

2022

## A New Feudalism: Selfish Genes, Great Wealth, and the Rise of the Dynastic Family Trust (DFT)

Eric Kades

Follow this and additional works at: [https://opencommons.uconn.edu/law\\_review](https://opencommons.uconn.edu/law_review)



Part of the [Estates and Trusts Commons](#)

---

### Recommended Citation

Kades, Eric, "A New Feudalism: Selfish Genes, Great Wealth, and the Rise of the Dynastic Family Trust (DFT)" (2022). *Connecticut Law Review*. 553.

[https://opencommons.uconn.edu/law\\_review/553](https://opencommons.uconn.edu/law_review/553)

# CONNECTICUT LAW REVIEW

---

VOLUME 55

DECEMBER 2022

NUMBER 1

---

## Article

### A New Feudalism: Selfish Genes, Great Wealth, and the Rise of the Dynastic Family Trust (DFT)

ERIC KADES

*Today's record levels of economic inequality are infecting our future as the top 0.01% bequeath vast wealth to their descendants. With the death of the Rule Against Perpetuities (RAP), this inequality has the potential to harden social class lines—not just for a generation or two, but forever. Although it may sound implausible, interviews with estate lawyers serving very high-net-worth clients reveal that some members of the wealthiest tier of testators are already exploiting the RAP's elimination, along with a tax loophole, to establish dynasty trusts that will financially empower their bloodline as long as it continues. Recent work in evolutionary biology reveals a universal and powerful human drive for high-status descendants—a drive for “quality” progeny so powerful that it appears to trump the usual desire to maximize quantity of offspring. Coupled with the long history of dynastic family wealth in England, this science suggests that today's wealthiest testators will utilize powerful modern legal institutions (e.g., well-developed laws of contract and trust; deep and efficient capital markets) to forge a new sort of trust that I dub a Dynastic Family Trust (DFT). DFTs will be larded with innovative provisions leveraging a founder's wealth to maximize descendants' status for generation after generation. For those fearing the pernicious effects of concentrated wealth on democracy and equal opportunity, the rise of the DFT is alarming. Fortunately, there is a very easy fix: simply reinstate the Rule Against Perpetuities. Given a race-to-the-bottom dynamic among the states, national legislation is necessary.*

## ARTICLE CONTENTS

I. INTRODUCTION .....	21
II. DARWINISM UPDATE: QUALITY OVER QUANTITY .....	24
III. WHAT DO ASPIRING DYNASTS MAXIMIZE? WHAT SHOULD THEY?.....	30
IV. PRIMOGENITURE, THE FEE TAIL, AND THE RISE AND RECENT DEMISE OF THE RULE AGAINST PERPETUITIES .....	37
V. GETTING SERIOUS ABOUT ESTABLISHING A DYNASTY: MAXIMIZING FAMILY STATUS AND POWER FOR THE LONG, LONG RUN WITH DYNASTIC FAMILY TRUSTS (DFTS) .....	43
A. A NEW WORLD OF POSSIBILITIES .....	44
B. THE SAVINGS RATE FOR DYNASTIC FAMILY TRUST INCOME .....	45
C. TRUST EXPENDITURES: <i>SELECTIVE</i> FUNDING OF DESCENDANTS .....	46
D. GROWING THE TRUST: INDUCING DESCENDANT CONTRIBUTIONS OF PRINCIPAL .....	52
E. GOVERNING A DFT .....	54
F. FUNDAMENTAL CHANGE.....	61
G. FINAL THOUGHTS ON CREATING FAMILY DYNASTY TRUSTS .....	65
H. LEST YOU THINK DYNASTIC FAMILY TRUSTS (DFTs) ARE JUST ONE PROFESSOR’S CASTLES IN THE AIR . . . ..	66
VI. PUTTING A STOP TO DYNASTIC FAMILY TRUSTS: THE NATIONAL ANTI-FEUDALISM ACT.....	68
A. DYNASTIC FAMILY WEALTH CAUSES SERIOUS SOCIAL HARMS .....	68
B. THE POLITICAL AND LEGAL PROBLEMS WITH A TAX SOLUTION.....	71
C. THE SOLUTION: A NATIONAL RULE AGAINST PERPETUITIES (THE NATIONAL ANTI-FEUDALISM ACT) .....	73
VII. CONCLUSION.....	74



# A New Feudalism: Selfish Genes, Great Wealth, and the Rise of the Dynastic Family Trust (DFT)

ERIC KADES\*

*“Among humans and other animals, power is the key to resource acquisition; social success is the route to power; and status and prestige are the markers of social success. Status and prestige therefore are likely to be universally desired by humans. Although a few theorists have made assertions to the contrary, the proposition that status and prestige are universally desired by humans has strong empirical support and is taken as axiomatic by many.”*<sup>1</sup>

## I. INTRODUCTION

One constant in the United States since the 1970s, through both Democratic and Republican administrations, has been increasing economic inequality.<sup>2</sup> After decades of skyrocketing top incomes and wealth in tandem with stagnation for the rest, inheritances are set to calcify this generation’s inequality. Because of the lamentable and almost entirely unnoticed disappearance of the Rule Against Perpetuities (RAP) in the United States over the last few decades, the problem is actually much worse: aspiring dynasts are now able to place substantial wealth in “dynasty trusts” that will privilege not just their children and grandchildren but all of their descendants in perpetuity—yes, truly *forever*.

Forever is a long time. We now squarely face the return of aristocratic families whose perpetual trusts ensure their high social status for generations without end, much like England’s feudal landed nobility. This is antithetical to founding American principles of democracy and equal opportunity—it raises the prospect of a “New Feudalism” with not only children’s life

---

\* Thomas Jefferson Professor of Law, William & Mary Law School. For uniformly helpful comments and corrections I thank Ellen Aprill, Ariel Jurow Kleiman, Ted Seto, Miranda Perry Fleischer, and student commenters at a workshop hosted by Loyola Law School in Los Angeles; and Jonathan Blattmachr, Bridget Crawford, Mitchell Gans, Phil Hackney, David Herzig, Anthony Infanti, Ed McCaffery, Carlyn McCaffrey, Allison Tait, and Phyllis Taite at a conference hosted by the University of Pittsburgh School of Law.

<sup>1</sup> Paul W. Turke, *Evolution and the Demand for Children*, 15 POPULATION & DEV. REV. 61, 65 (1989) (citations omitted).

<sup>2</sup> For a helpful overview of rising inequality in the U.S., see JULIANA MENASCE HOROWITZ ET AL., PEW RSCH. CTR., MOST AMERICANS SAY THERE IS TOO MUCH ECONOMIC INEQUALITY IN THE U.S., BUT FEWER THAN HALF CALL IT A TOP PRIORITY 14–16 (2020), [https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/01/PSDT\\_01.09.20\\_economic-inequality\\_FULL.pdf](https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2020/01/PSDT_01.09.20_economic-inequality_FULL.pdf).

chances largely determined by their parents' place in the pecking order but also grandchildren, great-grandchildren, and so on without end.

Trusts designed to benefit an unending number of generations may sound farfetched given centuries of wills and trusts that have lasted no longer than (roughly) two generations under the sage restriction of the RAP. But under the radar of almost everyone (except estate planners for the uber-wealthy) America conducting an experiment about the intensity of the human desire to transmit status to descendants for as long as possible. The death of the RAP, along with a loophole in federal transfer taxation, has enabled aspiring dynasts to place a limited fraction of their wealth in perpetual "dynasty" trusts free of taxation forever.<sup>3</sup>

To shed some light into this covert domain, I interviewed fifteen trust and estate lawyers who serve very affluent clients (with liquid assets starting at \$50 million and ranging up into the deca-billions).<sup>4</sup> Their reports are an astonishing wake-up call. As many as thirty percent of their clients express a keen interest in becoming timeless patriarchs<sup>5</sup> by establishing trusts benefiting their descendants forever. Moreover, a disproportionate number of these aspiring dynasty founders come from the wealthiest slice of this very wealthy cohort.<sup>6</sup>

Almost as soon as the RAP disappeared and the federal tax loophole appeared, the wealthiest Americans started establishing dynastic family wealth.<sup>7</sup> It seems that the dynastic urge burns indomitably; the RAP suppressed rather than extinguished it. This would come as no surprise to evolutionary biologists. Recent work in that field strongly suggests that, as the quote at the start of this article states, seeking *status* for oneself and one's descendants is a universal and powerful driver of human (and animal)

---

<sup>3</sup> Existing dynastic trusts exploit the demise of the RAP and a loophole in the federal estate and gift tax to create perpetual trusts that are untaxed forever, but the size of these trusts is formally limited to the dollar amount of the estate tax exemption. See generally Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003); Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 KAN. L. REV. 595 (2005); Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511 (2006). There are planning techniques to create dynasty trusts exceeding the exemption amount, but they are insufficient to insulate larger fortunes from the reaches of the estate and generation-skipping taxes. See *infra* notes 194–95, 221–22.

<sup>4</sup> Interviews were conducted from Jan. 12 to May 14, 2021. The bar advising the United States' wealthiest families is, by definition, not large. Based on continuing legal education programs for trusts and estates and news reports, I identified twenty lawyers who appear to have significant experience structuring estates worth hundreds of millions of dollars. Of these twenty, fifteen agreed to speak with me. Although some of them authorized me to cite them by name, others did not. Given the small size of this bar and the possibility that even an anonymous quote might reveal the identity of the speaker, I have refrained from using the names of any of those who agreed to speak with me.

<sup>5</sup> The use of the male noun patriarch here is intentional, as both historically and currently men control a disproportionate number of the world's largest fortunes. Of the United States' 100 wealthiest people, only 14 are women. *The Forbes 400: The Definitive Ranking of the Wealthiest Americans in 2022*, FORBES, <https://www.forbes.com/forbes-400> (last visited Oct. 10, 2022).

<sup>6</sup> See discussion *infra* Section V.H.

<sup>7</sup> See *infra* notes 107–10 and accompanying text.

behavior.<sup>8</sup> Indeed, striving for status overwhelms the baseline desire to maximize an individual's number of descendants.<sup>9</sup> Surprisingly, legal scholars have almost entirely overlooked evolutionary insights into inheritance behavior.<sup>10</sup> Although the primary contribution of this article is to identify the threat posed by letting the perpetual trust “genie” out of the RAP-imposed “lamp” and to offer an effective countermeasure, a secondary contribution is to demonstrate the significant role that evolutionary biology should play in explaining inheritance.

Considering the nascent contemporary (post-RAP) dynasties identified by interviewed estate counsel in tandem with the medieval, feudal (pre-RAP) dynasts, the few dynasty-free centuries achieved by the RAP look like a passing anomaly in strong tension with an elemental human desire for generation-spanning status.

Feudal dynasts used the relatively simple legal and institutional tools available in that age to lock in their high status: large landed estates passed from eldest son to eldest son (primogeniture) in a form of tenure, the fee tail, that insulated the bloodline from losing title because of heirs' licentious or negligent misdeeds.<sup>11</sup> Today's would-be dynasts have at their disposal a panoply of much more powerful tools and institutions: well-developed and well-enforced laws of contract, inheritance, and trust; expert legal, financial, and fiduciary agents; and deep, efficient capital markets that make holding large pools of liquid and mobile wealth cheap and easy. Primogeniture and the fee tail pale in comparison—and yet those facile tools proved effective enough to perpetuate the English feudal caste system for about a millennium.<sup>12</sup> If such primitive tools served elites so effectively, what can present-day dynasts accomplish with their infinitely superior toolkit?

The answer, in a few words? A lot, and almost certainly too much. This article explores how extremely wealthy people driven by the deep biological urge for high-status descendants can harness our modern-day legal system to set up what I label Dynastic Family Trusts (DFTs) to most effectively

---

<sup>8</sup> See Turke, *supra* note 1 and accompanying text.

<sup>9</sup> See discussion *infra* Part II.

<sup>10</sup> The application of evolutionary biology to any legal issues is relatively novel. For an early overview, see Owen D. Jones, *Law and Evolutionary Biology: Obstacles and Opportunities*, 10 J. CONTEMP. HEALTH L. & POL'Y 265 (1994). For a skeptical view of evolutionary biology's value in understanding and shaping legal norms, see Brian Leiter & Michael Weisberg, *Why Evolutionary Biology Is (So Far) Irrelevant to Legal Regulation*, 29 LAW & PHIL. 31 (2010). Leiter and Weisberg's perspective may be excessively pessimistic, especially for this article, given the strong scientific consensus on the prominent role that status-seeking plays in shaping human behavior. See Turke, *supra* note 1. For a convincing application of evolutionary biology to another domain of law, see James E. Krier, *Evolutionary Theory and the Origin of Property Rights*, 95 CORNELL L. REV. 139 (2009).

<sup>11</sup> See discussion *infra* Part IV.

<sup>12</sup> See Graziella Bertocchi, *The Law of Primogeniture and the Transition from Landed Aristocracy to Industrial Democracy*, 11 J. ECON. GROWTH 43, 44 (2006) (discussing the factors that maintained feudalism and noting that “partible inheritance gain[ed] ground as industrialization and democratization advance[d]”).

establish, maintain, and enhance the status of their bloodline for generations without end. The surest method to project status across generations is leaving vast wealth in trust for descendants, and DFTs are tailor-made to serve this end.

Why do DFTs achieve “too much?” The answer is obvious for anyone who believes in the foundational American values of democracy and equal opportunity. Perpetual, untouchable DFTs that guarantee prodigious wealth to a small circle of dynastic families pose a clear danger to both. As to politics, Justice Brandeis is purported to have observed that “[w]e may have democracy in this country, or we may have wealth concentrated in the hands of a few, but we can't have both.”<sup>13</sup> Wealth is a universal solvent that confers political as well as economic power. At some point, excessive wealth concentration enables aristocrats to pull too many levers of power, undermining democracy. In the private realm, dynastic wealth heavily skews life chances in favor of the fortunate few.

Thus, DFTs pose a serious, imminent threat to American values and governance. There is, however, a simple, proven mechanism to quash this threat: the good old Rule Against Perpetuities. It helped usher England out of the feudalism of the Middle Ages, and it can serve as a roadblock today to the rise of a New Feudalism.

## II. DARWINISM UPDATE: QUALITY OVER QUANTITY

Most readers need no primer on evolution or genetics. Since Darwin's work nearly two hundred years ago and continuing with science popularizers like Dawkins, it has become common knowledge that genes exert a powerful drive on living entities to reproduce, and that over many generations nature will naturally select those genes that reproduce themselves most effectively.<sup>14</sup>

Most readers, however, likely do need an updated understanding of the optimal *long-term* strategy for humans to propagate their genes. High school biology classes may continue to teach that genes drive individuals to maximize the raw number of children that they produce.<sup>15</sup> For humans and many animals, however, the recent theoretical and empirical work summarized in this section points in quite a different direction. Simply put, the research summarized in this section shows that for humans (and higher animals), the *quality* of children matters more than the quantity for

---

<sup>13</sup> Peter Scott Campbell, *Democracy v. Concentrated Wealth: In Search of a Louis D. Brandeis Quote*, 16 GREEN BAG 2D 251, 256 (2013). A thorough study of the origins of this quote concludes that “[w]hile there is no positive proof Brandeis ever said these exact words, he expressed a similar sentiment numerous times. If it is not a Brandeis quote, it is at least a Brandeisian one.” *Id.*

<sup>14</sup> See generally CHARLES DARWIN, *ON THE ORIGIN OF SPECIES* (Harvard Univ. Press 1964) (1859); RICHARD DAWKINS, *THE SELFISH GENE* (1976).

<sup>15</sup> See, e.g., *Life History Strategies*, KHAN ACAD., <https://www.khanacademy.org/science/ap-biology/ecology-ap/energy-flow-through-ecosystems/a/life-history-strategies> (last visited Sept. 30, 2022) (Advanced Placement Biology resource explaining “[h]ow organisms allocate energy to maximize the number of offspring they leave behind”).

maximizing long-term genetic survival. This simple biological fact has profound implications for understanding many facets of human behavior, especially inheritance.

In biology as much as in economics, resources are scarce. Thus, for parents “fundamental trade-offs must be navigated, such as that between investing in mating effort versus parental investment, in reproduction versus survival, and in *offspring quantity versus quality*. . . . [N]atural selection leads to the optimization of such trade-offs to maximize inclusive fitness, i.e.,[.] the production of long-term genetic descendants.”<sup>16</sup>

Evolutionary pressures to optimize the quantity-quality tradeoff operate for all animals, not just humans. In a famous finding, Lack demonstrated that bird “[c]lutch-size has been evolved through natural selection to correspond with the largest number of young *for which the parents can on the average find enough food*.”<sup>17</sup> Offspring quality here means receiving food sufficient to reach adulthood and potentially reproduce. Genes that cause birds to have so many children that all starve will disappear via natural selection. In addition to increasing the chance that they will reach adulthood, chicks receiving sufficient food have a better chance of weathering natural disasters that inevitably strike all populations at irregular intervals (e.g., famines, unusually cold winters, *pandemics*).<sup>18</sup> We will see below that among humans higher status has a powerful positive correlation with surviving such disasters.

We do not know the evolutionary details of how quality came to matter among birds or even apes.<sup>19</sup> Animals leave only archeological evidence. The dawn of agriculture and higher human civilizations, as is so often the case, provides both rich documentation of events and fundamental causation of human social evolution.

---

<sup>16</sup> David W. Lawson & Monique Borgerhoff Mulder, *The Offspring Quantity-Quality Trade-Off and Human Fertility Variation*, 371 PHIL. TRANSACTIONS ROYAL SOC’Y B, Apr. 19, 2016, at 2 (emphasis added).

<sup>17</sup> DAVID LACK, *THE NATURAL REGULATION OF ANIMAL NUMBERS* 22 (1954) (emphasis added).

<sup>18</sup> James L. Boone & Karen L. Kessler, *More Status or More Children? Social Status, Fertility Reduction, and Long-Term Fitness*, 20 EVOLUTION & HUM. BEHAV. 257, 265–66 (1999).

<sup>19</sup> Status plays an outsized role in many ape and monkey populations. Frequently, only the highest-status males and females reproduce, and higher-status group members display aggression and intimidation toward lower-status apes and monkeys. Alison Jolly, *The Evolution of Primate Behavior: A Survey of the Primate Order Traces the Progressive Development of Intelligence as a Way of Life*, 73 AM. SCIENTIST 230, 237 (1985); Guy Cowlshaw & R.I.M. Dunbar, *Dominance Rank and Mating Success in Male Primates*, 41 ANIMAL BEHAV. 1045, 1045–46 (1991); Anne Pusey et al., *The Influence of Dominance Rank on the Reproductive Success of Female Chimpanzees*, 277 SCIENCE 828, 829–30 (1997). See generally Joan B. Silk et al., *Differential Reproductive Success and Facultative Adjustment of Sex Ratios Among Captive Female Bonnet Macaques* (*Macaca Radiata*), 29 ANIMAL BEHAV. 1106, 1113 (1981).



Although the evidence strongly suggests that hunter-gatherer human groups were (and are) exceptionally egalitarian,<sup>20</sup> the advent of agriculture gave rise to more efficient calorie production that unleashed population growth that in turn led to a division of labor that dramatically increased productivity.<sup>21</sup> The dark side of agricultural societies, however, was the rapid generation of sharp status hierarchies and unprecedented wealth inequality.<sup>22</sup> All of this wealth made material inheritances a critical factor in life chances—much more important than for any other animal. “The ability of parents to influence their children’s status is likely to be much greater in complex foraging, pastoralist, and agricultural societies with heritable wealth and heritable statuses.”<sup>23</sup>

Until quite recently, the highest-status humans, in keeping with simpler evolutionary theory, relied on the *quantity* of offspring at least as much as quality in propagating their bloodline. “Consistent with widespread optimization of fertility, wealthier individuals have been shown to raise larger families in practically all traditional societies where such relationships have been considered.”<sup>24</sup> In addition, fertility generally declined in direct proportion with wealth.<sup>25</sup>

Still, status is a *relativistic* competition and even among a small elite the struggle for status remains intense. “Resource insolvency brought on by the birth of children has been an important selective pressure throughout human evolution, and as a result humans have evolved to strive for social and economic success.”<sup>26</sup> Inheritance is a primary pathway for parents to confer status on their descendants and so improve their ability to propagate their genes.

