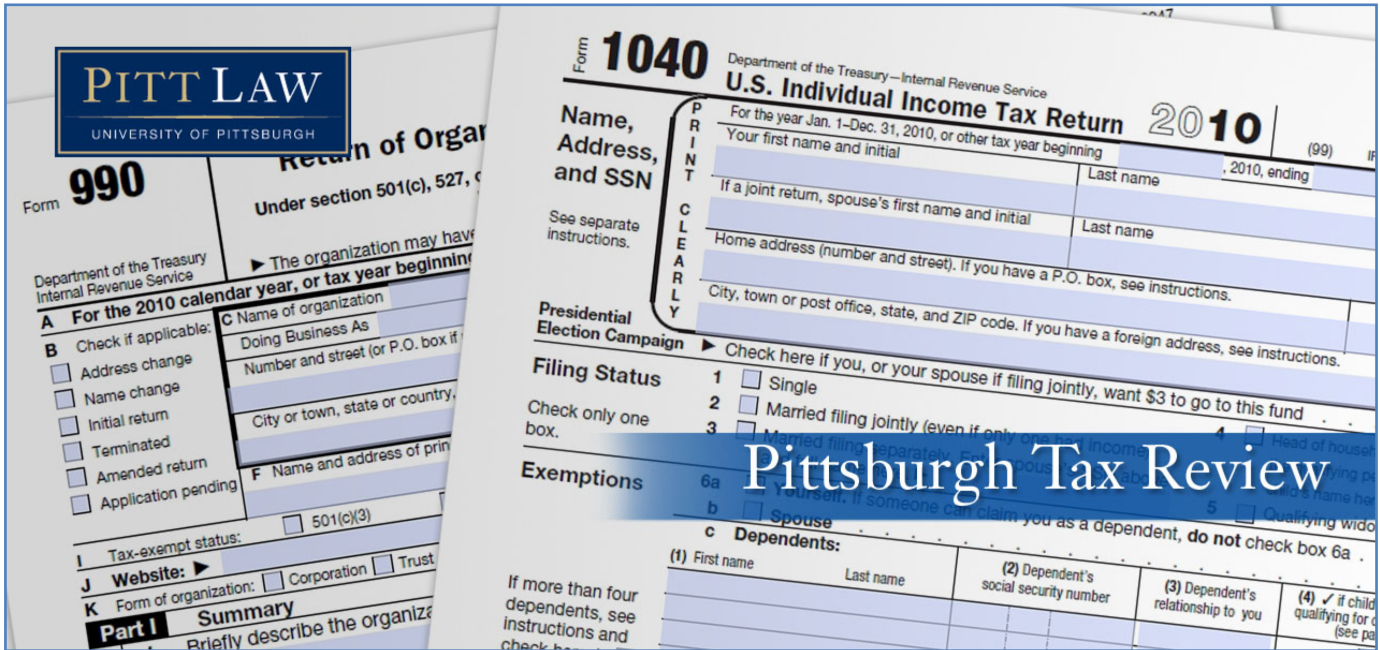

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ONE TRUST, TWO TAXES

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ONE TRUST, TWO TAXES

Eric Kades[*]

I. INTRODUCTION

The effective end of the Rule Against Perpetuities (RAP) around the turn of the 20th Century is the most important legal revolution that nobody noticed or cared about, and that continues to this day. Yet, the stakes for America could not be higher. Democracy is under assault from a moneyed class that cares profoundly about the demise of the RAP. In its absence, their grand project of seeking elevated status has metastasized from short-term plans to unending hegemony. Through new-fangled perpetual trusts designed to optimally fund bloodline status generation after generation, they stand on the precipice of sweeping away the ideals taught to generations of Americans in their school civics classes: democracy, egalitarianism, and equal opportunity. Restoring the RAP seems unlikely, so what can be done? This Article proposes a two-pronged counterattack. First, families should be limited to a single dynastic trust. Second, in recognition of a conceptually novel wealth concentration externality, the federal government should impose a negative externality wealth tax on these dynastic trusts, with rates increasing with the duration of the trust to reflect the growing harms that dynastic wealth causes to American society. This new tax is not a replacement for the current estate tax, which should remain in place to serve anti-dynastic as well as other established ends.

II. ONE (DYNASTIC FAMILY) TRUST: CAGING THE BEAST

When we decide that we need to tolerate the proximity of dangerous animals, we cage or otherwise carefully control them (see zoos, circuses). For a number of reasons, we do want trusts around (see orphans and people

[*] A special thanks to Phil Hackney and Tony Infanti for organizing and hosting a conference on one of the most important but unappreciated social developments of this era: the return of feudalistic dynastic wealth. For uniformly helpful comments, I thank Phil, Tony, along with conference participants Jonathan Blattmachr, Bridget Crawford, Ed McCaffery, Carlyn McCaffrey, Carla Spivak, Allison Tait, and Phyllis Taite.

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with disabilities). Although such traditional, valuable uses lead most to view them as benign and even desirable, trusts in fact have morphed into predatory entities at the vanguard of instantiating a new hereditary elite—a "New Feudalism." Part II's thesis is that if we cannot entirely slay socially carnivorous "dynasty trusts," if we must suffer their presence, then we need to put them in very, very secure cages. The most effective legal enclosure is to limit bloodlines to single Dynastic Family Trusts ("DFTs," as defined below) incapable of reproduction.

