

2019

# Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)

Eric Kades

*William & Mary Law School*, [eakade@wm.edu](mailto:eakade@wm.edu)

# OF PIKETTY AND PERPETUITIES: DYNASTIC WEALTH IN THE TWENTY- FIRST CENTURY (AND BEYOND)

ERIC KADES

INTRODUCTION .....	146
I. FACTUAL AND THEORETICAL PREDICATES .....	152
<i>A. The Root of the Problem: Extreme and Worsening Wealth Inequality</i> .....	152
<i>B. Inherited Wealth Making a Comeback</i> .....	157
<i>C. Piketty’s Framework: Understanding Wealth (Capital) and Inheritance in the     Twenty-First Century (<math>r &gt; g</math> Writ Large)</i> .....	160
II. LEGAL CHANGE ENABLING PERPETUAL FAMILY (DYNASTIC) TRUSTS .....	174
<i>A. Dynasties Rising I: The Demise of the Rule Against Perpetuities</i> .....	175
<i>B. Dynasties Rising II: The Fading Estate Tax</i> .....	179
III. THE REAL POSSIBILITY OF DYNASTIC WEALTH: PIKETTY’S “NEW MATH” FOR DYNASTIC WEALTH ( $r > g$ WRIT SMALL) .....	184
IV. POLICY JUSTIFICATIONS FOR REGULATING DEAD-HAND CONTROL .....	188
<i>A. Crumbling Foundations of Traditional Arguments Against Dead-Hand Control</i> .....	189
<i>B. The Political Economy Case Against Dynastic Wealth</i> .....	191
<i>C. The True Costs of Perpetuities: Economic Harms Resulting from the Dead-Hand     Control of the Savings Rate</i> .....	193
1. The Paradox of Thrift .....	193
2. Reduction in Long-Term Rate of Consumption .....	197
3. In Praise of Dissipation .....	199
V. TAXES ON PERPETUITIES (TOPs) INSTEAD OF A <i>RULE AGAINST</i> PERPETUITIES (RAP) .....	203
<i>A. Why Taxation Instead of Required Expenditures?</i> .....	205
<i>B. Taxing Dynastic Trust Savings in Excess of the Golden Rule Level</i> .....	207
<i>C. Taxing Dynastic Trusts to Address the Paradox of Thrift</i> .....	208
<i>D. Fostering the Dissipation of Dynastic Wealth</i> .....	210
<i>E. And What of Large Estates Not Bequeathed via Dynasty Trusts?</i> .....	211
CONCLUSION .....	212
APPENDIX A: SCENARIO IN WHICH THE SAVING RATE EXCEEDS THE “GOLDEN RULE” LEVEL .....	215

# OF PIKETTY AND PERPETUITIES: DYNASTIC WEALTH IN THE TWENTY- FIRST CENTURY (AND BEYOND)

ERIC KADES\*

**Abstract:** For the first time since independence, in a nation founded in large part on the rejection of a fixed nobility determined by birth and perpetuated by inheritance, America is paving the way for the creation of dynastic family wealth. Abolition of the Rule Against Perpetuities in over half the states along with sharp reductions in, and likely elimination of, the federal estate tax mean that there soon will be no obstacles to creating large pools of dynastic wealth insuring lavish incomes to heirs for generations without end. The timing of these legal changes could hardly be worse. Marshaling innovative economic data extending back centuries, Thomas Piketty has shown that the relatively egalitarian incomes enjoyed in developed economies from the end of World War II until around 1980 were an aberration and that we are in the process of returning to the historical norm of much greater income and wealth inequality. This Article shows, unhappily, that this revival of unending inherited wealth is of even greater concern than previously thought. In doing so, this Article makes three significant contributions to the growing literature on income inequality and its devastating effects. First, this Article reveals the importance of Piketty’s work to the law of inheritance, and in particular, it extends his “macro” economic insights to the “micro” level of families and the potential role for newly-legitimated perpetual trusts to instantiate a nobility consisting of a relatively small group of families forever privileged by ever-expanding inherited wealth. Second, this Article identifies three devastating consequences of perpetuities, consequences that more than justify rules restricting perpetuities. Finally, this Article reconceptualizes the harms resulting from perpetuities and proposes innovative normative solutions carefully calibrated to ameliorate those harms.

## INTRODUCTION

Although confusing to generations of first-year law students, the Rule Against Perpetuities (“RAP”) is considered one of the great victories of

---

© 2019, Eric Kades. All rights reserved.

\* Thomas Jefferson Professor of Law, William & Mary Law School. Thanks to Nancy Combs, Greg Alexander, Bob Ellickson, Adam Hirsch, Jim Krier, Robert Sitkoff, Josh Tate, and Lawrence Waggoner for helpful comments.

modernity over feudalism. According to the stock narrative, reforming British judges prevented the landed aristocracy from imposing conditions on inheritances that would ensure bloodline ownership of estates and other wealth in perpetuity.<sup>1</sup> The RAP migrated to Britain's North American colonies, and for centuries steadfastly blocked efforts to create dynastic wealth in this country.<sup>2</sup> Recently, however, in a doctrinal revolution that shocked legal scholars and practitioners, the RAP has essentially disappeared.<sup>3</sup> Over half the states now permit decedents to create so-called "dynastic trusts" that control the disposition of their wealth not just for one or two generations, but rather for hundreds<sup>4</sup> or thousands of years<sup>5</sup>—or forever.<sup>6</sup> Because testators can create trusts ruled by the jurisdiction of their choosing,<sup>7</sup> any wealthy American can now set up a multi-million dollar dynasty trust ensuring that forever her progeny and only her progeny shall enjoy the income generated by her bequeathed wealth.

Whereas the birth of the RAP was driven by public-spirited concern about economic efficiency and the plight of the underclass, its death shared

<sup>1</sup> JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* §§ 140–170 (Little, Brown, & Company, 3d ed. 1915).

<sup>2</sup> *Id.* at § 200 (highlighting how the RAP doctrine that was adopted in the United States of America was the same as the one in the English colonies).

<sup>3</sup> See generally HOWARD M. ZARITSKY, *AM. COLL. OF TR. & EST. COUNSEL, THE RULE AGAINST PERPETUITIES: A SURVEY OF STATE (AND D.C.) LAW* (2012), [http://www.actec.org/assets/1/6/Zaritsky\\_RAP\\_Survey.pdf](http://www.actec.org/assets/1/6/Zaritsky_RAP_Survey.pdf) [<https://perma.cc/H2HK-LPPV>] (documenting how the RESTATEMENT (SECOND) OF PROP. (AM. LAW INST. 1979) initiated the movement to significantly weaken or eliminate the RAP).

<sup>4</sup> See ALA. CODE § 35-4A-2 (2014) (stating that a transferor's property distribution plan can last for 100 years for property not in trust); *id.* § 35-4A-5 (stating that a transferor's property distribution plan can last for 360 years for property in trust); ARIZ. REV. STAT. § 14-2901(A)(2) (2012) (stating that a trust can vest up to 500 years after its creation); FLA. STAT. § 689.225(2) (1994 & 2012 Supp.) (stating that a trust created after December 2000 can vest within 360 years of its creation); NEV. REV. STAT. § 111.103(1)(b) (2015) (stating that a nonvested property interest can vest within 365 years after it is created); TENN. CODE § 66-1-202(f) (2015) (stating that trusts can vest within 360 years, an alternative to common law RAP); REV. CODE WASH. § 11.98.130 (2018) (stating that trusts are valid for 150 years).

<sup>5</sup> ALASKA STAT. § 34.27.051 (2016) (setting the limit at 1,000 years); COLO. REV. STAT. § 15-1102.5(1)(b)(III) (2016) (setting the limit for post-May 31, 2011 trusts at 1,000 years); UTAH CODE ANN. § 75-2-1203(1) (LexisNexis 2018) (setting the limit at 1,000 years); WYO. STAT. ANN. § 34-1-139 (2017) (same).

<sup>6</sup> IDAHO CODE § 55-111 (2012) (allowing perpetual trusts); KY. REV. STAT. § 381.224 (2016) (same); MICH. COMP. LAWS § 554.91–94. (declaring that there is no RAP for personal property held in trust); N.J. STAT. ANN. § 46:2F-9 (West 2014) (declaring there is no RAP in New Jersey); OHIO REV. CODE § 2131.09(B)(2) (conveying that there is no RAP if trustee has full powers of alienation); 20 PA. CON. STAT. § 6107.1(b) (2016) (declaring that no RAP will apply after December 31, 2006); R.I. GEN. LAWS § 34-11-38 (2011) (declaring no RAP in Rhode Island); S.D. CODIFIED LAWS § 43-5-8 (2004) (same in South Dakota); WIS. STAT. § 700.16 (2014) (declaring no RAP if trustee has power of alienation).

<sup>7</sup> See *infra* note 159 and accompanying text.

none of that noble spirit, and instead was driven by greed.<sup>8</sup> Specifically, bank trust departments employing clever lawyers and effective lobbyists convinced legislatures in state after state to erase the venerable RAP for no better reason than to aid them in competing for wealthy people's trust business.<sup>9</sup> Despite this seemingly perverse "race to the bottom" in state legislation,<sup>10</sup> few outside of legal academia mourned the RAP's passing.

This Article shows that we should mourn RAP's death. Indeed, from a perspective of sound social policy, the timing of the RAP's disappearance could scarcely be worse. In a paradigm-shifting opus, improbable for a technical 500-page economics tomb, Thomas Piketty's best-selling *Capital in the Twenty-First Century* forcefully demonstrates that we are returning to a world in which inherited wealth will outweigh earnings, and where income inequality will become even more pronounced than it is today.<sup>11</sup> Piketty's insights will be explained as they are relevant in the pages below, but the core of Piketty's case for the growing power of inherited wealth is his now-famous empirically validated inequality, " $r > g$ ," which signifies that the rate of return on wealth ( $r$ ) exceeds the rate of growth of national income ( $g$ ). Piketty compellingly shows that in a world driven by  $r > g$ , those receiving large inheritances each generation can enjoy part of their return as income, reinvest the remainder, and pass on ever-growing pools of wealth that bestow upon their progeny rentier incomes outpacing the labor

---

<sup>8</sup> See Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 373–76 (2005) (discussing how lawyers would advise their clients who lived in states where the RAP was valid to open trusts and designate trustees in states that had already abolished the RAP in order to circumvent the RAP limitations). This loophole caused banking institutions in states where the RAP was present to push for its abolition in order for them to stay competitive. *Id.* at 374.

<sup>9</sup> *Id.* at 374.

<sup>10</sup> In the context of state law, "race to the bottom" refers generally to inter-state competitions to attract some activity with more and more favorable provisions for narrow interests at the cost of the general welfare. In the legal literature, the term was popularized by William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 YALE L.J. 663, 665–66 (1974). Cary argued that states competed with each other to attract incorporation business by enacting corporate law provisions more and more favorable to managers and officers, at the expense of shareholders. *Id.* Cary's use of the term appears to come from a Justice Brandeis dissent in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 558–59 (1933) (Brandeis, J., dissenting) ("Companies were early formed to provide charters for corporations in states where the cost was lowest and the law least restrictive. The states joined in advertising their wares. The race was not one of diligence but of laxity."). Legal scholars have discussed races to the bottom in other contexts. See generally Alvin Klevorick, *The Race to the Bottom in a Federal System: Lessons from the World of Trade Policy*, 14 YALE J. REG. 177 (1996); Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

<sup>11</sup> See THOMAS PIKETTY, *CAPITAL IN THE TWENTY-FIRST CENTURY* 1 (Arthur Goldhammer trans., Harv. Univ. Press 2014) (arguing that this deepening inequality will undermine the meritocratic values of democratic societies).

incomes of those who chose their parents unwisely and possess little or no wealth.<sup>12</sup> This is nothing less than a prescription for a return to Europe's Belle Époque or America's Gilded Age, the era in the late nineteenth and early twentieth centuries defined by large pools of inherited wealth.<sup>13</sup>

This Article makes three significant contributions to the growing literature on income inequality and its devastating effects. First, it reveals the importance of Piketty's work to the law of inheritance in general and perpetuities in particular. Scholars have failed to fully appreciate the compelling implications of Piketty's theory for inheritance law.<sup>14</sup> This Article identifies those implications and, more importantly, extends his "macro" insight about the implications of  $r > g$  to the "micro" level of families and the potential role for newly-legitimated perpetual trusts to instantiate a nobility consisting of a relatively small group of families *forever* privileged by ever-expanding inherited wealth.<sup>15</sup> Many commentators have dismissed fears about perpetual trusts and dynastic family wealth, arguing that geometric expansion in the number of descendants would necessarily dilute dynastic wealth after a few generations.<sup>16</sup> Building on Piketty's model, I demonstrate that their optimism is misplaced.<sup>17</sup> Wealthy families, like most American families, are having fewer children.<sup>18</sup> Lower birth rates coupled with the size of the gap between  $r$  and  $g$  provide strong reason to fear the rise of a new aristocracy founded on inherited wealth.

This Article's second important contribution is to identify three devastating consequences of perpetuities, consequences that more than justify rules restricting perpetuities. Commentators have attempted to defend the RAP in the past, but RAP opponents have subjected those defenses to with-

<sup>12</sup> See PIKETTY, *supra* note 11, at 85–86.

<sup>13</sup> *Gilded Age*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Gilded-Age> [<https://perma.cc/3YMM-8ZA6>] (describing America's Gilded Age as a time of great wealth accumulation but simultaneously an era of "greedy industrialists and corrupt politicians"); *La Belle Époque: The Twilight of the Nineteenth Century*, MIAMI DADE COLLEGE, [https://www.mdc.edu/wolfson/academic/artsletters/art\\_philosophy/humanities/bellepoque.htm](https://www.mdc.edu/wolfson/academic/artsletters/art_philosophy/humanities/bellepoque.htm) [<https://perma.cc/VX9L-7C3K>].

<sup>14</sup> In one telling feature, his repeated and extended discussion of literary tales of wealth all revolve around pursuing brides who had received a large inheritance. See PIKETTY, *supra* note 11, at 104–06, 113–16, 407–22. More directly, he notes that it is possible to have high wealth without inheritances and implies that this would be benign. *Id.* at 384.

<sup>15</sup> See *infra* notes 190–221 and accompanying text.

<sup>16</sup> See generally, e.g., John V. Orth, *Escaping the Malthusian Trap: Dynasty Trusts for Serious Dynasts*, 17 GREEN BAG 2D 29, 31 (2013); William J. Turnier & Jeffrey L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX REV. 779, 789 (2009).

<sup>17</sup> See *infra* notes 190–221 and accompanying text.

<sup>18</sup> *More or Less*, THE ECONOMIST, Sept. 1, 2012, at 77 (explaining that rich people fall under the "k-selection" reproductive strategy where they have fewer offspring in order to provide each offspring with detailed care).

ering—and legitimate—criticism.<sup>19</sup> This Article shows that previous defenders missed the mark because they failed to identify three serious social costs of perpetuities.<sup>20</sup> First, I show that dynastic trusts are likely to lead to an excessively high economy-wide savings rate, which has detrimental long-term economic consequences.<sup>21</sup> Second, I show that because dynasty trusts are controlled by the dead hands of the past, they will be impervious to any and all policy levers that state officials employ to affect savings during recessions and other economic downturns.<sup>22</sup> This second insight powerfully reinvestigates the so-called “dead hand control” objection to perpetuities: Why on Earth (or any celestial object that might someday sustain a human economy) would we permit the wishes of the long dead to dictate savings decisions that are detrimental to contemporaneous economic stability and growth, and beyond the power of regulators to influence? Third, dynastic trusts restrict heirs from spending their inherited wealth, and thereby curtail a powerful mechanism for reducing economic inequality.<sup>23</sup>

Perpetuities, then, pose multiple real threats to future generations’ welfare. This Article, however, does not advocate reinstating the RAP. The RAP is an absolutist and blunt instrument that is too inflexible to adequately address the negative consequences of perpetuities that I identified. Rather, the Article’s third significant contribution is that it re-conceptualizes the harms resulting from perpetuities and proposes an innovative normative solution carefully calibrated to ameliorate those harms. Specifically, the Article re-conceptualizes extended dead-hand control of wealth as the source of externalities that impose costs on future generations.<sup>24</sup> This Article then advocates employing the first and best tool for combatting negative externalities: taxes calibrated to the harm caused by each external cost. An externality tax prices out of the practice those who are unwilling or unable to cover the social costs of their desired perpetuities, and it efficiently permits those who value long-term dead-hand control above its costs to enjoy its benefits—after fattening the public treasury with payments equal to the societal harms imposed.