---

<sup>20</sup> See generally MORTON H. FRIED, *THE EVOLUTION OF POLITICAL SOCIETY: AN ESSAY IN POLITICAL ANTHROPOLOGY* (1967) (comparing societal development in egalitarian, ranked, and stratified societies); Christopher Boehm, *The Natural Selection of Altruistic Traits*, 10 HUM. NATURE 205, 211 (1999) (discussing the “egalitarian syndrome” of prehistoric hunter-gatherers); Tim Ingold, *On the Social Relations of the Hunter-Gatherer Band*, in *THE CAMBRIDGE ENCYCLOPEDIA OF HUNTERS AND GATHERERS* 399, 400–01 (Richard B. Lee & Richard Daly eds., 1999) (discussing theories of “[c]ommunism, familism, and reciprocity” in early societies).

<sup>21</sup> See Kingsley Davis, *The World Demographic Transition*, 237 ANNALS AM. ACAD. POL. & SOC. SCI. 1, 4–5 (1945).

<sup>22</sup> Bertocchi, *supra* note 12, at 44.

<sup>23</sup> Mary K. Shenk et al., *Status Competition, Inequality, and Fertility: Implications for the Demographic Transition*, 371 PHIL. TRANSACTIONS ROYAL SOC’Y B, Apr. 19, 2016, at 2 (citation omitted).

<sup>24</sup> David W. Lawson & Ruth Mace, *Parental Investment and the Optimization of Human Family Size*, 366 PHIL. TRANSACTIONS ROYAL SOC’Y B 333, 338 (2011) (citation omitted).

<sup>25</sup> *Id.* The numbers were breathtaking. In early Chinese society, emperors kept thousands of women, their princes kept hundreds, and lower nobility kept scores. Laura Betzig, *Sex, Succession, and Stratification in the First Six Civilizations: How Powerful Men Reproduced, Passed Power on to Their Sons, and Used Power to Defend Their Wealth, Women, and Children*, in 1 SOCIAL STRATIFICATION AND SOCIOECONOMIC INEQUALITY 37, 41–42 (Lee Ellis ed., 1993). Betzig has compiled similar evidence of a strong correlation between wealth and *male* fertility among the Inca, the Assyrians, the Aztecs, the Babylonians, the Egyptians, and the Sumerians. *Id.* at 42–44.

<sup>26</sup> Turke, *supra* note 1, at 64.

Early inheritance patterns were amazingly consistent across civilizations. Given the ability of men to have many more children than women (due to the physical and temporal toll taken by carrying children to term), wealthy testators around the globe traditionally left the vast bulk of their assets to one or a few sons with the expectation that these favored male heirs would *buy* many wives.<sup>27</sup> Congruently, common folks would sell their daughters to these wealthy males for a “bride-price” used in turn to buy one or a few wives for their favored male children.<sup>28</sup>

The trend towards greater parental investment in fewer children (quality over quantity) has accelerated in the modern era. Seemingly every society reaching some critical level of material well-being has gone through the “demographic transition,” which is a fancy label for “fewer children per couple and lower mortality rates.”<sup>29</sup> Our focus is on the former,<sup>30</sup> a phenomenon at odds with simple evolutionary theory made even more odd because the reduction in fertility invariably begins with the wealthiest strata of society and works its way down to the middle and lower classes only after decades.<sup>31</sup> The one large vestige of simple Darwinism—enormous broods of children sired by high-status men—has essentially come to an end.<sup>32</sup>

---

<sup>27</sup> Steven J.C. Gaulin & James S. Boster, *Dowry as Female Competition*, 92 AM. ANTHROPOLOGIST 994, 1002 (1990); Laura Betzig, *Roman Polygyny*, 13 ETHOLOGY & SOCIOBIOLOGY 309, 340–44 (1992); Thomas H. Hollingsworth, *The Demography of the British Peerage*, 16 POPULATION STUDIES (SUPPLEMENT) (1964) 19–21, 50–51; LAWRENCE STONE, *THE FAMILY, SEX, AND MARRIAGE IN ENGLAND 1500–1800*, at 270–74 (1977); Ruth Mace, *Biased Parental Investment and Reproductive Success in Gabbra Pastoralists*, 38 BEHAV. ECOLOGICAL SOCIOBIOLOGY 75, 79 (1996); John Hartung, *Polygyny and Inheritance of Wealth*, 23 CURRENT ANTHROPOLOGY 1, 2 (1982).

<sup>28</sup> Gaulin & Boster, *supra* note 27, at 997; Hartung, *supra* note 27, at 3.

<sup>29</sup> The seminal article is Kingsley Davis’s *The World Demographic Transition*, *see supra* note 21. For a comprehensive treatment, see generally JEAN-CLAUDE CHESNAIS, *THE DEMOGRAPHIC TRANSITION: STAGES, PATTERNS, AND ECONOMIC IMPLICATIONS* (1992).

<sup>30</sup> Lower mortality rates in modernizing societies are largely due to improvements in public health, e.g., safe water supplies, sanitary processing of waste, and other measures limiting the spread of infectious diseases. *See, e.g.,* Annette Prüss-Ustün et al., *Burden of Disease from Inadequate Water, Sanitation and Hygiene for Selected Adverse Health Outcomes: An Updated Analysis with a Focus on Low- and Middle-Income Countries*, 222 INT’L J. HYGIENE & ENV. HEALTH 765 (2019); GBD 2016 Diarrhoeal Disease Collaborators, *Estimates of the Global, Regional, and National Morbidity, Mortality, and Aetiologies of Diarrhoea in 195 Countries: A Systematic Analysis for the Global Burden of Disease Study 2016*, 18 LANCET INFECTIOUS DISEASES 1211 (2018).

<sup>31</sup> Boone & Kessler, *supra* note 18, at 274–75.

<sup>32</sup> There is some evidence that the demographic transition may be coming to an end and that we are witnessing a restoration of the positive relationship between income/wealth and fertility, both within and across nations. Those at the highest incomes seem to be having more children than those in the middle. Mikko Myrskylä et al., *Advances in Development Reverse Fertility Declines*, 460 NATURE 741, 741 (2009); Jonathan Fox et al., *Is a Positive Relationship Between Fertility and Economic Development Emerging at the Sub-National Regional Level? Theoretical Considerations and Evidence from Europe*, 35 EUR. J. POPULATION 487, 490 (2019). *See also* Gert Stulp & Louise Barrett, *Wealth, Fertility and Adaptive Behaviour in Industrial Populations*, 371 PHIL. TRANSACTIONS ROYAL SOC’Y B, Apr. 19, 2016, at 8–9 (criticizing prior wealth-fertility research for failing to recognize that the reasons behind fertility decisions vary between industrial societies and “cannot be understood on the basis of historical economic optimality models alone”).

Among evolutionary biologists there seems to be a growing consensus that *status-seeking* is the key to explaining fertility reduction in modernizing economies. Johansson appears to have first articulated the theory.<sup>33</sup> Later work summarized the idea:

[F]ertility reduction in the early stages of the demographic transition was the outcome of high levels of “status anxiety” among elites . . . . [S]tatus anxiety [is] “a strong commitment among married couples to the preservation of the material basis of their own high social status and to the transmission of that status to their children.”<sup>34</sup>

Subsequent theoreticians have elaborated, explaining the catalytic effect that increasing inequality (a hallmark of western economies in the last four to five decades) has on such status competition. “[C]onditions similar to those in demographic transition societies yield increased investment in both embodied capital and social status, generating substantial decreases in fertility, *particularly under conditions of high inequality and intense status competition*.”<sup>35</sup> They cite status-seeking as a key missing piece needed to explain declining fertility among wealthier citizens in modern developed economies.

[U]nder certain ecological circumstances—particularly the presence of heritable wealth and modern markets—investment in status trades off with the number of children parents are able to support, providing a motivation for decreased fertility. We argue that economic and risk-based models are necessary yet insufficient to explain modern levels of fertility decline and suggest that failure to consider status competition is a key reason why.<sup>36</sup>

Why is the competition for status-seeking so intense? Really, how much *cost-justified* investment can parents make in one or a few children? The answer: a lot—indeed almost an unlimited amount. Status is a *relative* or *positional* good.<sup>37</sup> Absolute or objective measures (e.g., knowledge,

---

<sup>33</sup> S. Ryan Johansson, *Status Anxiety and Demographic Contraction of Privileged Populations*, 13 POPULATION & DEV. REV. 439 (1987).

<sup>34</sup> Boone & Kessler, *supra* note 18, at 274 (quoting Johansson, *supra* note 33, at 463).

<sup>35</sup> Shenk et al., *supra* note 23, at 1 (emphasis added).

<sup>36</sup> *Id.* at 2. Some intriguing research suggests that the Roman Empire experienced a nascent version of the status anxiety that prevails in nations that have completed the demographic transition. “There is good evidence that the Roman upper classes were limiting the number of their children through abortion, infanticide, abandonment, and contraception beginning just before the time of Christ and continuing for several centuries. . . . Even in the contemporary sources, the limitation of births by upper classes is seen as essentially deriving from . . . the desire to maintain a high standard of living and to avoid the [diminution] of the family estate.” Boone & Kessler, *supra* note 18, at 275.

<sup>37</sup> For an early and influential exposition of positional goods, see ROBERT H. FRANK, CHOOSING THE RIGHT POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985).

experience) really do not matter; all that matters to parents is spending enough to leapfrog the children of other parents close to them on the socioeconomic ladder. This leads to a sort of arms race in which everyone spends more and more to try to get their children ahead of everyone else's children. "Once some parents concentrate their resources on small numbers of children, other parents must follow suit if their offspring are to be socially competitive."<sup>38</sup> Such competition for a positional good like status is inefficient, with many parents, especially wealthy ones, investing far beyond the point that yields any comparable objective increments to their offspring's abilities.<sup>39</sup>

It appears that the status anxiety-driven focus on quality rather than quantity of offspring is a long-term phenomenon; the best evidence suggests that it is not a short-term detour designed to produce greater quantities of descendants in more distant generations. "[W]hile low fertility decreases reproductive success, it substantially *increases* the socio-economic success of descendants, suggesting that *fertility is being traded off for socio-economic standing*."<sup>40</sup> The multigenerational data necessary to demonstrate these facts are rare, but an amazing Swedish data set tracking four generations over the last 100-odd years found that wealthier parents' higher investment in their children yielded higher-status grandchildren and great-grandchildren, but not more of them.<sup>41</sup>

As the scholars quoted above emphasize, inequality, developed markets, and large inheritances—all phenomena on the rise in recent decades—intensify status competition. It all starts with income and wealth inequality: in a world of equal resources, it would be much more difficult to establish higher status. Inequality has been increasing inexorably for the last forty to fifty years and the trend continues.<sup>42</sup> Of particular importance, the number

---

<sup>38</sup> Turke, *supra* note 1, at 64.

<sup>39</sup> See Anne H. Gauthier & Petra W. de Jong, *Costly Children: The Motivations for Parental Investment in Children in a Low Fertility Context*, 77 GENUS, Feb. 17, 2021, at 13–14 (finding that parents' noneconomic justification for investing in their children, such as ensuring their happiness, often outweighs economic motives); MARIANNE COOPER, CUT ADRIFT: FAMILIES IN INSECURE TIMES 92–126 (2014) (finding the "process of perfecting children is a central part of affluent families' response to the economic changes occurring in the world around them").

<sup>40</sup> Shenk et al., *supra* note 23, at 10 (second emphasis added) (citations omitted).

<sup>41</sup> Anna Goodman et al., *Low Fertility Increases Descendant Socioeconomic Position but Reduces Long-Term Fitness in Modern Post-Industrial Society*, 279 PROC. ROYAL SOC'Y B 4342, 4347–49 (2012). A similar study limited to only men in and around one American city and covering only three generations (i.e., number of grandchildren) similarly found that (1) higher-status fathers seem to trade off quantity of children for fewer children of higher status, and (2) this strategy does not result in a greater number of grandchildren. Hillard S. Kaplan et al., *Does Observed Fertility Maximize Fitness Among New Mexican Men?*, 6 HUM. NATURE 325, 345 (1995).

<sup>42</sup> For the gaping (and ever-widening) extent of wealth inequality in the United States, see Ana Hernández Kent et al., *What Wealth Inequality in America Looks Like: Key Facts & Figures*, FED. RESRV. BANK ST. LOUIS: OPEN VAULT BLOG (Aug. 14, 2019), <https://www.stlouisfed.org/open-vault/2019/august/wealth-inequality-in-america-facts-figures> ("Wealth inequality in America has grown

of multibillionaires—those with the resources to found family dynasties—is also on the rise.<sup>43</sup>

Massive wealth and wealth inequality are necessary but insufficient to raise the specter of a New Feudalism. The dynastic urge for unending bloodline status documented in this subsection operates within a social and legal environment. The sophisticated dynasties of acute concern limned in the remainder of this article rely on well-developed laws of property, contract, trust, tax, and inheritance. The Rule Against Perpetuities helped suppress anti-egalitarian and antidemocratic dynastic wealth for centuries,<sup>44</sup> but the wealthy and their agents quietly demolished this obstacle.<sup>45</sup> The United States has entered a new world in which dynastic wealth is now feasible. How will the extremely wealthy, in whom the urge for unending family status burns brightly, harness this altered legal landscape to realize their feudalistic desires? We begin to answer that question in the next section.

### III. WHAT DO ASPIRING DYNASTS MAXIMIZE? WHAT SHOULD THEY?

This article does not focus on status maximization for the entire population or even for the average or median citizen. The evolutionary biology covered in the previous section offers all sorts of interesting insights for the general population.—For example, it seems that most middle-class and upper-middle-class parents across the developed world continue to have relatively few children precisely because they cannot afford to provide all the trappings of high status to large broods.<sup>46</sup> All of these folks, and even the lower quantiles of the wealthy, simply do not have sufficient wealth to found family dynasties capable of providing powerful support to unending

---

tremendously from 1989 to 2016, to the point where the top 10% of families ranked by household wealth (with at least \$1.2 million in net worth) own 77% of the wealth ‘pie.’ The bottom half of families ranked by household wealth (with \$97,000 or less in net worth) own only 1% of the pie.”). Worldwide, wealth is distributed even more unequally. *Facts: Global Inequality*, INEQUALITY.ORG, <https://inequality.org/facts/global-inequality/> (last visited Oct. 10, 2022).

<sup>43</sup> Accounting for inflation, the number of American billionaires more than doubled from 1990 to 2020. Measuring in 2020 dollars, the *Forbes 400* wealthiest Americans list in 1990 included 184 billionaires; by 2020, all 400 persons listed were billionaires (starting at \$2.1 billion). *Forbes 400 List of Wealthiest Americans*, ASSOC. PRESS (Oct. 9, 1990), <https://apnews.com/article/64a97ffd61c3c807b7bedf53d992d7d5>; *The Forbes 400: The Definitive Ranking of the Wealthiest Americas in 2020*, FORBES, available at <http://web.archive.org/web/20200908204909/https://www.forbes.com/forbes-400/>. The price level essentially doubled from January 1990 to 2020, and so this calculation defines billionaires as those with wealth above \$500 million as measured in 1990. *BLS Data Viewer*, U.S. BUREAU OF LAB. STAT.: BLS BETA LABS, <https://beta.bls.gov/dataViewer/view/timeseries/CUSR0000SA0> (select “1990” from “Start Year” dropdown and “2020 from End Year” dropdown; then click “Update”).

<sup>44</sup> See *infra* notes 75–76, 101–03 and accompanying text.

<sup>45</sup> See *infra* notes 107–10 and accompanying text.

<sup>46</sup> For a theoretical framework supporting this hypothesis about the middle class, see Henry Harpending & Alan Rogers, *Fitness in Stratified Societies*, 11 *ETHOLOGY & SOCIOBIOLOGY* 497, 505–08 (1990).

generations of descendants. To found and fund such a dynasty requires hundreds of millions if not billions of dollars.<sup>47</sup> Thus, the remainder of this article focuses on those with vast fortunes. By definition, this is a very small slice of the population in any society, perhaps as few as around 1,000 households in the United States today.<sup>48</sup>

Although focusing on such a small segment of the population might seem inconsequential, this is no mean group (literally). Those of enormous wealth have enormous influence: their large political donations and control over vast enterprises illuminate some of the privileges of great wealth. More to the point of this article, such immense wealth enables a prospective dynast to give his descendants a leg up in the status competition for as long as the legal system permits. In the United States today, that is forever. This section explores how a rational dynast will design his DFT to achieve long-lasting family status; in the argot of economics, this section hypothesizes about the utility function of wealthy dynasts.

At first blush, it might seem that wealthy dynasts face no constraints—with so much wealth, can they not afford everything? That is, can they not afford to have scores of children and fund them all lavishly? Potential dynasts will not be so myopic; by definition they are playing the long game. Given this open-ended planning horizon, dynasts face a number of important trade-offs. Perhaps the single most important choice is whether to spend marginal dollars on cultivating the status of contemporary generations (essentially the dynast's children and grandchildren) or retain those funds to nurture status in future generations. This principle permeates Part V's analysis of how a dynast might structure a perpetual trust to maintain and even grow family status over the far horizon.

The fact that status is a positional good—that is, not an absolute standard but rather defined in terms of ranking relative to others<sup>49</sup>—means that serious dynasts must maximize the bang for each buck spent. Gross wealth in large part determines the winners of the family status game, but wise investing can make a material difference. Investing here refers to two very different activities: (1) choice of the trust's income-generating assets, and (2) choice of those descendants for whom selective monetary grants will most effectively enhance family status. The former is largely for business school finance classes; the latter has gone unexamined. Part V below addresses this blind spot. The important point for now is that budding dynasts should be careful to invest large sums only in the most promising of their descendants.

---

<sup>47</sup> See generally William J. Turnier & Jeffery L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX REV. 779, 790–97 (2009) (describing various expenses involved in the maintenance of dynastic trusts, limiting their yield).

<sup>48</sup> *Forbes's* 2022 list of the 400 wealthiest Americans bottoms out at wealth of about \$2.7 billion. *FORBES*, *supra* note 5. There is no precise data available on the number of Americans with wealth sufficient to establish a viable dynastic trust; rather, anyone with a net worth of \$1 billion seems like a plausible dynast.

<sup>49</sup> See *supra* text accompanying note 37.

Given the gene-driven desire to enhance descendants' status that spans the animal kingdom from the humble birds of Part II to the billionaire humans now in focus, one might expect status-seeking to permeate the legal and social science scholarship on inheritance. To the contrary, there is essentially nothing in the inheritance literature on the role of bloodline status maximization. As noted in the Introduction, a tangential but important contribution of this article is to bring evolutionary biology's emphasis on fitness and status to the law and social science of inheritance.<sup>50</sup>

The primary conventional explanation for leaving wealth to survivors (most commonly children and grandchildren) is altruism.<sup>51</sup> So far, so good: maximizing fitness explains why parents have selfless feelings toward their children, grandchildren, and more remote generations. Economists' altruistic parents, however, bear little resemblance to biologists' fitness maximizers and status seekers. Economic models of parents' utility functions typically (1) treat all members of a generation equally, (2) show concern for their descendants' happiness/satisfaction (utility), and (3) discount future generations' utility with the usual (exponential) discounting function.<sup>52</sup> None of these features apply to very wealthy dynasts focused on establishing a family dynasty.

First, as Part V below explores in detail, a rational dynast discriminates among his descendants deliberately and systematically. Given his focus on continuing *family* status, equal treatment makes little sense.<sup>53</sup> He instead will craft his trust to invest only in the most promising of his progeny in each generation. This clearly is at odds with prevalent norms of equal inheritances and even more at odds with the empirical finding that *inter vivos* gifts are biased in favor of children experiencing difficulties—for example, a child who cannot hold down a job or a grandchild with a disability.<sup>54</sup> But testators

---

<sup>50</sup> See *supra* text following note 10.