To start at the beginning: what is a trust? Although not so classified traditionally, there is a growing consensus that trusts are non-natural legal entities, like corporations, LLCs, and other business forms.[1] Such artificial, easily created legal persons provide a powerful means to partition assets for both good and bad.[2] Although trusts lack the limited liability that most business entities today enjoy,[3] they do offer unparalleled flexibility.[4] Unlike holders of shares, LLC memberships, or partnership interests, trust beneficiaries have no attachable legal property interest on which their creditors can levy.[5] On top of this inherent feature, many states permit the

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[1] "[I]n this Chapter and elsewhere in this country, the trust is treated as an entity to such an extent that it is no longer inappropriate to refer to claims against or liabilities of a 'trust' . . . or to refer to and treat trusts, in law and in practice, as if they were entities in numerous other contexts." RESTATEMENT (THIRD) OF TR. ch. 21, intro. note (AM. L. INST. 2012); *see also id.* § 2 cmt. a ("Increasingly, modern common-law and statutory concepts and terminology tacitly recognize the trust as a legal 'entity,' consisting of the trust estate and the associated fiduciary relation between the trustee and the beneficiaries.").

[2] *See, e.g.*, Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 470, 472 (1998).

[3] Note, though, that for at least one very prominent form of trusts, "Delaware Statutory Trusts," investors/beneficiaries do enjoy the same limited liability conferred on corporate shareholders, LLC members, and LLP partners. 12 DEL. CODE ANN. tit. 12 § 3803(a) (2023) ("Except to the extent otherwise provided in the governing instrument of the statutory trust, the beneficial owners shall be entitled to the same limitation of personal liability extended to stockholders of private corporations for profit organized under the general corporation law of the State.").

[4] Sitkoff notes the "highly enabling, elastic, flexible, and default nature with respect to in personam relations." Robert Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 629 (2004); *see also* Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom*, 85 CORNELL L. REV. 1035, 1041 (2000) ("The trust's success has, in large measure, been attributable to its flexibility . . . no inherent limitations exist on the purposes for which a trust may be created.").

[5] BROWNE C. LEWIS, THE LAW OF TRUSTS, ch. 5 (2013) ("the beneficiary's creditors cannot force the trustee to pay his debts. . . ."), https://lewislawoftrusts.lawbooks.cali.org/chapter/spendthrift-trusts-and-creditors/.

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creation of "spendthrift" trusts that bar beneficiaries from alienating their beneficial interests.[6] This provides a second layer of debtor beneficiary protection, preventing creditors from levying on trust assets to satisfy a beneficiary's debts even if, e.g., the debtor has unfettered rights to all trust income.

For the purposes of the DFTs at the center stage of this Article, trusts provide unmatched flexibility in two key dimensions. First, trusts can dole out value to the class of beneficiaries in literally any manner, as specified in the trust instrument or as determined at the (authorized) discretion of the trustee(s).[7] Trusts can distribute income based on the most obscure contingencies imaginable, and with the demise of the RAP they can do so forever.[8] *Forever*. In sharp contrast, each class of a corporation's shareholders are treated equally. Although founding documents and ongoing governing bodies can distribute LLC or LLP income unequally to members or partners, they generally cannot exclude these owners from any and all income and, moreover, they generally cannot distribute income based on any conceivable contingencies.[9]

Second, there are essentially no limits on the management structure of a trust. The settlor can lay down absolute rules of distribution that leave the trust's manager(s) with absolutely no discretion—again, forever given the effective disappearance of the RAP.[10] At the other extreme, settlors can give trustees completely unfettered discretion to manage assets and distribute income and principal in any manner whatsoever.[11] Trust settlors can choose

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[6] Sterk, *supra* note 4, at 1040–43; *see also* James T. Lorenzetti, *The Offshore Trust: A Contemporary Asset Protection Scheme*, 102 COM. L.J. 138 (1997); Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating it Too*, 47 RUTGERS L. REV. 11 (1994).

[7] GEORGE C. BOGERT & AMY MORRIS HESS, THE LAW OF TRUSTS AND TRUSTEES, § 181 ("Beneficiaries of various types of interests") ("The settlor has great freedom in the selection of the beneficiaries and their interests. The interests she creates in them must always be equitable, but otherwise they need no particular characteristics.").

[8] *Id.* § 214 ("The large majority of states, however, have either abolished the rule, thus permitting perpetual trusts, or modified it . . . .") (citation omitted).

[9] *See, e.g.*, 8 DEL. §§ 151, 170 (requiring equal treatment of all shareholders of a given class of stock).

[10] *See generally* BOGERT & HESS, *supra* note 7, ch. 8 ("The Trustee—Selection: Capacity").

[11] *Id.*

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any option between these two extreme polar cases. In addition, the settlor can establish any mechanism for the appointment and removal of trustees that she likes.[12] The trustee can be a single bank forever, a group of self-perpetuating trustees, those elected periodically by beneficiaries, or any other system within the fertile imagination of trust and estate lawyers.[13] Trustees can be removable for cause, or at the whim of a majority of trustees, or by beneficiaries.[14] Although in many states close corporations can dispense with the board of directors and other default facets of their control structure, shareholders retain ultimate control and there are strong rules favoring alienability of votes (i.e. alienability of shares).[15] Even supposedly maximally flexible LLCs cannot even approximate the degrees of freedom available via trusts.

As detailed in earlier work,[16] very wealthy settlors with humanity's deeply programmed desire to maximize the status rather than the raw number of their progeny have elemental incentives to establish perpetual trusts designed to maximize the status of their bloodline. Given the approximately 300-year existence of the RAP followed by only a few decades of our brave new RAP-less legal landscape, we do not yet know how putative founders of family dynasties are going to respond to this new, dynasty-friendly legal landscape. Here, as in earlier work,[17] I assume that even centuries-long legal rules do not alter eons of evolutionary programming. In a thought experiment motivated by a hybrid of biological and economic thinking, I have hypothesized that rational, calculating dynasts will ensconce their wealth in perpetual trusts with a host of novel features, including:

- selective funding of descendants based on the likelihood that each will enhance the social status of the family (by e.g., earning another fortune,

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[12] *Id.* § 520.