The Article proceeds as follows. Part I brings readers up to speed on factual and theoretical predicates necessary to understand the law and policy of perpetuities.<sup>25</sup> Section A demonstrates the extent of wealth inequality

---

<sup>19</sup> See *infra* notes 240–294 and accompanying text.

<sup>20</sup> See *infra* notes 240–294 and accompanying text.

<sup>21</sup> See *infra* notes 190–221 and accompanying text.

<sup>22</sup> See *infra* notes 222–294 and accompanying text.

<sup>23</sup> See *infra* notes 240–294 and accompanying text.

<sup>24</sup> See *infra* notes 240–294 and accompanying text.

<sup>25</sup> See *infra* notes 38–132 and accompanying text.

over the long run of history and shows that after brief improvement in the twentieth century, wealth inequality is currently rising from atypically low levels towards higher, historically typical levels.<sup>26</sup> Section B then documents one of the most important implications of growing wealth inequality today: the increasing role that inherited wealth will play in determining socioeconomic status for the remainder of this century and beyond.<sup>27</sup> Section C examines these facts under the lens of Piketty's theoretical framework to provide a deeper understanding of how inherited wealth is coming to play a dominant role in the distribution of wealth and income.<sup>28</sup> Together this material provides a basic picture of the mounting importance of inheritance in American economic life as the twenty-first century unfolds.

Part II turns to recent legal developments that, for the first time since the Middle Ages, have enabled wealth owners to create perpetual "dynastic" trusts.<sup>29</sup> Section A documents and describes the virtual disappearance of the Rule Against Perpetuities.<sup>30</sup> Section B describes the long, expensive campaign being waged by a small group of wealthy families to abolish the Estate Tax, the progress that they have made, and the likelihood that they soon will succeed.<sup>31</sup>

Part III refutes the contentions of scholars who assert that the ever-expanding number of descendants will dilute dynastic wealth and reduce the threat posed by perpetual trusts.<sup>32</sup> In particular, Part III draws on additional theoretical work to elucidate incentives to create perpetuities. More importantly, Part III employs basic accounting techniques to show that it is indeed quite possible that dynasty trusts can fund relatively high consumption for a growing group of descendants indefinitely.

Parts I through III provide the first-ever explanation for why the economic impact of inheritances is on the rise, how recent legal innovation has paved the way for perpetual trusts, why people might create such trusts, and how the simple fact of  $r > g$  makes perpetual family trusts financial viable for indefinite stretches of time.<sup>33</sup>

Part IV takes a normative turn.<sup>34</sup> Section A summarizes the existing scholarly literature and concludes that that the arguments advanced heretofore for limiting perpetuities have justifiably been subject to serious cri-

---

<sup>26</sup> See *infra* notes 38–62 and accompanying text.

<sup>27</sup> See *infra* notes 63–77 and accompanying text.

<sup>28</sup> See *infra* notes 78–132 and accompanying text.

<sup>29</sup> See *infra* notes 133–189 and accompanying text.

<sup>30</sup> See *infra* notes 133–165 and accompanying text.

<sup>31</sup> See *infra* notes 166–189 and accompanying text.

<sup>32</sup> See *infra* notes 190–221 and accompanying text.

<sup>33</sup> See *infra* notes 38–221 and accompanying text.

<sup>34</sup> See *infra* notes 222–294 and accompanying text.



tiques.<sup>35</sup> Section B identifies three previously overlooked, highly negative consequences of perpetuities that more than justify their limitation.<sup>36</sup> Excessively high savings rates by dynastic trusts will both exacerbate recessions in the shorter term and potentially reduce social consumption levels in the longer term. Locking up wealth in untouchable dynastic trusts will prevent heirs from dissipating concentrated wealth in ways that promote economic equality and socioeconomic mobility.

Part V advances the Article's primary normative proposal.<sup>37</sup> It rejects reinstatement of the RAP because it asserts that policymakers can manage the costs imposed by perpetuities more effectively with taxes than with the RAP's outright ban. Because perpetuities are best understood as imposing external costs on future generations, then taxation is the preferred method for managing such negative externalities. Finally, Part V specifically demonstrates that an annual tax on capital is preferable to the once-a-generation estate tax to ameliorate the inequitable facets of wealth transmission.

## I. FACTUAL AND THEORETICAL PREDICATES

### A. *The Root of the Problem: Extreme and Worsening Wealth Inequality*

This Section sets the stage by detailing the relationship between wealth inequality and income inequality and charting their dual upward trajectory. Although the academy and the popular press have focused largely on *income* inequality, thanks to Thomas Piketty, we now know that wealth inequality driven by large inheritances is the much greater concern.<sup>38</sup>

We begin with an ironclad rule of economic history: wealth is always distributed more unequally than income.<sup>39</sup> Although inevitably thin, what data we have from the Middle Ages suggests that wealth inequality was more than twice as high as income inequality.<sup>40</sup> Using a different metric,

<sup>35</sup> See *infra* notes 222–232 and accompanying text.

<sup>36</sup> See *infra* notes 233–239 and accompanying text.

<sup>37</sup> See *infra* notes 295–341 and accompanying text.

<sup>38</sup> For an overview of the literature on income inequality, see generally CONG. BUDGET OFFICE, TRENDS IN THE DISTRIBUTION OF HOUSEHOLD INCOME BETWEEN 1979 AND 2007 (2011), <https://www.cbo.gov/sites/default/files/112th-congress-2011-2012/reports/10-25-householdincome0.pdf> [<https://perma.cc/WV23-PQGL>]; Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1 (2003); Joseph E. Stiglitz, *The Origins of Inequality, and Policies to Contain It*, 68 NAT'L TAX J. 425 (2015).

<sup>39</sup> See, e.g., Catherine Rampell, *Inequality Is Most Extreme in Wealth, Not Income*, N.Y. TIMES: ECONOMIX BLOG (Mar. 30, 2011), <https://economix.blogs.nytimes.com/2011/03/30/inequality-is-most-extreme-in-wealth-not-income/> [<https://perma.cc/FUN8-FDA7>].

<sup>40</sup> Compare Bruce M.S. Campbell, *Benchmarking Medieval Economic Development: England, Wales, Scotland, and Ireland, c.1290*, 61 ECON. HIST. REV. 896, 940 (2008) (noting a Gini Index for income inequality of about 0.31 for United Kingdom around 1300), with Nathan Suss-

Piketty notes the extremely high fraction of total national wealth owned by those at the top of the income distribution in Europe around 1900: the top 10% owned 80–90% of all wealth, and the top 1% owned from 50–60%.<sup>41</sup> This was more than twice as high as the share of total income accruing to these elites.<sup>42</sup> Generalizing, Piketty states that “we . . . find the same extremely high concentration of wealth—with 80–90% of capital owned by the top decile and between 50–60% by the top percentile—in most societies prior to the nineteenth century, and in particular in traditional agrarian societies in the modern era, as well as in the Middle Ages and antiquity.”<sup>43</sup>

Although neither contemporary wealth nor income inequality has returned to these historically high levels, both are on the rise.<sup>44</sup> Moreover, wealth inequality continues to obey the iron rule of exceeding income inequality. The following table summarizes the essential facts for the U.S. over the last thirty years.<sup>45</sup>

---

man, *Income Inequality in Paris in the Heyday of the Commercial Revolution 3* (Feb. 2006) (unpublished manuscript), [http://degit.sam.sdu.dk/papers/degit\\_11/C011\\_043.pdf](http://degit.sam.sdu.dk/papers/degit_11/C011_043.pdf) [<https://perma.cc/2H2R-WXEC>] (noting that the wealth Gini for the U.K. at roughly same time was 0.7). The Gini Index measures inequality in the distribution of some quantitative good on a scale from zero to one, with zero indicating complete equality (every individual has an equal amount of the good) and one indicating complete inequality (one individual owns all of the good; everyone else has none). See *Who, What, Why: What Is the Gini Coefficient?*, BBC (Mar. 12, 2015), <https://www.bbc.com/news/blogs-magazine-monitor-31847943> [<https://perma.cc/68TE-PP2V>] (explaining the history of the Gini coefficient and how it measures income inequality).

<sup>41</sup> PIKETTY, *supra* note 11, at 339–43.

<sup>42</sup> *Compare id.* at 345 fig.10.3 (providing data on wealth inequality), *with id.* at 327 fig.9.9 (providing data on income inequality).

<sup>43</sup> *Id.* at 345.

<sup>44</sup> Eric Levitz, *Inequality Is Rising Across the Globe—and Skyrocketing in the U.S.*, NEW YORK (Dec. 15, 2017), <http://nymag.com/intelligencer/2017/12/inequality-is-rising-globally-and-soaring-in-the-u-s.html> [<https://perma.cc/ET4T-RWGQ>] (showing alarming statistics about the growing inequality in income and wealth and the role of policymakers in this deepening divide).

<sup>45</sup> Author’s calculations based on BD. OF GOVERNORS OF THE FED. RESERVE SYS., *SURVEY OF CONSUMER FINANCES* (2016) (on file with author). All Tables and Figures are also available at <https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/60-1/kades-graphics.pdf> [<https://perma.cc/DH7R-VEQQ>].

Table 1: Evolution of Top Shares of Wealth and Income in the U.S., 1989–2016

United States	Share of National Wealth		Share of National Income	
	Top 10%	Top 1%	Top 10%	Top 1%
1989	67.2%	30.0%	42.3%	17.0%
2016	77.1%	38.6%	49.9%	23.4%

Note that wealth inequality is substantially higher than income inequality. By 2016, for example, the top 10% held an astonishing 77.1% of the nation's private wealth, dwarfing their still impressive 42.3% of national income. Perhaps even more flabbergasting, the top 1% held almost 39% of national wealth by 2016, compared to “only” about 23% of national income. Other metrics, such as Gini Indices, buttress the case that the iron rule continues to apply: wealth inequality exceeds income inequality by a considerable margin.<sup>46</sup> Finally, the data in this table demonstrate that wealth (and income) inequality have been trending upward considerably over the last few decades. During the years in question, the share of wealth held by the top 1% of wealthholders jumped by over eight percent from 30.0% to 38.6%.

Although we have seen two ways to measure wealth inequality, shares held by the top percentiles and Gini Indices, there are a number of other measures.<sup>47</sup> One particularly illuminating measure that lies at the core of both traditional economic models and Piketty's work is the ratio of capital (wealth) to income (denoted K/Y, K for capital, Y for income).<sup>48</sup> If wealth were distributed according to income, this metric would be of little use. In that case, income generated from wealth would be proportional to income generated from labor and thus, at least on a percent basis, the distribution of wealth would not increase inequality. Given the tremendous wealth inequality documented in the previous paragraph, however, we know that the income generated by wealth will in turn increase income inequality.

The K/Y ratio provides a very useful handle for assessing the relative economic advantage conferred by that top-heavy wealth. A high ratio means that wealth holdings are large relative to national income. This means those holding that wealth will command a large share of national income simply by

<sup>46</sup> For example, from 1983 to 2007, the Gini Coefficient for wealth increased from 0.80 to 0.83. Edward N. Wolff, *Recent Trends in Household Wealth in the United States: Rising Debt and the Middle-Class Squeeze—an Update to 2007* at 11 (Levy Econ. Inst. of Bard Coll., Working Paper No. 589, 2010), [http://www.levyinstitute.org/pubs/wp\\_589.pdf](http://www.levyinstitute.org/pubs/wp_589.pdf) [<https://perma.cc/L4WY-T3R6>]. During that same time period, the Gini Coefficient for income went from 0.48 to 0.57. *Id.*

<sup>47</sup> See generally FRANK A. COWELL, *MEASURING INEQUALITY* (3d ed. 2011) (providing a comprehensive but accessible survey of the various inequality metrics).

<sup>48</sup> PIKETTY, *supra* note 11, at 164–98.

virtue of their asset income, before adding in their labor income. There is a strong historical correlation between high inequality and high K/Y ratios.<sup>49</sup>

During Europe's Belle Époque (translated to "Beautiful Era"), from 1871 to the beginning of World War I in 1914, the K/Y ratio stood at 600% to 700%; that is, the capital stocks of France, Germany, and the U.K. were worth about six or seven years of national income.<sup>50</sup> Historically, this ratio is typical. The negative shocks to wealth from the two world wars and the Great Depression in the first half of the 1900s cut these K/Y ratios in half, down to 200 to 300%.<sup>51</sup> This K/Y ratio reduction coincided with very large reductions in wealth and income inequality.<sup>52</sup>

Since 1950, however, K/Y ratios have trended up considerably. By 2010, the ratio in a number of developed nations, including the United States, had reached 400 to 700%.<sup>53</sup> Over the decades since World War II, private wealth has slowly but surely reconstituted itself.<sup>54</sup> The economic weight of this growing pool of wealth (relative to income), concentrated as it is among the top centiles, is beginning to make itself felt and looks to become an ever-larger contributor to growing income inequality.

We conclude this Section by asking a simple but important question: why is wealth inequality so much greater than income inequality? We postpone one important answer, inheritances, until the following Section.<sup>55</sup> Consider two households that differ only in the labor incomes earned to explore how the wealthier household might end up with wealth that exceeded its proportionate share of income. Assume the wealthier household earned \$100,000, the other household earned \$50,000, both saved and invested 10% of income, and both earned a 5% return on their investments. Assuming those facts, the wealthier household would then enjoy investment in-

<sup>49</sup> PIKETTY, *supra* note 11, at 356.

<sup>50</sup> Thomas Piketty & Gabriel Zucman, *Capital Is Back: Wealth-Income Ratios in Rich Countries 1700–2010*, 129 Q.J. ECON. 1255, 1258 fig.II (2014) (depicting the ratios between private wealth and national income from 1870–2010); *La Belle Époque*, [http://www.angelsmyth.com/belle\\_epoque.html](http://www.angelsmyth.com/belle_epoque.html) [<https://perma.cc/R3ZT-ZDCW>] (highlighting an era of peace and prosperity both financially and socially in Europe from 1871–1914).

<sup>51</sup> Piketty & Zucman, *supra* note 50, at 1257–58.

<sup>52</sup> See PIKETTY, *supra* note 11, at 18–20, 139–41, 167–70; Carola Frydman & Raven Molloy, *The Compression of Top Income Inequality During the 1940s at 19–23* (Jan. 2011) (unpublished manuscript), [http://web.mit.edu/frydman/www/compression\\_0111.pdf](http://web.mit.edu/frydman/www/compression_0111.pdf) [<https://perma.cc/Y936-AJC4>] (focusing on wage inequality in the 1940s with an emphasis on top executive salaries). See generally WALTER SCHEIDEL, *THE GREAT LEVELER: VIOLENCE AND THE HISTORY OF INEQUALITY FROM THE STONE AGE TO THE TWENTY-FIRST CENTURY* 115–29 (2017) (highlighting the effects of war on the economy and the role of government regulation, inflation, and physical destruction on the distribution of income and wealth).

<sup>53</sup> Piketty & Zucman, *supra* note 50, at 1258 figs.I & II.

<sup>54</sup> *Id.* at 1255.

<sup>55</sup> See *infra* notes 63–77 and accompanying text.

come of \$500 and the less fortunate household \$250. The ratio between these two numbers is exactly the same as the ratio between their labor incomes, 2:1. Under the stated assumptions, wealth inequality will strictly mimic income inequality.

This simple example illustrates two important principles: disregarding inheritances (and other gifts), the only way for wealth to be distributed more unevenly than income is for the wealthy to either: (i) earn a higher rate of return on their investments, or (ii) save a larger proportion of their income (or both).

Although not conclusive, there is strong evidence that those investing larger sums earn higher returns. Given the lack of any systematic administrative or survey data, scholars perforce have examined eclectic evidence to shed light on the relationship between an investor's wealth and the rate of return on her investments. As a baseline, annual rates of return over the last few decades have averaged around 4%. The world's wealthiest individuals, however, enjoyed annual returns of 6–7%.<sup>56</sup> The three American universities with the largest endowments enjoyed annual returns of 10.2% on their assets from 1980–2010. Moreover, for American universities, there is strong positive correlation between endowments size and rate of return.<sup>57</sup> Piketty consequently concludes that “it is quite plausible to think that if the average return on capital is 4%, wealthier people might get as much as 6% or 7%, whereas less wealthy individuals might have to make do with as little as 2% or 3%.”<sup>58</sup> He hypothesizes that economies of scale and greater risk tolerance enable wealthier households to garner these significantly higher returns.