<sup>51</sup> Some alternative explanations for giving do not seem to have much purchase in the domain of inheritance. The “warm glow” that donors experience when making a gift seems inapposite. James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 ECON. J. 464, 464–65, 473–74 (1990). Other explanations may have explanatory power for people of typical wealth but not for those rich enough to found a dynasty, e.g., the idea that an inheritance is payment to children in return for caring for the donor in his declining years. See, e.g., Anne LaFerrère & François-Charles Wolff, *Microeconomic Models of Family Transfers*, in 2 HANDBOOK OF THE ECONOMICS OF GIVING, ALTRUISM & RECIPROCITY 890, 917–33 (Serge-Christophe Kolm & Jean Mercier Ythier eds., 2006).

<sup>52</sup> See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY 135–54, 179–200 (enlarged ed. 1993) [hereinafter BECKER, A TREATISE ON THE FAMILY]; Gary S. Becker & Robert J. Barro, *A Reformulation of the Economic Theory of Fertility*, 103 Q.J. ECON. 1, 2–3 (1988).

<sup>53</sup> Again, I use male pronouns to reflect the continuing over-representation of men in the subpopulation of the very wealthy. See *supra* note 5.

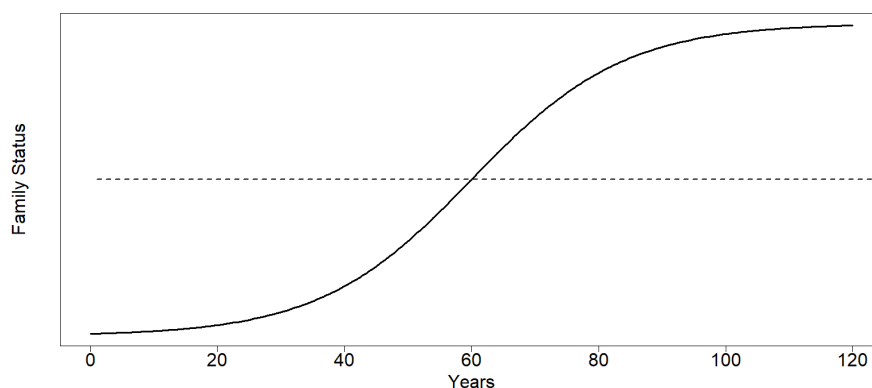
<sup>54</sup> See Anne LaFerrère, *Intergenerational Transmission Models: A Survey*, in THE ECONOMICS OF RECIPROCITY, GIVING & ALTRUISM 207, 209–12 (L.-A. Gérard-Varet, et al. eds., 2000) (finding that transfers from parents to children increase “when the child's income decreases and when [intensity of altruism] is higher”); Thomas A. Dunn & John W. Phillips, *The Timing and Division of Parental*

of extreme wealth can easily provide their living descendants, for whom they may have deep affection, with wealth sufficient for a lavish lifestyle, and then begin to select among descendants for status potential.

Second, a dynast focuses on *group* (family) status, not summed *individual* utility. Again, natural affection for living children and grandchildren may induce large gifts to ensure the welfare of known loved ones. In the longer run, however, a dynast is not in the game of altruistically buying the most happiness that his wealth can provide to every descendant. He instead will spend money strategically to maximize his bloodline's standing in society.

Finally, dynasts will not generally discount future developments in the usual exponential fashion. Due to time preference (all else equal, economists assume that we want any good sooner rather than later) and positive interest rates (a closely related phenomenon), altruistic models of bequests assume that donors give less and less weight, at an exponentially decaying rate, to each future generation's utility.<sup>55</sup> This article posits, however, that dynasts' preferences are inconsistent in some ways with the usual discounting of future value. Dynasts care about long-term family status and might well be willing to endure some extended period of lower status in the short-term before deploying accumulated trust income to raise family status in the longer term. The following figure illustrates this point.

FIGURE 1



A dynast would forego short-term status for fifty years (two generations) in return for higher long-term status (the solid curve) instead of maintaining a steady, middling level of status over the same horizon (the dashed flat line). Given any reasonable positive interest rate, with its attendant exponential discounting of future value (here, status), a donor following traditional

---

*Transfers to Children*, 54 *ECON. LETTERS* 135, 137 (1997) (finding “that parents preferentially award *inter vivos* transfers, most notably cash gifts, to their poorer children”).

<sup>55</sup> BECKER, *A TREATISE ON THE FAMILY*, *supra* note 52, at 156–69.



economic models and maximizing the sum of descendants' discounted status would always opt for the flat dashed line since the long-term gains illustrated by the solid line would be discounted so heavily that they could never make up for lightly discounted short-term losses in the first fifty years. In contrast, this article posits that dynasts will tolerate estate plans that attain relatively low status for a few generations if the scheme eventually is likely to produce and maintain higher family status.

To round out the basic contours of a dynast's preferences, the remainder of this section contrasts the "dynastic urge" model outlined so far with two alternative conceptualizations of a wealthy person's desires. First, an egotistical donor might use his fortune to buy unending fame for himself and his name. Investing in familial status is one way to achieve this,<sup>56</sup> but casual empiricism suggests that large, targeted charitable donations are a better means for converting wealth into eternal name recognition. The last names of John Harvard<sup>57</sup> and Elihu Yale<sup>58</sup> have become globally known and esteemed based on founding gifts made hundreds of years ago. Other examples include Alfred Nobel,<sup>59</sup> Andrew Carnegie,<sup>60</sup> Henry Ford,<sup>61</sup> and John D. and Catherine T. MacArthur.<sup>62</sup> The Ford family illustrates another path to wide name recognition after death: creating a trademark used to sell high-profile goods (in his case, cars and trucks); Bill Hewlett and David

---

<sup>56</sup> See, e.g., *Joseph P. Kennedy*, JOHN F. KENNEDY PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/the-kennedy-family/joseph-p-kennedy> (last visited Nov. 3, 2022) (noting that after World War II the Kennedy family's patriarch "turned his energies to the careers of his remaining sons, especially his second son, John, convincing him to run [for Congress] in 1946 . . ."); Taffy Brodesser-Akner, *Where Would the Kardashians Be Without Kris Jenner?*, N.Y. TIMES (May 8, 2015), <https://www.nytimes.com/2015/05/10/magazine/where-would-the-kardashians-be-without-kris-jenner.html> (crediting television personality Kris Jenner, who "manages the careers of all six of her children, as well as her own," with securing her family's success in various enterprises).

<sup>57</sup> *A Timeline of Harvard's History*, HARV. UNIV., <https://www.harvard.edu/about/history/timeline/> (last visited Oct. 10, 2022).

<sup>58</sup> *Traditions & History*, YALE UNIV., <https://www.yale.edu/about-yale/traditions-history> (last visited Oct. 10, 2022).

<sup>59</sup> *The Man Behind the Prize – Alfred Nobel*, NOBEL PRIZE, <https://www.nobelprize.org/alfred-nobel-2/> (last visited Oct. 10, 2022).

<sup>60</sup> In addition to founding a predecessor ("Carnegie Technical Schools") to what is now called Carnegie-Mellon University in Pittsburgh, Pennsylvania, Andrew Carnegie funded thousands of libraries bearing his name all over the United States and established a charitable corporation that continues to operate. *History and Organization*, CARNEGIE MELLON UNIV., <https://www.cmu.edu/ira/factbook/pdf/facts2016/history-and-organization.pdf> (last visited Oct. 10, 2022); Susan Stamberg, *How Andrew Carnegie Turned His Fortune into a Library Legacy*, NAT'L PUB. RADIO (Aug. 1, 2013, 3:00 AM), <https://www.npr.org/2013/08/01/207272849/how-andrew-carnegie-turned-his-fortune-into-a-library-legacy>; *Our History*, CARNEGIE CORP. OF N.Y., <https://www.carnegie.org/about/our-history/> (last visited Oct. 2, 2022).

<sup>61</sup> *Our Origins*, FORD FOUND., <https://www.fordfoundation.org/about/about-ford/our-origins/> (last visited Oct. 10, 2022).

<sup>62</sup> *Our History*, MACARTHUR FOUND., <https://www.macfound.org/about/our-history/> (last visited Oct. 10, 2022).

Packard are another example of fame rooted in both charity<sup>63</sup> and commerce.<sup>64</sup> Charity, however, seems a surer route to lasting name recognition. It is hard to think of a single name associated with a business operating as of 1636 (Harvard's founding) or 1701 (Yale's founding).<sup>65</sup>

Although name recognition is part of high social status for the donor, it does not seem likely to help descendants increase or even maintain that status. Evolutionary biologists might well diagnose wealthy donors prioritizing postmortem name recognition over providing a leg up to their progeny as maladaptive egoists.<sup>66</sup>

Dynasts adaptively maximizing long-term family status must be pursuing some longer-term strategy. If they are not spending their vast fortunes on having more children, they must be banking the money to fund the status of later generations. In the colorful language of Gandolfi et al., “wealth is, in a sense, potential or ‘frozen’ children, resources that can be turned into children at any time by future descendants.”<sup>67</sup>

Although it sounds cold and calculating, from this perspective a rational dynast, genetically driven to maximize the number of his descendants, would think of each generation of descendants as “investment vehicles” for achieving long-term fitness. Gandolfi et al. focus on the relative returns of “non-human capital” (investment income) and the optimal quantity of descendants.<sup>68</sup> They stress that dynasts will have fewer children when investments yield high returns, and more when returns sag.<sup>69</sup>

My thesis has significant overlap with this perspective. Like Gandolfi et al., I assume that dynasts are rational, that they make long-term plans based on deep-seated, genetically rooted preferences, and I consider trade-offs between deploying wealth in the present and postponing its use until later in service of these preferences.

<sup>63</sup> *The Hewlett Family and Foundation History*, WILLIAM & FLORA HEWLETT FOUND., <https://hewlett.org/about-us/hewlett-family-and-history/> (last visited Oct. 10, 2022).

<sup>64</sup> *About Us*, HP, <https://www.hp.com/us-en/hp-information.html> (last visited Oct. 10, 2022).

<sup>65</sup> HARV. UNIV., *supra* note 57; YALE UNIV., *supra* note 58. There are a handful of businesses dating back as far as A.D. 578, with a number in Japan. Kim Jae-kyoung, *Centennial Firms Dry up in Korea*, KOREA TIMES (May 14, 2008, 7:06 PM), [https://www.koreatimes.co.kr/www/news/biz/2008/05/123\\_24196.html](https://www.koreatimes.co.kr/www/news/biz/2008/05/123_24196.html). It is difficult to tell if any of these are household names in their home nations or abroad.

<sup>66</sup> Further, biologists would expect any genes driving this egoism to disappear as a result of natural selection. See, e.g., W.D. Hamilton, *The Genetical Evolution of Social Behaviour I*, 7 J. THEORETICAL BIOLOGY 1, 1 (1964) (“In certain circumstances an individual may leave more adult offspring by expending care and materials on its offspring already born than by reserving them for its own survival and further fecundity.”).

<sup>67</sup> ARTHUR E. GANDOLFI ET AL., *ECONOMICS AS AN EVOLUTIONARY SCIENCE: FROM UTILITY TO FITNESS* 115 (2002).

<sup>68</sup> *Id.* at 112–15.

<sup>69</sup> *Id.* at 114 (“[I]f parents produce too many children the return on the optimal quality child will be below the return on non-human capital and it would then be in the genetic interest of parents to reduce the number of children produced and increase the amount invested in non-human capital until equilibrium is restored.”).

This article parts ways with Gandolfi et al. in assumptions about the nature of those preferences. They take seriously “[t]he biological approach to preferences . . . [which] postulates that all such motives or drives or tastes represent proximate aspects of a single underlying goal—fitness.”<sup>70</sup> As highlighted above, however, a growing body of scholarship questions this simple focus on fitness and instead suggests that humans strive for descendants of high status rather than gross number of descendants. Following these findings, this article explores how rational prospective dynasts will deploy their wealth to maximize the odds of maintaining familial status generation after generation.

Although this hunger for continuing bloodline status is rooted in our genes, it may also have become part of our consciousness. Speculating about preferences has its risks but can shed light on how people behave. Put starkly, would dynasts be satisfied with producing a huge number of descendants, all or most of whom were of low social status? To ask the same question in a historical context, were medieval lords content to father large numbers of low-status children? The answer is “no”: they heavily favored eldest sons via the practice of primogeniture and more generally favored sons over daughters.<sup>71</sup> They did not spread their wealth equally over all of their marital and any out-of-wedlock children.<sup>72</sup> This article proceeds on the assumption that both the genes driving this behavior and conscious reflections on this issue have not changed significantly—prospective dynasts today care deeply (down to their DNA) about the social status of their progeny as a group and are averse to the prospect of a high number of lower-status descendants.

This article further departs from earlier scholarship by postulating that dynasts will focus bequests on *individual* descendants rather than entire generations. On the subject of efficiently converting wealth into high-status descendants, past work has focused on fluctuations in rates of return on financial assets.<sup>73</sup> The idea is that dynasts will invest more in descendants when financial returns are low and less when returns are high.<sup>74</sup> An additional, unstated premise in this earlier work is the plausible notion that, on average, rates of return (in terms of producing more descendants) are equal across all descendants. This implies that dynasts will spend symmetrically on all members of a given generation but will not discriminate between members of a given generation.

---

<sup>70</sup> *Id.* at 99 (quoting Jack Hirshleifer, *Economics from a Biological Viewpoint*, 20 J.L. & ECON. 1, 19 (1977)).

<sup>71</sup> Carole Shammas, *English Inheritance Law and Its Transfer to the Colonies*, 31 AM. J. LEGAL HIST. 145, 146, 150–53 (1987); see also *supra*, text accompanying notes 11, 27–28.

<sup>72</sup> Shammas, *supra* note 71, at 150.

<sup>73</sup> E.g., GANDOLFI ET AL., *supra* note 67, at 112–15.

<sup>74</sup> *Id.* at 114.

As elaborated at length in Part V, this article suggests that astute dynasts setting up DFTs will mandate mechanisms for trust managers to size up the “quality” of descendants and invest greater sums in those more likely to raise the status of the family. Indeed, investing disproportionately in higher-quality descendants is a core element of the dynastic trusts considered in Part V.

I do not assume that *every* prospective dynast will bequeath his wealth to maximize his progeny’s status according to the general contours of this section and the specific provisions outlined in Part V. The genetic roots of the will to achieve and maintain status strongly suggest, however, that some nontrivial fraction of today’s billionaires will, if permitted, follow their feudal forerunners and use DFTs to raise the status of their family line over an unending horizon.

That brings us to the final question of this section: why have none of those with immense riches over the last 400-odd years established DFTs? Although the federal estate tax no doubt has acted as a deterrent,<sup>75</sup> it is only about 100 years old. At bottom, the answer is simple: at its founding, the United States inherited the British Rule Against Perpetuities (RAP).<sup>76</sup> The next section covers some history essential to the narrative. It first limns the RAP’s role in suppressing the dynastic urge at the core of feudalism, and then documents how (shockingly) over the last few decades the RAP has effectively disappeared in the supposedly egalitarian United States. The country thus finds itself on the cusp of a New Feudalism with the rise of a small coterie of powerful dynastic families.

#### IV. PRIMOGENITURE, THE FEE TAIL, AND THE RISE AND RECENT DEMISE OF THE RULE AGAINST PERPETUITIES

Our historical detour begins with two of the primary features of medieval English society: primogeniture and the fee tail (or “entails”). Primogeniture refers to an inheritance regime in which the oldest child (invariably the oldest male child) inherits virtually all of his parents’ wealth.<sup>77</sup> In the chaotic and dangerous world of early feudalism, rife with external invaders and internal brigands, preventing the division of properties on the death of the fighting man possessing the estate was a sensible and perhaps necessary policy to maintain holdings large enough to support the local lord and his armed men—the sole source of law, order, and national defense.<sup>78</sup>

---

<sup>75</sup> See *infra* Part VI.

<sup>76</sup> See *infra* note 103 and accompanying text.

<sup>77</sup> 1 ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 383 (R.H. Campbell & A.S. Skinner eds., 1976) (1776).

<sup>78</sup> *Id.* (“In those disorderly times, every great landlord was a sort of petty prince. . . . The security of a landed estate . . . depended upon its greatness. To divide it was to ruin it . . .”).

In early medieval times, there was no right of inheritance<sup>79</sup> and this too made sense: what if a lord's sons were all unable or unwilling to keep the peace and guard the realm? Thus, monarchs retained the right to install a militarily effective successor from outside of the family to possess the estate and use its income to support himself and his coterie of knights.<sup>80</sup>

As kings, lords, and knights restored tranquility to England (along with the rest of Europe), one might have expected both primogeniture and unified ownership to disappear, given that society and the economy did not need to focus so narrowly on supporting mounted, armed, and armored fighters. The selfish genes of the English lordly class, however, pushed hard for the right of their sons to inherit their estates and extracted this concession from the king no later than 1290.<sup>81</sup> More to the point of this section, the nobility in England (and elsewhere) almost immediately instituted the practice of primogeniture.

During the 13th century, primogeniture emerged as a reaction to the intensified demographic pressure and the consequent inefficient partition of land. It kept spreading across Europe up to the 16th and the 17th century . . . . [I]t remained most common among the nobility and whenever land constituted a dominant portion of wealth.<sup>82</sup>

The reason that partitioning the land was inefficient, however, had changed. The problem was no longer exploiting economies of scale in supporting armed men, but rather preserving the status of at least one branch of the family. "[T]he main cost of partibility is that it reduces the size of a holding below the minimum needed to support a family, although clearly the desire to maintain social status and local political power still remains a factor."<sup>83</sup>

This was a story repeated around the globe.<sup>84</sup> For over thirteen centuries, inheritance practices in some regions of Tibet mandated a "monomarital principle," in which only one son married—or a group of brothers married a single fertile female—to prevent partition of the family estate.<sup>85</sup> The Tibetans scoldingly pointed to the poverty among the neighboring Nepalese who divided estates equally among their children, producing widespread

---

<sup>79</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*71–72; 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF THE ENGLISH LAW 329 (Cambridge University Press 2d ed. 1968).

<sup>80</sup> BLACKSTONE, *supra* note 79, at \*73–74.

<sup>81</sup> Quia Emptores, 18 Edw. c. 1.

<sup>82</sup> Bertocchi, *supra* note 12, at 63 (citing FAMILY AND INHERITANCE: RURAL SOCIETY IN WESTERN EUROPE, 1200–1800 (Jack Goody et al. eds., 1976)).

<sup>83</sup> Sarah Blaffer Hrdy & Debra S. Judge, *Darwin and the Puzzle of Primogeniture*, 4 HUM. NATURE 1, 7 (1993).

<sup>84</sup> For other examples from Europe, see generally *id.*

<sup>85</sup> WILLIAM H. DURHAM, COEVOLUTION: GENES, CULTURE, AND HUMAN DIVERSITY 60–61, 76–78, 80–81 (1991).

poverty.<sup>86</sup> Moreover, those Tibetans who did partition holdings among their children produced more children *but fewer grandchildren*.<sup>87</sup> In a word, partitioning wealth (land) instead of leaving it all to one child led to lower *long-term* biological fitness.

The Tibetan experience was unusual in that it did not generally favor eldest sons. Far more typical was Japan's rigorous version of male primogeniture. "Almost invariably only one son inherited the land, and only this son (who succeeded to family headship) married. Typically this heir was the eldest son . . . . A clear advantage of this 'stem-family' system was to keep the family farm and other property intact from one generation to the next."<sup>88</sup> Status maintenance again sits center stage. In contrasting the common American practice of equally dividing estates, de Tocqueville highlighted the way in which primogeniture fosters a view of ancestral lands as the font of an *enduring family dynasty*. "The family represents the estate, the estate the family; whose name, together with its origin, *its glory, its power*, and its virtues, is thus perpetuated in an imperishable memorial of the past and *a sure pledge of the future*."<sup>89</sup>

In addition to keeping the family lands as an undivided whole, the English nobility also successfully pushed to create a legal device that would prevent ownership of the family estate from ever leaving the family: the fee tail.<sup>90</sup> This device was *tailor-made* for status-seeking genes. A grant (usually via will) in fee tail by a fee simple owner dictated that in each succeeding generation one descendant would enjoy a life estate in the family lands but would lack any right to either sell the property or choose an heir.<sup>91</sup> That one descendant, given primogeniture, was invariably the eldest son.<sup>92</sup> If any eldest son died without issue, the fee tail dictated that the next life estate holder was the decedent's next eldest brother or that brother's eldest male son if he had predeceased his elder brother. If no such brother existed, the fee tail shifted the estate by climbing back up the family tree to the nearest branch with a now-eldest living son, and that lucky fellow and his line of eldest sons would enjoy life estates, again as limited by the original fee tail

---

<sup>86</sup> *Id.* at 73.