[13] *Id.* ch. 8.

[14] *Id.* § 520.

[15] *See, e.g.*, ANDREW A. SCHWARTZ, THE PERPETUAL CORPORATION 771–72 ("Shares of stock in a corporation are alienable, which is to say that they are freely transferrable and may be bought or sold at any time. Thus, once a corporation sells or conveys shares to investors, it creates a secondary market in which those shares may be sold to willing buyers.") (citations omitted).

[16] *See* Eric Kades, *A New Feudalism: Selfish Genes, Great Wealth, and the Rise of the Dynastic Family Trust (DFT)*, 55 CONN. L. REV. 553 (2022).

[17] *Id.*

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becoming a powerful politician, or rising to prominence in the arts or entertainment industries);

- saving more trust income when there are many promising family candidates for status, and less when the field is weak; and
- including terms that will induce descendants to either (i) contribute their fortunes to the founder's original trust, or (ii) set up a similar trust to maximize the status of their branch of the founder's family tree.

I dub such trusts "dynastic family trusts" ("DFTs").[18]

As I have discussed in prior scholarship[19] and elaborate further in this section and the next, the creation of unending family wealth has more than overtones of the instantiation of a new nobility. In a nation founded on egalitarian principles and the complete rejection of monarchs, hereditary elites, and all of the other (considerable) remnants of feudalism in Britain at the time of The War of Independence, permitting legal devices empowering the wealthy to elevate the status of their descendants forever is dissonant with our most basic national mores. More to the point, the potential that DFTs possess to create a new, hereditary nobility in the United States will reinforce already formidable forces that are increasing inequality and fraying the social fabric. All of this to say: the expected rise of the DFT is undesirable. They are socially pernicious.

The first-best solution to the problems posed by DFTs, of course, would be to ban them. That is what the RAP did for three-hundred-odd years. That battle is lost. More than half of the states have either abolished the RAP or so diluted it that settlors can establish a DFT or an extremely close approximation.[20] Thus, the beast that is the DFT is on the loose. What, then, is the best way to cage it? First, any solution must be national. The ease with which dynastic aspirants can choose the state law that will govern their DFTs means that if even one state permits these trusts they are available to anyone—especially wealthy folks who invariably enjoy sophisticated legal advice. Second, narrowly-focused tax provisions seem like the best feasible

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[18] This is distinguished from the now-common label "dynasty trusts" used to describe the ability to create perpetual trusts limited to the value of the estate tax exemption. *See generally* Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588 (2003).

[19] Kades, *supra* note 16.

[20] *See, e.g.*, S.D. CODIFIED LAWS § 43-5-8 (abolishing Rule against Perpetuities entirely) (2022); ALASKA STAT. § 34.27.051 (2022) (permitting trusts to control property for 1,000 years).

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route to corralling DFTs. Limiting the target of taxation to dynastic actors should help to deflect the inevitable attempt by the moneyed class and their hired hands to convince members of the bottom 99% that they too are subject to the tax. Only the wealthiest Americans can realistically contemplate founding a dynasty.

This Article proposes limiting families to *one DFT per bloodline*. The basic idea is that once a settlor has created a DFT, any subsequent DFT created by any descendant triggers highly unfavorable tax treatment for *all* DFTs in the family tree of the original settlor. Without such a limitation, dynasts could set up a complex web of DFTs that together work to achieve their dynastic ends, but that by virtue of their very number make it difficult or even impossible to regulate and tax. In addition, limiting family trees to a single DFT prevents members of later generations from setting up more and more such trusts, multiplying the anti-egalitarian effect of the settlor's initial DFT.

Finally, the law should require settlors to record DFTs. This seems uncontroversial as all states require that wills be recorded after probate. It is true that to date no state requires or even has established any mechanism for recording trusts.[21] Keeping trusts private does not generally seem problematic as most concern arrangements of little interest to the public. Few care if Daddy Warbucks provides lifetime income to Orphan Annie. DFTs, however, are different. In a real sense, they create a privileged class not just for a generation or two, but forever. They empower a very small number of families to exert highly disproportionate influence on public policy. It is bad enough to face the prospect of a new feudal age with DFTs instantiating a new nobility. There seems to be no good reason to permit this charmed circle to exert their influence out of the sight of the rest of society.

[21] There is a technical exception for trusts established to control voting of corporate shares. *See, e.g.*, 8 DEL. CODE ANN. tit. 8 § 218 (2023) (requiring creators of voting trusts to record publicly the existence and terms of the trust).

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III. EXTERNALITY TAX ON LARGE DYNASTIC TRUSTS

A. Overview of the Two Taxes Proposed in This and the Next Section

The "two taxes" in this Article's title refer to the new and the old. This Part limns a novel tax on the novel DFT; the next simply recommends simultaneously maintaining the current estate tax. The two taxes do operate in tandem to at least some extent. In the main, however, they serve divergent purposes. The innovative tax described in this section targets the *negative externality* imposed by DFTs—what Wojciech Kopczuk has called the "wealth concentration externality."[22] The rationale for such externality (or Pigouvian) taxes is well-established: to force actors to internalize the costs of the negative externalities they impose on others.[23] The canonical example is a tax on polluters to compensate those harmed by their noxious emissions. The current estate tax serves this same goal to a modest degree as well as other more traditional purposes.