Whatever the explanation, markedly higher rates of return on savings play a central role in this Article, as will be discussed below, because they make perpetual trusts viable. Although an *extra* 2–3% in returns over one year sounds modest, it can make a huge difference over a generation (defined as twenty-five years). Based on the power of compound interest, \$100 dollars of wealth growing at 6.5% will be worth about \$483 after twenty-five years, while the same \$100 earning 4% grows to only \$266. Piketty summarizes how this magnifies the effects of  $r > g$ :

In view of the law of compound interest . . . [higher returns for wealth investors] can account for very rapid divergence, so that if there is nothing to counteract it, very large fortunes can attain extreme levels within a few decades. Thus unequal returns on capi-

---

<sup>56</sup> PIKETTY, *supra* note 11, at 525.

<sup>57</sup> *Id.* at 448 tbl.12.2.

<sup>58</sup> *Id.* at 431.

tal are a force for divergence that significantly amplifies and aggravates the effects of the inequality  $r > g$ .<sup>59</sup>

Not only do wealthy people earn higher rates of return on their wealth, they also put a greater proportion of their income into savings.<sup>60</sup> This might seem obvious, but as a theoretical matter it is not. If the primary purpose of saving was to set aside funds for hard times (for example, loss of job, or a large medical claim for the uninsured), then less wealthy households might well save at a higher rate. Similarly, if the primary purpose of saving is to fund retirement, we might expect everyone to save at the same *rate* so as to preserve the same level of income in retirement as they enjoyed during their working years.<sup>61</sup> Although there are other viable candidates, the most compelling explanation for savings rates that increase with income and reach very high levels at top incomes is the desire to leave bequests.<sup>62</sup> We now turn to that topic.

### *B. Inherited Wealth Making a Comeback*

Given the primacy of the bequest motive for explaining high savings rates among the wealthy, it is unsurprising that growing wealth is begetting growing inheritances and that growing wealth *inequality* is begetting growing inheritance inequality.<sup>63</sup> If everyone annuitized all of their wealth (or threw a ‘party to die for’ and blew all of their wealth before dying), inheritances would be zero and wealth inequality would differ little from income

<sup>59</sup> *Id.*

<sup>60</sup> See Karen E. Dynan et al., *Do the Rich Save More?*, 112 J. POL. ECON. 397, 438 (2004) (finding that there is a strong positive relationship between saving rates and lifetime income).

<sup>61</sup> See Franco Modigliani & Richard H. Brumberg, *Utility Analysis and the Consumption Function: An Interpretation of Cross-section Data*, in POST-KEYNESIAN ECONOMICS 388, 388–436 (Kenneth K. Kurihara ed., 1954) (discussing the famous “life-cycle” model of savings for the first time); see also Orazio P. Attanasio, *Consumption*, in 1 HANDBOOK OF MACROECONOMICS 741, 760–80 (John B. Taylor & Michael Woodford eds., 1999) (providing in-depth literature on the life cycle model that is used to study consumption behavior).

<sup>62</sup> See Dynan et al., *supra* note 60, at 435 (stating that the high savings rates for higher-income groups is fueled by a motive to bequest). Furthermore, “the very high saving rates of the top 1 percent or top 5 percent are difficult to explain any other way.” *Id.*; see also Marco Cagetti & Mariacristina De Nardi, *Wealth Inequality: Data and Models*, 12 MACROECONOMIC DYNAMICS 285, 307 (2008) (highlighting that saving in order to leave bequests is a driving force for higher income individuals); James B. Davies & Anthony Shorrocks, *Wealth & Economic Inequality*, in 1 HANDBOOK OF INCOME DISTRIBUTION 605, 621 (Anthony B. Atkinson & François Bourguignon eds., 1999) (arguing that “[i]ntentional bequest behaviour is likely to be required in order to explain the shape of the upper tail of the wealth distribution”).

<sup>63</sup> See *supra* Table 1 & note 45.

inequality.<sup>64</sup> Capital income would magnify inequalities during the large wealth-holder's life, but its dissipation would prevent it from passing on inequality and immobility to the next generation. That, of course, is not how it works. The evidence is clear: leaving bequests to descendants is a prime motivation for accumulating wealth.<sup>65</sup>

Inheritance inequality in the United States mirrors that of wealth inequality.<sup>66</sup> In general, only about 20% of American households will ever receive a significant inheritance or inter vivos gift.<sup>67</sup> Yet, households in the top 1% of incomes receive about 35% of all inheritance dollars and households in the top 10% receive about 73%.<sup>68</sup> The analogous percentages for wealth acquisition are 33.8% for households in the top 1% of income and 80.5% for households in the top 10% of incomes.<sup>69</sup> The largest inheritances generally are not dissipated in one generation.<sup>70</sup> For households in the top 1% of incomes great wealth can be transferred to multiple generations.<sup>71</sup>

Unfortunately, data on the historical evolution of inheritance flows in the United States is scarce, so at present we cannot put these current numbers into a longer-term context.<sup>72</sup> Over the long run, trends in income, wealth, and inheritance tend to be correlated across developed economies. For example, France has particularly strong historical data on inheritances due to a tax on bequests and gifts that the nation has imposed continuously since the eighteenth century.<sup>73</sup> In keeping with the idea that examining the ratio of wealth to national income (K/Y) is a useful way to assess the influ-

---

<sup>64</sup> WILLIAM F. SHARPE, INVESTMENTS 573 (3d ed. 1985) (stating that an annuity is "a contract in which an insurance company [or other financial intermediary] promises to pay a given amount each month to the purchaser, until the latter dies"). Annuitizing enables people to insure against outliving their wealth. *Id.*

<sup>65</sup> See Dynan et al., *supra* note 60, at 435.

<sup>66</sup> See EDWARD N. WOLFF, INHERITING WEALTH IN AMERICA: FUTURE BOOM OR BUST? 3–4 (2015) (describing the relationship between inheritance inequality and wealth inequality).

<sup>67</sup> *Id.* at 3.

<sup>68</sup> *Id.* at 4.

<sup>69</sup> See *supra* Table 1 & note 45.

<sup>70</sup> Stephen Mihm, Opinion, *The Children of the Rich Will Always Be with Us*, BLOOMBERG (July 10, 2018), <https://www.bloomberg.com/opinion/articles/2018-07-10/rich-kids-inheritances-will-last-many-generations> [<https://perma.cc/JDP6-6PZH>] (arguing that it would take four centuries for a wealthy family's wealth to dissipate to that of an average household).

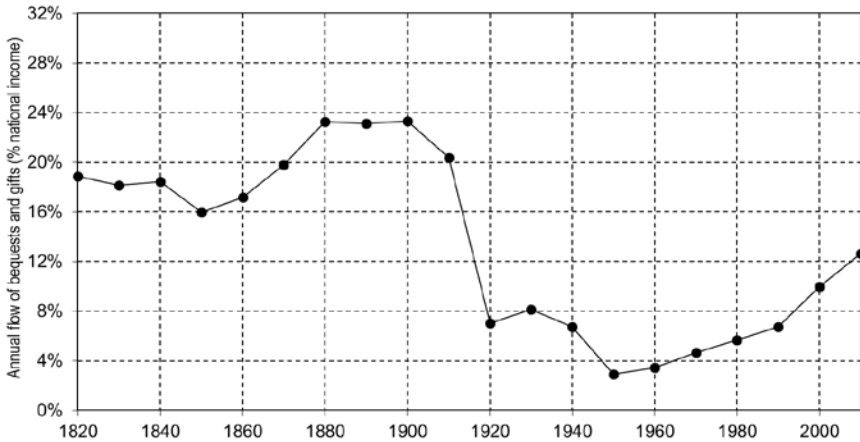
<sup>71</sup> Wolff, *supra* note 46, at 3 (arguing that wealth transfers for those in the top one percent of incomes form part of a dynasty).

<sup>72</sup> See Thomas Piketty & Gabriel Zucman, *Wealth and Inheritance in the Long Run*, in 2B HANDBOOK OF INCOME DISTRIBUTION 1303, 1341–42 (Anthony Atkinson & François Bourguignon eds. 2015) (describing a paucity of historical data on inheritance in the United States).

<sup>73</sup> Thomas Piketty, *On the Long-Run Evolution of Inheritance: France 1820–2050*, 126 Q.J. ECON. 1071, 1096 (2011) (illustrating the long run effects of wealth accumulation, growth, and inheritance on inequality).

ence of wealth, the following figure charts the inheritance each year as a fraction of national income in France from 1820 to 2010.<sup>74</sup>

Figure 1: Annual Inheritance Flow as a Fraction of National Income, France 1820–2010



Throughout the 1800s, inheritances each year amounted to anywhere from 15–25% of national income. This bespeaks an economic climate where inheritances matter. If inheritance dollars were spread evenly, then on average, generationally, bequests would add around 20% to everyone’s income. That is real money. Inheritances, however, are distributed unequally and thus the relatively high flow in the nineteenth century was a major factor driving economic inequality.

As Figure 1 illustrates, the serious dent that the world wars and the Great Depression inflicted on wealth took a large bite out of inheritances. Thus, Figure 1 shows that annual inheritances fell to around 4% of national income in France after World War II and remained below 7% through 1980. At a small fraction of their earlier peak level, inheritances were virtually irrelevant economically during France’s “Les Trente Glorieuses”—the “Glorious Thirty Years” from 1946–1975, when the economic condition of the French working and middle classes improved consistently and markedly.<sup>75</sup> As Figure 1 above shows, however, French inheritances since then

<sup>74</sup> Piketty & Zucman, *supra* note 72, at 1335 fig.15.17. Figure 1 in this Article is simplified from the original in Piketty & Zucman’s work, using only the estate data from that original figure. See also *supra* note 45.

<sup>75</sup> See generally JEAN FOURASTIÉ, *LES TRENTE GLORIEUSES, OU LA RÉVOLUTION INVISIBLE DE 1946 À 1975* [THE GLORIOUS THIRTY, OR THE INVISIBLE REVOLUTION FROM 1946 TO 1975] (1979). Other western European nations have similarly rosy monikers for the period of robust growth enjoyed during the recovery decades after World War II, such as “Wirtschaftswunder” (or



have been on the rise. The same is true for Britain, Germany, and other European nations.<sup>76</sup> One of Piketty's central conjectures is that inheritances are well on their way to reestablishing themselves as one of the most important forms of wealth transmission in all developed economies.<sup>77</sup> Given the highly unequal distribution of wealth, this necessarily implies greater wealth and income inequality.

*C. Piketty's Framework: Understanding Wealth (Capital) and Inheritance in the Twenty-First Century ( $r > g$  Writ Large)*

In a monumental achievement, economists (including Piketty) over the last thirty-odd years have assembled high quality data on a number of variables essential to understanding the evolution of inequality, which goes back to the early 1800s.<sup>78</sup> The figures presented below extend this long-term perspective back an order of magnitude further, over 2,000 years, in tracing Piketty's two key variables,  $r$  (the rate of return on capital) and  $g$  (the growth rate of the economy). This Section presents historical evidence for the inequality  $r > g$ , and explains both (i) why this inequality was 'temporarily suspended' during the 1900s, and (ii) why it is on its way to reasserting itself in the 2000s.<sup>79</sup> This Section then outlines the theory behind the effect of  $r > g$  on inequality over the long term.<sup>80</sup> Piketty's theoretical framework is essential for understanding why the legal changes analyzed in Part II likely will have such deleterious effect on the (mal)distribution of wealth and income.

---

"economic miracle") in Germany, and "Il Miracolo economico" (or "economic miracle") in Italy. See generally Barry Eichengreen & Albrecht Ritschl, *Understanding Western German Economic Growth in the 1950s* (London School of Econ., Working Papers No. 113/08, 2008), <http://www.lse.ac.uk/Economic-History/Assets/Documents/WorkingPapers/Economic-History/2008/WP113.pdf> [<https://perma.cc/265K-WJWA>] (describing the German Wirtschaftswunder); Giangiacomo Nardozzi, *The Italian "Economic Miracle"*, RIVISTA DI STORIA ECONOMICA, no. 2, 2003, at 139 (describing the Italian "Miracolo economico").

<sup>76</sup> PIKETTY, *supra* note 11, at 525.

<sup>77</sup> *Id.* at 398 (explaining that inheritances and gifts in the twenty-first century will be much higher than they were in the twentieth century).

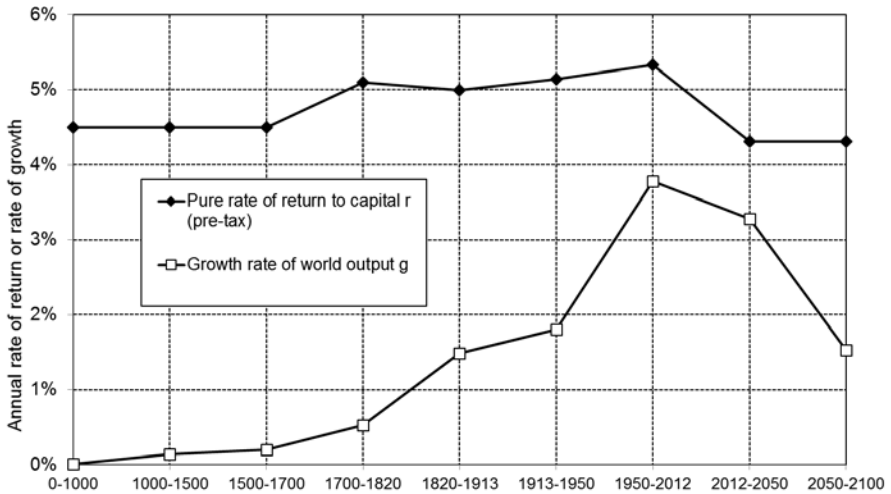
<sup>78</sup> See generally P.H. Lindert, *Three Centuries of Inequality in Britain and America*, in 1 HANDBOOK OF INCOME DISTRIBUTION 167 (Anthony B. Atkinson & François Bourguignon eds., 2000); Thomas Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913–1998*, 118 Q.J. ECON. 1 (2003); Piketty & Zucman, *supra* note 72; Anthony B. Atkinson, *Wealth and Inheritance in Britain from 1896 to the Present* (London School of Econ., Ctr. for Analysis of Social Exclusion, Working Paper No. CASE/178, 2013), [http://darp.lse.ac.uk/papersdb/Atkinson\\_\(JE118\).pdf](http://darp.lse.ac.uk/papersdb/Atkinson_(JE118).pdf) [<https://perma.cc/6T62-4AFL>].

<sup>79</sup> See *infra* notes 78–132 and accompanying text.

<sup>80</sup> See *infra* notes 114–132 and accompanying text.

The following figure shows the evolution of  $r$  and  $g$  over the last 2000 years, along with a forecast of their likely path for the remainder of the twenty-first century.<sup>81</sup> The rate of return here is before tax, and before capital losses (for example, it includes dividends paid on stocks, but not increases or decreases in the share price).

Figure 2: Rate of Return ( $r$ ) vs. Growth Rate ( $g$ ) at the World Level, from Antiquity Until 2100



The path of  $r$  (rate of return of capital) is simpler than that of  $g$  (growth rate of the economy), but it is remarkable in its own way because capital has, on average, yielded around a 4.5–5% return since the beginning of the first millennium. Land has been the primary form of capital for most of human history, and its approximate rental rate in agrarian societies across time and location has always been around 5%.<sup>82</sup> This same 5% rental rate appears time and again as the implied rate of return on fortunes in the nineteenth century novels of Jane Austen and Honoré de Balzac.<sup>83</sup> Given the enormous changes in economic life over the last 2017 years, this near-constancy is truly astonishing. We can state “ $r = 5\%$ ” as a third iron fact of economic history.<sup>84</sup>

<sup>81</sup> Piketty & Zucman, *supra* note 72, at 1357 fig.15.27.

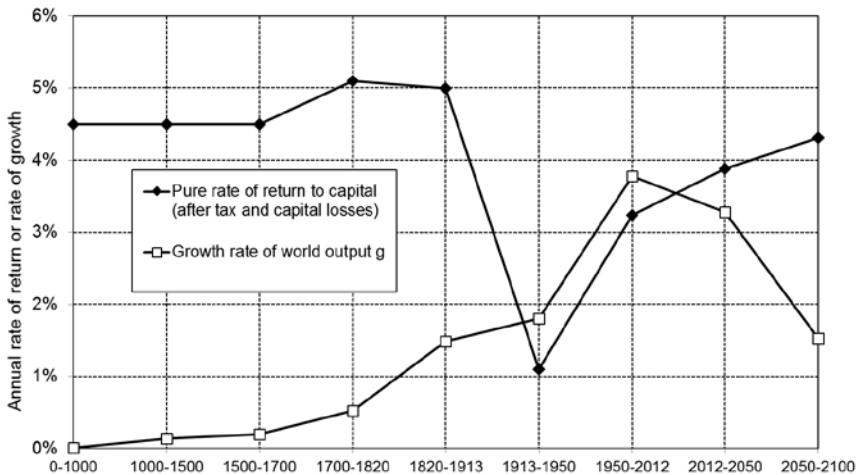
<sup>82</sup> PIKETTY, *supra* note 11, at 353. See also *supra* note 45.

