Restatement. See Restatement (Third) of Prop.: Wills & Other Donative Transfers § 2.7 statutory note (1999).


Alternatively, if a benefactor dies testate, the doctrine of *ademption by satisfaction* applies. Under that doctrine, if the benefactor intended a gift made to a beneficiary in part to satisfy a bequest left to that beneficiary under the benefactor's will, the gift is again factored in by deducting it from the bequest.\(^\text{189}\) Whereas the common law sometimes presumes intent to apply the doctrine,\(^\text{190}\) the Code never does so; once more, it requires a writing expressing intent.\(^\text{191}\) Lawmakers conceptualize the doctrines of advancement and ademption by satisfaction as analogous and complementary.\(^\text{192}\)

Suppose, though, a testator executes an incomplete will and a partial intestacy ensues. Which of the two doctrines applies? Assume, for example, that the testator's will provides a bequest of $50,000 each to three children, A, B, and C, but the will includes no effective residuary clause. Under the intestacy statute, A, B, and C comprise the testator's heirs. Evidence reveals that the testator made an inter vivos gift of $80,000 to A, and that the testator intended this gift as a proxy for A's inheritance (and further that the testator formalized this intent properly under state law). The doctrine of satisfaction operates on individual bequests and therefore comes into play whether or not they appear within a complete will.\(^\text{193}\) Therefore, because the gift to A exceeded A's bequest, the gift offsets A's bequest in its entirety, and A receives nothing under the testator's will. But after offsetting $50,000 of the $80,000 gift, does the court also take into account the remaining $30,000 when ordering distributions under the intestacy statute? The answer varies from state to state. In a minority of jurisdictions today, the doctrine of advancement only operates in the event of a complete intestacy; in more states—a group that has grown in number over the past half-century—the doctrine extends to partial intestacy.\(^\text{194}\)

The Commissioners have shifted their stance on this issue in line with the national trend. Under the original version of the Uniform Probate Code, the doctrine of advancement applied only in instances of complete intestacy.\(^\text{195}\) As

\(^{189}\) McGovern et al., supra note 83, § 2.6, at 78–79; Barney Barstow, Ademption by Satisfaction, 6 Wis. L. Rev. 217 passim (1931).


\(^{192}\) See id. § 2-609 cmt. Even so, the Code contains a deliberate but unexplained inconsistency between the two doctrines. Compare id. § 2-109(c) & cmt., 8 pt. 1 U.L.A. 58 (Supp. 2012) (disregarding an advancement to an heir who predeceases the decedent), with id. § 2-609(c) & cmt., 8 pt. 1 U.L.A. 183 (Supp. 2012) (continuing to take into account a gift made to a will beneficiary who predeceases the testator).

\(^{193}\) See Restatement (Third) of Prop.: Wills & Other Donative Transfers § 5.4 (1999); 6 Bowe & Parker, supra note 190, § 54.3.

\(^{194}\) A review of all fifty state-advancement statutes by the author reveals that currently (1) twelve apply expressly only in the event of a complete intestacy, (2) twenty also apply expressly in the event of a partial intestacy, and (3) eighteen fail expressly to resolve the issue. Sixty years ago, however, the reverse pattern prevailed. See Elbert, supra note 186, at 665; Elbert, supra note 187, at 242–43.

revised in 1990, the Code’s advancement section also covers partial intestacy.\textsuperscript{196} Predictably, the Restatement parrots the revised Code.\textsuperscript{197} Yet, in the accompanying comments neither the Commissioners nor the authors of the Restatement offer a word of explanation to justify either the original rule or the decision to change it.\textsuperscript{198} Their silence suggests that this element of the law of incomplete wills may have been incompletely thought through.\textsuperscript{199}

By applying the law of advancement to cases of partial intestacy, would lawmakers better effectuate the testator’s intent? Analysis suggests that \textit{it depends}. In our hypothetical example above, if the testator had made the $80,000 gift to \textit{A} sometime after executing the incomplete will, then presumably the testator will not have contemplated the gift at the time when she formulated the estate plan. Under these circumstances, both the doctrine of ademption by satisfaction and advancement should apply to pare down both the bequest and (if necessary, as in our hypothetical) \textit{A}’s further share under the intestacy statute.\textsuperscript{200}

The modern version of the Uniform Probate Code achieves this result. Nevertheless, a glitch remains in the plain language of the Code. Suppose that (as sometimes happens\textsuperscript{201}) the will itself anticipates the possibility of subsequent gifts and provides that they be deducted from a beneficiary’s testamentary share. Now we have direct evidence of intent to equalize the shares and, \textit{a fortiori}, the doctrine of advancement should apply in the event of a partial intestacy. Under the text of the Code, the doctrine of ademption by satisfaction will apply on the basis of the provision of the will, even if no writing contemporaneous with a subsequent gift reiterates the intent to equalize.\textsuperscript{202} But if a partial intestacy follows, and the doctrine of satisfaction

\begin{itemize}
  \item \textsuperscript{197} \textbf{Restatement (Third) of Prop.: Wills & Other Donative Transfers} § 2.6 cmt. i (1999). This doctrine was not addressed in the second Restatement. Because the Reporter for the third Restatement also served as Reporter for the Uniform Probate Code, the two have become largely coordinated projects. \textit{See supra} note 59 and accompanying text.
  \item \textsuperscript{199} No prior academic discussions have subjected this aspect of advancement doctrine to policy analysis.
  \item \textsuperscript{200} Likewise, if the bequest to \textit{A} under the will were specific rather than general, then the doctrine of ademption by satisfaction might not apply under state law, rendering the doctrine of advancement potentially relevant. \textit{See Unif. Probate Code} § 2-609 cmt. (amended 2010), 8 pt. 1 U.L.A. 183 (Supp. 2012); Restatement (Third) of Prop.: Wills & Other Donative Transfers § 5.4 cmts. c & e (1999); BowE & Parker, supra note 190, §§ 54.23, .33, .37.
  \item \textsuperscript{201} \textit{See Unif. Probate Code} § 2-609 cmt. (amended 2010), 8 pt. 1 U.L.A. 183 (Supp. 2012) ("Some wills expressly provide for lifetime advances by a hotchpot clause."); \textit{see also} Elbert, supra note 186, at 679–81 (discussing will provisions that charge advancements).
  \item \textsuperscript{202} The doctrine of satisfaction applies "only if (i) the will provides for deduction of the gift, [or] (ii) the testator [so] declared in a contemporaneous writing." \textbf{Unif. Probate Code} § 2-609(a) (amended 2010), 8 pt. 1 U.L.A. 183 (Supp. 2012).
\end{itemize}
fails to cut back the inheritance sufficiently to achieve the intended equality, as in our hypothetical, then the doctrine of advancement applies only if the testator states in a second writing contemporaneous with the subsequent gift that it was intended as an advancement. By its plain text, the Code fails to permit formalization of an advancement by a prior writing, even one executed as a legally valid will.203 A properly drafted statute adapting the doctrine of advancement to cases of partial intestacy would offer testators that opportunity.