Despite disparate purposes, these two taxes do work in tandem to a significant degree. The wealth concentration externality tax of this section will raise some revenue from more determined dynasts willing to incur the relatively high tax bill for establishing a DFT. I assume, however, that most would-be dynasts will blanch at the prospect of the externality tax and thus the tax will largely suppress our species' powerful Darwinian dynastic urges. For those at the top of today's highly skewed income distribution, more consumption really is not an option. The two basic options are to leave money to their descendants or other favored persons, or to donate their fortunes to charity. Of course, many wealthy donors historically have done some of each. Whatever the mix, either charity or non-dynastic wealth transfers are socially preferable to DFTs. Charity, at least when defined appropriately,[24] provides funds for a variety of public goods without imposing any tax burden. Leaving

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[22] Wojciech Kopczuk, *Taxation of Intergenerational Transfers & Wealth*, *in* 5 HANDBOOK OF PUBLIC ECONOMICS 329 (Alan J. Auerbach et al. eds., 2013).

[23] *See generally* William J. Baumol, *On Taxation and the Control of Externalities*, 62 AM. ECON. REV. 307 (1972). For a novel and enlightening example of a Pigouvian tax, see Ellen Aprill, *The Private Foundation Excise Tax on Self-Dealing: Contours, Comparison and Character*, 17 PITT. TAX REV. 297, 325–29 (2019).

[24] *See generally* Eric Kades, *The Charitable Continuum*, 22 THEORETICAL INQUIRIES IN LAW 285 (2021).

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wealth to descendants in a traditional, non-perpetual way both avoids the creation of dynastic wealth and enables the government to raise revenue with the relatively efficient and equitable estate tax.

B. The Concentrated Wealth Externality

DFTs transform simple (if spectacularly large) pools of wealth into an unending advantage for a lucky few bloodlines. The Renaissance British judges who first slayed the perpetual wealth beast achieved one of the signal victories of modernism over feudalism. Back in that age, dynastic noble families strived to keep the centerpiece of the economy, their huge, landed estates, securely titled in their progeny forever.[25] Perhaps the greatest social cost posed by locking up landed wealth in bloodlines for generations without end was that it rendered land largely inalienable and thus interfered with efficient market processes that would otherwise shift it to higher-value users and new uses.

That is not a problem in modern economies in which the lion's share of wealth consists of marketable assets like stocks and bonds. If placed in trusts, *wealth* can remain static in families without limiting the mobility of the underlying *assets*. Trustees can sell any asset of a DFT that has a higher value use and replace it with some other asset. Thus, the main policy justification for the RAP no longer applies.

There is, however, a policy reason of perhaps even greater moment, that economist Wojciech Kopczuk has identified and labeled the "wealth concentration externality."[26] He begins with some casual and only suggestive empiricism: there is a fairly strong correlation between concentrated wealth (higher wealth inequality) and poor governance.[27] Kopczuk then speculates that inordinately wealthy families may use their wealth to obtain and

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[25] For an in-depth study of the use of the fee tail to maintain bloodline control of large estates, see JOSEPH BIANCALANA, THE FEE TAIL AND THE COMMON RECOVERY IN MEDIEVAL ENGLAND 1176–1502 (2001).

[26] *See* Wojciech Kopczuk, *Economics of Estate Taxation: Review of Theory and Evidence*, 63 TAX L. REV. 139, 151–53 (2009).

[27] *Id.* at 152.

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maintain privileged economic rights such as monopolies and favorable contracts with the state.[28]

Although Kopczuk focuses on some of the issues that make concentrated wealth (wealth inequality) socially poisonous, we will need to unpack and then repackage the use of the externality concept (twice!) in order to make it fit in this atypical context.

Typically, the phrase "negative externality" is used for phenomena like pollution, e.g., a factory spewing smoke and dust on nearby homes.[29] A common misunderstanding is that the word "externality" refers to the physical invasion. Instead, it is a shorthand for the phrase "external *to markets*."[30] The idea is that if there was a market for clean air, then the factory and homeowners would negotiate to reach a mutually advantageous arrangement. The resulting contract would reflect the relative value of the two uses in the context of the law of property rights. For example, if operating the factory was of great value and could not be done without polluting, but the property owners had a legal right to be free of pollution, then the factory would agree to pay damages equal to at least the harm caused by the pollution it emits. There may, however, be no such market due to transactions costs. First and foremost, the large number of homeowners will complicate the bargaining process. Second, and more subtly, the parties are locked into dealing with each other—they cannot turn to competitors if they think the other side is making unreasonable demands. Such "bilateral monopolies" are another source of transactions costs, and such costs can be so high that bargaining is impossible—which means the absence of a market for clean air around the factory.

It is not at all clear, however, how such "missing markets due to transactions cost" narratives apply to wealth concentration. One can tell all sorts of stories about the baleful effects of economic inequality, but they do not naturally fit into the ordinary externality schema.

It is helpful to take a brief dive into the more technical definition of an externality. In a simple world without externalities, a person's utility function

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[28] *Id.*

[29] *See, e.g.*, Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970).

[30] *See* RICHARD CORNES & TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS 40–42 (§ 3.1, "Externalities as absence of markets") (2d ed. 1996).

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contains simply those goods she chooses to purchase with her income. When the factory operates, one of the "goods" (well, "bads") it produces is smoke and dust. These negatively affect the neighboring homeowners' utility, which means that their utility functions must include items not chosen by them. This is the technical definition of an externality: something affecting an individual's welfare that they did not purchase.

People do not in any sense bargain for the distribution of wealth that prevails in their economic environment. Yet there is evidence that inequality affects individuals' welfare. In a prominent series of studies on the effect of status and power on health outcomes for British civil servants (the so-called "Whitehall Studies"), Michael Marmot showed that even after controlling for age, income, lifestyle (diet, smoking, etc.) and other factors, there was a strong positive correlation between better health and possessing higher-status civil service jobs that provide the office-holder with substantial discretion and the power to direct the work of others.[31] This suggests that an individual's status enters her utility function, for better (a positive externality) if she enjoys high status or for worse (a negative externality) if she is closer to the bottom of the totem pole. As wealth inequality increases, the magnitude of these effects presumably increases concomitantly. This is a relatively rigorous mechanism, at least in part empirically verified, showing how concentrated wealth may have a negative external effect on the health of lower-status citizens—and health is a relatively important element of a person's welfare.