<sup>83</sup> *Id.* at 53.

<sup>84</sup> See *supra* notes 56–58 and accompanying text. It is important to remember that this is an average of all rates of return. We have good evidence that larger fortunes yield above-average returns, and this fact exacerbates the tendency of  $r > g$  to concentrate wealth and widen inequality, as discussed above. See *supra* notes 56–58 and accompanying text.

For the purposes of studying owners' return on their wealth, the  $r$  depicted in Figure 2 above may be inflated for two reasons. First, governments tax capital income, though this is almost entirely a modern phenomenon.<sup>85</sup> Second, owners suffer reductions in wealth when the price of their assets fall ("capital losses"). The following figure adjusts  $r$  to reflect these two factors ( $g$  is unchanged from Figure 2).<sup>86</sup>

Figure 3: After-Tax, After-Gains/Losses Rate of Return ( $r$ ) vs. Growth Rate ( $g$ ) at the World Level, from Antiquity Until 2100



Note that  $r$  is unchanged up to 1913, reflecting the almost total absence of taxes on capital income and the lack of data on asset prices. The sharp drop in returns in Figure 3 as compared to Figure 2 reflects both the enactment of significant taxes on capital income and the sharp decline in most asset prices caused by the world wars and the Great Depression. Since then,  $r$  has rallied considerably and appears headed back up towards its historically typical level of 5%.

The evolution of  $g$  has been less static. One way of accounting for growth is national income increases come from either more workers (demographic growth) or greater output per worker (productivity growth).<sup>87</sup> Although we lack detailed population data for most of the last 2000 years, simple calculations suggest we should infer low demographic growth rates for

<sup>85</sup> See generally Jane G. Gravelle, *Capital Gains Taxes: An Overview* (Cong. Res. Serv., Rep. No. 96-769, 2018), <https://fas.org/sgp/crs/misc/96-769.pdf> [<https://perma.cc/T8W7-4FJR>] (providing an overview of capital taxation in the United States).

<sup>86</sup> Piketty & Zucman, *supra* note 72, at 1357 fig.15.28.

<sup>87</sup> See CHARLES I. JONES, INTRODUCTION TO ECONOMIC GROWTH 3–11 (2d ed. 2002).

most of that period. Recent estimates put the world's population as of the year 1 at anywhere from 213–300 million people.<sup>88</sup> The world's population as of 2015 was about 7.3 billion.<sup>89</sup> Using the low-end estimate of 213 million, a constant population growth rate of 1% since year 1 would imply an astronomical population of over 108 *quadrillion* people as of 2015.<sup>90</sup> Rather, from the statistics we have, we can infer that population grew at a rate well below one half of one percent a year until 1900. It peaked at an annual rate of just over 2% in the 1960s. It has since fallen considerably, to an annual rate of about 1.1%.<sup>91</sup>

Although more difficult to measure, both historically and contemporaneously, similar calculations show that productivity growth has also been quite low over the long run of history.<sup>92</sup> Productivity growth of even 1% a year would imply that over 2015 years *per capita* income would increase by a factor of almost 510 million.<sup>93</sup> We are certainly better off than our ancestors from two millennia past, but not that much better. Of course, productivity gains over the last couple of centuries have been higher, though not as high as many think. For the world's seven largest economies, for instance, productivity growth has fallen from 2.9% a year in the 1970s to only 1.4% from 2000–2012.<sup>94</sup> Economies playing catch-up in transitioning to modern industrial and service economies do experience bursts of high productivity gains, but these do not last. Korea, for example, enjoyed annual productivity gains of almost 8% a year in the late 1980s, but by 2012 the rate had fallen to 3.4%.<sup>95</sup>

The historical record suggests that income growth was well below 1% for most of the last 2000 years until both population and productivity started

<sup>88</sup> 2 ANGUS MADDISON, *THE WORLD ECONOMY: HISTORICAL STATISTICS* (placing the estimate at 213 million); UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS, *THE WORLD AT SIX BILLION 4–5* (2015) (estimating 300 million); *Human Population: Population Growth*, POPULATION REFERENCE BUREAU (July 1, 2016), <https://www.prb.org/humanpopulation/> [<https://perma.cc/X5YV-YKVP>] (estimating 300 million, as well).

<sup>89</sup> UNITED NATIONS DEP'T OF ECON. & SOC. AFFAIRS, *WORLD POPULATION PROSPECTS: THE 2015 REVISIONS, KEY FINDINGS AND ADVANCE TABLES 8* (2015), [https://esa.un.org/unpd/wpp/publications/files/key\\_findings\\_wpp\\_2015.pdf](https://esa.un.org/unpd/wpp/publications/files/key_findings_wpp_2015.pdf) [<https://perma.cc/6HUF-FT3F>].

<sup>90</sup>  $213,000,000 \cdot (1.01)^{2015} \approx 108,600,000,000,000$ . This is just the basic equation for exponential growth, starting at 213 million and growing at 1% for 2,015 years. See Eric W. Weinstein, *Law of Growth*, WOLFRAM MATHWORLD (Dec. 11, 2018), <http://mathworld.wolfram.com/LawofGrowth.html> [<https://perma.cc/SB57-ZMBE>].

<sup>91</sup> *Id.*

<sup>92</sup> Piketty & Zucman, *supra* note 72, at 1357 fig.15.28.

<sup>93</sup>  $(1.01)^{2015} \approx 510,000,000$ . See *supra* note 90 (noting the exponential growth equation).

<sup>94</sup> See *Labor Productivity Growth in the Total Economy*, ORG. FOR ECON. CO-OPERATION & DEV. (OECD), <https://stats.oecd.org/Index.aspx?DataSetCode=PDYGTH> [<https://perma.cc/ZRZ9-63CM>] (listing that data).

<sup>95</sup> See *id.*

rising at the dawn of the Industrial Age in the 1700s.<sup>96</sup> Truly spectacular income growth occurred from 1945 until the mid-1970s, as the world enjoyed ‘catch-up’ productivity and population gains after the crippling shocks of world wars and the Great Depression. Forecasts for the future of growth, however, are not as rosy; best estimates are that by the end of the twenty-first century income growth (demographic plus productivity) will dip below 2%—still historically high but much lower than growth occurring in the decades after World War II.

Figure 3 above captures not only epochal trends in human history, but also includes best-estimate forecasts of economic evolution in these key variables for the remainder of the twenty-first century, which is discussed later in this Section. The bottom line is a four-part story:

- 1) throughout most of human history,  $r$  has exceeded  $g$  by a considerable amount;
- 2) accounting for capital income taxes and asset price declines, there was a sharp divergence leading to the inversion  $r < g$  due to the world wars and the Great Depression, along with strong growth;
- 3) since 1945  $r$  has recovered much lost ground but  $g$  has reached historically unprecedented levels to maintain the inversion  $r < g$ ; but
- 4) best forecasts suggest that  $r$  will continue its recovery and  $g$  will fall. So that inversion will disappear,  $r > g$  will reassert itself by 2050, and it will reach historically typical levels by the end of the twenty-first century.

Before examining in some detail the powerfully inequality-producing impact of  $r > g$ , it is important to keep in mind the highly unequal distribution of wealth previously discussed.<sup>97</sup>

[I]f capital ownership were equally distributed and each worker received an equal share of profits in addition to his or her wages, virtually no one would be interested in the division of earnings between profits and wages. If the capital-labor split gives rise to so many conflicts, it is due first and foremost to the extreme concentration of the ownership of capital.<sup>98</sup>

To oversimplify,  $r$  represents the return to *rentiers* whose income comes exclusively from assets (for example, rents on realty; dividends on

---

<sup>96</sup> See *supra* Figure 3 & note 45.

<sup>97</sup> See *supra*, notes 38–62 and accompanying text.

<sup>98</sup> PIKETTY, *supra* note 11, at 40.

stocks; interest on bonds);  $g$  represents the growth of working folks' *labor* incomes.<sup>99</sup> If everyone owned the same amount of property, everyone would enjoy the same (relatively modest) capital income and, to the extent they saved this income, the same growth in their wealth.

Given rather steep wealth inequality, however, there is a strong tendency, rooted in simple but inevitable accounting identities, for fortunes in wealthier families to snowball through generations of growing inheritances. Piketty summarizes the basic logic:

When the rate of return on capital significantly exceeds the growth rate of the economy (as it did through much of history until the nineteenth century and as is likely to be the case again in the twenty-first century), then it logically follows that inherited wealth grows faster than output and income. People with inherited wealth need save only a portion of their income from capital to see that capital grow more quickly than the economy as a whole. Under such conditions, it is almost inevitable that inherited wealth will dominate wealth amassed from a lifetime's labor by a wide margin, and the concentration of capital will attain extremely high levels—levels potentially incompatible with the meritocratic values and principles of social justice fundamental to modern democratic societies.<sup>100</sup>

He later puts it in more concrete terms.

For example, if  $g = 1\%$  and  $r = 5\%$ , saving one-fifth of the income from capital (while consuming the other four-fifths) is enough to ensure that capital inherited from the previous generation grows at the same rate as the economy. If one saves more, because one's fortune is large enough to live well while consuming somewhat less of one's annual rent, then one's fortune will increase more rapidly than the economy, and inequality of wealth will tend to increase even if one contributes no income from labor. For strictly mathematical reasons, then, the conditions are ideal for an "inheritance society" to prosper—where by "inheritance society" I mean a society characterized by both a very high concentration of wealth and a significant persistence of large fortunes from generation to generation.<sup>101</sup>

---

<sup>99</sup> See *id.* at 278–79.

<sup>100</sup> *Id.* at 26.

<sup>101</sup> *Id.* at 351.

To understand the mechanism Piketty describes, it is helpful to trace the accumulation of wealth across a generation and compare it to the income of a similar worker who possesses no wealth.<sup>102</sup> Sticking with Piketty's numbers quoted in the previous paragraph, we assume national income  $g$  is growing at 1% while the return on capital  $r$  is 5%. A laborer (L), perhaps a first-year associate at a large firm, starts her working life earning \$200,000. Although she doesn't make partner (the top 1%), she chugs along as an "of counsel" employee and her raises keep pace with the growth rate of the economy. By the end of a fifty-year career, L will enjoy an income of almost \$330,000. Note that the increase in her income does not reflect inflation, which we assume is zero. Rather, it reflects the real growth of the economy—her annual 1% raises were by design tied to the economy's growth rate. Finally, observe the power of compounded growth. If L's annual raises were limited to 1% of her initial income, \$2,000 a year, her salary on retirement after fifty such raises would have been \$300,000 instead of \$330,000. Receiving raises every year based on her current salary, incorporating previous raises, results in about a 10% higher end-of-career salary.

The power of such compounding *at a higher rate* plays a central role in understanding the increase in wealth of L's counterpart, B, who inherits \$10 million on the same day that L begins her career. This number corresponds roughly to the minimum wealth necessary to put B in the top 1% of wealth-holders in the United States in 2015.<sup>103</sup> It is thus by no means an extraordinary level of wealth; one out of every 100 American households enjoys at least this level of wealth and of course many enjoy substantially more. There are many ways that B could choose to apportion the annual income from her fortune (starting out at 5% of \$10 million, or \$500,000). We will consider two illustrative alternatives: "minimalist" and "maximalist" savings.

Using a minimalist saving strategy, B sets aside just enough income each year so that her pool of wealth grows at the same rate as the economy. Given that the economy is growing at only 1% while her fortune is growing at 5%, B can achieve this result by saving one-fifth of her 5% returns and can consume the remaining 4%. With this savings rate of one-fifth, or 20%, after fifty years B's fortune will increase from \$10 million to almost \$16.5 million. In addition, her consumption will increase from \$400,000 (consuming 80% of

---

<sup>102</sup> The detailed calculations underlying these examples appear in an on-line appendix available at <https://www.bc.edu/content/dam/bc1/schools/law/pdf/law-review-content/BCLR/60-1/kades-appendix.pdf> [<https://perma.cc/BC8J-56WD>].

<sup>103</sup> Author's calculations based on SURVEY OF CONSUMER FINANCE, *supra* note 45. In 2016, this survey indicates that wealth at the 99th percentile was \$10,350,300.

initial income) almost \$660,000. Under this minimalist savings strategy, B enjoys much greater gains in consumption than her laboring counterpart L.

Moreover, B will be able to leave her children \$16.5 million. If she has but one child, that child will, in a relative sense, be just as well off as B was on receiving her inheritance: the child's wealth equals B's wealth grown at the same rate as national income. The child can pursue the same strategy as B, begin life consuming as much as B at retirement, \$660,000, and continue to grow the family fortune in line with the economy as a whole. If B has more than one child, her fortune must be split into two or more pieces (assuming she doesn't favor one and leave everything to that child—in a modern version of the feudal practice of primogeniture) and the accumulative power of wealth will be significantly attenuated. If B has multiple children, their inherited wealth will not support their mother's lifestyle and they will leave correspondingly less to their children.

If B has a sufficiently strong urge to establish dynastic family wealth, however, she can instead choose a "maximalist" savings strategy. It is not maximalist in the strong sense of saving every cent of wealth-generated income in excess of that necessary to live a thread-bare existence approaching poverty. Rather, it is maximalist in the weaker sense of saving every cent in excess of that needed to 'keep up with the Jones,' or, in this case, to keep up with the consumption of laboring L.

Under the "maximalist" savings regimen, when B receives her inheritance of \$10M yielding (at 5%) income of \$500,000, she consumes only \$200,000, and saves the remaining \$300,000. This amounts to a savings rate of 60%. If B continues to spend just enough to keep up with L, the power of compounded growth comes into full bloom. In service of her strong taste to fund a dynasty, B will increase her savings rate to 90% after 50 years, yet still enjoying consumption equal to L's total income. At the end, B's wealth will reach an astonishing \$65 million—over six times her inheritance.

More importantly, this \$65 million is about four times the amount that B would have accumulated had she pursued the minimalist savings path which was designed to keep her wealth growing at the same rate as national income. This radically improves the prospects for dynastic family wealth. B can now afford to have *four* children and leave each of them about \$16 million. Again, this exceeds the fortune that she inherited, \$10 million, by an amount that matches growth in national income. B's descendants will roughly inherit the same relative economic power as their mother. If they and succeeding generations pursue the same maximalist savings strategy, geometrically increasing numbers of B's progeny will enjoy very comfortable existences that keep up with growing national income levels without working a day in their lives. If B and her descendants have on average fewer than four children, they can afford to increase their consumption at a rate



exceeding  $g$  (1% in these examples). They could spend the surplus on a lavish lifestyle, or on influencing the political process to protect their privileged status over those (like  $L$ ) without significant wealth.

There is nothing special about the numbers used in this example. The key point is that with  $r$  at 5%, it is relatively easy for wealth growth to exceed descendant growth. If once a generation (twenty-five years) each descendant has two children, the set of descendants grows at about 2.8% a year averaged over time. With an  $r$  of 5%, a dynasty trust can handily accommodate the growing brood of beneficiaries.

This all depends, of course, on maintaining a very high savings rate. Even if  $B$ 's desires to establish or continue dynastic family wealth are strong enough to restrain her from consuming more, it is unlikely that all of her descendants in future generations will voluntarily decide to be so frugal. Someone through the generations will value fancy cars and first-class travel over growing the family fortune. This of course is precisely where perpetuities enter the equation.  $B$  has very good reasons, discussed in Part IV, Section C, for trying to enforce her desire for endless dynastic wealth on all of her descendants, as it is virtually certain some of them will prefer to dissipate the family fortune on consumption of one form or another.<sup>104</sup>

Contrast  $B$  and her descendants with  $L$ , whose progeny will have to find their own way in the world. True,  $L$  could save considerable sums, but not anything approaching \$10 million. That is close to her lifetime earnings, and even the power of compound interest could not bring her close to accumulating an estate of \$10 million. In highlighting the centrality of  $r > g$ , Piketty focuses our attention not on any consumption advantage that  $B$  or her heirs might enjoy over  $L$  and her heirs, but rather on the separation of society into a divide between a leisured class of ever-expanding wealth and a working class with essentially no wealth. This division will span generations indefinitely, fueled by  $r > g$ .