Now reverse the order of events. Suppose in our hypothetical that the testator first made a gift intended (and properly formalized) as an advancement to A and then subsequently executed the will allocating $50,000 each to A, B, and C. Lawmakers have always assumed that when a will follows a gift, the testator intends to take the gift into account when she fixes the size of the bequests—or, to recall the terminology found in some of the cases, the bequest “merges” the prior gift-advance.204 Accordingly, the doctrine of satisfaction fails to apply; it only pertains to gifts that succeed wills.205

The same principle should inform the doctrine of advancement under incomplete wills: the testator will have considered a prior gift-advance when setting the amount of the bequests under the will, and the doctrine of advancement should no longer apply. Although in this scenario a testator could conceivably anticipate that the law of advancement will continue to cover the intestate portion of the estate and rely on adjustments to intestate shares when allocating the testate portion of the estate, the likelihood of this sort of premeditation seems vanishingly small. Partial intestacy appears almost invariably to arise through inadvertence, not design.206 Nevertheless, under the

203.  Id. § 2-109(a), 8 pt. 1 U.L.A. 58 (Supp. 2012) (“If an individual dies intestate as to all or a portion of his [or her] estate ... [a gift to] an heir is treated as an advancement ... only if (i) the decedent declared in a contemporaneous writing ... that the gift is an advancement, or (ii) the decedent’s contemporaneous writing ... otherwise indicates that the gift is to be taken into account in computing the division ... of the decedent’s intestate estate.” (first alteration in original)).

204.  E.g., In re Estate of Sechler, 190 A.2d 302, 303 (Pa. 1963).

205.  Restatement (Third) of Prop.: Wills & Other Donative Transfers § 5.4 cmt. a (1999); 6 BowE & Parker, supra note 190, §§ 54.22, 55.2; McGovern et al., supra note 83, § 54.22; 6 BowE & Parker, supra note 190, §§ 54.22, 55.2; McGovern et al., supra note 83, § 54.22; 6 BowE & Parker, supra note 190, §§ 54.22, 55.2; McGovern et al., supra note 83, § 54.22; 6 BowE & Parker, supra note 190, §§ 54.22, 55.2; McGovern et al., supra note 83, § 54.22. The Uniform Probate Code could be clearer on this point: nowhere does its section covering ademption by satisfaction expressly limit the doctrine to gifts that succeed wills. See Unif. Probate Code § 2-609(a) (amended 2010), 8 pt. 1 U.L.A. 183 (Supp. 2012). Nevertheless, for the doctrine to apply under the Code, the testator must “declare[] in a contemporaneous writing that the gift is in satisfaction of the devise.” Id. This language arguably implies that a will setting out the devise must already exist.

206. A rare judicial analysis is pertinent:

[I]t is apparent from the provisions of the will, that [the testator] designed and manifestly supposed that he had made a disposition of his whole estate. . . . [I]n view of all his previous advancements, he [subsequently] made such a distribution of his property, by his will, as he deemed just and proper. In such a case, therefore, although the testator had, unexpectedly and beyond his own anticipation, died intestate, as to the residuum of his estate, the statutory provision as to advancements could have no just application.
Uniform Probate Code, the doctrine of advancement applies in cases of partial intestacy, irrespective of whether the gift followed or preceded execution of the will.207

A further complication, though, muddies the waters of our conjectures. Suppose a testator makes a gift-advance to a child and later executes a will that fails to provide bequests to any of the children. In this situation, the testator has not overtly calculated how much the donee-child should receive relative to others. The testator’s omission of bequests to other children might signify her intent to forgive the advancement under the will; had she wished to compensate for the advancement, the testator could have made equalizing bequests to the other children. But at the same time, the testator could be relying on a surrogate to do so. Suppose, for example, the testator executes a will making small bequests to other family members and then leaves the residue, comprised of the bulk of the estate, to her spouse. The testator may assume that the spouse will take gift-advances into account when calculating how, in turn, to divide their combined estates among their children. But if the spouse predeceases the testator, causing the residuary bequest to lapse and a partial intestacy to ensue, then the spouse can no longer play this role; under these circumstances, the testator might wish the doctrine of advancement to apply after all. The case, in short, is unclear, making intent difficult to anticipate.208

All of this suggests that any per se rule assimilating gifts into incomplete estate plans is insufficiently refined. Application of the doctrine of advancement to partial intestacy should turn on whether the advancement occurred before or after the will was executed; and if the advancement occurred before the testator executed a will that names no children as beneficiaries, then ideally extrinsic evidence should be admissible to clarify intent. The laws of Great Britain once contained a flexible rule of this sort. Under the Administration of Estates Act of 1925, the doctrine of advancement applied to the shares of children in the event of partial intestacy but “subject to any contrary intention expressed or appearing from the circumstances of the case.”209 This provision disappeared after 1995, when Parliament ended the duty of children to account for advancements in cases of partial intestacy.210 The Uniform Probate Code continues that duty but

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Needles v. Needles, 7 Ohio St. 432, 435-36 (1857); see also supra note 9 and accompanying text; infra note 210.

207. See supra note 196 and accompanying text.

208. A further exceptional case arises where a will does bequeath to some children and entirely omits the child who received a prior gift intended as an advancement. Either the will or extrinsic evidence might show that the testator reduced the child’s bequest to nothing in order to take account of the gift-advance, still without succeeding in fully equalizing the children’s respective shares. See In re Estate of Hayne, 133 P. 277, 278-79 (Cal. 1913) (applying the doctrine of advancement to a partially intestate estate on this basis).


210. Law Reform (Succession) Act, 1995, c. 41, §§ 1(2)(a), 1(3) (Eng. & Wales). This change conformed with the recommendation of the Law Commission, which deemed the
fails to draw any distinctions or afford any discretion. By making the doctrine of advancement applicable to partial intestacy in all cases, the Code is likely to carry out testators’ intent only in some cases.

IV. DISTRIBUTIVE RULES OF PARTIAL INTESTACY

The larger question that remains is how to treat the intestate portion of an incomplete estate plan when a testator has indicated nothing in the text of the will about who she would want to include or exclude as an heir. The usual principle that applies in this situation is to treat the two legal domains as perfectly distinct. The will holds sway within its four walls; the law of intestacy governs beyond. The Uniform Probate Code codifies this dichotomy, stating that “[a]ny part of a decedent’s estate not effectively disposed of by will passes by intestate succession,”211 and the Restatement concurs.212

A few American jurisdictions deviate from this pattern, however. In those states, the rules of complete and partial intestacy differ to some extent.