In ambitious work, Wilkinson and Pickett strive to generalize the findings of Marmot and others to show that greater economic inequality is correlated with greater stress and less trust *even for the wealthy and those enjoying relatively high status*.[32] Using nation-level data, they illustrate positive correlations between greater inequality and a host of social outcomes, from average blood pressure and other health outcomes to the general level of social trust.[33] Although their findings are suggestive, they must be used with caution as aggregated data can contain group-level

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[31] MICHAEL MARMOT, THE STATUS SYNDROME (2005).

[32] RICHARD G. WILKINSON & KATE PICKETT, THE SPIRIT LEVEL: WHY GREATER EQUALITY MAKES SOCIETIES STRONGER 43–44, 52–54 (2011).

[33] *Id.*

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relationships that do not hold at the level of individuals.[34] Still, warts and all, Wilkinson and Pickett's work provides additional grounds on which to believe that concentrated wealth may impose negative externalities not just for lower-status individuals but for everyone.

Kopczuk, however, has bigger game in his sights when he writes of the concentrated wealth externality.[35] His examples (monopolies;[36] sweetheart contracts) have little in common with the adverse effects that inequality seems to have on health, social trust, and the like. State-protected monopolies sound less in indirect social phenomena and more in some kind of corruption—a phenomenon with essentially no relation to economic externalities. Explaining the use of wealth to obtain favorable legal status from the government does not involve any sort of transaction costs that lead to missing markets.

Kopczuk, however, seems to be contemplating a new, meta-level meaning of "externality." Economics and political science usually take as exogenously determined individuals' preferences (utility functions) and the basic nature of the state (e.g., a democracy). Thus, they usually assume (often implicitly) that no actors or institutions have the means to alter these parameters. The Framers wove a "Separation of Powers" into the fabric of the Constitution to make sure that no branch or level of government would have the overweening power to alter these fundamentals. Branches of governments, however, are not the only entities that we might worry have so much power that they can undermine bedrock societal assumptions like commitments to democracy and truth. Observers have periodically worried that an excessive concentration of wealth can pose a serious threat to fundamental democratic principles. Perhaps most famously, Brandeis is

[34] *See generally* Andrew Gelman et al., *Models, Assumptions and Model Checking in Ecological Regressions*, 164 J. ROYAL STAT. SOC'Y 101 (2001).

[35] *See supra* note 22.

[36] *See id.* at 13.

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purported to have said that "We can have democracy, or we can have highly concentrated wealth. We cannot have both."[37]

What Kopczuk may mean by "concentrated wealth externality" is that when the share of wealth held by the top 0.01% passes some threshold, wealth gives its holders sufficient influence and power to make changes *external to the social contract*. They can erode democracy with stealth takeovers of state legislatures, followed by gerrymandering legislative districts to enable their faction to rule indefinitely with a minority of votes.[38] They can use money to elect or have appointed judges willing to find ways to make holdings starkly at odds with democracy, such as refusals to find constitutional problems with gerrymandering. Perhaps even more sobering, sufficiently large amounts of wealth may enable the moneyed class to indoctrinate the electorate to acquiesce and even support policies irreconcilable with democracy and equal opportunity. In this meta-externality, elites are not inserting external effects into citizens' utility functions; rather, they are re-writing their very utility functions, what they value, with decades-long campaigns of disinformation and outright untruths.[39]

C. Externality Multipliers

As fearsome as all of these developments are at present, they are subject to two "multipliers" that steeply increase the pernicious effects of concentrated wealth. First, and most relevant to this Article, the passing of the RAP and the prospect of DFTs mean that we are on a path guaranteeing the propagation of elevated wealth inequality generation after generation, and

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[37] Although he expressed this sentiment more than once, it appears that he never actually framed the thought in this exact language. *See* Peter S. Campbell, *Democracy v. Concentrated Wealth, In Search of a Louis D. Brandeis Quote*, 16 GREEN BAG 2D 251 (2013).

[38] For in-depth documentation of decades-long efforts by the Koch brothers and other wealthy families to mold public opinion to their private advantage, see JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT (2017).

[39] Perhaps the most infamous example is the endlessly-repeated claim that all sorts of families were losing the ancestral farm because of the burdens on the estate tax. When asked to identify even a single example, however, industry representatives "could not provide the *New York Times* with a single example in which a family had to sell its farm to cover its estate tax liability, and that was when the exemption was a fraction of what it is today." PUBLIC CITIZEN CONGRESS WATCH & UNITED FOR A FAIR ECONOMY, SPENDING MILLIONS TO SAVE BILLIONS, THE CAMPAIGN OF THE SUPER WEALTHY TO KILL THE ESTATE TAX 25 (2006) [hereinafter PUBLIC CITIZEN CONGRESS WATCH & UNITED FOR A FAIR ECONOMY].

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making it likely that the problem will worsen. Concentrated wealth may work like a snowball rolling downhill. In a vicious cycle, more wealth begets more political and social influence. One of the primary uses of such power is to skew political and social outcomes to divert a yet greater share of wealth to those with such power. It is unclear what limits, if any, exist to this ever-increasing wealth concentration and the externalities limned in the previous subsection.

The second externality multiplier is cooperation among the small coterie of extremely wealthy families. Although they are competing against each other for status, they have powerful common interests in tilting political and social outcomes in favor of themselves and against the bottom 99%. Just as the oil or pharmaceutical industries (consisting of competing firms) form trade associations to lobby and campaign for laws and policies in their industries' respective interests, very wealthy families have pooled resources to fight for laws that will protect and enhance their wealth—i.e., for measures that will at least maintain and likely increase wealth concentration and the negative externalities that come with it.