Whenever the rate of return on capital is significantly and durably higher than the growth rate of the economy, it is all but inevitable that inheritance (of fortunes accumulated in the past) predominates over saving (wealth accumulated in the present) . . . . The inequality  $r > g$  in one sense implies that *the past tends to devour the future: wealth originating in the past automatically grows more rapidly, even without labor, than wealth stemming from work, which can be saved*. Almost inevitably, this tends to give

---

<sup>104</sup> See *infra* notes 241–294 and accompanying text (explaining the motivation behind dynastic wealth and its effect on the economy).

lasting, disproportionate importance to inequalities created in the past, and therefore to inheritance.<sup>105</sup>

The discussion of Piketty's model so far may not have sufficiently illuminated the role that a low growth rate of national income ( $g$ ) plays in the "tendency of the past to devour the future."<sup>106</sup> The mechanism is two-fold, reflecting the fact (discussed earlier) that  $g$  can be partitioned into two factors: (i) demographic growth (a growing population of workers); and (ii) productivity growth (growing output per worker).<sup>107</sup>

The demographics of family size play a large role in inherited wealth's influence.<sup>108</sup> To take an extreme example, in a world in which each couple has ten children, it is clearly better as a general rule not to count too much on inherited wealth, because the family wealth will be divided by ten with each new generation. In such a society, the overall influence of inherited wealth would be strongly diminished, and most people would be more realistic to rely on their own labor and savings. Recall, in the example depicted above, that in order for B to support multiple children in the style to which their parents were accustomed, she had to save a much higher share of her capital income. Even if a wealthy family were to have only one child per generation, if pure demographic growth is high (but not quite as high as  $r$ ), a dynasty can preserve its standard of living indefinitely but its wealth as a share of national income will be continually shrinking and thus continually reducing its ability to exercise inordinate influence in political and other social spheres.

Piketty uses a similar hypothetical to explain the equalizing effect of rapid growth. He argues that:

[I]n a society where output per capita grows tenfold every generation, it is better to count on what one can earn and save from one's own labor: the income of previous generations is so small compared with current income that the wealth accumulated by one's parents and grandparents doesn't amount to much.<sup>109</sup>

Here Piketty seems to contemplate a world of inversion, in which  $r < g$ . In a booming economy, with output *per worker* growing so rapidly, pools of

<sup>105</sup> PIKETTY, *supra* note 11, at 377–78 (emphasis added).

<sup>106</sup> Paraphrasing italicized text from PIKETTY as quoted *supra* note 105 and accompanying text.

<sup>107</sup> See *supra* notes 88–91 and accompanying text.

<sup>108</sup> See PIKETTY, *supra* note 11, at 83 (using an extreme example of how the effect of inherited wealth would be diminished in a world in which each couple has ten children resulting in most people relying on their own labor and savings).

<sup>109</sup> PIKETTY, *supra* note 11, at 84.

wealth that seemed large twenty-five or fifty years ago will shrink markedly relative to rapidly rising incomes.<sup>110</sup>

So far we have looked at divergent wealth and income outcomes for individual families under  $r > g$ . The inequality, of course, also has important *macroeconomic* implications—effects that reverberate through the entire economy.<sup>111</sup> Perhaps the single most important macroeconomic effect of  $r > g$  is on the accumulation of capital. In the examples contrasting B and L above, we saw that if  $r$  exceeds  $g$  by a material amount, wealthy families can simultaneously (i) consume at a fairly high level that grows in tandem with national income, and (ii) save very large percentages of their income to propagate their privileged position to their descendants. In our “maximalist” savings alternative for B, the savings rate reached 90% and would keep on rising if we examined matters over a longer horizon.

If it is going to yield a return, all of that savings cannot sit idle under a mattress. Piketty follows the usual assumption of longer-term economic theory and abstracts away from the business cycles that may arise from a mismatch between investment and savings.<sup>112</sup> The wealthy hold the lion’s share of society’s wealth,<sup>113</sup> and if we are returning to a world in which  $r$  exceeds  $g$  by a considerable margin, then we should expect a rise in savings

---

<sup>110</sup> See *id.* It is worth pausing to reflect on the time frame relevant to Pikettian dynamics. Most economics focuses on the shorter term (for example, growth next year) or the turns in a business cycle (typically lasting from four-six years). See, e.g., *U.S. Business Cycle Expansions and Contractions*, NAT’L BUREAU OF ECON. RESEARCH, <http://www.nber.org/cycles.html> [<https://perma.cc/35UT-DVY8>]. Piketty’s focus is much longer-term given his concern about the propagation of inherited wealth. Inheritance is a once-a-generation event and hence generations are the relevant time unit for him—a generation equaling about twenty-five years. See Donn Devine, *How Long Is a Generation? Science Provides an Answer*, ANCESTRY MAG., Sept.–Oct. 2005, at 51. The fact that  $r$  is 5% and  $g$  is only 1% does not make a monumental difference over one or even a few years. Twenty-five years, however, is another matter. To give an example of the importance of such a time frame in accounting for the ramifications of  $r > g$ , note that a 3% annual raise doesn’t seem dramatically greater than a 1% raise, but a series of 1% raises over 25 years will raise pay by only 28% ( $1.01^{25}$ ), while 25 years of 3% raises will more than double pay (109% increase =  $1.03^{25}$ ).

<sup>111</sup> Joseph Stiglitz, *Inequality, Wealth, and Capital*, QUERIES MAG., Summer 2015, at 56, <https://www8.gsb.columbia.edu/faculty/jstiglitz/sites/jstiglitz/files/Inequality%2C%20Wealth%20and%20Capital.pdf> [<https://perma.cc/RZ99-JV98>] (arguing that “[m]ost readers of Piketty’s book get the impression that the accumulation of wealth through savings is almost entirely responsible for the rise in inequality and that there is, therefore, a link between growth of the economy—the accumulation of capital—on the one hand and inequality and wealth on the other”).

<sup>112</sup> See, e.g., Robert M. Solow, *A Contribution to the Theory of Economic Growth*, 70 Q.J. ECON. 65, 66–68 (1956) (discussing that long-run model). We later remove this assumption to consider how excess savings can lead to more frequent and deeper recessions—the so-called “paradox of thrift.” See *infra* notes 242–265 and accompanying text.

<sup>113</sup> See *supra* notes 38–62 and accompanying text.

and thus a rise in the amount of capital in the economy. Perhaps more importantly, lower growth also tends to increase the relative amount of capital.

There are many ways to determine the level of capital in an economy.<sup>114</sup> As with our discussion of family wealth, one particularly insightful way is to consider the ratio of capital to national income, or  $K/Y$ . Since all savings are invested, the capital stock ( $K$ ) must be growing at the rate of savings. National income ( $Y$ ) is by definition growing at rate  $g$ . Thus if the savings rate and the growth rate remain unchanged for a long time, they determine the ratio of  $K$  to  $Y$ . Note that, all else equal, slow growth tends to raise this measure of capital intensity.

In an  $r > g$  world, we have already discussed why the saving rate ( $s$ ) is relatively high. We have also summarized Piketty's argument that income growth ( $g$ ) is likely to revert to relatively low levels over this century. This means that, as a matter of simple accounting, the ratio of capital to income,  $K/Y$ , is likely to increase in the coming decades. This is called "capital deepening," the idea being that there is more capital (for example, machines) attached to each worker.

To finish this summary of Piketty's model, we must answer two questions raised by this process of capital deepening:

- 1) Won't all of that capital deepening depress returns on capital, closing the gap between  $r$  and  $g$ ?
- 2) Isn't more capital always a good thing?

The first question stems from simple economic logic. All else equal, an increase in the supply of something (capital,  $K$ ) invariably reduces its price (return on capital,  $r$ ). The question is: how much will  $r$  fall as  $K$  increases? The answer to this question depends on the value of an obscure economic parameter, the elasticity of substitution between capital and labor.<sup>115</sup> Intuitively, this factor measures how easy it is to switch between labor and capital in the production of goods and services, with "easy" here meaning "at low cost." If replacing labor with capital is easy, the rate of return on capital ( $r$ ) does not drastically decrease. If owners of capital can keep saving and investing large sums without reducing  $r$  too much, then the process of capital deepening will not reduce  $r$  that much and the inequality  $r > g$  will continue to hold—with all of the negatives Piketty's book identifies.

---

<sup>114</sup> CHARLES R. HULTEN, *THE MEASUREMENT OF CAPITAL* 119 (Ernst R. Berndt & Jack E. Triplett eds., 1991) (noting that "[f]rom Karl Marx to the Cambridge controversies, there has been an ongoing disagreement among economists as to what capital is and how it should be measured").

<sup>115</sup> WALTER NICHOLSON, *MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS* 250–53 (3d ed. 1985); PIKETTY, *supra* note 11, at 216.

As evidence that  $r$  does not fall that much when the wealthy save and invest more and more wealth, Piketty cites the fact that historically the share of wealth going to capital (instead of labor) has not decreased when capital deepening has occurred.<sup>116</sup> This implies that  $r$  must not fall that much when  $K$  increases; if it did, the share of national income accruing to capital would decline. He argues that “[i]ntuitively, this corresponds to a situation in which there are many different uses for capital in the long run. Indeed, the observed historical evolutions suggest that it is always possible—up to a certain point, at least—to find new and useful things to do with capital.”<sup>117</sup> If this is correct, then reductions in  $r$  due to capital deepening will not be significant enough to undo  $r > g$  and the associated social harms.

The second question (“Isn’t more capital always a good thing?”) taps into deeply held mores embracing thrift: saving is better than consuming. Illustrations abound throughout history, from biblical morality tales<sup>118</sup> to children’s fables<sup>119</sup> to Horatio Alger’s fictitious embodiments of the American Dream in his novels about upwardly-mobile young lads at the dawn of America’s Gilded Age.<sup>120</sup> There are multiple motivations for this preference for parsimony, but a primary one is that savings can be invested in productive projects that enable more consumption over time.<sup>121</sup> Further, building on this argument, wealthy investors can argue that their frugality raises labor incomes based on the conventional and widely-held belief that increasing the amount of capital per worker raises wages.<sup>122</sup> This is an instance in which trickle-down economics might actually work.<sup>123</sup>

<sup>116</sup> PIKETTY, *supra* note 11, at 216.

<sup>117</sup> *Id.*

<sup>118</sup> See Luke 15:11–32 (noting the famed Parable of the Prodigal Son, in which one son saves and the other spends foolishly).

<sup>119</sup> Aesop, *The Ants and the Grasshopper*, LIBRARY OF CONG., <http://read.gov/aesop/052.html> [<https://perma.cc/H9BZ-7AZR>] (noting the moral: “There’s a time for work and a time for play.”).

<sup>120</sup> See generally HORATIO ALGER, *MARK THE MATCH BOY* (1869); HORATIO ALGER, *RAGGED DICK* (1868); HORATIO ALGER, *STRUGGLING UPWARD* (1868).

<sup>121</sup> See OLIVIER BLANCHARD, *MACROECONOMICS* 56–57 (5th ed. 2009).

<sup>122</sup> See NICHOLSON, *supra* note 115, at 490–98 (illustrating that prevailing neoclassical economic theory maintains that the wage is determined by the marginal product of labor, and injecting more capital per worker into the production process is assumed to make laborers more productive).

<sup>123</sup> See *Trickle-down Theory*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/trickle-down%20theory> [<https://perma.cc/A8MT-AEFP>] (stating that trickle-down economic theory “suggests that a policy of tax cuts and other financial benefits to businesses and rich individuals will indirectly benefit the broader and poor population”). There is a large body of evidence that tax cuts for the wealthy do not provide trickle-down benefits for less-affluent households. See generally Martin Feldstein & Douglas W. Elmendorf, *Budget Deficits, Tax Incentives, and Inflation: A Surprising Lesson from the 1983–1984 Recovery*, in 3 *TAX POLICY AND THE ECONOMY 1* (Lawrence H. Summers ed., 1989), <http://www.nber.org/chapters/c10943.pdf> [<https://perma.cc/5XN8-KMME>] (providing data from the 1980s making that argument); Danny Yagan, *Capital Tax Reform and the Real Economy: The Effects of the 2003 Dividend Tax Cut*, 105 *AM. ECON. REV.* 3531 (2015)

Although Piketty does not address this question, there are a number of rebuttals. First, although capital deepening does raise the *level* of national income, it does not raise the long-term *growth rate* of the economy due to diminishing returns that inevitably set in as an economy deploys more and more of the same old capital.<sup>124</sup> Thus the benefits of pure capital accumulation are less lasting than many believe. Moreover, the growing income inequality that has accompanied the explosive growth of wealth inequality since the 1970s seriously brings into question the hope that capital deepening benefits most workers.<sup>125</sup> This may be due to the changing nature of capital and what has been dubbed “skill-biased technological change,” but this is beyond the scope of this Article.<sup>126</sup> Investment today no longer consists of machines that make lower-skilled laborers more productive. It consists of computers, patents, copyrights, and other investments that may enhance the productivity of a relatively small slice of workers at the top of the income distribution—hence rising incomes in the top 1–10% and stagnation for the median worker.<sup>127</sup> There is simply no evidence that capital deepening has raised lower- or middle-class incomes in the twenty-first century. This type of trickle-down economics simply is not working.

A second rebuttal to the notion that more capital is always better is the Keynesian idea of the “paradox of thrift:” if too much income is saved in ways that do not fund investment expenditures, there is a shortfall in aggregate demand and the economy slumps.<sup>128</sup> In the long run there may be plen-

---

(making that argument). On the trickle-down benefits of consumption expenditures by the wealthy, see *infra* notes 233–239 and accompanying text.

<sup>124</sup> This, again, is the fundamental insight of Solow, *supra* note 112.

<sup>125</sup> There is now an enormous literature on growing income and wealth inequality. In addition to Piketty’s book, other seminal contributions include: CONG. BUDGET OFFICE, *GROWING DISPARITIES IN LIFE EXPECTANCY* (2008), [https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/04-17-lifeexpectancy\\_brief.pdf](https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/04-17-lifeexpectancy_brief.pdf) [<https://perma.cc/C7QU-JX4S>] (discussing life-expectancy inequality); Sean F. Reardon, *The Widening Academic Achievement Gap Between the Rich and the Poor: New Evidence and Possible Explanations*, in *WHITHER OPPORTUNITY? RISING INEQUALITY, SCHOOLS, AND CHILDREN’S LIFE CHANCES* 91 (Greg J. Duncan & Richard J. Murnane eds., 2011) (discussing educational inequality); Cagetti & De Nardi, *supra* note 62 (discussing wealth inequality); Raj Chetty et al., *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility*, 104 *AM. ECON. REV.* 141 (2017) (discussing socioeconomic mobility); and Piketty & Saez, *supra* note 78 (discussing income inequality).

<sup>126</sup> For a discussion of this topic, see generally, for example, David Autor et al., *The Skill Content of Recent Technical Change: An Empirical Exploration*, 118 *Q.J. ECON.* 1279 (2003); Claudia Goldin & Lawrence Katz, *The Origins of Technology-Skill Complementarity*, 113 *Q.J. ECON.* 693 (1998).

<sup>127</sup> See, e.g., Thomas Piketty et al., *Distributional National Accounts: Methods and Estimates for the United States* (Wash. Ctr. for Equitable Growth, Working Paper, 2016), <http://equitablegrowth.org/working-papers/distributional-national-accounts/> [<https://perma.cc/Q4RV-MF43>] (explaining how increased capital income for the top one percent reinforces wealth inequality).

<sup>128</sup> See *infra* notes 242–265 and accompanying text.

tiful opportunities for profitable investment as Piketty suggests,<sup>129</sup> but any temporary failure of the pipeline pumping savings into investment can cause recessions and even depressions. The higher the savings rate, the greater the potential for a savings-investment disconnect to send the economy into a tailspin, and the savings rates required to fund dynastic wealth are extremely high by historical standards.<sup>130</sup> We return to this issue in Part IV, Section B.<sup>131</sup>

Finally, there is an equitable rebuttal to the idea that everyone benefits from greater saving and investing by the wealthy: why exactly is it that a very small fraction of the population possesses such a disproportionate share of society's productive capital? This of course raises difficult, complex questions about the interplay of incentives and fairness.<sup>132</sup> If a society places any weight on division of the pie in tandem with the size of the pie these questions cannot be avoided. Implicit in Piketty's work is the notion that inheritance is ground zero in the creation of inequality and its propagation across generations; thus, laws about inheritance are ground zero in addressing the foreboding return to a world of  $r > g$ .

## II. LEGAL CHANGE ENABLING PERPETUAL FAMILY (DYNASTIC) TRUSTS

That legal ground zero has witnessed a full-fledged rout of reasoned opposition to the return of dynastic wealth. This Section documents the two recent developments in the law of inheritance at the heart of this rout of reason. The timing of this misadventure could hardly be worse. As Piketty and others were raising the alarm about the return of dynastic family wealth, American state legislatures and the federal Congress were dismantling the relatively modest anti-feudal legal rules that would to some extent mitigate the negative dynamics of  $r > g$ . We turn first to the virtual disappearance of the centuries-old Rule Against Perpetuities (RAP), and then examine the continuing determined assault on the estate tax.