A. Existing Deviations

One alternative framework, currently found in only a single American state, also existed for a time within British law. Under many state intestacy statutes (along with Great Britain’s), a surviving spouse receives a share of the estate that sometimes varies with its net value.213 Under the Uniform Probate Code, for example, if an intestate decedent leaves surviving descendants who are not also descendants of the surviving spouse, the spouse receives the first $150,000 (sometimes called the “preferential share”) out of the net probate estate, plus one-half of the balance (the “fractional share”).214 Hence, the spouse’s total proportional inheritance as an heir rises


for smaller estates—a result justified by empirical evidence of individuals’ wishes.\(^{215}\)

Great Britain’s intestacy statute employs a similar formula.\(^{216}\) Prior to 1996, though, the British statute included a further wrinkle: in the event of a partial intestacy, the surviving spouse’s preferential share was diminished by any sums the spouse received under the will.\(^{217}\) In effect, then, Great Britain treated bequests to the spouse like advancements, reducing the spouse’s intestate share, but only with respect to the spouse’s preferential share, not her fractional share of the estate.\(^{218}\) The same rule exists today under the intestacy statute of Pennsylvania.\(^{219}\) Michigan formerly applied this rule, but abolished it in 2000.\(^{220}\)

Two other states go further still. Under the intestacy statute of Kentucky, bequests to a child or grandchild under wills are treated as advancements for purposes of calculating the full extent of the child or grandchild’s share as heir in the event of a partial intestacy; she must account for the amount received by will before she can take by partial intestacy.\(^{221}\) The same rule applies in Tennessee to all heirs, without limitation to descendants.\(^{222}\) Still

215. Id. § 2-102 cmt.; see also Restatement (Third) of Prop.: Wills & Other Donative Transfers § 2.2 reporter’s notes 1–2 (1999).


218. Since 1996, a surviving spouse in England or Wales receives the same share by partial intestacy that she would receive in the event of a complete intestacy. Administration of Estates Act § 49 (as amended by Law Reform (Succession) Act, 1995, c. 41, § 1(2)(b)). The Law Commission had again criticized the former rule as “complex and expensive to administer,” noting that “many administrators of estates are lay persons who have little previous knowledge and experience of the intestacy rules.” The Law Comm’n, supra note 210, at § 22.


220. Mich. Comp. Laws Ann. § 700.105(b) (West 2002) (repealed 2000) (applicable in one of the two situations where a preferential share arose, and making no exception for bequests of personality). Repeal appears to have occurred without debate, as part of the omnibus enactment of the substantive article of the Uniform Probate Code in Michigan. See id. § 700.2102.

221. Ky. Rev. Stat. Ann. § 391.140 (LexisNexis 2010) (applying the doctrine of advancement to “[a]ny real or personal property or money, given or devised” (emphasis added)). The statutory rule was given effect in Bowles v. Winchester, 76 Ky. 1, 6–13 (1877), and Walters v. Neafus, 125 S.W. 167, 170 (Ky. 1910).

222. Tenn. Code Ann. § 31-5-102 (2007) (covering “[a]ll advancements, whether by settlement or otherwise, in the lifetime of deceased, or by testamentary provision . . . .”). The rule was applied in Vance v. Huling, 10 Tenn. 135, 136–37 (1826); Sturdevant v. Goodrich, 11 Tenn. 95, 96–98 (1832); and Gold v. Vaughan, 36 Tenn. 245, 247–49 (1856). In North Carolina, the state supreme court initially construed a state statute as instituting the same rule. Norwood v. Branch, 4 N.C. (Taylor) 400, 400–01 (1816). Subsequently, though, the same court reconsidered and rejected such a construction. See Wilson v. Hightower, 10 N.C. (3 Hawks) 76, 77–78 (1824); Ford v. Whedbee, 21 N.C. (21 Dev. & Bat. Eq.) 16, 21 (1834); Johnston v. Johnston,
current, both statutory rules are of ancient vintage: Kentucky’s Act first appeared on the statute book in 1852; Tennessee’s in 1784. Britain also formerly had such a rule, applicable to all descendants of the testator, but again abolished the rule in 1995.

Although now unique to the state, Pennsylvania’s approach to the preferential share fits the rationale for including such a share within the scheme of intestacy. Assuming a decedent typically would want her surviving spouse to receive a minimum amount from the estate, whatever its size, a decedent meets that commitment when she furnishes the spouse with testate assets. Viewed another way, the preferential share is supposed to provide a surviving spouse a larger proportion of smaller estates—but if an estate is composed of both testate and intestate assets, then the intestate portion bears no consistent relationship to the size of the total estate.Treating bequests to the spouse as advancements of the preferential share adjusts for this distortion. Nevertheless, the Commissioners have never incorporated this rule into any of the preferential shares created under the Uniform Probate Code.

At the same time, the rule found in Kentucky and Tennessee, treating bequests as advancements in cases of partial intestacy, appears at odds with the likely intent of a testator. By executing a will varying the shares of children (or other heirs), the testator expresses a wish to benefit them unevenly. To compensate for uneven bequests when distributing property not covered by the estate plan contradicts that wish. The preamble of Tennessee’s first statute imposing the rule in 1784 indicates that it sought not to effectuate intent, but rather “to promote that equality of property which is the spirit and principle of a genuine republic.” Lawmakers have long since abandoned the idea of bending inheritance to political ends. Plainly, the statutes at issue are obsolete, and their survival today as legal archaisms reminds the


223. For the respective statutory histories, see Bowles, 76 Ky. at 10–12, and Pearce v. Gleaves, 18 Tenn. 359, 360–61 (1837) (decided under prior statutory law).


225. Compare the British Law Commission’s concern that such a rule is administratively complex. See supra note 218 and accompanying text.


227. Walker, 25 Ga. at 557 (“We should disappoint [the testator’s] purpose, and indeed, make a will for him, if we were to hold that the legatees should account for what they received under the will, before they could share in the undisposed part of the estate.”).

228. Sturdevant v. Goodrich, 11 Tenn. (3 Yer.) 95, 96 (1832) (internal quotation marks omitted). Likewise in Kentucky, the rule serves “the purpose of effecting an equitable distribution. The legislative will is consulted, and not the intention of the testator or intestate . . . .” Bowles, 76 Ky. (13 Bush) at 12; see also Norwood v. Branch, 4 N.C. (Taylor) 400, 400 (1816).
student just how commonly and persistently lawmakers have succumbed to legislative neglect in the inheritance field.\textsuperscript{229}

B. Proposed Deviations

From the standpoint of intent-effectuation, indeed, we must consider the merits of the opposite approach. Rather than compensate for individualized bequests, courts could extrapolate from them, using an incomplete will as a blueprint for the whole estate. In the bargain, partial intestacy would disappear as a concept, and any instructions in the will concerning the exclusion or redefinition of heirs would become superfluous.

Although nowhere codified as such, this idea is not alien to American judicial thinking. In crafting a related doctrine, lawmakers have recognized that the particularized will can effectuate intent more accurately than the generalized intestacy statute, although lawmakers have disagreed about the scope of that principle.