D. Directly Addressing the Manifestations of Increasing Wealth Concentration

Those of extreme wealth can use their effectively limitless lucre to influence law and policy in two ways. First, and more conventionally, they can "invest" in influencing all three branches of government. This begins with campaign contributions to help elect legislators, executives, and (in many states) judges sympathetic to increasing wealth concentration. It continues with expenditures on lobbying[40] legislatures and executives, and on funding litigation to push forward judicial legal change by judges appointed by fellow traveling politicians or elected with contributions from the wealthy.

The second less conventional and more portentous investments that the wealthy can make are in broader social campaigns to change public opinion

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[40] Lobbying is a very broad firm that should be read here to encompass gifts to legislators approaching bribery, *e.g.*, invitations to speak at gatherings in posh locations, with deluxe hotel accommodations, first-class air travel, and long stays for one short speech or even no speech at all.

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and tilt it to better align with maintaining and even increasing their privileged status. There is perhaps no better example than the sustained and extremely well-funded efforts of a small group of wealthy families to eliminate the federal estate tax.[41] Beginning in the early 1990s and now going on four decades, this public opinion campaign has spent tens of millions of dollars trying to convince middle-class Americans that a tax assessed on only the wealthiest families poses some sort of threat to the modest inheritances that middle-class Americans leave their descendants. This campaign has gone beyond the deception and spin that pervades much of political advocacy and over into simple lies. The most prominent example is the endlessly-repeated averment that many farmers could not leave the family farm to their children because their estates had to sell the farm to pay the federal estate tax bill. Despite looking high and low, however, nobody has produced even a single example of such an event.[42]

If the problem is the influence of money in elections, governance, and the formation of opinions about social matters, why not attack these mechanisms instead of imposing a wealth concentration externality tax? The practical answer begins with a Supreme Court, now composed of six members appointed by the political party traditionally identified with the moneyed class, which has erected more and more constitutional impediments to legislation that would limit the influence of money on politics.[43] Perhaps with very cleverly-drafted legislation or a change in the composition of the Supreme Court ways could be found around these obstacles to cabining the political clout of wealth. It is difficult to imagine, however, how any legislation limiting public opinion campaigns (e.g., to eliminate the federal estate tax) would not run afoul of even the most regulation-friendly

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[41] *See* MICHAEL J. GRAETZ & IAN SHAPIRO, DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH (2005). Note that throughout this Article I use "[federal] estate tax" as a shorthand for "[federal] estate and gift taxes, along with the generation-skipping tax."

[42] *See* PUBLIC CITIZEN CONGRESS WATCH & UNITED FOR A FAIR ECONOMY, *supra* note 39, at 25.

[43] Two of the more prominent Supreme Court decisions invoking the First Amendment to reject limitations on the influence of wealth on politics are *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (holding that limits on independent campaign spending, along with limits on candidates' personal outlays on campaigns violate the First Amendment), and *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (holding that corporations enjoy First Amendment rights and that it violates their free speech rights to limit their independent campaign expenditures).

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interpretations of the First Amendment.[44] Advocating for legal change, no matter how harmful that change might be to the welfare of the vast majority of Americans, is political argumentation at the absolute core of the right to free speech.

At a more theoretical level, this First Amendment problem with curbing the power of wealth is symptomatic of a fundamental problem. Money is the universal solvent. There is no end to the ways in which those having it in plenty can deploy it to further their political and social agenda. They can sponsor free and relatively cushy "retreats" to market their ideology to high school and college students—often with their motives and positions disguised. They can generously fund think-tanks to produce a steady torrent of advocacy work to influence public opinion indirectly via the media or directly via the internet. They can quietly foment racial fault lines to divide and "conquer" workers of modest means. They can hire internet trolls to emit a constant stream of misleading and false information to influence voters. Trying to cabin the pervasive influence of money on public life is a futile game of whack-a-mole: hit 'em here and they just pop up over there.

So, the problem is deeper than just "money in politics." It is excessive wealth concentration in a democracy. Brandeis was right: at some point, concentrated wealth is simply inconsistent with democracy.[45] The only effective solution is to attack the problem at its root. We must find tools to curb the concentration of wealth and, in particular, the propagation and acceleration of wealth concentration generation after generation via DFTs.

E. A Tax to Offset the Wealth Concentration Externality

Having identified the wealth concentration externality, the standard policy response to such an externality is a tax. The rates of such externality (or "Pigouvian") taxes need to be calibrated to the size of the adverse impact of the externality. For pollution, the tax should reflect the harm emissions impose on neighboring property owners. Forced to internalize the cost of their externality, many polluters will elect to reduce or eliminate their emissions if the market for their product cannot bear the price increase that

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[44] *Cf.* Philip Hackney, *Dark Money Darker? IRS Shutters Collection of Donor Data*, 25 FLA. TAX REV. 140 (2021).

[45] *See* Campbell, *supra* note 37, at 251.

paying the externality tax necessitates. Some of the higher-value polluters, however, will continue to pollute, pay the tax, and pass on at least part of the tax to their customers.

Two federal taxes currently apply to DFTs: the estate tax and the income tax on trusts. Designed well before the RAP shriveled away, neither is up to the task of forcing settlors to internalize the costs of the wealth concentration externality. This Part III(E) first addresses some special inadequacies of the trust income tax and then discusses why neither it nor the estate tax works to counteract the wealth concentration externality.

In theory, the federal income tax on trusts[46] could be part of the solution to the wealth concentration externality. It imposes the highest marginal income tax rate in the Code.[47] As presently constituted, however, it is woefully underpowered. In addition to lacking essential components for taxing perpetual trusts, it is increasingly subject to end runs designed by clever trust and estate lawyers. Here is just a short list of the ways that a deftly designed DFT could provide value to beneficiaries generation after generation without paying income tax on the valuable goods and services that the trust can generously provide.