---

<sup>129</sup> See PIKETTY, *supra* note 11, at 216.

<sup>130</sup> See *supra* notes 100–102 (describing example of dynastic wealth creator saving ninety percent of capital income).

<sup>131</sup> See *infra* notes 233–239 and accompanying text.

<sup>132</sup> For a classic overview of these tensions, see generally ARTHUR M. OKUN, EQUALITY AND EFFICIENCY, THE BIG TRADEOFF (1975).

*A. Dynasties Rising I: The Demise of the Rule Against Perpetuities*

Although the Rule Against Perpetuities (RAP) itself is “only” about 325 years old,<sup>133</sup> its roots in the English common law go back much further, almost to the Norman Invasion in 1066. Much to the embarrassment of natural rights theorists, there was actually *no right* to inherit in the decades after 1066—for example, on the death of a loyal baron, the king had the right to install an ally bearing no relation to the decedent as lord of an estate.<sup>134</sup> The nobility of course lobbied intensively for the right to pass their estates on to their progeny and eventually succeeded.<sup>135</sup>

Indeed, in 1285 they not only won the right to bequeath their estates, but also by statute gained the right to create a “fee tail.”<sup>136</sup> This estate dictated that successive donees of an estate (usually the oldest male child under primogeniture) enjoyed what amounted to a life estate. Each took possession and collected all income from the land (for example, rents; sale of cut lumber) as long as he lived but could not sell, mortgage, or in any way erode its value—thus each succeeding eldest son had a right to inherit an estate of undiminished value.<sup>137</sup>

This chain of life estates continued indefinitely and was an early type of perpetuity. Judges looked with disfavor on the fee tail, as it made for disobedient children and made land inalienable: any sale by the current owner, even if joined by his eldest son and eldest grandson, could not bind later generations of unborn rights holders. Thus, the English judiciary, in a series of decisions, created complex legal mechanisms by which the possessor of a fee tail could convert his life estate into full ownership (“fee simple”).<sup>138</sup>

<sup>133</sup> The birth of the RAP is usually identified with the holding in *The Duke of Norfolk's Case*, 22 Eng. Rep. 931 (Ch. 1682), discussed *infra* note 140 and accompanying text.

<sup>134</sup> See 2 WILLIAM BLACKSTONE, COMMENTARIES \*71–72; 1 FREDERICK POLLOCK & WILLIAM MAITLAND, THE HISTORY OF THE ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 329 (2d ed. 1968).

<sup>135</sup> The famous Statute *Quia Emptores Terrarum*, 18 Edw. 1, c. 1 (1290), clearly contemplates the right of freeholders to transfer and devise their lands. See also *Statute of Quia Emptores*, ENCYC. BRITANNICA, <https://www.britannica.com/event/Statute-of-Quia-Emptores> [<https://perma.cc/P4SF-YT8Y>].

<sup>136</sup> Statute *De Donis Conditionalibus*, 13 Edw. 1, c. 1 (1285). See also *Statutes of Westminster*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Statutes-of-Westminster#ref241280> [<https://perma.cc/7DUY-X22Z>].

<sup>137</sup> THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 28–34 (2d ed. 1984).

<sup>138</sup> The decisive precedent was *Taltarum's Case*, Y.B. 12 Edw. 4, 19 (1472), which enabled a possessor in fee tail to erase the rights of future generations (“bar the entail”) by a legal action called a common recovery. For all of the complex details and fictions involved in a common recovery, see A.W.B. SIMPSON, A HISTORY OF THE LAND LAW 86–94 (2d ed., Clarendon Press, 1986).



The urge to create dynastic wealth remained quite powerful and in the 1500s clever scribes working for the British nobility developed increasingly complicated wills designed to mimic the fee tail in preserving family estates by preventing all successors to title from selling, mortgaging, or otherwise disinheriting subsequent generations of the bloodline.<sup>139</sup> The ever-vigilant English judiciary remained implacably opposed to perpetuities in any and all guises. In a series of cases culminating in the famous *The Duke of Norfolk's Case*,<sup>140</sup> judges crafted the RAP as a general rule to limit the extent of “dead-hand control” that donors could exercise after gifting or bequeathing their property.<sup>141</sup>

The RAP itself is deceptively simple: “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>142</sup> Within these seemingly innocent twenty-seven words lurk intricacies that have tortured law students, practicing attorneys, and judges for generations.<sup>143</sup> The meaning of “vest” is not intuitive,<sup>144</sup> and figuring out whether there is a suitable “life in being” can be quite vexing.<sup>145</sup> For the purposes of this Article there is no need to understand all of the subterranean complexities of the RAP. The basic idea is simple: in her will, a testator can impose conditions and limitations for a period not exceeding the life of some living persons (usually children or grandchildren) plus twenty-one additional years. After that period, all conditions must be resolved and all limitations must end. In the most typical case of gifts to succeeding generations, the RAP means that a testator can maintain dead-hand control of her property until twenty-one years after the death of her last child.

We will discuss policy justifications for the RAP in Part IV,<sup>146</sup> but merely note here that the RAP achieved the judiciary’s goal of insuring market-

---

<sup>139</sup> GRAY, *supra* note 1, §§ 141c–141f.

<sup>140</sup> *The Duke of Norfolk's Case*, 22 Eng. Rep. 931.

<sup>141</sup> GRAY, *supra* note 1, § 156.

<sup>142</sup> *Id.* § 201.

<sup>143</sup> For perhaps the most famous articles on the intricacies of the RAP, see generally W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 973 (1938); and W. Barton Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973 (1965); as well as Keith L. Butler, *Long Live the Dead Hand: A Case for Repeal of the Rule Against Perpetuities in Washington*, 75 WASH. L. REV. 1237, 1238 (2000) (recalling Professor Leach’s description of the Rule as a “technicality-ridden legal nightmare”); and G. Graham Waite, *Let’s Abolish the Rule Against Perpetuities*, 21 REAL EST. L.J. 93, 97 (1992) (noting that “the rule’s most significant role . . . has been to intimidate lawyers”). In the infamous case of *Lucas v. Hamm*, 364 P.2d 685, 690 (Cal. 1961), the Supreme Court of California held that the RAP was so complicated that drafting a will that violated the rule was not legal malpractice.

<sup>144</sup> GRAY, *supra* note 1, §§ 205–210, at 176–83.

<sup>145</sup> *Id.* at 192–96.

<sup>146</sup> See *infra* notes 222–294 and accompanying text.

bility of land in seventeenth century England.<sup>147</sup> The RAP required the resolution of all uncertainty about the identity of interest holders within a somewhat variable but clearly bounded time period. This ensured that at some point the owner(s) could sell the property to a higher-value user, such as a more efficient farmer, or someone planning to convert wheat fields into sheep pastures. Thus, for centuries judges constructed and enforced the RAP and its predecessors to enhance the efficiency of the British economy by preserving the alienability of land, the key asset in an agricultural economy.

It took centuries to shape the RAP and fend off continual efforts by wealthy families and their lawyers to find loopholes. It has taken state legislatures only a couple of decades to essentially erase this handiwork. No principled public purpose motivated lawmakers. To the contrary, they seemingly gutted the RAP for no better reason than the proverbial thirty pieces of silver:<sup>148</sup> to help their domestic banks attract trust fund business. Prior scholarship has described the process carefully and comprehensively,<sup>149</sup> and so this Article tersely summarizes the death of the RAP.<sup>150</sup>

Perhaps surprisingly, the end of the RAP began with a seemingly benign change to the federal tax code. In 1986, Congress enacted the “Generation Skipping Transfer” (“GST”) tax to close a loophole that enabled families with large fortunes to avoid payment of the federal estate tax (levied on relatively large property holders on their death) by granting life estates to one or more generations of a testator’s descendants.<sup>151</sup> The key provision for our purposes is an exemption that permits donors to create trusts exempt

<sup>147</sup> Frederick Vierling, *The Rule Against Perpetuities Applied to Trusts*, 9 ST. LOUIS L. REV. 286, 287–90 (1924) (showing the founding cases for RAP in the seventeenth century and confirming the restrictions on land in the interest of commerce).

<sup>148</sup> Judas betrayed Jesus to the religious authorities for thirty silver coins. *Matthew* 26:15.

<sup>149</sup> See generally, e.g., Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 U.C.L.A. L. REV. 1303 (2003); Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511 (2006); Grayson M.P. McCouch, *Who Killed the Rule Against Perpetuities?*, 40 PEPPERDINE L. REV. 1291 (2013); Scott A. Shepard, *Which the Deader Hand—A Counter to the American Law Institute’s Proposed Revival of Dying Perpetuities Rules*, 86 TUL. L. REV. 559 (2012); Stewart Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097 (2003); Lawrence W. Waggoner, *Congress Promotes Perpetual Trusts: Why?* (Univ. of Mich. L. & Econ. Res. Paper Series, Paper No. 13-015, 2016), <https://ssrn.com/abstract=2326524> [<https://perma.cc/5X4J-YPW4>].

<sup>150</sup> Piketty alludes to the existence of the RAP, but seems unaware of its demise. See PIKETTY, *supra* note 11, at 363.

<sup>151</sup> See 26 U.S.C. §§ 2601–2663 (2012); see also Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465, 2477 (2006) (explaining how the GST added a tax that was close to or exactly the same as the highest estate tax on a generation skipping transfer which resulted in further closing the loophole).

from the GST.<sup>152</sup> The federal tax code imposes no limit on the duration of this trust. Why? “When Congress enacted the GST tax, it probably assumed that most states would continue to adhere to the Rule against Perpetuities in one or another variation . . . .”<sup>153</sup> That assumption was misguided. The GST exemption enabled donors to create trusts perpetually free from federal estate and gift taxation.<sup>154</sup>

Meanwhile, South Dakota was at the vanguard of a movement to attract wealth management business by enacting laws favorable to big banks, other asset managers, and their customers.<sup>155</sup> As part of this effort, the state abolished its RAP in 1983. When in 1986 the federal government created the GST exemption, the table was set for donors wishing to create sizeable dynastic trusts. Other states perceived that there was demand to establish such perpetuities. Delaware repealed its RAP in 1995,<sup>156</sup> and Alaska in 1997.<sup>157</sup> By 2011 over half the states had either abolished the RAP or lengthened the period of dead-hand control to hundreds or even thousands of years—abolition for all practical purposes.<sup>158</sup> Given the ease with which donors can (i) establish trusts outside of their state of domicile, and (ii)

---

<sup>152</sup> See 26 U.S.C. § 2631.

<sup>153</sup> Dukeminier & Krier, *supra* note 149, at 1313; see also Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* 2–3 (Univ. of Mich. L. & Econ. Research Paper Series, Paper No. 13-007, 2013), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1975117](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1975117) [<https://perma.cc/LN2J-UD8T>] (“When Congress granted the exemption, it failed to impose a durational limit on exempt trusts. Congress relied on state perpetuity laws to supply that limit.”).

<sup>154</sup> The size of the exemption is not trivial; by 2016 donors could exempt up to \$5,450,000 from federal estate taxation forever. 26 U.S.C. § 2631; see also INTERNAL REVENUE SERV., OMB NO. 1545-0015, FORM 706: UNITED STATES ESTATE (AND GENERATION-SKIPPING TRANSFER) TAX RETURN, <https://www.irs.gov/pub/irs-pdf/f706.pdf> [<https://perma.cc/V88Q-ENEU>]. Through the use of life insurance and other estate planning strategies, donors can effectively multiply this number by a factor of at least six and possibly more. See Dukeminier & Krier, *supra* note 149, at 1318–19.

<sup>155</sup> S.D. CODIFIED LAWS § 43-5-8 (2014) (“The common-law rule against perpetuities is not in force in this state.”). Wisconsin (1975) and Idaho (1957) had abolished their RAP long before South Dakota. See IDAHO CODE ANN. § 55-111 (West 2012); WIS. STAT. ANN. § 700.16(5) (West 2013–2014). I know of no explanation for these anomalous early departures from the RAP norm; there appears to be no evidence that they were designed to attract trust business. See Sterk, *supra* note 149, at 2101–02.

<sup>156</sup> See 25 DEL. CODE ANN. § 503 (2009). Delaware does require that trusts dispose of land 110 years after acquisition. *Id.* § 503(b).

<sup>157</sup> See ALASKA STAT. § 34.27.051–.053 (2016). For technical tax reasons, Alaska significantly revised its repeal statute in 2000. *Id.*; see also Sterk, *supra* note 149, at 2101–02.

<sup>158</sup> RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS, ch. 27, intro. note (AM. LAW INST. 2011) (listing twenty-five states). To the twenty-five states listed in this source, we can add at least four: Arizona, Colorado, Hawaii, and Washington. See ARIZ. REV. STAT. ANN. § 14-2901 (2012); COLO. REV. STAT. § 15-11-1102.5 (2016); HAW. REV. STAT. § 525-4(6) (2015); WASH. REV. CODE § 11.98.130 (2018).

choose the law of any state to govern the trust,<sup>159</sup> a surviving state RAP poses almost no hurdle for donors interested in creating perpetual dynasty trusts. As half of the states either abolished or severely diluted their RAPs, the Rule is effectively dead.

Professors Robert Sitkoff and Max Schanzenbach cogently summarize what transpired: “[a]lthough neither the federal wealth transfer taxes nor the interstate competition for trust funds relates to the policies underpinning the Rule, together they have mortally wounded the Rule by reducing it to a mere transaction cost.”<sup>160</sup> They further note that “[o]utright abolition represents a stark departure from a longstanding principle of Anglo-American common law. Yet there has been little or no debate on the merits of the Rule in the state legislatures that have abolished it.”<sup>161</sup> Based on sophisticated empirical work they conclude that it was very much worth the effort for these states’ trust industries, finding “that through 2003, the movement to abolish the Rule Against Perpetuities has affected the situs of \$100 billion in reported trust assets—roughly 10% of the 2003 total.”<sup>162</sup>

Parsing the evidence, Sitkoff and Schanzenbach believe that federal estate tax planning rather than the desire for dynastic wealth is the driving force behind the movement of trusts to states abolishing or eviscerating their RAPs.<sup>163</sup> Although this may have been the case, Dobris, writing relatively early in the process of RAP’s demise, saw dynastic urges coming to the fore.<sup>164</sup> Moreover, Piketty’s argument suggests that we are indeed moving towards a world in which  $r > g$  may dramatically increase the demand for dynastic family wealth.<sup>165</sup> The RAP no longer stands in the way.

### *B. Dynasties Rising II: The Fading Estate Tax*

As matters stand, the GST exemption and the death of the RAP mean that wealthy testators can create perpetual trusts of at least \$11.2 million dollars, and more with sophisticated estate planning tools like life insurance

---

<sup>159</sup> UNIF. TRUST CODE §§ 107, 403 (UNIF. LAW COMM’N 2010). See generally Eugene F. Scoles, *Choice of Law in Trusts: Uniform Trust Code, Sections 107 and 403*, 67 MO. L. REV. 213 (2002).

<sup>160</sup> Sitkoff & Schanzenbach, *supra* note 9, at 362.

<sup>161</sup> *Id.* at 368.

<sup>162</sup> *Id.* at 412.

<sup>163</sup> See Schanzenbach & Sitkoff, *supra* note 151, at 2470.

<sup>164</sup> See Joel C. Dobris, *The Death of the Rule Against Perpetuities, or the RAP Has No Friends—An Essay*, 35 REAL PROP. PROB. & TR. J. 601, 603 (2000) (“Are economic elites seizing a prosperous moment in time to assure their primacy forever? Rich folks always push for advantage, but at the moment no one is pushing back in the perpetuities arena.”).

<sup>165</sup> PIKETTY, *supra* note 11, at 377.

policies.<sup>166</sup> Although by no means peanuts, this is but a small portion of estates containing assets worth hundreds of millions or billions of dollars.

Despite dramatic reductions in the major tax reform bill enacted at the end of 2017,<sup>167</sup> the federal estate and gift tax regime<sup>168</sup> still imposes a significant tax levy on the largest estates,<sup>169</sup> with a top marginal rate of 40% applied to the value of estates in excess of \$11.2 million.<sup>170</sup> Although this legislation doubled the already generous \$5.5 million exemption, the estate tax survived as an effective tool against the creation of dynastic wealth by billionaires and hundred-millionaires. Its survival, however, is far from certain. The House version of the 2017 tax bill would have eliminated the estate and gift tax entirely, and powerful forces continue their campaign to achieve that end.<sup>171</sup>

By taking a major bite out of the largest estates, the current estate and gift tax serves as a significant counterweight to the intergenerational snowballing accumulation of large dynasty trusts that occurs naturally when  $r > g$ . Indeed, the federal estate and gift tax almost assuredly is a more potent weapon against the rise of a new aristocracy than the RAP. Politically, the federal estate and gift tax has been on the verge of extinction since the late 1990s and remains the target of powerful, wealthy interests. As with the completed demise of the RAP outlined in the previous Section, it is hard to imagine a worse juncture at which to reduce or eliminate the estate tax given the metastasizing role that inherited wealth is playing as  $r > g$  reasserts itself in the twenty-first century.