1. Lapse

Consider the doctrine of lapse. If a beneficiary under a will predeceases the testator, the estate plan mandated by the will becomes impossible to carry out in literal terms: the beneficiary is no longer available to receive property. But the inability of the executor to honor a “lapsed” bequest does not ordinarily cause a partial intestacy. If the testator included a residuary clause in the will, the residuary beneficiary receives all bequests that lapse, unless the will provides otherwise.\textsuperscript{230} Given that the testator intended unallocated property to flow to the residuary beneficiary, courts assume that the testator would also want allocated property under an impossible bequest to go to that beneficiary.\textsuperscript{231} In other words, the will, rather than the intestacy statute, guides the disposition of the impossible bequest. Only if a will fails to include a residuary clause do the testator’s heirs succeed to a lapsed bequest.

Suppose the residue itself is divided among several beneficiaries and one of them predeceases the testator. Who receives the predeceasing residuary beneficiary’s share—the surviving residuary beneficiaries or the testator’s heirs? Under the common law’s no-residue-upon-a-residue rule, a partial intestacy occurs and the heirs take, unless the will provides otherwise.\textsuperscript{232} Received from Great Britain, this rule once predominated among the Ameri-

\begin{itemize}
\item \textsuperscript{229} For some additional examples, see Adam J. Hirsch, \textit{Cognitive Jurisprudence}, 76 S. Cal. L. Rev. 1331, 1344 n.58 (2003).
\item \textsuperscript{230} 6 Bowe \& Parker, \textit{supra} note 190, § 50.16. Under statutory law, a lapsed bequest may also go to descendants of the predeceasing beneficiary under some circumstances. \textit{Restatement (Third) of Prop.: Wills \& Other Donative Transfers §§ 1.2, 5.5} (1999).
\item \textsuperscript{231} See, e.g., \textit{In re Batchelder}, 18 N.E. 225, 226 (Mass. 1888) (“The testator knows that his specific intentions may fail, and it is partly on that account that he follows up his more particular provisions with a general drag-net.”).
\item \textsuperscript{232} E.g., Clark v. Case, 42 So. 2d 109, 111 (Miss. 1949).
\end{itemize}
can states,233 but it has waned in recent decades;234 one by one, a large majority of states have switched (usually by statute, but in a few instances by judicial decision) to an alternative doctrine, dubbed the remain-in-the-residue rule.235 This rule gives any lapsed residuary portions to the surviving residuary beneficiaries.236 Both the Uniform Probate Code and the Restatement endorse the shift237 (albeit with imperfect clarity238). The modern construction, again looking to the will to complete the estate plan, functions to avoid a partial intestacy.

Critics of the old no-residue-upon-a-residue rule urge that the will offers a better indication of the testator’s wishes than the intestacy statute in this situation. As one court reasoned, “Ordinarily a testator will include his most favored legatees in the residual bequest intending that they shall take the bulk of his estate to the exclusion of any unnamed heirs.”239 Considered in this light, “slightly enlarging the shares of named residuary beneficiaries would more likely match the testatrix’s intent than would distributing the lapsed shares to persons whom she potentially did not even include in her will.”240 Defenders of the common law rule—and a few remain—retort that

233. See id. (“This general rule of construction . . . is followed by most jurisdictions . . . ”).
234. Only eight states today continue to enforce the no-residue-upon-a-residue rule. See In re Estate of McFarland, 167 S.W.3d 299, 304 n.6 (Tenn. 2005).
235. Id. at 307 (Drowota, C.J., dissenting).
240. In re Estate of McFarland, 167 S.W.3d 299, 307 (Tenn. 2005) (Drowota, C.J., dissenting); see also, e.g., Corbett v. Skaggs, 207 P. 819, 822 (Kan. 1922) (“The reasons for allowing lapsed specific legacies to fall into the residue apply with equal force in favor of allowing all the residue to go to the surviving residuary legatees . . . instead of turning over a part of it to persons for whom other provision had been made, or who had not been referred to in the will at all.”); Commerce Nat’l Bank of Toledo v. Browning, 107 N.E.2d 120, 125 (Ohio 1952) (similar observation). For similar academic commentary, see ATKINSON, supra note 142, at 785, and Allen, supra note 226, at 1118.
the old rule causes the testator’s property to “pass to the most natural objects of her bounty—her heirs,” whereas the remain-in-the-residue rule would “completely redraft the terms of the will,” giving the surviving residuary beneficiaries “enlarge[d] . . . percentages” that the testator never intended to create.241

One court has described this debate as a clash between “two competing schools of thought as to what a testator would most probably desire to happen when a residuary gift lapses.”242 On reflection, though, it seems that the two theories are potentially reconcilable; the strength of the alternative arguments hinges incrementally on the circumstances. In the ordinary run of situations, the bulk of an estate flows through the residue. Consequently, when a testator allocates a large fraction of the residue to a beneficiary, the testator does indeed signal her closeness to that beneficiary. When, however, a testator allocates only a small fraction of the residue to a beneficiary, the bequest fails to carry the same connotations; given a choice, the testator might well prefer to enrich her heirs, rather than heap further rewards on a beneficiary whom the testator has not singled out as a “most favored legatee[].”243

To posit stark examples, suppose a testator divides the residue between two beneficiaries, allocating 99 percent of the residue to A and the remaining 1 percent to B. B predeceases the testator, but A survives. Because A comprises the primary beneficiary, it stands to reason that the testator would want A to absorb B’s lapsed fraction of the residue, which is thereby only “slightly enlarge[ed].”244 But if we turn the tables and assume that A predeceases the testator while B survives, the like assumption becomes problematic. B was a relatively minor beneficiary to begin with, and to augment B’s share so substantially as a result of A’s death distorts the estate plan and thereby could easily do violence to the testator’s intent.245

241. In re McFarland, 167 S.W.3d at 305; see also, e.g., Ensley v. Valley Nat’l Bank of Ariz. (In re Estate of Jackson), 471 P.2d 278, 280 (Ariz. 1970) (“To allow the lapsed residue to pass to the surviving residuary legatees would defeat the intent of the testator who intended the residuary beneficiaries to receive only the portion specified in the will and no more.”); In re Estate of Levy, 415 P.2d 1006, 1008 (Okla. 1966) (similar observation). For an early statement of the argument, see Cunningham’s Devisees v. Cunningham’s Heirs, 57 Ky. 19, 23 (1857) (asserting that the no-residue-upon-a-residue rule is preferable “because it would be inconsistent with the evident intention of the testator to give [a surviving residuary beneficiary] a larger proportion of [the residue] than [the testator] had declared he should be entitled to”). For an academic endorsement, see 2 Thomas Jarmar, A Treatise on Wills 1030 (Raymond Jennings & John C. Harper eds., 8th ed. 1951) (offering British commentary).

242. In re McFarland, 167 S.W.3d at 305.

243. See supra note 239 and accompanying text.

244. See supra note 240 and accompanying text. The same analysis applies, incidentally, where a bequest lapses above a residuary bequest which remains effective. At least in the typical case, the residuary bequest will dwarf the lapsed bequest, and this favoritism justifies the traditional assumption that lapsed bequests flow into the residue, rather than to the heirs via a partial intestacy.