<sup>87</sup> *Id.* at 83–89.

<sup>88</sup> Hrdy & Judge, *supra* note 83, at 17–18 (citing THOMAS C. SMITH, NAKAHARA: FAMILY FARMING AND POPULATION IN A JAPANESE VILLAGE, 1717–1830 (1977)).

<sup>89</sup> 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 54 (Henry Reeve trans., Bantam Classic 2004) (1835) (emphases added).

<sup>90</sup> The Statute of Westminster the Second (De Donis Conditionalibus) 1285, 13 Edw. c. 1. Note that the workings of the fee tail figure prominently in the plot of *Downton Abbey*. See Wendy S. Goffe & Deborah L. Jacobs, *Downton Abbey's Plot Twists Spur Lawyers' Debates*, FORBES (Jan. 23, 2014, 5:59 AM), <https://www.forbes.com/sites/deborahljacobs/2014/01/23/downton-abbey-plot-twists-spur-lawyers-debates>.

<sup>91</sup> 13 Edw. c. 1; see also STONE, *supra* note 27, at 156.

<sup>92</sup> Shammass, *supra* note 71, at 152.

(no rights to sell; no rights to choose his own heir).<sup>93</sup> If this second line failed, the fee tail dictated finding a third, a fourth, and so on.<sup>94</sup>

Lords' lawyers designed fee tails to keep wealth in their clients' bloodlines for as long as possible.<sup>95</sup> In a relatively short time, the English nobility came a long way: from no right of inheritance<sup>96</sup> to the potent combination of primogeniture and the fee tail. From a biological perspective, this was a huge victory for their selfish genes and push for status. Most other European nations saw similarly strong forms of family dynastic inheritance that generally survived into the 1800s.<sup>97</sup>

The fee tail, however, had two natural and consequential enemies. First and foremost, eldest sons inevitably varied in the depth of their commitment to maintaining family status. Those with less dynastic leanings might have wished to sell or mortgage part or all of the property in service of either unbridled egotism (e.g., gambling; maintaining numerous mistresses) or selflessness (e.g., treating all of their children equally; improving the lot of their tenants).<sup>98</sup> Whatever the reason, those heirs not sharing their forebearers' commitment to enduring family would want to "break" the entailment of the family estate and obtain full ownership (fee simple).<sup>99</sup>

These wayward eldest sons found a critical ally in another enemy of the fee tail: the late medieval/Renaissance English judiciary. Perhaps driven by their vocation, these judges seem to have developed a sense of public policy that transcended family status. Witnessing the social costs of the fee tail (severe limitation of the alienability of land; fathers' inability to threaten errant sons with disinheritance), the judiciary entertained and approved of complex legal maneuvers that enabled a life holder in a fee tail to convert his interest to a fee simple.<sup>100</sup>

Aspiring dynasts did not go down without a fight. They tasked their legal advisors with finding alternatives to the fee tail that would achieve the same end: prevent any of their descendants from selling off the family estate. Although it took a couple of centuries, the judges (again siding with heirs lacking the dynastic urge) eventually crafted a general, insurmountable

---

<sup>93</sup> See sources cited *supra* note 91.

<sup>94</sup> 13 Edw. c. 1; Shammass, *supra* note 71, at 152.

<sup>95</sup> JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES § 141f (3d ed. 1915).

<sup>96</sup> See *supra* text accompanying note 79.

<sup>97</sup> Bertocchi, *supra* note 12, at 44 ("The French revolution abolished entails, but it is only with the 19th century that most European countries finally outlawed them . . .").

<sup>98</sup> See STONE, *supra* note 27, at 156–57 (noting the "changing attitudes towards family responsibility held by different generations of landed proprietors" by the sixteenth century).

<sup>99</sup> *Id.*

<sup>100</sup> See *Taltarum's Case*, YB 12 Edw. 4, fol. 19, Mich, pl. 25 (1472), reprinted in A.K.R. KIRALFY, A SOURCE BOOK OF ENGLISH LAW 92–97 (1957). For an accessible overview of suits to convert fee tails to fee simples, see A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 86–93 (2d ed. 1986).

obstacle to dynastic family wealth: the Rule Against Perpetuities (RAP).<sup>101</sup> Without subjecting the reader to its tortured intricacies, the RAP essentially dictates that a testator's dead hand can control the disposition of his wealth only until his youngest grandchild reaches the age of twenty-one.<sup>102</sup> Thus, a will reading "to my children for their joint lives, then to my grandchildren for their joint lives until the youngest reaches the age of twenty-one, then to my grandchildren in fee simple" is valid. But trying to reach further generations, for example "to my children for their joint lives, then to my grandchildren for their joint lives, then to my great-grandchildren in fee simple" violates the RAP, meaning the attempted gift to the class of great-grandchildren is void.

The RAP is one of the most undercelebrated social/legal innovations of all time, a signal death knell to the (considerable) remnants of feudalism in seventeenth-century England. No longer could the aristocracy hermetically seal their large estates within family hands for generations without end. Unsurprisingly, given their democratic, anti-feudal ideology, Britain's American colonial courts followed versions of the RAP from their earliest reported decisions.<sup>103</sup>

American egalitarianism, however, did not entirely suppress the genetic drive for status. For example, parents sometimes engaged in primogeniture in order to avoid excessive subdivision and maintain family status. De Tocqueville noted that in early 1800s Massachusetts, densely populated by American standards if not European ones, "estates are very rarely divided; the eldest son takes the land, and the others go to seek their fortune in the desert. The law has abolished the rights of primogeniture, but circumstances have concurred to re-establish it . . . ."<sup>104</sup> Similarly, in eighteenth- and early-nineteenth-century Connecticut, the wealthy channeled "assets to favored heirs [that] allowed selected offspring to maintain a privileged socioeconomic status, but in the case of relatively land-poor parents it provided a means to elevate one or more selected offspring into a more privileged position with increased probability of survival and successful

---

<sup>101</sup> GRAY, *supra* note 95, § 141f ("[T]he ingenuity of conveyancers [lawyers], aided by the inadvertence of the judges, created a class of future interests which the courts held to be indestructible; that thereupon it became necessary to make a new rule for the restraint of indestructible future interests; and that this rule is the Rule against Perpetuities."). For the tortured series of cases from which the RAP emerged, see *id.* §§ 123–70.

<sup>102</sup> *Id.* §§ 186, 223–24.

<sup>103</sup> See, e.g., *Lightfoot v. Lightfoot*, 1 Va. Colonial Dec. R84, R86 (Gen. Ct. 1732) ("[T]he Expect'cy wou'd be too remote, and the Law won't allow the Rem'r of a Chattle to be good unless it may of necessity vest in a few years as upon the Death of one Person or more in being[.]"); *Lessee of Ashton v. Ashton*, 1 U.S. (1 Dall.) 4 (Pa. 1760) ("[A]n executory Devise must take effect within the Compass of a Life or Lives in [being], or at farthest within nine Months after: . . . [these facts] tended to a Perpetuity.").

<sup>104</sup> 1 DE TOCQUEVILLE, *supra* note 89, at 341.



reproduction.”<sup>105</sup> One early American religious leader encouraged just such behavior, advising his flock to:

keep your Estate in one Hand; never divide it or cut off any, especially Lands. . . . 'Tis not good to be upon a Level, or under the Foot of every Scoundrel. . . . As for the other Children, if there are several, give them Trades. . . . This I think is better for every one, than to have a little Scrap of Land to Starve upon, and the Estates ruined, & the Family sink into Obscurity.<sup>106</sup>

Despite this timeless and deep-seated drive for status, from the first European colonists through the nation's bicentennial in 1976, Americans lived in a world where the RAP's limitations were ingrained into the mindset of wealthy testators and their lawyers. Even the most deeply grounded elements of the legal landscape, however, can be uprooted. The death of the RAP over the last four decades began in the early 1980s when lobbyists for bank trust departments in South Dakota decided that they could attract lucrative out-of-state trusts and estate business by repealing the RAP.<sup>107</sup> These bankers must have believed, per the pervasive biological evidence covered *supra* in Part II, that the dynastic flame burned still in the genes of wealthy people despite the centuries-long limitation imposed by the RAP, and they were right. Billions of dollars in trust business shifted to South Dakota as well as the many other states (over half) that followed its lead and either abolished or seriously diluted the RAP.<sup>108</sup>

This largely unnoticed but highly consequential legal regime shift has spawned a new cadre of lawyers specializing in designing dynastic trusts. Like most lawyers, especially those for the wealthy, these folks do not publicize what they do for their clients. Their promotional materials, however, revolve around the word “dynastic,”<sup>109</sup> and so presumably they are

---

<sup>105</sup> Hrdy & Judge, *supra* note 83, at 12.

<sup>106</sup> *Id.* (emphasis added) (quoting Thomas Chesebrough, *Some Thoughts on Raising a Family*, in EXTRACTS FROM THE ITINERARIES AND OTHER MISCELLANIES OF EZRA STILES, D.D., LL.D. 1755–1794 WITH A SELECTION FROM HIS CORRESPONDENCE 1, 1 (Franklin Bowditch Dexter ed., 1916)).

<sup>107</sup> S.D. CODIFIED LAWS § 43-5-8 (2022) (“The common-law rule against perpetuities is not in force in this state.”). For reasons lost in the mists of history, Idaho and Wisconsin stopped recognizing the common-law RAP long before South Dakota. 1957 Idaho Sess. Laws 92 ch. 54, § 1 (codified as amended at IDAHO CODE § 55-111 (2022)); WIS. STAT. § 700.16(5) (2022).

<sup>108</sup> Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 376 (2005). For lists of the states that have abolished or neutered the RAP, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, ch. 27, intro. note (AM. L. INST. 2011) (listing twenty-five states); Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 B.C. L. REV. 145, 178 n.158 (2019) (adding four more states).

<sup>109</sup> See, e.g., *A Primer on Dynasty Trusts*, WEALTHSPIRE ADVISORS (Mar. 26, 2018), <https://www.wealthspire.com/guides-whitepapers/primer-dynasty-trusts/> (“Dynasty Trusts avoid the Rule Against Perpetuities through careful structuring, and can therefore last forever. This feature makes them superior to other trusts. As a result, for families with significant wealth, Dynasty Trusts now form

reaching out to provide plans for wealthy individuals who desire to use their wealth to perpetuate the status and influence of their progeny. Interviews with a small number of these estate law specialists reveal that some very wealthy individuals are indeed intentionally structuring trusts to benefit unending generations of their descendants.<sup>110</sup> The demise of the RAP means that for the first time since the nation's founding, these aspiring American dynasts can now create family trusts that last *forever*. Inheritance in the United States, at least for the very wealthy, is entering uncharted territory. How will aspiring dynasts behave when no longer constrained by the RAP? The next section endeavors to answer this important but almost entirely unexamined question.

#### V. GETTING SERIOUS ABOUT ESTABLISHING A DYNASTY: MAXIMIZING FAMILY STATUS AND POWER FOR THE LONG, LONG RUN WITH DYNASTIC FAMILY TRUSTS (DFTs)

In this brave new RAP-less legal landscape, this section explores how today's rational aspiring dynast can structure his estate plan in order to best serve his hypothesized desire to maximize his descendants' socioeconomic status and power.<sup>111</sup> To put it somewhat metaphorically, this section explores the implications of a legal landscape permitting the unholy alliance of our genetic urge for status and virtually unlimited wealth *forever*. As mentioned earlier, this article labels estate plans applying the techniques outlined here "Dynastic Family Trusts" (DFTs). DFTs following the blueprints here will cement family status much more effectively than the simpler, traditionally structured "dynasty trusts" commonly marketed since the death of the RAP.<sup>112</sup>

We first contrast the capacious dynastic possibilities in the new post-RAP world with the historically much more constrained world of the RAP in Section V.A. After briefly discussing the optimal savings rate for dynastic trust income in Section V.B, Section V.C then analyzes how a dynast optimizing long-term familial status would channel funds from his DFT to those descendants best able to enhance family status. Such trusts will have greater long-term potency if the creator can coax wealthy descendants to bequeath all or a large chunk of their fortunes to the original trust or to a "sub-tree" trust benefiting those descendants' branches of the family. Section V.D explores DFT provisions to induce such contributions. A perpetual trust requires some continuing and self-renewing governance structure beyond any collection of trustees placed in charge at inception, and

---

the core of their financial and estate plan."); David Gass, *How to Create a Dynasty Trust (and Why You Need One)*, ANDERSON ADVISORS (Sept. 29, 2021), <https://andersonadvisors.com/how-to-create-dynasty-trust-why-you-need-one/>.

<sup>110</sup> See *infra* Section V.H.

<sup>111</sup> See *supra* Part III.

<sup>112</sup> See sources cited *supra* note 109.

Section V.E explains why the DFT is the best tool for the job. The last two sections discuss “fundamental change transactions,” such as merging DFTs (V.F), and the extent to which dynastic families are incentivized to pool resources to achieve common goals, like ensuring that legislatures do not restore the RAP and eliminating or minimizing estate taxation (V.G).

#### A. *A New World of Possibilities*

Medieval dynasts and their attorneys operated in a relatively unsophisticated legal world. Trusts did not exist,<sup>113</sup> the law of contracts was in its infancy,<sup>114</sup> and property rights were less secure.<sup>115</sup> In this (relatively) primitive legal environment, wealthy nobles, following basic genetic desires, endeavored to ensure their descendants’ status, and so availed themselves of the tools at hand: primogeniture and the fee tail.<sup>116</sup> As means to the end of status or even simple Darwinian fitness, these are highly imperfect. The chance that each eldest son is the ablest manager of the family’s fortune falls well short of certainty. Darwin himself commented on primogeniture’s deficiencies, lamenting, “Oh, what a scheme is primogeniture for destroying natural selection!”<sup>117</sup>

By contrast, in our RAP-less world, dynasty founders can draw on the flexible, detailed, and vigorously enforced laws of property, contract, and trusts to engage in estate planning orders of magnitude more sophisticated than primogeniture and the fee tail. Perhaps the greatest challenge for legal advisors to the wealthy for the next few decades will be exercising their imaginations to implement plans that the RAP had barred from the legal imagination for centuries.

Two prior commentaries, one personal, suggest the difficulties of freeing minds of the current generation of dynasts and estate planners from long-standing customs and practices. One of the few earlier analyses of using wealth to found a family dynasty noted that “it is not unreasonable to make selective gifts during his lifetime that optimize the production of grandchildren. The parent can give preference to one child or the other based on the circumstances at the time, while leaving the remainder of his

---

<sup>113</sup> AMY MORRIS HESS ET AL., *BOGERT’S THE LAW OF TRUSTS AND TRUSTEES* § 2 (2022) [hereinafter “BOGERT ON TRUSTS”] (“The origin of uses and trusts”).

<sup>114</sup> Frederick Pollock, *Contracts in Early English Law*, 6 HARV. L. REV. 389, 389, 402 (1893).

<sup>115</sup> Alexander Volokh, *Property Rights and Contract Form in Medieval Europe*, 11 AM. L. & ECON. REV. 399, 432 (2009).

<sup>116</sup> See *supra* Part IV.

<sup>117</sup> Hrdy & Judge, *supra* note 83, at 2 (quoting Letter from Charles Darwin to Alfred Russell Wallace (May 28, 1864), in 3 THE LIFE AND LETTERS OF CHARLES DARWIN, 89, 91 (Francis Darwin ed., 1887)). In another letter Darwin reiterated the point. “Suppose the first-born bull was necessarily made by each farmer the begetter of his stock!” scoffed Darwin (an animal-breeder in his own right) in a letter to Joseph Hooker in 1862 . . . .” *Id.* (quoting Letter from Charles Darwin to Joseph Hooker (Jan. 25, 1862), in 2 THE LIFE AND LETTERS OF CHARLES DARWIN, *supra*, at 384, 385).

resources evenly divided among his children or grandchildren.”<sup>118</sup> The reference to “his lifetime” and the focus on only living descendants shows that the authors, born and bred in a world in which the RAP prevailed, simply could not conceive of drafting a dynastic trust that could “give preference” to more status-enhancing descendants for generation after generation over an unending horizon.

The second example is personal. In discussing post-RAP inheritance behavior in a previous article, I voiced concern that dynasts would structure their trusts so that *all* of their descendants, forever, could enjoy work-free lives.<sup>119</sup> Such passive evenhandedness and benevolence, however, would do little to perpetuate family status. Rather, it seems like a prescription for a growing, amorphous collection of trust fund babies, many of whom would simply while away their lives at the beach. That is no way to build a lasting family dynasty of high social status. As a citizen and a lawyer raised and educated in a world where the RAP was taken as an immutable part of the legal landscape, the idea of long-term, sophisticated planning to establish a family dynasty was, at least initially, beyond my imagination. This article embodies a much more ambitious and sophisticated conception of how the wealthy can establish durable, elite family dynasties.

#### B. *The Savings Rate for Dynastic Family Trust Income*

The difficulty of perceiving the post-RAP possibilities leads to all sorts of fundamental errors in thinking about optimal dynastic planning. In keeping with one of the main biological lessons of Part III, the single most important mental leap that dynasts and their advisors must make is *selective treatment of remote offspring*.<sup>120</sup> As noted earlier, feelings of natural affection along with social norms will almost certainly cause dynasts to provide generously for all of their children, grandchildren, and any more remote descendants alive before the dynast expires.<sup>121</sup> That in no way prevents a dynast from initiating a colder, more calculating program of directing trust benefits to those more remote descendants most likely to enhance family status.

Under my prior error of trying to comfortably fund *all* progeny *equally*, I wrote that dynastic trusts would need to save trust income at extraordinary rates (over ninety percent) so that the power of compound returns could keep up with potentially exponential growth in number of descendants.<sup>122</sup> Once it dawns on potential dynasts that they can selectively fund their distant progeny, and that many descendants need receive only modest benefits (e.g., a basic education if their parents are impecunious), today’s

<sup>118</sup> GANDOLFI ET AL., *supra* note 67, at 120.

<sup>119</sup> Kades, *supra* note 108, at 167.

<sup>120</sup> See *supra* notes 53–54 and accompanying text.

<sup>121</sup> See *supra* text following note 54.

<sup>122</sup> Kades, *supra* note 108, at 198.

dynasts are free to choose plans that save less trust income and yet achieve more status-enhancing bang for the buck. The quest for *unending* family status does require that dynastic trusts, like private universities (which also desire to survive and thrive with as much status as possible forever), maintain or increase principal (endowments) and fund themselves through income on that principal.<sup>123</sup>

There are a number of important and subtle issues that dynasts must weigh regarding the trust's savings rate.<sup>124</sup> Although mandating a fixed (real) savings rate has the virtue of simplicity, such a rigid rule comes with significant costs. One of the fundamental trade-offs that dynasts face is between funding the current generation of descendants versus postponing expenditures until later generations. This matters for at least two reasons. First, when rates of return on DFT assets are relatively high, at the margin, the trust should reinvest income for future investments as opposed to spending it. For a dynast, high rates of return are the opportunity cost of spending now instead of later, when he could have relatively large accumulated earnings to spend on future descendants. Second, if trust managers determine that the living descendants are of below-average quality in their ability to enhance family status, it makes sense to refrain from investing in a subpar group and instead save the income to invest in future generations that, by the laws of probability, are very likely to yield greater status gains.