The story of how the federal estate and gift tax has been eviscerated and remains on the verge of elimination since the 1990s is intricate. We highlight those elements relevant to this Article.<sup>172</sup> In the early 1990s, a small group of conservative activists began a campaign to abolish the estate and gift tax.<sup>173</sup> Behind the scenes lurked a very small coterie of extremely wealthy families (collective wealth of nearly \$200 billion) who since the 1990s have spent nearly half a billion dollars on a host of repeal efforts.<sup>174</sup>

---

<sup>166</sup> See *supra* note 154 and accompanying text.

<sup>167</sup> The Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 11061 (2017).

<sup>168</sup> See 26 U.S.C. §§ 2001–2801 (2012).

<sup>169</sup> This assumes that the donor has created a perpetual trust to exploit the GST exemption.

<sup>170</sup> 26 U.S.C. § 2001(c).

<sup>171</sup> See H.R. 1 § 11061.

<sup>172</sup> For a sophisticated and well-sourced treatment, see generally MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2005).

<sup>173</sup> See GRAETZ & SHAPIRO, *supra* note 172, at 12–23 (explaining the origins of the estate tax repeal coalition and highlighting that “Kill the Death Tax” coalition had forty-two members by early 1997).

<sup>174</sup> See PUB. CITIZEN CONG. WATCH & UNITED FOR A FAIR ECON., *SPENDING MILLIONS TO SAVE BILLIONS: THE CAMPAIGN OF THE SUPER WEALTHY TO KILL THE ESTATE TAX* 11, 14 (2006),

They have pushed the estate tax to brink on more than one occasion and they are not going away.

These financiers of the movement to abolish the most progressive tax in America (applying to only the wealthiest 2%) do not base their campaign on the merits of living off hefty trust funds. Rather, their most oft-repeated and successful arguments revolve around assertions that payment of the estate tax forced too many heirs to sell family farms or businesses in order to satisfy an onerous tax bill.<sup>175</sup> The only problem with these assertions is that they are demonstrably false. According to the Center on Budget and Policy Priorities:

[O]nly 80 small business and farm estates nationwide will owe any estate tax in 2009. This figure represents only 0.003 percent of all estates—that is, the estates of three out of every 100,000 people who die this year. . . . The 80 small farm and business estates left by people who die in 2009 that will owe any estate tax will owe the tax at an average rate of just 14 percent.<sup>176</sup>

There was nothing special about 2009. Despite endless stories of families forced off their patrimonial farm by the estate tax, “the repeal opponents could not give the *New York Times* a legitimate account of a family that had to sell its farm in order to pay its estate tax.”<sup>177</sup> Much the same was also true of tall tales about forced sales of family businesses to pay estate tax bills.<sup>178</sup>

Indeed, farmers and small business owners are strange bedfellows for America’s wealthiest families. The abolition coalition has refused to consider compromises that would have raised the minimum size of estates taxed to levels that would virtually guarantee that no farmer and very few business owners would pay a cent in estate tax. Such an increase in the exemption amount would have done little for the ultra-wealthy families funding the campaign. This led Graetz and Shapiro to speculate that “the farmers

---

[http://d3n8a8pro7vhmx.cloudfront.net/ufe/legacy\\_url/450/millions\\_billions.pdf?1448062992](http://d3n8a8pro7vhmx.cloudfront.net/ufe/legacy_url/450/millions_billions.pdf?1448062992) [<https://perma.cc/4YRC-6YNS>].

<sup>175</sup> See GRAETZ & SHAPIRO, *supra* note 172, at 50–61 (explaining how repeal advocates searched for wrenching stories about families who were struggling to keep local family businesses open after their breadwinners had died and used these stories to lobby Congress to repeal the estate tax).

<sup>176</sup> CTR. ON BUDGET & POLICY PRIORITIES, *THE ESTATE TAX: MYTHS AND REALITIES 2–3* (2009), <https://www.cbpp.org/archiveSite/estatetaxmyths.pdf> [<https://perma.cc/EJ4U-VJKF>].

<sup>177</sup> PUB. CITIZEN CONG. WATCH & UNITED FOR A FAIR ECON., *supra* note 174, at 25 (highlighting that the prop-repeal group “American Farm Bureau in 2001 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”).

<sup>178</sup> See *id.* (noting the “dearth of examples of businesses and farms harmed by the tax”).

and small businesses were stalking horses for the billionaires and hundred-millionaires who, with their massive portfolio wealth, pulled strings from behind the scenes . . . .”<sup>179</sup> They concede that they lacked “the smoking gun that would prove [this],”<sup>180</sup> but their suspicions seem well-founded.

When Republican presidential candidate George W. Bush took office in 2000, his party controlled both houses of Congress, enabling him to pass a massive tax cut that included an apparent abolition of the federal estate and gift tax. The Republicans lacked the votes in the Senate to get around some obscure procedures for fiscal measures that might increase the deficit, and so had to settle for a bizarre provision that reduced the tax from 2001–2009, eliminated it for 2010, but then restored it to its pre-repeal level in 2011 and thereafter!<sup>181</sup> Although Bush and congressional Republicans clearly hoped to eventually make the repeal permanent, they never mustered the votes.<sup>182</sup> Under Democratic President Barak Obama, the certainty of a veto that could not be overridden rendered the campaign to permanently abolish the estate tax nugatory.<sup>183</sup>

With Republican presidential candidate Donald Trump’s victory in 2016, along with Republican majorities in both houses of Congress, the federal estate and gift tax looked like a dead man walking. Trump had pledged to abolish it.

We are going to repeal the death tax. The threat of being hit by the death tax leads small business owners and farmers in this country to waste countless hours and resources on complicated estate planning to make sure their children aren’t hit with a huge tax when they die. No one wants their children to have to sell the family business to pay an unfair tax.<sup>184</sup>

---

<sup>179</sup> GRAETZ & SHAPIRO, *supra* note 172, at 216.

<sup>180</sup> *Id.*

<sup>181</sup> For all the gory details, see *id.* at 189–91.

<sup>182</sup> *Id.*

<sup>183</sup> See Emily Stephenson & David Lawder, *White House Threatens Veto of Republican Estate Tax Repeal Bill*, REUTERS (Apr. 14, 2015), <https://www.reuters.com/article/us-usa-tax-estate-idUSKBN0N529E20150414> [<https://perma.cc/RN66-TP7D>].

<sup>184</sup> Press Release, The White House, 2017 Tax Reform for Economic Growth and American Jobs (Apr. 26, 2017), [http://newsletters.usdbriefs.com/2017/Tax/TNV/170426\\_1suppA.pdf](http://newsletters.usdbriefs.com/2017/Tax/TNV/170426_1suppA.pdf) [<https://perma.cc/M7TB-JLG3>] (outlining President Trump’s tax reform plans, listing “[r]epeal the death tax” as one of the planned reforms); Gary Cohn, *President Trump Proposed a Massive Tax Cut. Here’s What You Need to Know*, THE WHITE HOUSE: BLOG, <https://www.whitehouse.gov/blog/2017/04/26/president-trump-proposed-massive-tax-cut-heres-what-you-need-know> [<https://perma.cc/S6CR-ZU7L>] (quoting “[w]e are going to repeal the death tax”). The use of the term “death tax” instead of “estate tax” was a carefully calculated linguistic stratagem of those campaigning to abolish the federal estate and gift tax. See GRAETZ & SHAPIRO, *supra* note 172, at 14, 74–84, 123–25, 229, 232, 235, 245, 253–55 (discussing this tactic).

Trump and other advocates of repeal continued to cite the same disinformation (“alternative facts”?)<sup>185</sup> despite its known falsity. Notwithstanding the support of the President and congressional majorities, the estate tax survived by the slimmest of margins.<sup>186</sup>

If the vast majority of Republican officeholders, continually prodded by very wealthy families, do eventually succeed in repealing the estate tax, then for the first time since the Gilded Age, family wealth will pass from generation to generation undiminished. This of course will significantly strengthen the dynasty-reinforcing dynamics of  $r > g$ . As with the RAP, it is harder to imagine a less auspicious time to abolish taxation of inherited wealth.<sup>187</sup> Even more sobering, it is hard to imagine a story that more vividly illustrates the influence that concentrated wealth can have on lawmaking in a democracy. A small circle of wealthy families, through a persistent campaign of misinformation, have managed to convince many farmers, family restaurant owners, and others of relatively limited means that the federal government is going to take half of their modest wealth when they die despite the fact that the current estate tax applies only to multi-millionaires—far fewer than 1% of Americans.<sup>188</sup> Piketty counsels us that inherited wealth is ‘just getting started’ and will balloon this century based on the cumulative effects of  $r > g$ . Justice Brandeis was no alarmist to declare that “[w]e can have democracy in this country, or we can have great wealth concentrated in the hands of a few, but we can’t have both.”<sup>189</sup>

---

<sup>185</sup> See Marilyn Wedge, *The Historical Origins of “Alternative Facts,”* PSYCHOL. TODAY (Jan. 23, 2017), <https://www.psychologytoday.com/blog/suffer-the-children/201701/the-historical-origin-alternative-facts> [<https://perma.cc/AQ8F-PRCG>] (explaining how the Trump administration has used the term “alternative facts” to make “falsehoods lose their negative connotations and become facts”).

<sup>186</sup> Josh Barro, *In Partial Defense of Susan Collins, on the Tax Bill,* BUS. INSIDER (Dec. 22, 2017), <http://www.businessinsider.com/in-partial-defense-of-susan-collins-on-the-tax-bill-2017-12> [<https://perma.cc/4YAZ-T7EH>]. It seems that the opposition of a single Republican Senator, Susan Collins of Maine, blocked the complete abolition of the estate tax. See *id.*

<sup>187</sup> See *supra* Part I.A (illustrating the increase of wealth inequality in recent years).

<sup>188</sup> CHYE-CHING HUANG & CHLOE CHO, TEN FACTS YOU SHOULD KNOW ABOUT THE FEDERAL ESTATE TAX, CTR. ON BUDGET & POLICY PRIORITIES 4 (2017), <https://www.cbpp.org/sites/default/files/atoms/files/1-8-15tax.pdf> [<https://perma.cc/J624-AVZ6>] (highlighting that only eighty small family-owned farms or businesses will owe estate tax).

<sup>189</sup> The source of this quote is a bit obscure. It is referenced in *The Morrow Book of Quotations in American History*, and originally appeared in the newspaper *Labor*, as early as 1933. This commonly-used version appeared in *Labor* on Oct. 14, 1941, shortly after Brandeis’ death, in an article attributing the quote to Justice Brandeis. See Bryan W. White, *Louis D. Brandeis, Wealth and Democracy: Checking a Common Quotation (Updated)*, ZEBRA FACT CHECK (Mar. 12, 2013), <http://www.zebrafactcheck.com/louis-d-brandeis-wealth-and-democracy-checking-a-common-quotations/> [<https://perma.cc/EFR3-84YZ>]. But see Peter S. Campbell, *Democracy v. Concentrated Wealth, In Search of a Louis D. Brandeis Quote*, 16 GREEN BAG 2d 251, 256 (2013) (concluding after exhaustive research that “[w]hile there is no positive proof Brandeis ever said these exact words, he ex-



### III. THE REAL POSSIBILITY OF DYNASTIC WEALTH: PIKETTY'S "NEW MATH" FOR DYNASTIC WEALTH ( $r > g$ WRIT SMALL)

A significant body of scholarship argues that we need not be concerned about attempts to create perpetual dynastic wealth because even if the wealthy desire to found dynasties, and even if existing legal rules permit them to do so, their efforts will inevitably fail. The most important argument raised by these 'naysayers' is Malthusian in that it centers on the way that geometrically expanding numbers of beneficiaries inevitably frustrate attempts to establish dynastic family wealth.<sup>190</sup> Turnier and Harrison colorfully label this the "ever-growing army of surviving descendants."<sup>191</sup> Waggoner, a true giant in the field of future interests and perpetuities, elaborates. Under some reasonable assumptions,<sup>192</sup> he calculates that "[o]ne hundred and fifty years after creation, a perpetual trust could have about 450 living beneficiaries; after 250 years, more than 7,000 living beneficiaries; after 350 years, about 114,500 living beneficiaries. This means that 350 years after creation, Michigan Stadium or the Rose Bowl would not be large enough to hold them all."<sup>193</sup>

The implications for attempts to establish dynastic wealth seem clear: after a relatively modest number of generations, the inevitable result is "a trust that disgorge[s] essentially nothing to a massive number of beneficiaries, with all of the income of the trust being used in trust administration."<sup>194</sup>

---

pressed a similar sentiment numerous times. If it is not a Brandeis quote, it is at least a Brandeisian one").

<sup>190</sup> See THOMAS R. MALTHUS, AN ESSAY ON THE PRINCIPLE OF POPULATION 59–70 (9th ed. 1798) (arguing that any temporary food surplus inevitably leads to higher human reproduction rates that bring per-capita food supplies towards bare subsistence levels). Two contributions to the literature on growing groups of dynasty trust beneficiaries expressly include the term Malthusian in their titles. See generally, e.g., Orth, *supra* note 16 at 29; Turnier & Harrison, *supra* note 16. For similar concern with a mushrooming group of beneficiaries, see Joel C. Dobris, *Undoing Repeal of the Rule Against Perpetuities: Federal and State Tools for Breaking Dynasty Trusts*, 27 CARDOZO L. REV. 2537, 2541 n.17 (2006) (explaining the "tragedy of the commons" and the "tragedy of the anticommons" theories that focus on the effects on a resource when it is subjected to overuse and underuse by multiple owners); and Dukeminier & Krier, *supra* note 149, at 1339 ("In a perpetual trust, the number of beneficiaries can multiply relentlessly from generation to generation. . . . Eventually the trust might become unmanageable.").

<sup>191</sup> Turnier & Harrison, *supra* note 16, at 784.

<sup>192</sup> Waggoner, *supra* note 153, at 5–6 (assuming that every person has two children, that everyone lives to age 75, and that the average age of parents when they have children is 25).

<sup>193</sup> *Id.*

<sup>194</sup> Scott Andrew Shepard, *A Uniform Perpetuities Reform Act*, 16 N.Y.U. J. LEG. & PUB. POL'Y 89, 105 (2013) (illustrating that as later calculations presented in this Section show, even a real growth rate for wealth of only three percent may be sufficient to support true dynastic wealth).

This is no donor's vision of a successful dynastic bloodline that will project familial wealth and power into the future unendingly.

However, the extended example in Part I, Section C above<sup>195</sup> reveals that this focus on geometrically expanding population in isolation ignores the undeniable fact that wealth also grows geometrically. Indeed, "compounded return" is a synonym for geometric growth.<sup>196</sup> In other words, humans are fruitful, but so too is wealth. Some scholars have noted this in passing without wrestling with the implications.<sup>197</sup> Those who have failed to account for geometrically growing wealth did not have the benefit of Piketty's work on the long history of relatively high rates of return; for that reason, they generally assumed, per prior common wisdom, that wealth grows at anomalously low rates. Shepard, for example, assumes that wealth grows at a real rate of 3%, which is well below the 5–6% rates that Piketty shows to have been typical in most eras for which data is available.<sup>198</sup> This oversight severely undermines his conclusion that perpetual dynastic trusts "would inevitably, eventually, result in a trust that disgorged essentially nothing to a massive number of beneficiaries, with all of the income of the trust being used in trust administration."<sup>199</sup> In short, the Malthusians either ignore entirely the fact that wealth grows geometrically or impute far too low a rate of return.

The following calculations distill the essence of the competition between the growing body of descendants receiving benefits from a trust and the growing value of the trust's assets and the income it generates. Following the best empirical work, we assume that the length of a generation is about 25 years<sup>200</sup> and that each mother in a dynasty has two children.<sup>201</sup> This implies that the number of beneficiaries grows at about 2.8% a year.<sup>202</sup>

<sup>195</sup> See *supra* notes 101–105 and accompanying text.

<sup>196</sup> See *Compound Return*, INVESTOPEDIA, <https://www.investopedia.com/terms/c/compound-return.asp> [<https://perma.cc/4DVH-WF97>].

<sup>197</sup> See, e.g., Turnier & Harrison, *supra* note 16, at 798 (noting that "unless resources in a dynasty trust grow at a rate sufficient to keep up with the expectations of the ever increasing living members of the beneficiary class who will look to the trust for support, the demand for distributions from the trust will eventually exceed the ability of the trust to satisfy that demand").