245. In this circumstance, if a bequest lapses above the residue, directing the lapsed bequest to a minor residuary beneficiary also becomes more problematic; here, though, the
Incomplete Wills

The structural insight to glean here is that incompleteness is a matter of degree, and the extent of incompleteness can affect a testator’s preferences regarding the missing component of the estate plan. When only a small fraction of the residue is left undisposed of, reallocating it by reference to an estate plan naming a primary beneficiary makes sense; but when much of the residue is undisposed of, rendering the residuary aspect of the estate plan very incomplete, reliance on a small part of the plan to dispose of the better part becomes a doubtful exercise.

Given factual variation, the ideal approach may be to give courts a choice between implementing either the no-residue-upon-a-residue rule or the remain-in-the-residue rule in any given case, depending on which seems more likely to effectuate intent in light of the scale of the lapse that occurred, coupled with extrinsic evidence. In the absence of evidence one way or the other, a default rule in favor of the modern rule could continue to apply.

Precedents (of a sort) do exist for this approach. In a large majority of jurisdictions, historically, courts lacked formal discretion over the disposition of a lapsed bequest, and they have resisted the suggestion that the relative size of the predeceasing and surviving residuary interests should affect the application of the rules of lapse. Yet, as we know, law in action sometimes diverges

amount of the bequest typically is less, and hence less distortive of the estate plan set out within the will, than a lapsed residuary bequest.

246. For a case in which extrinsic evidence clarified a preference for partial intestacy where a bequest of a share of the residue was revoked, see Bott v. Wright (Estate of Uhl), 81 Cal. Rptr. 436, 438–40 (Ct. App. 1969).

247. In principle, lawmakers need not limit this option to a lapse within the residue; they could also grant courts leave to make this choice in instances where a lapse occurs above the residue. One court observed:

[A]s an original question, there might . . . [be] some doubt about the fair construction of a general residuary clause. It might seem as likely . . . that the words, “rest” or “residue,” mean “property of which I have not attempted to make disposition hereby” as that they mean “property of which I have not made a valid disposition hereby.”

Kellogg v. Campbell, 209 N.E.2d 645, 646–47 (Ohio Prob. Ct. 1965) (emphasis in original) (quoting 6 BOWLES & PARKER, supra note 190, § 50.16, at 107) (internal quotation marks omitted). Under the old English common law, abolished by act of Parliament in 1837, lapsed devises of land bypassed the residue and went to the heirs. Thomas Amory Lee, The Devolution of Void and Lapsed Devises, 25 COLUM. L. REV. 447, 447–49 (1925). By statute, Kentucky maintained this rule of lapse for all sorts of bequests until 1974. See 2 JAMES R. MERRITT, KENTUCKY PRACTICE SERIES PROBATE PRACTICE AND PROCEDURE § 1731 (Norvie L. Lay ed., 2d ed. Supp. 2012); see also, Cundiff v. Schmitt, 243 S.W.2d 667, 668–69 (Ky. 1951) (applying the old rule). Yet lapse above the residue is such a common phenomenon that a flexible rule applicable to nonresiduary lapse would carry in its train significant administrative burdens for courts. This fact, coupled with the likelihood that the modern rule allotting lapsed bequests to the residue reflects intent in most cases, see supra notes 231, 244–245, suggests that the game is probably not worth the candle.

248. See Zille v. Am. Legion (In re Estate of Zilles), 200 P.3d 1024, 1030 n.7 (Ariz. Ct. App. 2008) (“We reject the notion urged by the [h]eirs at oral argument that [the lapsed bequest of] 90% [of the residue] is so much greater than [the two survivors’ respective shares of] 5% that we should dispense with the remaining residuary beneficiaries as functionally de
from law in books. It was a notorious fact—acknowledged by Judge Cardozo in a candid moment—that a court operating under the old no-residue-upon-a-residue rule could in practice keep lapsed residuary bequests within the residue by declaring them part of an implicit class gift whenever the judge was disposed to do so.\(^4\) No complementary legal fiction stands available under the remain-in-the-residue rule,\(^5\) which has spread to most states.\(^6\) This rigidity of application arguably represents a functional drawback of the modern rule.

Under recognized law, precursors of the approach proposed here are fewer but not wholly lacking: in two jurisdictions today, courts have leave to exercise discretion in the event of a lapse in the residue. A line of decisions in Wisconsin granted courts authority to choose between the alternative outcomes on the basis of both intrinsic and extrinsic evidence.\(^7\) The state has

\(^249\) The no-residue-upon-a-residue rule is "reluctantly enforced by courts when tokens are not at hand to suggest an opposite intention." Oliver v. Wells, 173 N.E. 676, 678 (N.Y. 1930) (Cardozo, J.); see also In re Estate of Burke, 222 A.2d 273, 279 (N.J. 1966) ("[I]t was not unusual to find ... avoidance of the rule on rather tenuous grounds where the court sought to effectuate its view of the testator's desire in the contingency."); Nielsen v. Nielsen (In re Nielsen's Will), 41 N.W.2d 369, 372 (Wis. 1950) (construing the will to avoid the no-residue-upon-a-residue rule). For academic observations, see 6 Bowles & Parker, supra note 190, § 50.18, at 114, and The 1956-57 Legislature: Problems Left Uncorrected, 26 Fordham L. Rev. 372, 379 (1957). One court has characterized judicial evasion of the old rule as a doctrinal subtlety: "Several of the courts which follow the [no-residue-upon-a-residue] rule have developed an exception that the rule will readily yield to contrary indications gathered from the will as read in light of the attending circumstances." Ensley v. Valley Nat'l Bank of Ariz. (In re Estate of Jackson), 471 P.2d 278, 280 (Ariz. 1970). One circumstance sometimes cited to override the no-residue-upon-a-residue rule has been the presence of a negative will, indicating the testator's preference to avoid a partial intestacy—thereby giving effect to a negative will indirectly, through the medium of construction. See, e.g., Fulkerson v. Fitch (In re Estate of Roulston), 142 So. 2d 107, 110 (Fla. Dist. Ct. App. 1962); Strauss v. Strauss, 2 N.E.2d 699, 703 (Ill. 1936); Horseman v. Horseman, 217 S.W.2d 645, 647-48 (Ky. 1949); Cavers v. St. Louis Union Trust Co., 531 S.W.2d 526, 533-35 (Mo. Ct. App. 1975); In re Estate of Dammann, 191 N.E.2d 452, 454 (N.Y. 1963). For early examples, see Willis v. Watson, 5 Ill. (4 Scam.) 64, 68-69 (1842), and Atkins v. Kron, 37 N.C. (2 Ired. Eq.) 58, 62 (1841) (per curiam). But see Strohm v. McMullen, 89 N.E.2d 383, 387 (Ill. 1949) (expressly rejecting this principle of construction), overruled in part on other grounds by Schroeder v. Ben, 138 N.E.2d 496 (Ill. 1956).