Another factor that will influence the optimal savings rate is the extent to which the founder believes he can induce descendants to contribute to his DFT. Traditionally, private family trusts are funded by one or a series of capital donations from the trust's creator, and do not contemplate later contributions. Nothing in trust law, however, stands in the way of later contributions from others—including donations from beneficiaries, as strange as that may sound. As discussed *infra*,<sup>125</sup> DFT founders may be able to structure incentives such that their descendants agree to make contributions—perhaps sizeable contributions—to the trust. The founder can specify a lower savings rate in the event that these provisions do in fact generate significant descendant contributions.

### C. *Trust Expenditures: Selective Funding of Descendants*

The most important terms in DFTs, as flagged in the previous section, revolve around selecting the descendants who will receive trust distributions, how much they will receive, and when they will receive them.

---

<sup>123</sup> For a study of how universities invest their endowments for future generations, see David Chambers et al., *Seventy-Five Years of Investing for Future Generations*, 76 FIN. ANALYSTS J., no. 1, 2020, at 5.

<sup>124</sup> There are some obvious issues. For example, the trust should target an inflation-adjusted savings rate, and the trust should diversify its investments to avoid taking uncompensated risks.

<sup>125</sup> See *infra* Section V.D.

As this section illustrates at some length, there are numerous variables to consider in settling on an investment plan to maximize long-term family status, and these variables interact. Thus, instead of specifying a formal optimization problem and solving for an analytic solution or running simulations, this section lays out the important variables and considers the role that each will play for rational DFT founders aiming to establish and sustain high family status.<sup>126</sup>

As mentioned earlier, one of the easiest ways to see the need for investing selectively in descendants is that the converse, funding all progeny equally with trust income while preserving or growing the trust's principal, likely leads to generation after generation of indolent trust fund "coupon clippers."<sup>127</sup> Guaranteeing a handsome lifetime income to all descendants (and all of their issue) neither screens for ability nor creates incentive to succeed in ways that bolster family status. This article assumes that selectively funding descendants is an essential element of dynastic planning.

Selective investment in children is not entirely novel. Before a society's demographic transition and shift in focus from quantity to status, rational parents discriminate between their children in order to maximize the raw count of their genes in future generations.<sup>128</sup> The starkest examples come from societies permitting polygyny. As discussed earlier, if sons of wealthy parents can use incremental inheritance or gift dollars to buy more wives, then the number of children (especially male children, who can repeat this cycle) that they can sire is limited only by the extent of their wealth.<sup>129</sup> Data from scores of polygynous societies bears out that rational wealthy parents realized and heavily biased their bequests in favor of sons; "it has been shown across cultures that male-biased inheritance is more common the higher the degree of polygyny."<sup>130</sup> Indeed, they often selectively funded not just all sons over daughters, but even a few sons over all sons,<sup>131</sup> implying some sort of increasing returns to wealth in producing family status.

Such relatively simple selective investment in male sons was the most that parents could achieve in simpler times. Given much more developed

---

<sup>126</sup> In separate, more quantitative work, I will derive some formal results for simplified models that do not attempt to encompass all of the variables considered in this subsection.

<sup>127</sup> See *supra* text accompanying note 119. A coupon clipper is "a wealthy and idle person whose chief labor is clipping and cashing bond coupons." *Coupon Clipper*, MERRIAM-WEBSTER DICTIONARY <https://www.merriam-webster.com/dictionary/coupon%20clipper> (last visited Oct. 12, 2022). Until late in the twentieth century, borrowers issued bonds in paper format with rows of coupons for lenders to cut out and mail to the borrower to receive their periodic interest payments. Ken Belson, *Coupon Clipping, the Old-Fashioned Way*, N.Y. TIMES (Feb. 12, 2006), <https://www.nytimes.com/2006/02/12/business/yourmoney/coupon-clipping-the-oldfashioned-way.html>.

<sup>128</sup> See *supra* note 24 and accompanying text.

<sup>129</sup> See *supra* text accompanying note 27.

<sup>130</sup> Mace, *supra* note 27, at 79 (citations omitted).

<sup>131</sup> Lawson & Borgerhoff Mulder, *supra* note 16, at 5 (measures to concentrate wealth selectively on one or a few children include "primogeniture, ultimogeniture, and unigeniture, conventions on age at first marriage, and even complete restrictions on marriage") (citations omitted).

legal systems and a much stabler social environment, today's striving dynasts can engage in much more comprehensive, nuanced selective investment, not just in their children but also in succeeding generations *without end* (given freedom from the shackles of the RAP). Today's dynasts can engage in selective investment on steroids. What follows is an attempt to highlight the most powerful ways to administer the dynastic steroid that is the DFT.

A dynasty founder will strive to channel the (perpetual) income from his immense but not infinite wealth to those descendants most likely to enhance the family's status. This involves some important trade-offs. First, he must decide how much to fund living generations (children, and perhaps grandchildren and great-grandchildren), and how much to save for later generations. Within each generation, he will try to craft rules that provide more funds to the most gifted descendants and little or nothing to those with little or no promise. If we think of each descendant as a race car, then income from DFT wealth is the fuel. In the race for family status, dynasts will want to provide copious fuel to their best vehicles.

Dynasts face a very difficult question: what sort of funding for select descendants will best raise family status? First and foremost, to continue the analogy, the race cars are all very different. If all descendants were the same,<sup>132</sup> the answer would be relatively easy: fund each one up to some point of diminishing returns.

In reality, of course, descendants are not equal. Still, it may well be rational to invest some 'base' amount in all descendants. Perhaps the easiest piece of this puzzle is that rational dynasts will provide all descendants with trust income sufficient to ensure that they grow up in a safe and nurturing environment, receive a good education, and have the opportunity to engage in enriching activities like the arts and sports. Outlays for these purposes accomplish two critical purposes: (1) maximize the potential achievements of each descendant, and (2) help identify the "type" of each descendant, in terms of qualities that affect potential for success (e.g., intelligence, drive, creativity, social skills), and determine those meriting additional post-educational investment.<sup>133</sup>

Thus, rational dynasts might well opt to fund basic life quality and education costs for *all* of their descendants during their formative years. Dynasts might also opt for a second dollop of non-selective spending: having the trust provide each descendant with a significant lump sum payment on

---

<sup>132</sup> This of course is impossible—unless human cloning becomes legal and accepted. Under a biological fitness metric, cloning is the optimal strategy for gene propagation. For maximizing family status, however, a diversity of talents and abilities might well work better than generation after generation of one set of genes (i.e., one person). Although cloning is not illegal under federal law, there are regulatory inhibitions. See 48 CFR § 352.270-13(d) (2021) (barring use of federal funds for cloning humans). A number of states have banned cloning. See, e.g., CAL. HEALTH & SAFETY CODE § 24185 (West 2022); VA. CODE ANN. § 32.1-162.22 (2022).

<sup>133</sup> Some minimal level of spending on all descendants might also reduce the probability that none of them engages in antisocial acts that might tarnish the dynasty's status, e.g., thievery or fraud.

reaching the age of majority (typically 18) or a few years thereafter. A gift equal to the income of someone at the ninetieth percentile of the prevailing income distribution (about \$130,000 in the United States today<sup>134</sup>), often labeled a “demogrant,”<sup>135</sup> might give descendants a head start in their careers. Budding entrepreneurs could start a business when otherwise unable to obtain funds on reasonable terms in the capital markets. Budding politicians could run competitive campaigns despite the inevitable difficulties unknown candidates face attracting donations.

Even during their formative years, some members of each generation may distinguish themselves as meriting greater investment. Those demonstrating unusually high intelligence, given its value in virtually all domains, might merit extra early expenditures (e.g., tuition at elite private schools, special tutoring) to realize their full potential. Other forms of talent might also justify early investment (e.g., leadership, athleticism, artistry).

Determining how individuals contribute to family status is another critical matter for dynasts. First and foremost, of course, wealth plays an irreplaceable role in establishing status in the long run over generation after generation. Thus, DFTs should foster careers that produce very high incomes. This is actually quite a diverse set, including business executives, entrepreneurs, elite athletes, and artists.<sup>136</sup> The celebrity status of top athletes and artists provides a second dimension of status gain, beyond their high incomes, though some businessmen and entrepreneurs also become household names.<sup>137</sup> The main additional collection of careers that bolster family status involve public service: holding high office, either elected (President or governor, senator or congressperson) or appointed (attorney general or other cabinet officer, chairman of the Federal Reserve System or other agency, federal judgeship).

It is not hard to identify the sort of DFT expenditures that could help talented family members achieve high office; the role of money in politics requires little discussion and no citation. Timing gifts to prospective elected officials does pose some subtle issues. Political donations from the trust likely provide the greatest value to those who first demonstrate some promise but are not yet well-established, and to seasoned politicians in tight races.

---

<sup>134</sup> *Income Percentile Calculator for the United States in 2020*, DQYDJ, <https://dqydj.com/income-percentile-calculator/> (last visited Oct. 12, 2022).

<sup>135</sup> James M. Buchanan, *Can Democracy Promote the General Welfare?*, 14 SOC. PHIL. & POL’Y, Jan. 13, 2009, at 165, 171 (defining “demogrants” as “equal-per-head transfer payments”); see also Otto Lehto & John Meadowcroft, *Welfare Without Rent Seeking? Buchanan’s Demogrant Proposal and the Possibility of a Constitutional Welfare State*, 32 CONST. POL. ECON. 145 (2021) (discussing Buchanan’s development of “demogrant” proposals in social welfare programs).

<sup>136</sup> See, e.g., *40 Under 40*, FORTUNE, <https://fortune.com/40-under-40/> (last visited Oct. 12, 2022) (showcasing “rising entrepreneurs, influencers, creators, and executives” from diverse industries).

<sup>137</sup> For example, Steve Jobs of Apple and Jack Welch of General Electric.



Fostering gifted athletes and artists involves quite different concerns. Although not perfect, experts can identify those with elite athletic potential at relatively early ages.<sup>138</sup> The DFT expenditures that maximize their talents are relatively modest, e.g., a personal coach and funds to travel to elite competitions. Detecting talented singers and writers early in life may be harder, and the role of money in fostering such gifts is less clear. DFT trustees might employ talent scouts to provide the best available gauge of descendants' potential in various arts. At least in some instances, however, it does seem that money can trump talent and allow mediocre performers to achieve fame and fortune.<sup>139</sup>

Finally, business acumen and entrepreneurial talent are difficult to forecast and thus dynasts might not try to fund such talent until descendants reach adulthood. Even then, to the extent that markets are by far the best gauges of these sorts of talent, trust funding might never make sense because those with true managerial or entrepreneurial talent will be able to fund their careers via the executive labor market or the venture capital market.

At a higher level of abstraction, standard marginal economic thinking offers a framework for the allocation of DFT funding. Just as consumers spend on each good until its marginal utility to them equals its cost (price),<sup>140</sup> and producers hire labor and capital until their marginal products equal the wage and interest rates,<sup>141</sup> rational dynasts will channel dollars to a descendant up to the point at which the *status* return on the last dollar spent falls to the level of the next most status-enhancing investment in another descendant.

Through whatever methods all of this is done, selective investment in descendants has an enormous advantage over regular, unconditional inheritances: it does not put a damper on incentives to effort and enterprise.<sup>142</sup> Quite to the contrary, selectively funding descendants based

---

<sup>138</sup> FC Barcelona, perennially one of Europe's top soccer teams, invited future superstar Lionel Messi to join its academy after noticing the thirteen-year-old's talented play in Argentina. Wright Thompson, *The Strange Relationship Between Lionel Messi and His Hometown in Argentina*, ESPN: OUTSIDE THE LINES (Oct. 4, 2012), <http://www.espn.com/espn/eticket/story?page=lionel-messi>. In the United States, *Sports Illustrated* published cover features on LeBron James (basketball) and Bryce Harper (baseball) while the future stars were still in high school. Grant Wahl, *Ahead of His Class*, SPORTS ILLUSTRATED, Feb. 18, 2002, at 62, <https://vault.si.com/vault/2002/02/18/702980>; Tom Verducci, *Baseball's LeBron*, SPORTS ILLUSTRATED, June 8, 2009, at 62, <https://vault.si.com/vault/2009/06/08/1004210>.

<sup>139</sup> The success of Korean "Kpop" bands may be based in large part on record label investments and strategizing. *How the Kpop Industry Actually Works*, FANGIRL INITIATIVE (Dec. 6, 2016), <http://www.thefangirlinitiative.com/2016/12/how-kpop-industry-actually-works.html>.

<sup>140</sup> ANDREU MAS-COLELL ET AL., MICROECONOMIC THEORY 50–63 (1995).

<sup>141</sup> *Id.* at 135–43.

<sup>142</sup> For strong evidence on the disincentive effect that inheritances have on effort, see Douglas Holtz-Eakin et al., *The Carnegie Conjecture: Some Empirical Evidence*, 108 Q.J. ECON. 413, 432 (1993) (finding "the likelihood that a person decreases his or her participation in the labor force increases with the size of the inheritance received"); David Joulfaian & Mark O. Wilhelm, *Inheritance and Labor*

on potential creates something akin to an economic “tournament,” a mechanism turbo-charging incentives for maximal efforts by offering a very large payoff to one or a small circle of the top performers.<sup>143</sup>

Selective inheritances will be in tension with founders’ natural affection for their children and grandchildren. If a dynasty founder’s children and grandchildren all showed little potential, a single-minded rational status-seeking founder would fund none of them and instead save DFT income until more promising candidates appear in later generations. If the founder is attached to his children and grandchildren despite their unimpressive abilities, he need not give up on his dynastic dream. As noted earlier, he can simply postpone its implementation by providing handsome life incomes to his living descendants, and having the unsentimental, instrumental dynasty-reinforcing provisions of his DFT kick in only for later generations.<sup>144</sup>

Small numbers of children and grandchildren, relative to later generations, are an additional reason for dynasts to delay significant DFT expenditures. The engines of status are the founder’s exceptionally talented descendants. Simple probability theory tells us that if the optimal program for achieving ongoing family status is to fund only those falling in the top 0.1% of the relevant national or worldwide skill distribution, the odds of producing even one such exceptional descendant from ten children and 100 grandchildren (extraordinary fertility in developed nations today) is very small.<sup>145</sup> Given these numbers, it is rational to postpone the search for talented heirs for a couple generations until the ranks of descendants number in the high hundreds or thousands. Selectivity makes a difference only if the pool of candidates is sufficient to contain, probabilistically, some truly extraordinary descendants.

The best way to jumpstart the creation of a large pool of descendants, obviously, is for the founder to have many children. That, however, is only the first chapter. In order to assure continued growth of the founder’s bloodline talent pool generation after generation, he might want to have his DFT offer descendants a reward for each child born, or perhaps for each to

---

Supply, 29 J. HUM. RES. 1205, 1207 (1994) (finding “the labor disincentive of inheritance is fairly small”); Jeffrey R. Brown et al., *The Effect of Inheritance Receipt on Retirement*, 92 REV. ECON. & STAT. 425, 425 (2010) (finding that unexpected inheritances have a larger effect on labor disincentive than expected inheritances).

<sup>143</sup> Edward P. Lazear & Sherwin Rosen, *Rank-Order Tournaments as Optimum Labor Contracts*, 89 J. POL. ECON. 841, 863 (1981); Sherwin Rosen, *Prizes and Incentives in Elimination Tournaments*, 76 AM. ECON. REV. 701, 713–14 (1986).

<sup>144</sup> See *supra* text following note 54.

<sup>145</sup> Using the binomial distribution with a 0.1% chance of exceptional talent and 110 “tries” (ten children plus 100 grandchildren), the probability of no exceptional descendants is about 90%, one exceptional descendant 9.9%, two 0.5%, and vanishingly small chances for any larger number. Calculated in R with command “*dbinom(0:5,110,.001)*,” with output “[1] 8.957848e-01 9.863497e-02 5.380987e-03 1.939094e-04 5.192270e-06.” See *The R Project for Statistical Computing*, R FOUND., <https://www.r-project.org/> (last visited Oct. 12, 2022).

reach an age at which trustees can gauge his abilities with some accuracy, e.g., on graduating from high school or college.

*D. Growing the Trust: Inducing Descendant Contributions of Principal*

These per-descendant bonuses are another DFT expenditure that might bolster family status over the long run. Although the trust could rely solely on the original principal contributed by the founder to further its dynastic program, that seems under-ambitious. As in any enterprise, there is no end to the uses of wealth to raise family status. Indeed, wealth is undoubtedly the single most important component of status. Thus, it behooves dynasts to include DFT provisions incentivizing descendants to contribute wealth to the ongoing effort to maximize the family's socioeconomic status.

The interests of the founder and his progeny, however, are not perfectly aligned. First, some descendants simply will not share the founder's taste for perpetual family status. Whether they are hedonists bent on self-gratification, doting parents who spoil their children regardless of foregone benefits to later generations, humanitarians who want to help the less privileged, or those who embrace some other deviation from the urge to family status, such descendants will require some inducement to make contributions to the DFT. Even descendants sharing the founder's dynastic urge may wish to fund only their *sub-tree* of the founder's family tree.

There are additional hurdles to coaxing DFT contributions from descendants. Financially successful descendants are the primary targets, but once they have attained great wealth, they have much less need for any of the trust's benefits. To garner DFT donations from prosperous descendants, founders must offer *ex ante* deals early in descendants' adult lives—before they know whether they will prosper personally. Such deals will look a lot like family-based social insurance<sup>146</sup>: in return for pre-committing to make contributions to the DFT during their earning years, younger members will maintain the eligibility of themselves and possibly their children, grandchildren, and later generations for the set of universal trust benefits (e.g., basic support, funding college) outlined in the previous section. For such bargains to make sense, the total value of these universal payments cannot fall too far below the *expected* value of the required future contributions. If this is not the case, then for descendants considering 'buying in' to the trust, the transaction looks like a lottery ticket: they expect to pay in a moderate, predictable sum—some fraction of their average income over their working life—but will realize a positive return only if the trust at some point identifies them as particularly promising and decides to

---

<sup>146</sup> See *Family Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/oact/progdata/family.html> (last visited Oct. 12, 2022).

invest in their success. Under the standard assumption of risk aversion, this is not an attractive deal.<sup>147</sup>

Despite these partially divergent interests and timing difficulties, DFTs disbursing sufficient benefits to all descendants could offer an attractive bargain. There are three key terms to making the deal appealing to both the founder and his descendants. First, descendants would have to sign on relatively early in life, before they knew whether they would qualify for selective trust payments, and before they knew the amount of their lifetime income. Like all forms of insurance, this familial benefit scheme only works if contracted for before lady luck reveals her hand. Second, descendants would have to pay for participation via a lifetime tax/tithe on their income. The trust cannot afford to wait and accept payment out of the estates of the deceased as descendants could simply gift their wealth before death to whatever purposes they value more than the family dynasty. Third, the rates of this annual tax/tithe to the trust should be highly progressive. Having those who do not enjoy financial success pay relatively little into the trust and those who do pay disproportionately more reinforces the social insurance nature of the deal.

In addition to this “early” bargain with descendants, founders can include a second “late” bargain to encourage descendants to create their own DFTs. These separate trusts would have the same terms as the founder’s trust but *would provide benefits only to the descendant’s progeny*—that is, they would benefit only the descendant’s sub-tree of the founder’s family tree. To the extent that a descendant shares in whole or even in part the founder’s dynastic urge, there is a strong commonality of interest in creating such a “sub-tree” DFT: the descendant creates a trust benefiting *all* of his direct bloodline, and the founder incentivizes additional funds devoted to his dynastic ends that at least benefit a *subset* of his direct descendants. In cases of such overlapping dynastic interests, the founder would need to provide little in the way of incentives for descendants to establish such sub-tree trusts. If, however, he wanted to induce other descendants without a strong dynastic urge to establish their own (sub-tree) DFTs, the founder could include terms making a dying descendant’s branch of the family ineligible for trust benefits for twenty-five years (the typical definition of a generation) if the descendant does not devote his estate to a sub-tree trust, with the hope that his children would learn their lesson and set up their own sub-tree trusts. Such a term would not cause all descendants to set up trusts, and it might be least effective for those descendants who accumulate significant wealth and have strong preferences to leave their estates for nondynastic purposes. At

---

<sup>147</sup> Risk-averse descendants (the near-universal assumption regarding humans) will strike a deal with the trust even if the expected value of the bargain is less than zero because it reduces risk: they sacrifice uncertain future high incomes in return for guaranteed amounts earlier in life. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13–14 (9th ed. 2014).