- The trust can invest in assets that pay out no income and instead simply accumulate capital gains. Some corporations, for example, have a long-standing policy of paying no dividends. This avoids all income tax and shifts the tax liability to capital gains which are taxed at a significantly lower rate—and only after, potentially, decades-long deferral of any tax payment.
- The trust can buy real estate, cars, jets, and other capital goods, deduct them as costs of doing the trust's business, and let DFT beneficiaries use them for free or far below cost. In theory, the tax authorities could impute individual income to beneficiaries, but that is not cheap or easy for the tax authorities to do.
- The DFT can pay generation after generation of favored beneficiaries very generous salaries for doing modest amounts of work for the trust. Again, although the Internal Revenue Service ("I.R.S.") does have legal tools that could be used to correct these attempts to inflate trust expenses and reduce the DFT's tax bill, they are neither easy nor cheap to use.

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[46] *See* I.R.C. §§ 641–692 (Subchapter J).

[47] *See* I.R.C. §§ 641–692 (Subchapter J).

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At a higher level of generality, only a trust income tax with marginal rates not observed since the 1970s is capable of addressing the prospect of DFTs and their wealth concentration externality.

The current federal estate tax seems a more promising candidate for internalizing the costs of the wealth concentration externality. Indeed, it was expressly designed with some stripe of "dynasty-busting" in mind. The levy's fatal defect, however, is that it was designed about a hundred years ago when the RAP reigned unquestioned everywhere. Under those conditions, the estate tax and the RAP delivered an effective one-two punch to potential dynastic wealth. The estate tax took a decent bite out of the largest estates, and then the RAP ensured that the wealth would be dissipated across individual family members instead of maintained and grown in a separate legal entity that would effectively ennoble the settlor's bloodline forever.

Today, the death of the RAP and the rise of the DFT have rusted away the foundations of the estate tax's anti-dynastic role. This has given rise to the need for a new tax designed expressly and carefully to counteract the wealth concentration externality. How are we to measure, even crudely, the magnitude of negative externality caused by DFTs? The answer comes from the original anti-dynasty tool, the RAP, and that answer is *time*. Unless we abolish inheritance entirely, parents are going to leave wealth to their children and grandchildren, and so inequality gets transmitted across one or two generations. The RAP, in essence, prevented testators from dictating the use of their assets for generations beyond their grandchildren. The animating insight of the RAP is that too much dead hand control is socially undesirable, and that insight applies with equal force to the current RAP-less environment.

The RAP was a relatively crude, categorical rule, permitting control of inheritance for essentially two generations and then barring any further dead-hand control or planning. Taxes are much suppler than categorical rules, enabling us to specify an externality tax at least roughly calibrated to the harms emanating from the wealth concentration externality. As those harms are proportionate to the length of time over which wealth is locked up in a dynastic family, we need a tax with a rate that increases over time. Like most ideas, there is nothing original here. About a century ago an Italian economist, Eugenio Rignano, proposed an inheritance tax with rates that increased with the number of times that a given body of wealth passed to a

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succeeding generation.[48] Thus, when Amy's will bequeaths her wealth to her daughter Bette, the tax rate might be 2%, but when Bette leaves some or all of the same wealth to her daughter Carla, the tax rate would be higher than 2%, say 3% or 4%.

Rignano tied rates to the number of generations since a bequest was first made because generational gifts were the norm, e.g., "income in equal shares to all my children until the death of the last, then to all of my grandchildren."[49] As I have discussed in prior work,[50] however, evolutionary biology provides ample evidence that humans are programmed to maximize the status rather than the raw number of their descendants. Someone with the goal of maximizing the status of her bloodline rather than their raw number will not dole out her inheritance equally generation after generation. Such gifts are vestiges of an earlier age when laws (like the RAP in America or England; or the lack of trusts in most European nations) or technology made more nuanced inheritance strategies impossible or infeasible. With the RAP swept away, along with robust and favorable trust laws and deep capital markets, biology forecasts that today's billionaires driven by the status-seeking gene will establish trusts that treat their descendants highly unequally both within generations and across generations. As adverted to earlier,[51] the rational status-maximizing strategy is to heavily fund those descendants most likely to achieve high status, and fund others little if at all when it becomes unlikely that they achieve such status.

This development will unlink inheritances from their longstanding tie to generational time spans. A DFT established to maximize long-term bloodline status might distribute relatively few benefits for a couple of generations that happen to consist of status underachievers, then fund a large class of great

[48] EUGENIO RIGNANO, THE SOCIAL SIGNIFICANCE OF THE INHERITANCE TAX 99–111 (William J. Shultz trans.) (1924). Rignano in turn may have relied on the earlier work of a French economist, Ernest Solvay. *See* GUIDO ERREYGERS, VIEWS ON INHERITANCE IN THE HISTORY OF ECONOMIC THOUGHT, IS INHERITANCE LEGITIMATE? ETHICAL AND ECONOMIC ASPECTS OF WEALTH TRANSFERS 36–42 (Guido Erreygers & Toon Vandevelde eds., 1997).

[49] RIGANANO, *supra* note 48.

[50] *See* Kades, *supra* note 16, at 24–25.

[51] Kades, *supra* note 16.

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prospects in the next generation, then a few in the generation after that, and so on.