\(^250\) See, e.g., Olsen v. Erickson (In re Estate of Ulrikson), 290 N.W.2d 757, 758-60 (Minn. 1980) (where the facts suggest the testator probably would have preferred to apply the old rule). For a criticism of the case on related grounds, see Roberts, supra note 90, at 372-73.

\(^251\) See supra notes 233-237 and accompanying text.

since codified this rule. And under the unique "probable intent" doctrine that prevails in New Jersey, a court can deviate from the terms of a will and from the applicable rules of construction whenever necessary to effectuate intent. In at least one instance, a New Jersey court has invoked the probable intent doctrine to redistribute a lapsed residuary bequest to the testator's heirs, despite a state statute ordaining the remain-in-the-residue rule.

2. No Residuary

The problem of lapse in the residue aligns with the problem of incompleteness caused by the total failure or absence of a residuary bequest. Here, one discovers a brace of dueling presumptions that have long competed within the case law of will construction. Courts have created a presumption against intestacy, for "the mere fact that the testatrix made a will is evidence of an intent not to die intestate." But courts simultaneously posit a presumption against disinheritance of heirs, the persons thought to comprise "the natural objects of [the testator's] bounty." Courts arguing for the remain-in-the-residue rule cite to the first presumption for support, while defenders of the no-residue-upon-a-residue rule point to the second. With regard to a will excluding an heir, these two presumptions are sometimes said to "neutralize each other." But as a policy matter, they

253. Wis. Stat. Ann. § 854.07(2), (4) (West 2012) (applying the no-residue-upon-a-residue rule unless the testator intended otherwise, and providing that "[e]xtrinsic evidence may be used to construe the intent").


259. Compare Ensley v. Valley Nat'l Bank of Ariz. (In re Estate of Jackson), 471 P.2d 278, 281 (Ariz. 1970), and In re Estate of McFarland, 167 S.W.3d 299, 307 (Tenn. 2005) (Drowota, C.J., dissenting) (citing the presumption against intestacy to justify the remain-in-the-residue rule), with id. at 305 (citing the presumption against disinheritance of heirs to justify the no-residue-upon-a-residue rule). See also English v. Cooper, 55 N.E. 687, 688 (Ill. 1899) (citing the presumption against intestacy to justify the rule that lapsed bequests above the residue flow into the residue); Wright v. Wright, 122 N.E. 213, 216–17 (N.Y. 1919) (same).

again appear to evince a kind of variable tension that does not quite qualify as an antinomy. On the one hand, we would expect a testator to prefer to flesh out an estate plan with flesh-and-blood relatives; but on the other hand, even an incomplete will discloses the beneficiaries a testator has in mind to enrich at death. Once more, the degree of incompleteness systematically alters the tension. If a will is substantially incomplete, we take a greater risk by using relatively small bequests as a prototype for larger ones.\(^\text{261}\)

Given the alternatives, lawmakers could again grant courts limited discretion to deal with this form of an incomplete will. In the absence of an effective residuary clause, courts could exercise authority either to find a partial intestacy or to extrapolate from the fragmentary estate plan, assigning portions to beneficiaries proportional to their shares under the will on the basis of intrinsic and extrinsic evidence of the testator’s intent. For example, if partial intestacy would result in an escheat, a court could readily infer a preference for extrapolation.\(^\text{262}\) Similarly, if the testator included a

\(^{23}\) N.Y.2d 973 (App. Ct. 1969); see also, e.g., Armstrong v. Butler, 553 S.W.2d 453, 458 (Ark. 1977) (“Although there is a split of authority as to which [presumption] should prevail . . . . [i]t has been held that where the two conflict, the will should be interpreted without regard to either.”); Schiedel v. Murphy’s Ex’t, 188 S.W.2d 468, 469 (Ky. 1945) (“[The presumptions] must be carefully balanced against each other. One is of no greater force than the other.”); In re Rouse’s Estate, 87 A.2d 281, 283 (Pa. 1952) (describing the presumptions as “equally potent” resulting in a “conflict of rules”). For an academic observation, see Frances H. Foster, The Family Paradigm of Inheritance Law, 80 N.C. L. Rev. 199, 212–13 (2001).

\(^{261}\). Cf. Kesselring v. Nowak (Estate of Verdisson), 6 Cal. Rptr. 2d 363, 368 (Ct. App. 1992) (rejecting a party’s contention that the presumption against intestacy should not apply where the intestate portion of an estate is small relative to the testate portion). In a recent empirical study, researchers hypothesized that benefactors who had created will substitutes, by analogy, might wish to project the beneficiary named in them onto the intestacy statute. Mary Louise Fellows et al., An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes, 85 IND. L.J. 409 passim (2010). The researchers further conjectured that “the higher the value of a will substitute relative to the probate estate, the more likely [it is that] decedents would prefer to have some of the probate estate allocated to a will-substitute beneficiary.” Id. at 414. This study relied on telephone interviews, asking subjects to respond to hypothetical vignettes. Id. at 421–23. The researchers found no statistically significant difference between subjects’ responses when the vignettes increased the value or number of will substitutes created for the hypothetical beneficiary. Id. at 425–28. The researchers did, however, find statistically significant differences between subjects’ responses stemming from the status of the beneficiary: subjects allocated more to a “life partner” will-substitute beneficiary than to one who comprised a collateral blood relative. Id. at 427. One cannot but suspect that other factors may have overwhelmed status as a will-substitute beneficiary in this hypothetical study. Subjects could have responded on the basis of their sense of who represents an appropriate (or inappropriate) heir—in other words, they might have allocated a similar amount of intestate property to a life partner who took nothing under a will substitute as to one who comprised a beneficiary—a possibility that the study failed to test. See id. at 423 (limiting the vignettes to decedents who had created will substitutes totaling two alternative positive values).

\(^{262}\). See D.C. v. Estate of Parsons, 590 A.2d 133, 135 (D.C. 1991) (noting the drafting attorney’s assertion that the testator would have preferred extrapolation from the testamentary distribution of personal property over a partial intestacy resulting in an escheat); In re Martin’s Will, 95 N.Y.S.2d 260, 262–63 (Sur. Ct. 1949) (again urging such an extrapolation, versus a partial intestacy where no heirs appeared, raising the prospect of an escheat, but where the court adjourned proceedings to afford time to locate heirs); see also In re Jayne, 463 N.Y.S.2d
global negative will in her estate plan, then extrapolation almost surely would better reflect the testator's intent than either enforcing the global negative will (again resulting in an escheat) or not enforcing it (and hence benefiting disinherited heirs). In want of any evidence, though, a default rule—presumably following the traditional outcome of partial intestacy—could take effect.