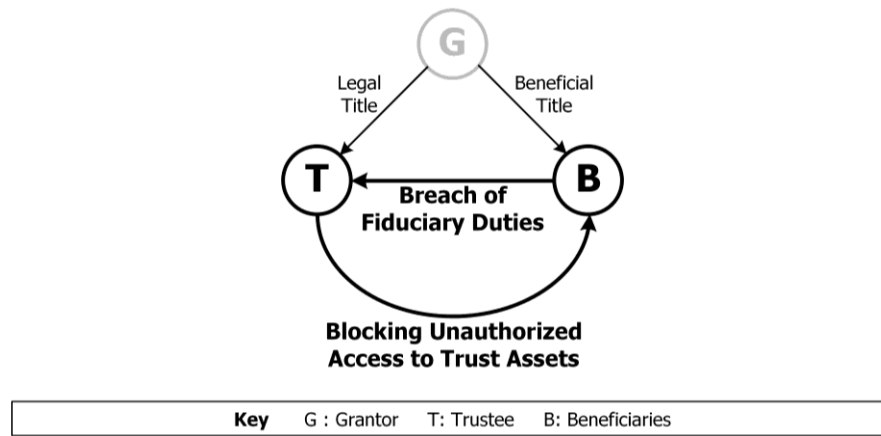
the margin, however, it should offer benefits sufficient to encourage some wavering descendants to buy into the dynastic project.

#### E. *Governing a DFT*

In order to incentivize contributions furthering his dynastic ends, a founder might be comfortable mandating that these provisions apply forever, unaltered and unamendable. That is the raw, unlimited power of a founder's dead hand in the wake of the RAP's demise. In other dimensions, however, a rational dynast will understand that maximizing family status over decades and centuries will need flexibility to deal with a fast-changing world. Most importantly, selecting the few recipients of selective DFT funding (beyond a secure and nurturing childhood and an education) is a fact-intensive endeavor requiring a continuous stream of monitoring, evaluating, and prioritizing. Given this and a host of other matters requiring periodic review and action (e.g., adjusting the investment portfolio of the trust; optimally addressing legal change; and hiring and firing agents such as trustees, lawyers, and accountants), dynastic family trusts will need to include some form of ongoing governance.

To understand the extent and contours of the need for this control and decision-making authority, it is worth contrasting a dynastic trust with a garden-variety testamentary trust. The following diagram summarizes this relatively simple set-up.

FIGURE 2: TENSIONS IN A TRADITIONAL TESTAMENTARY TRUST

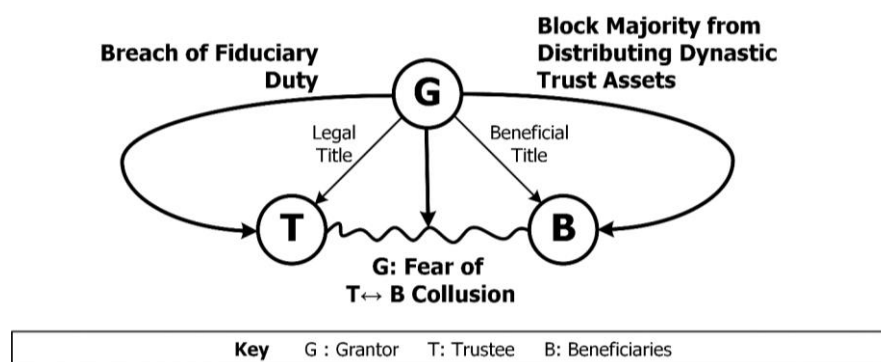


In addition to illustrating the definitional division of ownership of the grantor's property between a trustee with legal title (management and transactional powers) and beneficial (or equitable) title in the

beneficiaries,<sup>148</sup> this diagram highlights typical concerns in the working of such trusts. Note that the grantor (G) is “grayed out,” to indicate that the terms of typical testamentary trusts establish clear, well-defined, *and time-limited* rights in G’s property, and so he has little need to instantiate governance machinery. Typical testamentary trusts thus dispense with such unnecessary features. As bolded in the figure, beneficiaries (B) worry about trustees (T) breaching duties to them (mainly theft-like expropriation of trust income or principal),<sup>149</sup> while trustees may need to resist pressure from beneficiaries to distribute greater benefits than the grantor authorized. In all of this, the nature of the respective beneficiaries’ interests invariably both (2) makes rights clear and (2) ensures that beneficiary monitoring suffices to effectuate the grantor’s relatively simple intent. Thus, for example, if G leaves his estate in trust to B1 and B2 for their joint lives, then remainder to B3, B1 and B2 have strong incentives to prevent any grabby behavior by B3. More subtly, B3 has incentives to monitor use by B1 and B2 to make sure that they are not “wasting” the remainder he will receive when both have died.<sup>150</sup> Finally, B1 and B2 have clear motivation to make sure that the other is not deriving more than half of the benefits that the trust creates during their joint lives.<sup>151</sup> All in all, the grantor of an ordinary testamentary trust can count on the trustee and the beneficiaries to effectuate his ends: gifting specific interests to specific people, with all property interests vesting within two generations (thanks to the RAP) obviates any need for trust governance provisions.

The DFT is something else altogether as illustrated by this figure.

FIGURE 3: TENSIONS IN A DYNASTIC FAMILY TRUST (DFT)



<sup>148</sup> BOGERT ON TRUSTS, *supra* note 113, § 1.

<sup>149</sup> See *id.* § 543 (“Trustee’s duty of loyalty to the beneficiaries”). Trustees also have a duty of care to beneficiaries, *id.* § 541, but this is much less important than the duty of loyalty, which deploys strong rules and presumptions to deter any form of self-dealing that might enrich the trustee at the expense of the beneficiaries.

<sup>150</sup> See 8 MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 56.01 (2022) (LexisNexis Matthew Bender) (describing the law of waste).

<sup>151</sup> See *Id.* at §§ 56.04, 56.08 (describing waste by concurrent interests and potential remedies).

To focus attention, the tensions highlighted in the traditional testamentary trust figure are omitted here, though they are still relevant. For prospective dynasts, entirely new difficulties dwarf traditional concerns. First, the grantor (G, the trust's creator) will oppose any form of beneficiary (B) democratic control over a DFT, as represented by the looping arc on the right. As he designed it to direct a large portion of the trust's benefits to a select few descendants *over a very long horizon*, it seems likely that a majority of descendants, given their druthers, would sign on to a deal that distributed the entire trust res (potentially billions of dollars) in equal portions to each living descendant and dissolved the trust. Although it can be difficult to achieve unanimous support when there are many parties, under existing trust law all beneficiaries often have the ability to rearrange their rights or even dissolve the trust and receive the proceeds in agreed portions.<sup>152</sup> This, of course, is the last thing that a dynast wants. Quite to the contrary, he wants the DFT to remain intact, bolstering his bloodline's social status forever. This concern over future generations altering or dissolving the trust did not exist when the RAP barred perpetual trusts.<sup>153</sup> Today's new breed of dynasts will need to draft their trusts to empower trustees to prevent some critical mass of descendants from grabbing trust property and frustrating his dead-hand desire for unending family status.

The more they empower trustees, however, the more dynastic grantors will also have outsized worries about trustee breaches of duty (the looping line on the left side of Figure 3). Grantors in traditional trusts no doubt do worry about theft-like behavior or negligence by the trustees. But with simpler interests given to a specific, identified group of beneficiaries, all vesting within a limited time frame, grantors of typical time-limited trusts feel less need to concern themselves with disloyal trustees. DFT founders enjoy none of these sources of reassurance. Thus, they must craft trust provisions that will guard against self-dealing and other forms of trustee misfeasance over an open-ended horizon that will invariably include periodic replacements of trustees.

DFT founders, then, must navigate fairly narrow straits, between selfish majorities angling to dissolve the trust for immediate personal gain on the one side, and trustees' potential attempts to take what is not theirs. Dynasts facing the twin horns of this dilemma may try to establish a *balance of power*. Trustees must have enough power to prevent descendants from banding together in large majority coalitions and pressing for dissolution of the trust and distribution of its assets; conversely, descendants must have some effective means to monitor trustees and prevent them from theft-like behavior. A balance of power is one of the foundational structural principles

---

<sup>152</sup> See BOGERT ON TRUSTS, *supra* note 113, §§ 1005–09.

<sup>153</sup> See *supra* notes 99–101 and accompanying text.

of the U.S. Constitution,<sup>154</sup> and this commonality suggests that dynasts drafting DFTs are in a real sense creating mini family constitutions that will *forever* govern the distribution of large amounts of income within the family.

In calibrating this balance of power, trustees' tenure and the terms for replacing them are the key issues. If a majority of descendants can remove a trustee at will, a democratic dissolution of the trustee seems inevitable as a controlling bloc can eject trustee after trustee until they find a compliant one who will agree to distribute all assets and dissolve the DFT—perhaps for a “bonus” (bribe). At the other extreme, trustees with unlimited tenure (e.g., a bank trust department with no inevitable natural death) and beyond any power of removal are in a very strong position to divert trust income into their own pockets—and under little pressure to actively and effectively expend trust funds to raise the family's social status.

Descendants must have the power to remove trustees for cause—for example, taking unauthorized benefits. Founders might also include provisions automatically removing directors for prolonged failure to maintain or enhance family status; we discuss measures of trustee effectiveness below.

The toughest issues are the length of trustees' terms and the identity of those who either renew their contracts or select replacements. There are no simple solutions to these structural problems. Dynastic trustees are engaged in a long-term project, and in order to fairly judge their performance, a term of twenty-five years (one generation) makes some sense. When specifying who should decide whether to renew or replace at the end of a term, the dynastic founder will want to grant voting rights to individuals likely to share at least in part his interest in long-term family status. Elderly descendants who received selective funding and succeeded in using it to enhance the family's social standing comprise one promising group to decide when to replace the trustee. To guard against favoritism of their branch of the family and collusion with new trustees whom they select, the founder might want to include a proviso making the progeny of these electors ineligible for selective funding for one or a few generations.

The most powerful motivation for trustees to energetically and creatively raise family status is incentive-based compensation. Measuring relative status between families, however, is challenging. There are no easy, objective measures like profits or market share. Dynasty founders, perhaps individually but likely more efficiently done collectively,<sup>155</sup> will need to develop their own ranking metric—something they might dub a Family Prominence Index (FPI). Such a statistic would begin with measures of specific components that contribute to family status, including:

---

<sup>154</sup> See *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (“The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”).

<sup>155</sup> See *infra* Section V.G.



- total wealth in the DFT and any later-created family sub-tree dynastic trusts;<sup>156</sup>
- high political offices held by family members;
- leadership positions in high-profile business and nonprofits;
- continuing success of family-controlled business and charitable institutions;
- celebrity status for achievement in the arts, athletics, and other high-profile, status-enhancing professions; and
- frequency of favorable references to the family in popular media.

This list is not meant to be exhaustive. Once its designers have settled on the full array of components, they will normalize the measurement of each to put them on a common scale, assign weights, and define a family's overall FPI score as the weighted sum of the normalized component scores. The *level* of a family's FPI score, however, will have little meaning; designers could scale it to fall in any range, e.g., 0–100, 1–10, or with no maximal ceiling. Status is an inherently relative concept, and so dynasty founders presumably will care about their family's *rank* within the relatively small population of extremely high-status families.

Dynasts will draft compensation clauses that reward trustees who maintain—and especially those who raise—the family's FPI-based ranking. This is a long-term project, and so trustee compensation should be based on long-term trends, not short-term fluctuations. Selective funding decisions may not bear fruit for a decade or longer (e.g., starting a political career, launching a new business) and so the lion's share of trustee compensation should be tied to the changes in the family's FPI ranking over anywhere from five to twenty-five years. Early in a trustee's tenure, when any improved rankings are almost assuredly due to her predecessor's decisions, a trustee's compensation should be fixed. Conversely, trustees should continue to receive compensation for ranking improvements years after their departure as their late-career selective investments likely drive such gains.

There are complex and subtle interactions between the timing of this performance-based compensation and the weights chosen for the FPI components. If the weight on DFT wealth is too low relative to the other components, trustees will have incentives to overspend in the hopes of funding more winners and producing a one-generation increment in FPI rank. The bill for this myopic strategy, of course, will come due when there is significantly less DFT income to fund later generations. Thus, founders (or their agents) designing the FPI must take care to avoid underweighting wealth. At the other extreme, too high a weight on wealth will incentivize trustees to save *all* DFT income and invest nothing in descendants. To guard against these polar risks, founders should steer a middle ground by imposing some strict minimal and maximal spending limits, such as requiring the

---

<sup>156</sup> See discussion *supra* end of Section V.D.

twenty-five-year rolling average of annual distribution to fall in the range of three to five percent of the DFT's principal.<sup>157</sup> In addition, they might place some cap on distributions in any one year to guard against trustee attempts to raise status sharply but only temporarily.

All of these complexities make drafting DFTs exceptionally challenging. At first blush, this agglomeration of complications might make the clear and simple medieval alternatives of primogeniture and fee tail seem attractive. As discussed earlier, however, those crude tools forgo the potentially enormous status-enhancing power of selecting only the cream of the descendant crop to receive extraordinary funding in the service of the family's social standing. DFT founders in this RAP-free age, however, can harness powerful legal, institutional, and even mutual support.

First, consider the ready supply of legal talent to help establish dynastic trusts. Recall that banks and trust companies eager to attract trust business to their home states killed the RAP.<sup>158</sup> Those same actors have successfully continued their marketing-through-legislation campaign, and now at least one state, Delaware, has enacted specific dynasty trust legal provisions apparently designed to solve at least some of the problems posed in this subsection.<sup>159</sup> Just as state business organization statutes (corporations, LLCs, LLPs, etc.) provide off-the-rack provisions that make establishing and running a business cheaper, easier, and more predictable,<sup>160</sup> states competing for trust business will provide an increasingly comprehensive body of statutory law and regulations to make founding a dynasty easier in their jurisdiction.<sup>161</sup> Again paralleling corporate and other business entity laws,<sup>162</sup> courts in states winning the contest for trust business will deepen this support with a web of precedents resolving statutory ambiguities and reducing the uncertainty faced by dynasts in drafting their unavoidably complex DFTs.

Second, these banks and trust departments, along with affiliated lawyers, accountants, and other professionals, will provide additional support for dynasts. As DFTs become more common, trust officers and their agents will develop expertise in drafting and running them. This will enable them to provide DFT founders with greater confidence that their perpetual plan for family status can survive and thrive. Finally, and perhaps of greatest importance, these agents will develop reputations for fidelity to dynastic

---

<sup>157</sup> This is roughly in line with U.S. university and college endowment expenditure rates, which averaged about 4.4% in 2017 and 2018. Rick Seltzer, *Endowment Returns Slow; Survey Offers Peek at Spending*, INSIDE HIGHER ED (Jan. 31, 2019), <https://www.insidehighered.com/news/2019/01/31/college-endowments-returned-82-percent-2018-annual-survey-adds-some-insight-how>.

<sup>158</sup> See *supra* notes 107–08 and accompanying text.

<sup>159</sup> DEL. CODE ANN. tit. 25, § 503 (2014).

<sup>160</sup> See generally John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989).

<sup>161</sup> See, e.g., ALASKA STAT. §§ 34.27.075–.100 (2000); OHIO REV. CODE ANN. § 2131.09(B)(3) (West 2022).

<sup>162</sup> See generally ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* (1993).

clients.<sup>163</sup> Long-term interests in maintaining those reputations will lend credibility to trustees' promises of fidelity to founders' dynastic intent.<sup>164</sup>

Perhaps surprisingly, dynasts likely will act in concert despite their battles in the ongoing zero-sum war for rank. There are at least two major shared interests. First, dynastic families have obvious interests in shaping laws that facilitate DFTs. They have an existential interest in keeping the RAP dead and buried. They have powerful financial interests in minimizing taxation of DFTs. In particular, dynasts are archenemies of the federal estate and gift tax, and indeed wealthy families have banded together for decades, spent hundreds of millions of dollars lobbying against these taxes, and have come very close to eliminating them.<sup>165</sup> Just as broad and narrow interest groups have formed well-funded and influential lobbying entities to push their legislative and regulatory agendas,<sup>166</sup> like-thinking dynasts may form a "trade association" to represent them in the halls of Congress.

Second, dynasts have an interest in jointly developing tools essential to their endeavor, such as an FPI to measure and rank families' relative social status.<sup>167</sup> The need for an "industry standard" as opposed to having each dynastic founder define his own FPI is patent: *relative* status is what matters, and so for apples-to-apples comparisons dynasts must use a common metric. There may be other tools that dynasts could develop most efficiently together. For example, they might collectively fund research on the best ways to forecast the status-enhancing potential of children, teenagers, and young adults. Although there would be a competitive advantage for a family developing more accurate forecasts on its own, this could be an expensive endeavor and dynasts might pool their efforts (1) to avoid duplication, and (2) because one large effort might yield much better forecasts than a passel of individual family efforts. To use the jargon of economics, forecasting of individual achievement might fall in the "best shot" class of production technologies.<sup>168</sup> In addition, although the competition for rank among

---

<sup>163</sup> See Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 616 (1981) (describing a "private-contract enforcement mechanism [that] relies upon the value to the firm of repeat sales to satisfied customers as a means of preventing nonperformance").

<sup>164</sup> For seminal work on the economics of reputation, see George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970); Klein & Leffler, *supra* note 163; Carl Shapiro, *Premiums for High Quality Products as Returns to Reputations*, 98 Q.J. ECON. 659 (1983).

<sup>165</sup> MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* 12–23 (2005). For further discussion of the estate tax, see *infra* Section VI.B.

<sup>166</sup> The U.S. Chamber of Commerce spent more than \$77 million on lobbying the federal government in 2019; the pharmaceutical industry, via a separate entity, spent over \$29 million on its own narrower interests that year. *Top Spenders*, OPEN SECRETS, <https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=2019> (last visited Oct. 13, 2022).

<sup>167</sup> See *supra* text accompanying notes 155–57.

<sup>168</sup> See Jack Hirshleifer, *From Weakest-Link to Best-Shot: The Voluntary Provision of Public Goods*, 41 PUB. CHOICE 371, 373 (1983) (analogizing the "best-shot rule" to the effectiveness of a missile

dynasties is a zero-sum game, developing the tools for the ranking system is not. If dynastic families as a group become more efficient at raising their combined status, as a group they will enjoy even more power and influence over the remainder of the population. This is the foreboding prospect of a New Feudalism.

Although it sounds odd in this context, forming a lobbying group, creating an industry-standard FPI, and developing forecasting technology are all examples of public goods—with the relevant “public” defined as all family dynasties, not the entire population.<sup>169</sup>

There are well-known obstacles to uniting individuals to jointly fund such public good—in particular, the incentive for each actor to “free ride” by refusing to contribute in the hope that enough others will fund the project.<sup>170</sup> Although this stumbling block might frustrate efforts to act in concert, some characteristics of wealthy families and their dynastic plans raise the odds of success. Wealthy families generally are well-educated<sup>171</sup> and well-advised and so would likely understand the costs to each if the group effort fails because too many try to free-ride. In addition, the large gains that will flow from cooperative participation should further minimize free-riding. Finally, the astounding success that a small group of wealthy families have had in undermining public support for the estate and gift tax provides one prominent example of a similar small group of wealthy families overcoming group-action problems to produce a common good—for the group if not for the Republic.<sup>172</sup> This episode serves as an object lesson on the political potency of a focused, cooperating aristocracy and raises disquieting questions about dynastic power in a democracy.<sup>173</sup>

#### F. *Fundamental Change*

The previous section gave an overview of the “ordinary course” governance of a DFT. Like corporations and other business entities, founders may sometimes want their DFTs to engage in fundamental change

---

defense system, for which “the only relevant question is whether the single best defensive shot is good enough to destroy the incoming bogey”).

<sup>169</sup> See RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS* 8–12 (2d ed. 1996).

<sup>170</sup> *Id.* at 11.