I note in passing that this phenomenon will wreak havoc with the current generation-skipping transfer tax, which assumes that testamentary trusts will distribute benefits on the traditional generation-defined timeline.[52] For our purposes, the more important point is that DFT settlors optimally investing in potential status are pursuing a strategy independent of generational periods. This means that the wealth concentration externality is also untethered from generational shifts. The anti-social project upon which we wish to impose an externality tax is purely a function of time, like income or capital gains, and hence we should tax it on the pure passage of time, just as we do all income and capital gains. The estate tax, by definition focused on the once-a-generation event of death, is simply incongruent with the current environment of no RAP, the rise of the DFT, and dynasts' continuous focus on maximizing status.

To track the increasing harm of wealth concentration externalities, then, the annual tax on a given bloodline's single DFT should rise annually. The rate imposed during the first two generations might be relatively low, reflecting the implicit judgment behind the RAP that it is not particularly anti-social to make gifts to children and grandchildren whom settlors usually know and for whom they have great personal affection.

As we reach more remote generations, however, narratives of gifts to known and beloved individuals fall by the wayside. By the fourth or fifth generation, such motivations give way entirely to the underlying project of a DFT: maximizing the overall social status of the settlor's progeny. That urge is consistent with feudalism but inconsistent with the values on which America was founded and that prevail in advanced modern democracies.

The key issue is the rate structure chosen to internalize the wealth concentration externality. There is no way to specify a single most efficient or most equitable schedule of annually increasing wealth tax rates to impose on DFTs. Providing trust income to children and grandchildren is not considered socially pernicious and so the externality tax on the DFT principle might be very low, on the order of 0.5%, for the first fifty years of the trust—under the assumption that a generation on average is about twenty-five years.

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[52] The Generation Skipping Tax is in I.R.C. §§ 2601–2663.

After fifty years, as the socially acceptable segment of the (perpetual) trust fades away, the rate should increase steadily. It might, for example, jump to 1% in year fifty-one of the DFT and rise thereafter by 0.25% a year. In order to mathematically guarantee that the tax eventually curbs the ever-increasing wealth concentration externality imposed by the DFT, the tax rate must exceed typical rates of return on assets. For wealthy investors, who seem to earn higher returns than others, the relevant rate of return is something like 6–7% per year.[53] Thus the externality tax should reach at least 7–8% after a sufficient number of years. Given the assumption that wealth concentration externalities impose social costs that keep rising over time, it is not unreasonable to choose an even higher maximal rate.

No one without wealth in hundreds of millions or billions of dollars has any realistic hope of founding a family dynasty. This practicality suggests that there may be no need to exempt DFTs below a certain level from the tax. Further, as a matter of setting norms against dynasticism and exploiting the expressive power of the law, it makes sense to apply the externality tax to any and all DFTs, even those with principal well short of the towering level needed to have any chance of funding family status forever.

As discussed earlier,[54] the intended effect of such an externality tax, calibrated to some underlying harm caused by the taxpayer's behavior, is to modify much though not all such behavior. Those with the most powerful dynastic urges will proceed in the teeth of the tax. Though doomed to fall short of any dreams of eternally funding family status, given tax rates scheduled to exceed returns in a few generations, they would have to place a relatively high value on maximizing status for perhaps 100–150 years. Society would enjoy substantial tax income from their DFTs in the later years of the trust's existence. Those without the stomach for the externality tax will modify their behavior, decline to establish a DFT, and pursue some more traditional testamentary plan.

IV. The Good Old Estate Tax

Would-be dynasts deflected by the externality tax would still be subject to the current estate tax—as would those who persevere with their dynastic

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[53] Thomas Piketty, Capital in the Twenty-First Century 251 (Arthur Goldhammer trans. 2017) (2014).

[54] *See supra* Part III(B).

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plans. The wealth concentration externality tax is in no way a substitute for the estate tax. Although there is some overlap, they serve largely different purposes. The externality tax, like any externality tax, forces those imposing external costs on others to either pay the bill (internalize the externality) or cease and desist their harm-emitting activity. Although there is some debate over the purpose(s) of the current estate tax, this Article proceeds on the assumption that it serves multiple goals. First, it does have modest overlap with the externality tax in making dynastic wannabes pay a significant sum up front for the wealth concentration externalities they will impose over ensuing years. Second, although not currently a significant source of federal revenue, it does raise non-trivial sums in a highly equitable and likely efficient manner. Finally, at some margins, it creates incentives for wealthy testators to divert some of their wealth from family members and instead make charitable donations.

V. Conclusion

Extreme inequality is a cancer that slowly but surely gnaws away at the foundations of egalitarian democracy. For centuries the RAP served as powerful "chemotherapy" that pressed a sort of once-per-generation reset button that prevented this malignancy from spanning unbounded generations via feudal inheritance devices like the fee tail. To supplement this longer-term medicine in the wake of the huge fortunes accumulated during the Gilded Age, the federal government instituted the estate tax in 1916.[55] For the last century, the one-two punch of the RAP and the estate tax kept inequality below harmful levels. The estate tax trimmed away at immense wealth during the lifetime of those who amassed such fortunes, and the RAP severely limited the ability of wealth malignancies to spread into future generations without bounds. With the irreversible demise of the RAP and the continuing cloaked and lavishly funded campaign to eradicate the estate tax, inequality cancer threatens to metastasize and dissipate democracy and equal opportunity. This Article offers two new drugs to tame the burgeoning malignancy of dynastic family wealth. The wealth concentration externality tax with rates increasing concomitantly with the age of dynastic trusts, though radically different in means, serves the same ends as the RAP. It does not bar perpetual dynastic family trusts but makes them unappealing to all

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[55] Revenue Act of 1916, Pub. L. No. 64-271, 39 Stat. 756, 777.

but the most determined of dynasts (who will have to pay hefty sums into the public fisc). Limiting families to a single perpetual trust is a crucial adjuvant for this new tax, preventing families from using a proliferation of trusts as a formalism to defeat the substantive goals of the wealth concentration externality tax.

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