Such a rule would, of course, depart from current law, reiterated in recent cases. In one, a Florida court was asked to construe a homemade will providing for only a single beneficiary and bequeathing to him everything that the testator owned when the will was executed (but neglecting to anticipate and bequeath after-acquired property via a residuary clause). The court refused the sole beneficiary's petition to grant him the rest of the estate by implication. Rather, the court held that a partial intestacy ensued, and the heirs took the after-acquired property. "A will is not subject to judicial revision merely because it does not dispose of all of the testator's property," the court opined, for "[s]ynecdoche is a rhetorical device, not a judicial doctrine." Other courts concur in that assessment. Yet, the Florida case stood at one edge of the continuum, and the possibility of extrapolation was sufficiently attractive as to prompt a dissent. "Given [the testator's] clear intent" under the facts in this case, the dissenting judge would have applied the presumption against intestacy to correct the testator's omission of a residuary clause in favor of the sole beneficiary. In its turn, the majority defended the traditional

544, 545 (App. Div. 1983) (finding that partial intestacy resulted in an escheat, but where the surviving, lesser beneficiary under the will did not petition for an extrapolation).

263. See In re Martin's Will, 95 N.Y.S.2d at 261–62 (concerning a partial intestacy where a global negative will was held ineffective); see also supra notes 118–120 and accompanying text.

264. Whether the traditional rule or extrapolation comprises the majoritarian default is unclear. Wills appearing in a number of published cases have expressly bequeathed the residue among the named beneficiaries pro rata. E.g., Union Bank & Trust Co. v. Chancellor, 230 S.W.2d 629, 630 (Ky. 1950); Yancy v. Payne, 298 S.W. 940, 941 (Ky. 1927). Once a discretionary rule was in place, a subsequent empirical study could help to reveal the likelihood of the alternative preferences by virtue of the frequency with which the default rule was being applied or, alternatively, overridden. Such a study could prompt reconsideration of the applicable default rule.


266. E.g., Henderson v. Snow (In re Estate of Barnes), 407 P.2d 656, 659 (Cal. 1965) ("[A] will is never open to construction merely because it does not dispose of all the property." (quoting DeParcq v. O'Brien (In re Estate of Beldon), 77 P.2d 1052, 1054 (Cal. 1938)) (internal quotation marks omitted)); In re Martin's Will, 95 N.Y.S.2d 260, 261–63 (Sur. Ct. 1949) (rejecting the argument that the absence of a residuary clause implied bequests of pro rata shares of the residue to all beneficiaries named in the will); First Interstate Bank of Or. v. Young, 853 P.2d 1324, 1327 (Or. Ct. App. 1993) (ruling "we do not find that the absence of a ... residuary clause creates an ambiguity" which would be open to clarification by recourse to extrinsic evidence), cert. denied, 862 P.2d 1305 (Or. 1993); see also Hammer v. Hammer, 633 S.E.2d 878, 882–83 (N.C. Ct. App. 2006) (drawing the same conclusion).

267. Basile, 70 So. 3d at 690–91 (Van Nortwick, J., concurring in part and dissenting in part).
rule by highlighting the other edge of the continuum: "[I]f a will disposes of only one small specific item out of a large and valuable estate, it would be absurd to hold that the devisee of that one small item is entitled to the remainder of the estate."268 Added the court, "The same logic applies in the present case."269

Well, not really. Although the facts of the Florida case and of the court’s hypothetical both implicate testamentary incompleteness, they lie at opposite ends of the spectrum and support different inferences about intent. No comparison could better illustrate the arbitrariness of a mechanical rule that settles on one inference over the other.

Precedents for flexibility are scarce but not absent: here too, New Jersey’s probable intent doctrine applies,270 allowing courts in that state leeway to deviate from the default rules of partial intestacy. A New Jersey court invoked the doctrine in 2011 when confronted with facts similar to those assessed by the Florida court: under another homemade will, a testator bequeathed all of his "jewelry, personal effects, household goods, works of art and automobiles" to a single beneficiary, but neglected to specify the disposition of other assets.271 Extrinsic evidence showed further that the testator was estranged from his statutory heirs. The court held that the will contained a "gap" and awarded the residue to the sole beneficiary, instead of the heirs, in order to carry out the testator’s probable intent.272

3. Empirical Evidence

Whether the prevailing doctrine, applied mechanically, is likely to thwart intent in a large enough segment of the cases as to justify revision is another matter. Does the existing rule truly threaten to frustrate the wishes of a significant number of testators? Or does this Article offer a solution in search of a problem?

In order to gauge the scope of the problem, I have performed a further empirical study of all published cases resulting in a finding of partial intestacy since 1950. I was able to identify a total of 157 such cases, which I then examined individually to assess the distance between the estate plan mandated by the will at issue and the estate plan prescribed by the intestacy statute.273 By hypothesis, the greater the frequency with which those estate

268. *Id.* at 687 (majority opinion) (alteration in original) (quoting Goodwin v. Quigley (*In re Estate of Allen*), 388 N.W.2d 705, 707 (Mich. Ct. App. 1986)) (internal quotation marks omitted).

269. *Id.*

270. *See supra* note 254.

271. *In re* Estate of Duffy, 2011 WL 1327345, at *1 (N.J. Super. Ct. App. Div. 2011) (internal quotation marks omitted). Under the language of the will, if the named beneficiary had predeceased the testator his "entire estate" was to pass to a veterinarian to care for the testator’s pets. *Id.*

272. *Id.* at *1–2.

273. The raw data are available on request from the author. The author discarded from the data set a number of additional partial intestacy cases beyond these 157 because infor-
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plans diverge, so that incomplete wills suggest partiality toward beneficiaries who do not also comprise heirs, the greater the usefulness of judicial discretion to follow one plan or the other when awarding the intestate portion of the estate in order to effectuate probable intent.

Among the 23 cases where a single heir took the intestate portion of the estate, that heir was the sole beneficiary under the will in 4 cases (17.4%), one of the beneficiaries in 9 cases (39.1%), and not named in the will in 10 cases (43.5%). Among the 132 cases where multiple heirs took the intestate portion of the estate, those heirs comprised the exclusive beneficiaries under the will in 15 cases (11.4%); all of the heirs were included among a larger number of will beneficiaries in 43 cases (32.6%); some of the heirs were included among the will beneficiaries in 58 cases (43.9%); and none of the heirs were named in the will in 16 cases (12.1%). In 2 additional cases, no known heirs existed to take the intestate portion of the estate.

The clearest instance where we might doubt whether partial intestacy effectuates intent—namely, where no statutory heirs appear in the will, the divergence between the will and intestacy then waxing to its maximum—arose altogether in 28 out of the 157 cases (17.8%)—that is, in approximately 1 out of every 5.5 cases. Assuming these cases represent a random sample, the margin of error is ± 6%. The number of partial intestacy cases in which at least one statutory heir was left out of the will is substantially higher: a total of 86 cases, nearly 55% of the total.