<sup>171</sup> See, e.g., Gillian B. White, *The Rich Get Richer—and More Educated*, ATLANTIC (Feb. 5, 2015), <https://www.theatlantic.com/business/archive/2015/02/the-rich-get-richer-and-more-educated/385166/> (“In 2013, Americans in the highest-income bracket . . . were more than eight times more likely to have graduated from a bachelor’s-degree program than the lowest-income Americans.”).

<sup>172</sup> See *supra* text accompanying notes 165–66.

<sup>173</sup> See *supra* text accompanying note 13 (Justice Brandeis’s purported declaration that democracy and concentrated wealth are simply inconsistent).

transactions—analogs to corporate mergers, other forms of acquisitions, and amendments to foundational documents.<sup>174</sup>

Royal dynasts have had a longstanding, pervasive form of merger: “marriages of state” joining nations and cementing alliances by marrying a man and a woman from two hereditary ruling families.<sup>175</sup> Although strategic marriages may seem an obsolete concept, it is worth noting two modern ways in which marriages might play a role in reinforcing wealthy privilege.

First, the strong recent trend toward people marrying those of similar socioeconomic class—“assortative marriage”<sup>176</sup>—could lead to an increasing number of unions between descendants from different dynasties. Children of such unions will have *two* chances at garnering selective funding. As discussed earlier, DFTs may contain similar terms,<sup>177</sup> and so the chances of receiving money from each of these two sources may be highly correlated. This means that the odds of selective funding will remain low for most children of such marriages, but the exceptional ones have a very good chance at receiving funding from *both* trusts. Thus, as is the case generally, assortative marriages tend to increase inequality<sup>178</sup>—here, even *within* dynastic families.

Second, the end of the RAP raises a new possibility to reinforce dynasties: intra-family marriages. There are of course social, legal and health reasons to avoid marriage between siblings and first cousins, but children of more distant relatives have no heightened risk of genetic disorders.<sup>179</sup> But because DFTs can span untold numbers of generations, descendants looking to start a family may have a relatively large pool of second and more distant cousins from which to choose a mate. Although children of such parents do not have any enhanced probability of doubled funding like those of inter-dynasty marriages, intra-family unions should be

---

<sup>174</sup> Fundamental change transactions for corporations and other business entities include mergers, purchase of a control block of shares, sale of substantially all assets, and some amendments to articles of incorporation or similar documents for noncorporate entities. *See generally* STEPHEN M. BAINBRIDGE, CORPORATE LAW 337–418 (2d ed. 2009).

<sup>175</sup> *See generally* Patricia H. Fleming, *The Politics of Marriage Among Non-Catholic European Royalty*, 14 CURRENT ANTHROPOLOGY 231 (1973); Susan Doran, *Religion and Politics at the Court of Elizabeth I: The Habsburg Marriage Negotiations of 1559–1567*, 104 ENGLISH HIST. REV. 908 (1989); GEORGE QINGZHI ZHAO, MARRIAGE AS POLITICAL STRATEGY AND CULTURAL EXPRESSION: MONGOLIAN ROYAL MARRIAGES FROM WORLD EMPIRE TO YUAN DYNASTY (2008).

<sup>176</sup> Christine R. Schwartz, *Trends and Variation in Assortative Mating: Causes and Consequences*, 39 ANN. REV. SOCIO. 451, 452 (2013); Christine R. Schwartz & Robert D. Mare, *Trends in Educational Assortative Marriage From 1940 to 2003*, 42 DEMOGRAPHY 621, 621 (2005).

<sup>177</sup> *See supra* text accompanying notes 155156–15757 (discussing Family Prominence Index (FPI)).

<sup>178</sup> Schwartz & Mare, *supra* note 176, at 542.

<sup>179</sup> “[C]hildren of non-related couples have a 2–3% chance of being born with a birth defect, and children of first cousins have a 4–6% chance. This is not a huge chance, but it is real! In contrast, the genetic risk associated with second cousins having children is as small as it would be for two unrelated individuals.” Tiffany Nguyen, “Can You Marry a Second Cousin? What About a First Cousin or Half Sibling?” (Oct. 16, 2019), TECH INTERACTIVE, <https://www.thetech.org/ask-a-geneticist/can-you-marry-cousin>.

extremely attractive to founders intent on maximizing the status of their own descendants. Every time a descendant marries a non-descendant, the founder's genes are diluted by half in the children of that marriage. Offspring of intra-family marriages result in no such dilution. Evolutionary biology tells us that, all else equal, genes are programmed to propagate as much of themselves as possible. Founders who create dynastic trusts to satisfy these selfish genes might well provide for enhanced funding to descendants who marry within the family.<sup>180</sup>

Attempts to influence spousal choice, problematic because of strong norms for "love matches" in wealthier nations,<sup>181</sup> are not the only tool for making fundamental change to dynastic families. Dynasts, inherently long-term planners, may want to include provisions that authorize (1) mergers with other trusts, and (2) amendments of the DFT's terms.

Corporate mergers can make a combined entity more profitable than the two separate pieces by reducing costs through various efficiencies—usually economies of scale.<sup>182</sup> These include reducing per-unit fixed costs, purchasing quantities of inputs sufficient to receive quantity discounts, or wider application of the superior management skills of the surviving corporation's officers. DFTs of course seek to maximize not profit but rather long-term family status. Still, there may be economies of scale in "producing" family status and thus in merging dynastic trusts.<sup>183</sup>

In particular, the status value of rankings may not be linear: if the twentieth and twenty-first highest-ranked family dynasties can merge to become, say, the tenth-ranked dynasty, and being in the top ten might be especially desirable—akin to a song charting in the top ten or a top-ten university ranking—then the merger has made the dynasties more than the sum of its parts. Such supra-linear enhanced status seems necessary to make dynastic trust mergers desirable, as the simple increase in wealth and concomitant periodic income is basically diluted by the parallel increase in the number of descendants eligible for both universal and selective funding. When drafting their DFTs, dynasts must decide whether the gains from permitting mergers justify diluting the pool of recipients with another founder's descendants.

---

<sup>180</sup> This all assumes that marrying relatively distant cousins does not flout social norms to such an extent that it harms the family's status more than intermarriage helps limit genetic dilution of the dynast's descendants.

<sup>181</sup> See, e.g., Robert Levine et al., *Love and Marriage in Eleven Cultures*, 26 J. CROSS-CULTURAL PSYCH. 554, 554 (1995) (providing survey data showing that "[l]ove tended to receive greatest importance in the Western and Westernized nations").

<sup>182</sup> For an early statement of this justification for mergers, see Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968).

<sup>183</sup> Although the practice does not appear to be common, trusts can merge. A leading treatise on trust law includes among its model clauses for trusts a "Provision for Merging with Other Trusts." BOGERT ON TRUSTS, *supra* note 113, § 1258.

Those permitting mergers with other DFTs will want to include provisions addressing details like the name of the combined trust (hyphenate the two family names?), how to address inequalities in the wealth of the trusts, and the number of descendants in each family, along with meshing differences in the ways that the two trusts choose recipients for selective funding. These DFT mergers could be every bit as complex as corporate mergers, and founders will have to anticipate and plan for events that may occur decades or even centuries later. All of this complexity and uncertainty may cause founders to think carefully about permitting mergers at all.

Founders likely will be even more wary about permitting amendments to their DFTs. There is one very big upside to permitting amendments: addressing social change. Dynastic trusts are forever, and everyone knows that time changes society significantly in just one generation (approximately twenty-five years), and invariably transforms it fundamentally in a century—a long time in most contexts but not for a DFT. It is difficult to draft a trust that will work optimally, or even well, in the face of major social and legal change. To name just a few, founders might want to create a power of amendment to address:

- new methods for identifying talented descendants earlier in life;
- changes in the qualities that enhance family status; and
- changes in legal regimes, especially the law of trusts and tax law.

In a perfect world, founders would want to permit amendment to their DFTs to deal effectively with these and myriad other changes. Of course, we do not inhabit a perfect world. As in other matters, the founder faces a huge problem: whom can he trust to amend his DFT in ways that do not undermine its primary purpose, maximizing long-term family status? As discussed earlier in the context of governance, founders have real concerns about the fidelity of both trustees and descendants.<sup>184</sup> Simply put, founders cannot fully trust any of the relevant actors to be faithful with the trust's assets or to the trust's dynastic purpose.

Founders might try to navigate between the extremes of permitting amendment of either all or none of the DFT's provisions by providing that either the trustees, the descendants, or both can amend some less potentially threatening terms (e.g., methods for identifying talent), but cannot amend others that might affect the trust's core purpose (e.g., a provision that limits the percent of trust wealth or income paid out each year). This approach, however, would not permit the insertion of truly novel trust clauses on matters simply unaddressed in the original trust, and such amendments could be important for dealing with changing times. Creative scriveners, however, could strategically use such amendments to enrich trustees, descendants, or both at variance with the founder's dynastic intent.

---

<sup>184</sup> See *supra* Section V.E.

Another strategy for founders is to include general, dynamic principles instead of static specific rules. For example, the trust could mandate use of “best *evolving* methods of judging talent” instead of more specific procedures. Such general standards leave considerable wiggle room for trustees and beneficiaries to stray from the founder’s intent. There is no obvious answer, but the bottom line is that despite the inevitability of change over a dynasty trust’s (planned) perpetual existence, founders might well decide to bar future amendment because they cannot depend on the fidelity of trustees or beneficiaries. Instead, they will draft their DFTs as best they can to deal with change while retaining their trusts’ unending focus on maximizing family status.

### G. *Final Thoughts on Creating Family Dynasty Trusts*

Getting the terms of a DFT “right,” that is, maximizing family status achieved per dollar spent on promising descendants, is critically important. Dynastic families are vying for rank in a zero-sum game for status, and so there is intense pressure to best the competition. Middle-class families strive to keep up with the Joneses next door; prospective dynasts strive to keep up with (or surpass) the Fords, the Gates, and the Zuckerbergs.

Just as businesses that out-invest rival firms can decisively out-compete the latter in the long run, lineages with larger amounts of resource[s] have a greater chance of outcompeting . . . [families] . . . . Thus, differences in the amounts of resource controlled by different offspring lineages may critically determine which lineages predominate in the long run.<sup>185</sup>

Elaborate DFTs, designed to last indefinitely, may seem to call for superhuman planning and foresight. But remember (again) that dynasts’ trusts need not meet some unattainable level of efficiency in converting dollars to status; all they need do to “win” is draft better trusts than the competition—similarly imperfect dynasts. Finally, evolutionary biologists remind us that “[p]lanning and foresight have been (and remain) crucial to the attainment of social and economic success. Therefore, to a very large extent, conscious thought is expected to be devoted to competition in the realm of social and economic success.”<sup>186</sup> The DFT terms laid out in this section reflect unusual, but certainly not impossible, levels of planning and foresight by wealthy individuals with strong dynastic urges. Evolution favors those with such preferences.

We are in the early days of a RAP-free United States. Dynastic trust planning is in its infancy. We simply do not know the extent to which

---

<sup>185</sup> Sarah E. Hill & H. Kern Reeve, *Low Fertility in Humans as the Evolutionary Outcome of Snowballing Resource Games*, 16 BEHAV. ECOLOGY 398, 399 (2005) (citations omitted).

<sup>186</sup> Turke, *supra* note 1, at 66 (citation omitted).



extremely wealthy aspiring dynasts will leave their large estates in DFTs with terms like those explored here, and we do not know how effective such trusts would be in projecting family status and power for generation after generation. We do know, however, that medieval dynasts availed themselves of available legal tools to satisfy their dynastic urge (the fee tail, primogeniture), and that these relatively simple measures were the bedrock of family dynasties that controlled a large and powerful England for centuries.<sup>187</sup> Evolutionary biology tells us that the dynastic urge (or something like it) is woven deeply into our DNA.<sup>188</sup> Thus, there is good reason to predict that some modern American billionaires, driven by this genetic predisposition, will exploit the death of the RAP and set up dynastic trusts with many of the terms contemplated in this section.

H. *Lest You Think Dynastic Family Trusts (DFTs)  
Are Just One Professor's Castles in the Air . . .*

In addition to the theoretical case made in this section, interviews with fifteen lawyers who counsel very wealthy clients<sup>189</sup> suggest that some with vast fortunes are thinking in true open-ended dynastic terms in the wake of the RAP's demise—even with the continued existence of the federal estate tax system. All interviewees said that minimizing taxes (gift, estate, and generation-skipping transfer taxes) and protecting trust assets from creditor claims (especially divorced spouses of beneficiaries) are the main reasons that wealthy families' testamentary planning utilizes the limited dynasty trusts popular under current law.<sup>190</sup> One of the estate lawyers said that about five to ten of his clients had set up truly perpetual family trusts and, moreover, noted that this small group was from the wealthiest tier of clients that he serves. Two other interviewees said about a quarter of their clients focus on the dynastic aspect of their trusts and these lawyers, too, reported that these desires were far more common among the wealthiest stratum of donors. One estate lawyer described a client who had a precise plan for doling out trust income for the 376 years following his death, and another requested an estate plan that would limit benefits to his children, grandchildren, and even great-grandchildren in order to grow the estate for the benefit of his great-great-grandchildren and later generations. More generally, he noted that the (approximately) twenty-five percent with serious dynastic intentions are very focused on preserving or even growing

---

<sup>187</sup> See *supra* notes 90–97 and accompanying text.

<sup>188</sup> See *supra* Part IV.

<sup>189</sup> Although the exact numbers vary, these elite estate lawyers generally accept only clients with a minimum liquid wealth of \$50 million. Their median client might have wealth of \$100 million, and more than half reported having clients with fortunes greater than \$1 billion. For information regarding these interviews, see *supra* note 4.

<sup>190</sup> See *supra* note 3 for a nutshell description of existing dynastic trusts that lack the more robust features of the DFTs limned in this article.

principle in order to ensure that future generations without end will enjoy generous trust incomes.

There is, then, some evidence that very wealthy people contemplating death are starting to establish nascent DFTs. In particular, it appears that those at the top of the income distribution are setting up trusts designed to benefit unending generations of their progeny and, in particular, are limiting distributions in order to preserve principle forever—much as universities and colleges preserve and grow their endowments. Admittedly, none of the trust attorneys interviewed mentioned (1) selective funding of descendants based on status-enhancing potential,<sup>191</sup> or (2) inducing these same-said descendants to either make contributions to the founder’s DFT or set up a similar trust for their sub-tree trust.<sup>192</sup>

Perhaps these more sophisticated DFT mechanisms will never surface, but remember three things. First, we are still in the very early days of a world in which DFTs are permissible. Legal conventions are sticky and it will take time for wealthy individuals to radically depart from the testamentary practices of their parents, grandparents, and prior generations going back centuries. Further, creative trust lawyers need time to imagine all of the mechanisms now available to serve their clients’ deepest, long-constricted dynastic desires.

Second, the federal estate tax system, with its generation-skipping tax component, remains a significant hurdle to establishing dynastic wealth. As noted earlier,<sup>193</sup> the “dynasty trusts” commonly established today cannot contain more than a small fraction of today’s largest fortunes.<sup>194</sup> Although the estate tax system likely will survive as long as a Democrat remains in the White House, the previous two Republican Presidents have each come within a hair’s breadth of eliminating it entirely.<sup>195</sup> If and when this hurdle to dynastic wealth is repealed, the very wealthy and their lawyers will have

---

<sup>191</sup> See *supra* Section V.C.

<sup>192</sup> See *supra* Section V.D.

<sup>193</sup> See *supra* note 3.

<sup>194</sup> Such trusts are capped at the statutory exemption level of \$11.7 million, or \$23.4 million for a married couple, though there are various techniques to shove in greater levels of principle, e.g., by selling businesses to the trust at below-market prices or exploiting life insurance policies. See, e.g., Howard Kaye, *Maximize Your Legacy by Funding a Dynasty Trust with a Life Insurance Policy*, HOWARD KAYE INS. (July 6, 2016), <https://howardkayeinsurance.com/maximize-legacy-funding-dynasty-trust-life-insurance-policy/>. Even these methods have their limits and cannot be used to establish the DFTs with hundreds of millions or even billions of dollars of initial principle contemplated in this article. *Id.*

<sup>195</sup> See generally Michael J. Graetz, “Death Tax” Politics, 57 B.C. L. REV. 801 (2016); Calvin Woodward et al., *AP FACT CHECK: Trump’s Tax Fictions; Dem Debate Misfires*, ASSOC. PRESS (Feb. 24, 2020) (quoting President Trump as saying “We got rid of it. No more death tax, no more inheritance tax,” though 2017 changes merely doubled the threshold for the tax, rather than eliminating it entirely); see also 26 U.S.C. § 2010(c)(3)(C) (increasing the basic exclusion amount for the estate tax from \$5 million to \$10 million). The threshold is adjusted for inflation and now sits at about \$12 million. See *infra* text accompanying note 220.

much greater financial incentives to create, preserve, and even grow dynastic trusts in structures that resemble the DFTs outlined here.<sup>196</sup>

Third, based on the science summarized in Part II, no one should underestimate the deep roots and abiding force of the human desire to foster the status of descendants. The DFT is a tool custom-designed to exploit a RAP-less world in the service of mankind's genetic drive for bloodline status.

## VI. PUTTING A STOP TO DYNASTIC FAMILY TRUSTS: THE NATIONAL ANTI-FEUDALISM ACT

The potential rise of DFTs is not a good development; indeed, it should fill us with foreboding. These trusts will impose numerous serious social costs and provide precious few if any countervailing benefits. Abolishing the RAP unleashes our deepest biological desires in the service of family status, and the DFTs outlined in the previous section arm these selfish genes with a perpetual weapon of awe-inspiring power. In this part, after cataloging and summarizing the downsides of dynastic trusts in the first section, the second explains why estate and gift taxation is a flimsy, politically undependable tool for inhibiting the formation of dynastic trusts. The final section argues that a national Rule Against Perpetuities, which I dub *The National Anti-Feudalism Act*, is the best means to prevent the rise of dynastic family wealth in twenty-first-century America.

### A. *Dynastic Family Wealth Causes Serious Social Harms*

The *feudalism* tag is aptly negative, given the grim prospect of a future in which DFTs flourish. This development is part and parcel of the well-documented increase in socioeconomic inequality over the last few decades.<sup>197</sup> Growing bodies of empirical research are highlighting the profusion of social ills produced and exacerbated by income and wealth inequality.<sup>198</sup> By locking up large pools of wealth and doling out their income to a select few, dynasty trusts will add fuel to the inequality fire. Once established, dynasty trusts are designed to last forever. Thus, even if only a modest percentage of billionaires establish such trusts, the agglomeration of dynastic wealth will inexorably increase.

---

<sup>196</sup> See *supra* Section V.E.

<sup>197</sup> Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1, 31 (2003); THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 339 (Arthur Goldhammer trans., 2014) [hereinafter PIKETTY, *CAPITAL*] (exploring socioeconomic inequality in France).

<sup>198</sup> See, e.g., RICHARD WILKINSON & KATE PICKETT, *THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER* (2010) (describing the pervasive negative effect of inequality on average health); WHITHER INEQUALITY? *RIISING INEQUALITY, SCHOOLS, AND CHILDREN'S LIFE CHANCES* (Greg J. Duncan & Richard J. Murnane eds., 2011) (surveying the effect of educational inequality on income inequality and life chances); MARTIN DALY, *KILLING THE COMPETITION: ECONOMIC INEQUALITY AND HOMICIDE* (2016) (documenting a correlation between inequality and crime).

Given their potentially unending duration, the pernicious contributions of DFTs to inequality will continue for generation after generation. Even more than equality, the American Dream is rooted in the ideal of equal opportunity: everyone should have a fair chance to succeed.<sup>199</sup> In technical terms, that requires a society with significant intergenerational socioeconomic mobility—children’s place in society should not be largely determined by their parents’ place.<sup>200</sup> Children destined to follow in their parents’ footsteps is a hallmark of feudalism.<sup>201</sup> Although the historical record is thin until the last fifty-odd years, the United States was indeed the land of opportunity with greater socioeconomic mobility from generation to generation than other nations.<sup>202</sup> In the last few decades, however, that has all changed: to a greater degree than in almost any other advanced economy, Americans’ life chances now are determined by their parents’ wealth and status.<sup>203</sup> Inequality is increasingly being projected from generation to generation and the United States is in danger of developing caste-like permanent classes—again, a core feature of feudalism.<sup>204</sup>

Even more than luxury, wealth is power, and one of the most important arenas of power is the government. To hit the same note one more time, the ability of a very small cabal of extremely wealthy families to spend hundreds of millions of dollars in a successful effort to undermine public support of the federal estate and gift tax—a highly progressive tax that likely imposes few efficiency costs—is a singularly instructive illustration of the power of money in politics.<sup>205</sup> Although the literature on the influence of money on politics, government, and the law is enormous and the findings are not entirely uniform, the weight of both episodic and systematic evidence supports the widely held view that dollars have significant effects on public opinion, elections, and in the halls of legislatures and government

---

<sup>199</sup> See Eric Kades, *The Natural Property Rights Straitjacket: The Takings Clause, Taxation, and Excessive Rigidity*, 51 U.C. DAVIS L. REV. 1351, 1394–95 (“For generations, America has conceived of itself as the antithesis of the feudalism that still permeated British society in the eighteenth century, where lineage determined life chances. In the United States, it has long been maintained that even children from poorer families could make good with hard work and entrepreneurship.”)

<sup>200</sup> See Raj Chetty et al., *The Fading American Dream: Trends in Absolute Income Mobility Since 1940*, 356 SCIENCE 398 (2017) (measuring the percentage of those born from 1940 to 1984 who earn more than their parents).

<sup>201</sup> JACQUE LE GOFF, *MEDIEVAL CIVILIZATION 400–1500*, at 26 (Julia Barrow trans., Blackwell Publ’g 1990) (1964) (“Medieval Christian Europe was to turn the desire to escape from one’s lot into a major sin. ‘Like father, like son’ was to be the rule in the western middle ages, inherited from the late [Roman] Empire.”).

<sup>202</sup> Chetty et al., *supra* note 200, at 398, 400 fig.1B (finding that “the fraction of children earning more than their parents fell from 92% in the 1940 birth cohort to 50% in the 1984 birth cohort”).

<sup>203</sup> Raj Chetty et al., *Where is the Land of Opportunity? The Geography of Intergenerational Mobility in the United States*, 129 Q.J. ECON. 1553, 1554–55, 1569–78 (2014).

<sup>204</sup> See LE GOFF, *supra* note 201, at 26 (describing Medieval Christian Europe as “a stratified society, boxed off horizontally”).

<sup>205</sup> See *supra* text accompanying notes 165–66.

agencies.<sup>206</sup> Given the huge sums continually spent by smart and expertly advised people on influencing legislators, the lack of such effects would void even modest assumptions of rationality.<sup>207</sup>

The potency of wealth in elections and governance means that the rise of the DFT raises political as well as economic risks. As noted earlier, dynastic families share strong interests in many legal rules,<sup>208</sup> and so they are likely to pool their vast wealth to shape public opinion, influence elections, and channel legislative and regulatory decisions, especially regarding taxes, trusts, property rights, antitrust, and other areas important to the preservation and expansion of dynastic family wealth. There is a real danger of a vicious circle here, with wealth begetting laws favoring the wealthy, giving them yet more influence over lawmaking that they can use to increase their wealth and garner the dynastic class even more political influence.<sup>209</sup> These political victories for the well-to-do will increase inequality and reduce social mobility, with all of the costs cited above.

In addition to these intertwined negative economic and political effects, DFTs will also result in direct inefficiency. As noted earlier, status is a “positional” or “relative” good.<sup>210</sup> Only one family can have the highest status, only ten can be in the top ten, and so on. If dynasts value family status as highly as the evidence cited in Part II suggests, they will pen trusts authorized to spend extraordinary sums—indeed, devote their entire estate—to win the status game. This will lead obedient trustees to make selective investments in top descendants well past the point at which the marginal benefit (excluding status) exceeds or equals the marginal dollars being spent. In practice, we should expect to see results like ever-increasing investments in the political campaigns and careers of promising progeny, ever-more-lavish mansions as status signals, and investments in the education of many descendants far exceeding any reasonable expected objective returns. All of these expenditures in the competition for status are socially wasteful—in a word, inefficient. Legal countermeasures that short-circuit this zero-sum competition for higher rank would divert these

---

<sup>206</sup> For some recent examples, see Adam Bonica, *Professional Networks, Early Fundraising, and Electoral Success*, 16 ELECTION L.J. 153 (2017); Christopher Witko, *Regulation and Upper Class Bias in Campaign Finance Systems*, 16 ELECTION L.J. 6 (2017); Amy McKay, *Buying Policy? The Effects of Lobbyists' Resources on Their Policy Success*, 65 POL. RSCH. Q. 908 (2011). For a helpful overview of the literature, see Maggie Koerth, *Everybody Knows Money Influences Politics . . . Except Scientists*, FIVETHIRTYEIGHT, (June 4, 2019), <https://fivethirtyeight.com/features/everyone-knows-money-influences-politics-except-scientists/>.

<sup>207</sup> Koerth, *supra* note 206.

<sup>208</sup> See *supra* text accompanying notes 165–69.

<sup>209</sup> Others have argued that wealthy Americans have already created such a cycle through various means. See generally Jeffrey A. Winters & Benjamin I. Page, *Oligarchy in the United States?*, 7 PERSPS. ON POL. 731 (2009) (arguing that an “oligarchy” of the wealthiest Americans dominates key public policy issues that affect its income); JACOB S. HACKER & PAUL PIERSON, WINNER-TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS (2010).

<sup>210</sup> See *supra* text accompanying notes 37–39, 49.

outlays into other investments for which expected marginal benefits exceed marginal cost. Dynastic family ranks would change in largely random ways of no consequence to anyone except the small circle of dynastic families.

That completes the debit side of the DFT ledger, and it is a list impressive in both its length and its seriousness. What then, on the credit side, justifies legal tolerance of DFTs? That list is short, and its few entries are dubious. Some might cite “natural right” principles of property and freedom of contract that give owners the absolute right to dispose of their property however they see fit.<sup>211</sup> This, however, is a deontological statement of faith rather than a case rooted in the social values of efficiency and fairness.<sup>212</sup> Moreover, the historical record unequivocally rejects any such Anglo-American tradition of an unregulated right to leave property on death.<sup>213</sup>

The only social policy argument for permitting dynastic trusts is an efficiency story: the ability to quench their thirst to establish a dynasty will induce budding dynasts to work extra hard, be more creative, and so generate more wealth throughout their productive years. There appears to be no empirical evidence for any such implausible incentive effect.

#### B. *The Political and Legal Problems with a Tax Solution*

Limitations on dead-hand control like the RAP are not the only tools in the shed for prohibiting or inhibiting dynastic family wealth. One very commonly used alternative to prohibitive regulation is inhibiting taxation.<sup>214</sup> For example, although the United States has elected to address pollution largely via regulation (e.g., the Clean Air Act,<sup>215</sup> the Clean Water Act<sup>216</sup>), Congress, as it has done with other externalities, instead could have chosen to impose pollution taxes calibrated to the social harms imposed by pollutants.<sup>217</sup> Taxes at sufficiently high rates (if effectively collected) can achieve any desired reduction in antisocial activities.<sup>218</sup>

And in fact, the United States has a tax that may effectively repress dynastic desires: the federal estate and gift tax.<sup>219</sup> Applying to estates of over (roughly) \$12 million and imposing a top marginal rate of forty percent, this

---

<sup>211</sup> E.g., RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 3–6 (1985).

<sup>212</sup> Kades, *supra* note 199, at 1399–1400, 1404–09.

<sup>213</sup> *Id.* at 1411–18.

<sup>214</sup> See, e.g., A. Lans Bovenberg & Lawrence H. Goulder, *Environmental Taxation and Regulation*, in 3 *THE HANDBOOK OF PUBLIC ECONOMICS* 1471, 1474–77 (Alan J. Auerbach & Martin Feldstein eds., 2002).

<sup>215</sup> 42 U.S.C. §§ 7401–7671q.

<sup>216</sup> 33 U.S.C. §§ 1251–1389.

<sup>217</sup> See CORNES & SANDLER, *supra* note 169, at 72–78 (describing Pigouvian taxes and subsidies).

<sup>218</sup> For a comparison of tax and regulatory solutions to negative externalities, see Vidar Christiansen & Stephen Smith, *Externality-Correcting Taxes and Regulation*, 114 *SCANDINAVIAN J. ECON.* 358 (2012).

<sup>219</sup> 26 U.S.C. §§ 2001–2209.

tax significantly raises the cost of setting up a DFT.<sup>220</sup> Moreover, for the most determined dynasts willing to incur this tax in order to fund enduring familial status, the Generation-Skipping Tax is designed to impose a similar tax roughly every generation for trusts (like DFTs) that postpone vesting full title to estate assets.<sup>221</sup> As it applies at the top marginal rate of the estate tax,<sup>222</sup> this levy has the potential to take much of the dynastic wind out of the sails of DFTs.

Two caveats, however, are in order. First, if trust assets grow at an average rate of five percent, the estimated long-run return on capital held by wealthier investors,<sup>223</sup> DFTs can function effectively even after paying both the initial estate tax and the periodic Generation-Skipping Tax.<sup>224</sup> Second, it is unclear how the Generation-Skipping Tax would apply to a DFT. Congress drafted the tax to address rather simple tax-avoidance, such as giving children only a life estate and granting the remainder to the grandchildren.<sup>225</sup> Before the Generation-Skipping Tax, such a gift allowed a family to incur only one application of the estate tax instead of two—one at each generation. As we have seen, the DFT contemplated in this article does not involve *generational* gifts to *all* members of a given generation in the donor's family. As explained in Part V, Section C, the bulk of DFT benefits will flow to that small subset of descendants best able to enhance the family's status. Some generations may have no selective beneficiaries, and the timing of such payouts will not be driven by the death of the previous generation. It is far from clear how the Generation Skipping Tax would apply to DFTs with gifting almost entirely unmoored from generational successions.

This potential loophole, along with the proven vulnerability of the political and legislative processes to disinformation and lobbying campaigns by the wealthy, suggest that a tax solution to the dynastic wealth problem is improbable. In particular, the theoretically equivalent efficacy of taxation and regulation may evaporate when we account for the practical and inevitable power of the wealthy to undermine public support for even the fairest and most efficient taxes.<sup>226</sup> This seemingly pervasive political

---

<sup>220</sup> 26 U.S.C. § 2001; *see supra* note 195.

<sup>221</sup> 26 U.S.C. § 2601–2663; *see also* BOGERT ON TRUSTS, *supra* note 113, § 284.

<sup>222</sup> BOGERT ON TRUSTS, *supra* note 113, § 284.

<sup>223</sup> *See* PIKETTY, CAPITAL, *supra* note 197, at 354 fig.10.9 (“Rate of return versus growth rate at the world level, from Antiquity until 2100,” showing long-run average real return to capital of about five percent).

<sup>224</sup> An estate of \$1 billion earning a real return of five percent per year will more than double every twenty-five years after paying a forty percent tax every twenty-five years (calculation:  $[(\$1 \text{ billion}) * (1.05)^{25}] * (1 - 0.4) \approx \$2 \text{ billion}$ ).

<sup>225</sup> BOGERT ON TRUSTS, *supra* note 113, § 284.

<sup>226</sup> *See* Benjamin I. Page et al., *Democracy and the Policy Preferences of Wealthy Americans*, 11 PERSPS. ON POL. 51, 56 (2013) (describing how “the wealthy—much more than the general public—tend to favor spending cuts rather than tax increases”).

constraint motivates the search for regulatory measures to block the formation of dynastic family trusts.

C. *The Solution: A National Rule Against Perpetuities*  
(*The National Anti-Feudalism Act*)

Everyone hates taxes, so they are an easy political target. In contrast, who hates the RAP (besides wealthy dynasts, the agents and banks who serve them, and, of course, generations of law students)? Most likely lack any knowledge of its prior prevalence or recent demise. These observations suggest that the RAP or some other form of prohibitory legislation offers a more politically feasible route to enact effective anti-dynasty legislation.

The RAP, of course, was not one law in the United States but rather fifty-one separate laws covering all fifty states and the District of Columbia.<sup>227</sup> Re-enacting every last one of the state RAPs seems impossible, given the proven ability of any non-RAP jurisdiction to attract trust business from other states.<sup>228</sup> Prospective dynasts can easily create their DFT in any state that continues to dispense with the RAP, and, in classic “race-to-the-bottom” fashion, competition among the states for economic activity results in undesirable laws becoming the norm.<sup>229</sup> The universal state-law RAP genie is out of the bottle and getting it back in appears hopeless.

The natural solution to this race to the bottom among the states is a federal RAP. Such a unified national standard would short-circuit the state competition that provides havens for the creation of socially undesirable DFTs. The only significant constitutional argument against enactment of such a statute is that it exceeds the power of Congress to legislate under the Commerce Clause.<sup>230</sup> Over the last few decades, the Supreme Court has in modest ways limited the use of the Commerce Clause as a justification for national legislation.<sup>231</sup> In its most substantial limitation on that power, the Court in *National Federation of Independent Business v. Sebelius* held that

---

<sup>227</sup> See sources cited *supra* note 108.

<sup>228</sup> Sitkoff & Schanzenbach, *supra* note 108, at 359 (finding that “a state’s abolition of the Rule Against Perpetuities increased its reported trust assets by about \$6 billion”).

<sup>229</sup> The classic case of a posited race to the bottom is state competition for incorporation. See William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663, 666 (1974). For a contrary perspective, see ROMANO, *supra* note 162, at 14–15.

<sup>230</sup> There is a “probate exception” to federal courts’ jurisdiction, but it is exceedingly narrow, permitting a federal court to adjudicate rights and only barring them from actually taking legal control of property in the possession of a state court probate proceeding. *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Marshall v. Marshall*, 547 U.S. 293, 299–300 (2006).

<sup>231</sup> See *United States v. Lopez*, 514 U.S. 549, 564 (1995) (holding the Commerce Clause could not justify federal legislation barring possession of guns near schools, as this regulated crime, not commerce); *United States v. Morrison*, 529 U.S. 598, 613 (2000) (finding no Commerce Clause power for Congress to enact legislation providing a federal civil remedy for gender-motivated violence against women, as such violence is not economic activity).



the Commerce Clause did not authorize Congress to enact legislation requiring individuals to either purchase health insurance or pay a penalty.<sup>232</sup>

Unlike laws attempting to regulate guns near schools, violence against women, or individuals' decisions about purchasing health insurance, a national RAP would regulate the disposition of huge amounts of wealth. DFTs can effectively sequester all of this wealth, removing control over it (along with the perpetual annual income it generates) from any living person *forever*. The litany of nationwide socioeconomic harms flowing from DFTs as catalogued above<sup>233</sup> provides ample grounds for Commerce Clause power to enact a federal RAP. Congress has frequently passed major legislation to reduce inequality and improve socioeconomic mobility.<sup>234</sup> It has also legislated to curb the influence of money in politics.<sup>235</sup>

It would be strange and perverse to determine that Congress lacks the power to enact legislation preserving essential American anti-feudal tenets that date back to the Founding era and preserving fundamental aspects of the economy. Hence, *The National Anti-Feudalism Act* is an apt name for a federal RAP. Following state practices before the death of the RAP, there is more than one way to draft the core elements of such a statute. Congress could simply codify the common-law RAP<sup>236</sup> with its "measuring lives," or it could enact the arguably simpler Uniform Statutory Rule Against Perpetuities<sup>237</sup> and its ninety-year "wait-and-see" approach. Either of these,<sup>238</sup> along with variants,<sup>239</sup> would suffice to prevent the creation of DFTs and their attendant social harms.

## VII. CONCLUSION

The overarching worry is that DFTs raise the specter of a New Feudalism in twenty-first-century America. Under "the old" feudalism, a

---

<sup>232</sup> 567 U.S. 519, 588 (2012). A different configuration of Justices upheld the insurance mandate on the alternative ground that it amounted to a tax and that Congress's power to tax extended to such a levy. *Id.*

<sup>233</sup> See *supra* Section VI.A.

<sup>234</sup> E.g., Servicemen's Readjustment Act (G.I. Bill) of 1944, ch. 268, 58 Stat. 284 (1944) (current version at 38 U.S.C. §§ 3301–3327) (providing wide range of benefits to returning soldiers); Housing Act of 1937, ch. 896, 50 Stat. 888 (current version at 42 U.S.C. § 1437f) (providing housing subsidies to low-income Americans); Tariff Act of 1913, ch. 16, § 2, 38 Stat. 114, 166–67 (current version at 26 U.S.C. § 11) (progressive rate structure of federal income tax); Tax Reduction Act of 1975, Pub. L. No. 94-12 § 204, 89 Stat. 26 (codified as amended at 26 U.S.C. § 32) (Earned Income Tax Credit).

<sup>235</sup> E.g., Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (codified as amended at 52 U.S.C. § 30101–30146).

<sup>236</sup> GRAY, *supra* note 95, § 201 ("No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.").

<sup>237</sup> UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1 (1986) (UNIF. L. COMM'N, amended 1990).

<sup>238</sup> See BOGERT ON TRUSTS, *supra* note 113, § 214 (comparing states' adoption of either the common law or uniform rule).

<sup>239</sup> For less comprehensive solutions to the problems posed by perpetual trusts, see Joel C. Dobris, *Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2537 (2006) (discussing use of cy pres doctrine, taxation, and national regulation as potential tools).

small circle of dynastic families ruled medieval England for centuries. Without the modern tools of sophisticated trust law and liquid wealth, they nonetheless preserved their privileged status via the rudimentary but effective institutions of primogeniture, the fee tail, and preventing subdivision of the family's land—the essence of power in the feudal economy and polity.<sup>240</sup> Although no single factor undid their pervasive social hegemony, one critical development was the imposition of the RAP and the concomitant evisceration of fee tails. This marked the beginning of the end of the dynastic family wealth birthed by English feudalism.<sup>241</sup> To this day the RAP remains the law of England<sup>242</sup> and prevents the alarming prospects of a New Feudalism, built on DFTs, in the homeland of the Old Feudalism.

The rash and perverse abolition of the RAP has put the contemporary United States on a very different footing. Though cultural norms and natural affection for children and grandchildren may serve as a brake, Part II presented pervasive and powerful evidence that the dynastic urge has driven humans (and their evolutionary ancestors) to crave bloodline status, and the power that inherited wealth provides is a key means to this end. American law now gives free rein to our status-seeking, selfish genes. These primal urges might well drive today's super-rich to use the tools laid out in Part V and construct DFTs ensuring that some subset of their descendants maintains socioeconomic privilege forever. This may all sound farfetched, but when I began my academic career about thirty years ago (basically a single generation), nobody had the slightest inkling that the RAP, a pillar of Anglo-American inheritance law for centuries, was about to disappear.

It is supremely ironic that a nation ideologically founded in large part on rejection of the significant remnants of (the old) feudalism in eighteenth-century England now stands at the precipice of a New Feudalism that could never arise in the England of today. At present, little stands between the United States and the instantiation of a perpetual nobility completely at odds with the nation's founding principles. The federal estate tax may reduce the number of dynastic trusts formed, but it in no way can ensure against their ascent. Moreover, the very wealthy families likely to create dynastic trusts have undermined public support for the tax, have come within a hair's breadth of repealing it, and no doubt will continue their campaign against it. A National Anti-Feudalism Act with a nationwide RAP offers the surest means for preventing the rise of a New Feudalism.

---

<sup>240</sup> See *supra* notes 90–97 and accompanying text.

<sup>241</sup> See *supra* notes 98–103 and accompanying text.

<sup>242</sup> Perpetuities and Accumulations Act 2009, c. 18 (fixing the perpetuity period in England and Wales to 125 years). Although the RAP has never been the law in Scotland, restrictions on accumulation periods and life estates similarly limit trusts. James Drummond Young, *Defining Duration*, STEP J. (Mar. 1, 2010), <https://www.step.org/step-journal/step-journal-march-2010/defining-duration>.