As before, though, we should take these data with a grain of salt. It stands to reason that a disparity between the will and the intestacy statute heightens the risk of litigation, so instances of that nature could well prove overrepresented in the data set. That said, we can hardly dismiss the cases found to display sharp disparities as outliers. The limited discretion proposed in this Part responds to a tension encountered with some regularity in the case law, not to an academic bagatelle.

C. The Structure of Intestacy Law

At the end of the day, we find that a case can be made for injecting limited discretion into all three of the doctrines associated with incomplete wills—the effectiveness and consequences of redefinitive provisions, advancements, and partially invalid or wholly absent residuary clauses. At the same time, it must be admitted, introducing such discretion into the law goes against the doctrinal grain: by tradition, intestacy law has operated mechanically. Whether persuasive reasons exist to break with this tradition remains a question we cannot escape. Do total and partial intestacy raise problems sufficiently distinct as to call for asymmetric treatment under our law? Or is one merely a theoretical subdivision of the other—as they are typically treated today?

information provided in the opinions was too sparse to permit the cases to be coded with reasonable certainty. In several instances, case coding nevertheless required the author to draw inferences from the opinions. For coding purposes, the author treated nominal bequests as the functional equivalent of disinheritance.
To explore this issue, we need to isolate the rationales for an inflexible scheme of total intestacy in order to identify the limits of their application. As it happens, the merits of the current framework have aroused debate, and some commentators advocate loosening the rules of intestacy across the board for the same reason emphasized in this Article: to wit, not all people are alike, intent varies case by case, and no rules of intestacy can capture all of the variables that might lead persons to prefer one scheme of distribution over another.274

Defenders of the status quo make several points in rebuttal. Some warn that flexible rules of intestacy would create “a bureaucratic nightmare” of endless litigation,275 occasioning court costs that the state historically undertakes to subsidize. What is more, “[w]hen a decedent does not leave a valid will, it is impossible to accurately determine just what the decedent intended as to the distribution of his property.”276 In other words, on top of court costs, the inquiry would entail error costs, possibly approaching those of an inflexible rule. Finally, as I myself argued in a prior work, the primary economic virtue of a mechanical scheme of intestacy is the benefactor’s ability to rely on that scheme to generate her estate plan. A planned intestacy can minimize transaction costs, but the opportunity for planning largely disappears when a benefactor cannot predict with assurance what distribution would follow if she fails to execute a will.277

None of these concerns assert themselves strongly in connection with partial intestacy. Whereas roughly (or slightly under) half of all Americans die totally intestate,278 partial intestacy occurs less frequently, mitigating the burden that discretionary rules, when confined to those cases, would impose on courts. And by further restricting the inquiry to binary choices—between enforcing negative wills vel non, applying the doctrine of advancement vel non, extrapolating from the estate plan set down in the will vel non—as advocated in this Article, lawmakers would narrow the opportunity for litigation in those cases. A few states already carve out limited exceptions from the automatic operation of intestate succession in situations where intent is bound to vary widely.279 To do so here would fit partial intestacy into the same, defined pattern.


276. Schneider, supra note 22, at 426; see also, Mann, supra note 275, at 1050.


278. For empirical studies, see id. at 1051 n.73.

279. See, e.g., 20 Pa. Cons. Stat. Ann. § 2108 (making an adopted child an intestate heir of her natural parent if evidence shows that the two “maintained a family relationship,” and otherwise not); see also supra notes 173–174 and accompanying text (noting another such discretionary, binary choice within the Uniform Probate Code). In Great Britain, in cases of escheat, the Crown can claim intestate property but has broad statutory discretion to distribute
Nor does the prospect of judicial error loom as large with respect to flexible rules of partial intestacy. The inquiry becomes less speculative because, unlike cases of complete intestacy, here courts do have an executed will to provide evidence of intent. The investigation would not be open ended, and a court would not have license to put into effect substantive terms that a testator expressed informally; rather, a court would choose between expanding from a formalized, finalized document and following the intestacy statute.

Lastly, and perhaps most importantly, the economic argument that flexible rules of intestacy obstruct planning fails to apply here, for the simple reason that no one plans for a partial intestacy. As noted earlier, once a testator bears the transaction cost of executing an estate plan, the marginal cost of completing the will becomes negligible. Hence, a flexible rule for completing an incomplete will will remain transaction-cost efficient.

Ultimately, then, we may judge the problems of complete and partial intestacy as discontinuous, despite their superficial similarities.

CONCLUSION

Supported in part by empirical evidence, this Article has made the case for roping off the problem of partial intestacy from that of complete intestacy and treating the two differently under the law. Even as we continue to formulate and apply the rules of total intestacy rigidly, I have argued that the rules of partial intestacy would benefit from greater plasticity. Room for discretion is warranted because the reliability of the provisions of an incomplete will as a template for the missing parts varies with the facts and with the scope of the deficiency. Inflexible rules of partial intestacy operate too arbitrarily to effectuate intent.

I have presented the argument for this approach intrinsically (so to say) within inheritance law. But there may exist a second, larger justification for taking such a tack. For the problem of textual incompleteness also arises in other areas of law—including the law of contracts, often a compelling point of comparison for the law of gratuitous transfers.

Under the common law, an obligationally incomplete contract—lacking a term as to price, for instance—was historically held “indefinite” and hence void. In this manner, courts used to adopt a mechanical approach to the problem of contractual incompleteness. No longer: courts nowadays claim greater latitude to treat an incomplete contract either as preliminary to an

that property among the decedent’s dependents or loved ones. Kerridge, supra note 236, § 2-40.

280. See supra note 9 and accompanying text.

281. See supra text following note 8.

282. In earlier work, I posited the categorical association of wills and contracts, and I have explored in detail the analogies between inheritance and contractual default rules, see Hirsch, supra note 8, and between substantive limits on the right to contract and to bequeath, see Adam J. Hirsch, Freedom of Testation / Freedom of Contract, 95 Minn. L. Rev. 2180 passim (2011).

agreement or as an enforceable agreement with open terms, to be filled in as courts deem reasonable.\textsuperscript{284} This modern rule recognizes the variability of intent concerning the implications of contractual incompleteness, which can reflect either a want of agreement or an agreement to agree.

Although deliberate incompleteness is rare in connection with an incomplete will, by analogy, uncertainties of intent remain, as outlined in the last many pages. To respond by making inheritance doctrine more flexible would structurally amalgamate the law of incomplete wills with that of incomplete contracts, a domain in which bracketed judicial discretion seems to function well enough in practice. Both would then find consistent treatment within the meta-category of the law of transfers—not an imperative, to be sure, but a symmetry that would follow naturally from the close connection between the two fields.

We need not, at any rate, raise the issue quite to these heights of abstraction. However theoretically insightful, this Article strives at bottom to be practically inciteful. It is enough to rouse lawmakers to reassess an array of doctrines that—like too many others in the inheritance realm—have long met with analytical neglect.

\textsuperscript{284} \textit{Restatement (Second) of Contracts} §§ 33(3), 204 (1981).