<sup>198</sup> See Shepard, *supra* note 194, at 118.

<sup>199</sup> *Id.*

<sup>200</sup> See Devine, *supra* note 110 (discussing that benchmark).

<sup>201</sup> This almost assuredly overstates the reproduction rate among the wealthy. The birth rate for women in households with annual income of \$200,000 or more in the United States in 2014 was about 43 births per 1,000 women. See *Birth Rate in the United States in 2015, by Household Income*, STATISTA, <https://www.statista.com/statistics/241530/birth-rate-by-family-income-in-the-us/> [<https://perma.cc/E9ES-22N8>] (using data from the U.S. Census Bureau from 2014). If we assume that women are fertile for 30 years (from ages 15 to 45), this implies that each age cohort of 1,000 women has a total of  $30 \times 43 = 1,290$  children, for an average of only 1.3 children.

<sup>202</sup> Growth rate =  $e^{\ln(2)/25} - 1 = .028 = 2.8\%$ . For this formula, see Weisstein, *supra* note 90.

With Pikettian annual real returns to capital of around 5.5%,<sup>203</sup> it is immediately apparent that the Malthusian problem is illusory. A donor can require that her perpetual dynastic trust set aside 2.8% of income each year to cover expected growth in the class of beneficiaries, leaving 2.7% of the income for payouts to her descendants.

Under these parameters, a donor can assure all of her descendants, forever, a very comfortable annual income of \$200,000<sup>204</sup> by investing about \$14.8 million dollars in a dynasty trust.<sup>205</sup> This is not a trivial sum, but it is also not an extraordinary sum in this age of great wealth inequality. Someone dying with an estate of \$75 million could fund \$1 million-dollar annual incomes for all of her (expanding) set of descendants over an infinite horizon.<sup>206</sup> Finally, to consider an extreme example, Bill Gates, with reported wealth of about \$81 billion, could create a dynasty trust that would assure each of his growing tree of descendants over \$2 billion a year.<sup>207</sup> That, by any definition, would be an example of grandiose, awesome dynastic wealth.

Scholars spinning out scenarios of Malthusian proliferation of descendants can be forgiven for being intellectually blinded by the historically exceptional economic conditions of the twentieth century.<sup>208</sup> Having lived their entire lives during a period of unusually high growth ( $g$ ) and somewhat depressed rates of return ( $r$ ), the math outlined in the prior paragraphs seems implausible. Turnier and Harrison, for example, observe that a donor trying to establish a perpetual dynastic trust must contribute funds sufficient not only to keep up with the growing body of beneficiaries but also with income growth ( $g$ ) in the range of 5%.<sup>209</sup> As Piketty has shown, however, the national income growth rates approaching 5% enjoyed during the “Glo-

---

<sup>203</sup> See *supra* notes 56–58 and accompanying text. The choice of 5.5% is based on the historical return to capital of around 4.5% (*supra* Figure 2), and then adding a conservative 1% to reflect the higher returns that wealthier investors seem to enjoy.

<sup>204</sup> This would put all descendants in the top 7–8% of incomes. Author’s calculations using the SURVEY OF CONSUMER FINANCE 2016, *supra* note 45.

<sup>205</sup> A first generation of two children requires \$400,000 a year, which can be funded in perpetuity according to the standard formula for the capital necessary for a perpetuity = annual payment/interest rate = \$400,000/.027  $\approx$  \$14.8 million. See RICHARD A. BREALEY & STEWART C. MYERS, PRINCIPLES OF CORPORATE FINANCE 33–34 (4th ed. 1991) (providing the mathematical formula to value growing perpetuities).

<sup>206</sup> Chase Peterson-Withorn, *Forbes 400: The Full List of the Richest People in America 2016*, FORBES (Oct. 4, 2016), <https://www.forbes.com/sites/chasewithorn/2016/10/04/forbes-400-the-full-list-of-the-richest-people-in-america-2016/#206c05b422f4> [<https://perma.cc/UFZ2-RRM2>].

<sup>207</sup> Using the formula *supra* note 202 and adding in Bill Gates’s fortune: \$81 billion = \$2.18 billion/.027.

<sup>208</sup> See PIKETTY, *supra* note 11, at 85–86 (explaining that, globally, per capita output and purchasing increased dramatically during the twentieth century and lead to improvements in standards of living).

<sup>209</sup> See Turnier & Harrison, *supra* note 16, at 797.

rious Thirty Years” from 1946–1975 are historically quite atypical and unlikely to recur.<sup>210</sup> Going forward, in a world of low *g*, insuring that a “family’s relative standard of living in the larger society—‘keeping up with the Joneses’”<sup>211</sup> will require real annual income increases on the order of 1–2% as opposed to 4–5%.

Those raising the Malthusian argument cite other factors to buttress their case that dynasty trusts are infeasible, one of which has merit. This factor is that life expectancies are increasing, which implies that funding dynasty trusts will become more expensive.<sup>212</sup> With each generation living longer, there will on average be more beneficiaries to support at a given time. That said, longevity is increasing at a very slow rate. Between 2005 and 2015, life expectancy for all Americans rose only slightly over a year, from 77.6 to 78.8 years, and has been essentially flat since 2010.<sup>213</sup> With such small gains in longevity, it will take a century or more until dynastic trusts have significantly more beneficiaries to support due to increasing life spans.

Comparatively, other factors raised as barriers to funding dynastic trusts have no real bite. Inflation poses no threat to dynastic trusts as the value of and return on investments in ‘real assets’ like real estate, stocks, and intellectual property should naturally keep up with inflation.<sup>214</sup> Management fees ranging up to 2% can put a real crimp on the maintenance of dynastic wealth,<sup>215</sup> but informed donors will know that money managers rarely beat market index funds.<sup>216</sup> Management fees on simple index funds containing a portfolio with large numbers of stocks, bonds, and other assets

<sup>210</sup> See *supra* Figure 2 & note 45.

<sup>211</sup> Turnier & Harrison, *supra* note 16, at 796.

<sup>212</sup> See *id.* at 789.

<sup>213</sup> U.S. DEP’T OF HEALTH & HUMAN SERVS., HEALTH, UNITED STATES, 2016 at 116 tbl.15 (2016), <https://www.cdc.gov/nchs/data/hus/hus16.pdf> [<https://perma.cc/DWZ5-56D8>].

<sup>214</sup> See WILLIAM F. SHARPE & GORDON J. ALEXANDER, INVESTMENTS 257–62 (6th ed. 1998) (describing this theoretical prediction). Empirically, there are mixed results on this theoretical prediction. Returns to real estate keep up with inflation; for reasons that are not well understood, unexpected inflation is correlated with lower-than-expected stock returns. See, e.g., Andrew Ang et al., *Inflation and Individual Equities*, 68 FIN. ANALYSTS J. 36, 36–37 (2012) (depicting the impact of inflation on individual stocks and their rates of return); Martin Hoesli et al., *The Inflation Hedging Characteristics of U.S. and U.K. Investments: A Multi-Factor Error Correction Approach*, 36 J. REAL EST. FIN. ECON. 183, 184–86 (2008) (exploring the impact of inflation on commercial real estate returns and drawing a distinction between public and private assets).

<sup>215</sup> See Turnier & Harrison, *supra* note 16, at 792–93 (discussing money managers’ fees and noting they range between 1–2% of assets, but depend on a multiplicity of factors).

<sup>216</sup> See BURTON MALKIEL, A RANDOM WALK DOWN WALL STREET 244–71 (9th ed. 2007) (explaining the effect of behavioral finance theory on savings).

are fractions of 1%.<sup>217</sup> Such low transaction costs pose essentially no threat to the viability of dynastic trusts.

Taxation, however, does have a material, adverse effect on making trust assets grow in tandem with the number of beneficiaries. In particular, trust income retained and added to the trust res is taxable.<sup>218</sup> Most dividends (“qualified dividends”) are taxed at lower rates than ordinary income.<sup>219</sup> Capital gains are taxable only on the sale of assets, and a trust holding a well-diversified portfolio of assets has no need to sell any of its holdings. In addition, the tax rate on long-term capital gains is much lower than the rate on ordinary income.<sup>220</sup>

The estate tax is the last barrier standing in the way of perpetual family fortunes. With a top marginal rate of 40%<sup>221</sup> on *principal* (not just annual income) applied once a generation (that is, about once every 25 years), the estate tax makes maintaining true dynastic wealth difficult if not impossible. In its absence, the bottom line is that other taxes do not seriously affect the basic math implied by Piketty’s  $r > g$ : if, as seems quite possible, the estate tax is eliminated in the near future, creating dynastic trusts will be economically feasible for wealthy donors.

#### IV. POLICY JUSTIFICATIONS FOR REGULATING DEAD-HAND CONTROL

We have reached a juncture at which potentially unlimited dynastic family trusts (perpetuities) may grow without bounds primarily due to high trust savings rates and compounded returns. Not only are such trusts now legal, but per Pikettian economics, they have the potential to usher in a new class of rentier families enjoying high incomes spun off from dynastic trusts for generations on end in an  $r > g$  world. Should we simply accept the return of dynastic family wealth as a natural social outcome? This Section argues in the negative, offering novel grounds to justify laws to curb dynastic wealth. Section A begins by summarizing traditional arguments against dead-hand control along with powerful critiques of these arguments raised in recent scholarship. Section B then summarizes compelling but contested

---

<sup>217</sup> For example, the Schwab S&P 500 fund has an annual expense ratio of 0.04%; the Fidelity Spartan Total Market Index Fund Investor Class has an expense ratio of 0.015%; and the Vanguard Total Bond Market Index Fund Investor Shares has an expense ratio of 0.17%. Steven Nickolas, *Three Index Funds with the Lowest Expense Ratios*, INVESTOPEDIA (Oct. 16, 2018), <http://www.investopedia.com/articles/markets/102715/3-index-funds-lowest-expense-ratios.asp> [<https://perma.cc/F75T-MRQL>].

<sup>218</sup> See 26 U.S.C. § 641 (2012).

<sup>219</sup> See *id.* § 1(h)(11).

<sup>220</sup> Compare *id.* § 1(a) (setting the top marginal rate for ordinary income of married couple at 39.6%), with *id.* § 1(h) (setting the top marginal rate for long-term capital gains at 20%).

<sup>221</sup> See *id.* § 2001(c).

normative political arguments against dynastic wealth. Finally, in this Article's primary contribution, I offer novel positive economic justifications for adopting policies against perpetual family wealth: the dangers posed by dead-hand control of the savings rate in both the short and the long run, and the counterintuitive equality-fostering benefits of prodigal heirs.

*A. Crumbling Foundations of Traditional Arguments Against  
Dead-Hand Control*

Historically, the primary objection to locking wealth in families for generations without end was that it made the most important asset in the medieval economy inalienable. Even in relatively primitive feudal societies, alienability of property is critical to maximizing social wealth.<sup>222</sup> Sound economics requires channeling property to the person who values it the most. This is true for all goods but especially so for factors of production. In order to maximize output, the best farmers should do the farming, the best husbandmen should do the shepherding, and the best managers should oversee estates.

These considerations may well explain the hostility of common law judges to restraints on alienation in general and to perpetuities in particular.<sup>223</sup> Lawyers for the English nobility designed the fee tail and similar conveyance tools to insure that the family estate stayed in the family. The probability that successive eldest male heirs in a family bloodline are the best managers of the estate is vanishingly small. Managing a large piece of property with multiple uses in a dynamic environment where optimal contractual terms and land uses are evolving is no trivial matter. Nobles routinely hired agents to do much of the administration of their estates, but these 'middle managers' did not own the property and so lacked full incentives to maximize the value of the estate.<sup>224</sup>

In this environment, judicial opposition to perpetuities and creation of the Rule against them was a simple matter of sound social policy. Alienable

---

<sup>222</sup> Before their ancient script was decoded, scholars speculated that one of the large stone "kudurrus" of ancient Babylonia, dating as far back as the sixteenth century B.C.E., might have been constructed as magic objects or as recordation of ancient religious rituals. But "[t]he result was far less exciting than they had expected: the inscription commemorates a land donation given by a father to his daughter as a dowry when she married an important official." Susan Paulus, *Kudurrus, Guardians of Property*, ORIENTAL INST. OF THE UNIV. OF CHI.: NEWS & NOTES 4-6 (2016).

<sup>223</sup> See JOHN C. GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 2 (2d ed. 1895) ("The current of law has for centuries been in favor of removing old restraints on alienation; in favor of disallowing new ones . . . . The legislatures and the courts have co-operated in this end.")

<sup>224</sup> This is just an example of agency costs. See, e.g., SUSHIL BIKHCHANDANI ET AL., THE ANALYTICS OF UNCERTAINTY & INFORMATION 309-18 (2d ed. 2014).

land more readily flowed from inept management to skilled oversight, from farmers to shepherders, or from agricultural to residential or industrial use.<sup>225</sup>

Insuring alienability, however, no longer requires the RAP because of widespread use of trusts. Assets, be they land, patents, corporations, or anything else, can be placed in trust.<sup>226</sup> The trustee has both legal duties and economic incentives to maximize the value of the trust and so will tend to sell assets to the highest bidder—the essence of the free market approach to directing productive assets to those best able to manage them. Indeed, in England property divided between a life estate holder and a beneficiary of the remainder must be placed in a trust by law, insuring that disagreements between the life estate and remainder beneficiaries cannot render the land inalienable.<sup>227</sup> If policymakers are solely concerned about alienability, the RAP is overkill. Simply requiring grantors to (i) place all property they wish to divide between present and future interest holders into a trust, and (ii) give the trustee full power to sell all assets, suffices to insure the power and the incentives to sell assets to highest-value users.

Scholars in the twentieth century, realizing that fostering alienability no longer necessitated the RAP, offered instead a “balancing” justification for the Rule, a sort of compromise permitting grantors control over their assets for a limited time. As famously stated by Professor Lewis Simes, the leading future interests and RAP scholar of his generation.

The Rule against Perpetuities strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with the property which they enjoy . . . . The difficulty here is that, if we give free rein to the desires of one generation to create future interests, the members of succeeding generations will receive the property in a restricted state. They will thus be unable to create all the future interests they wish. Perhaps, they may not even be able to devise it at all. Hence, to come most nearly to satisfying the desires of peoples of all generations, we must strike a fair balance between unrestricted testamentary disposition of property by the present generation and unrestricted disposition by future generations.<sup>228</sup>

---

<sup>225</sup> CHRISTOPHER DYER, AN AGE IN TRANSITION? ECONOMY AND SOCIETY IN ENGLAND IN THE LATER MIDDLE AGES 108 (2015).

<sup>226</sup> See JESSE DUKEMINIER ET AL., PROPERTY 273–80 (7th ed. 2010).

<sup>227</sup> Law of Property Act, 1925, 15 & 16 Geo. 5, § 1–7 (Eng.).

<sup>228</sup> Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707, 723 (1955).

Simes's balancing rationale for the RAP has long had its critics. Gallanis questioned both its empirical basis and its utilitarian theoretical foundations.<sup>229</sup> In discussing the latter issue, he points out that there is no theoretical basis to believe that the RAP yields greater utility than either a total ban on restricted gifts at one end of the spectrum or permission for eternal restrictions at the other pole (where America is today).<sup>230</sup> In a similar vein, a student note points out a peculiarity of the RAP: donors can choose to leave nothing to their heirs or everything to their heirs without restriction, so why deny intermediate choices that control ownership for many generations or forever? "Acceptance of either extreme but rejection of arrangements that fall in the middle seems an awfully strange way to achieve 'balance.'"<sup>231</sup>

Hirsch and Wang take these arguments to their logical conclusion and argue that as long as dynastic grantors employ trusts that give trustees a free rein, there is simply no problem with perpetual wealth in a bloodline.

[W]hen a bequest incorporates broadly flexible provisions for investment and distribution . . . no clear justification for regulation appears. A trust of this sort should neither depress value nor foster arbitrariness; indeed, it can affirmatively benefit a family by providing its members with comprehensive insurance against need . . . . Arguably, lawmakers should permit discretionary family trusts to persist, even in perpetuity.<sup>232</sup>

As this discussion shows, the traditional arguments for forbidding perpetuities have little current force.

### *B. The Political Economy Case Against Dynastic Wealth*

Yet the assertion that dynastic wealth poses no costs or threats would be strange to America's founding generation. Orth chronicles that:

[w]hen the North Carolina General Assembly abolished entailment [that is, the fee tail, a type of perpetual family estate] in 1784, . . . it explained that "entails of estates tend only to raise the wealth and importance of particular families and individuals, giving them an

---

<sup>229</sup> See generally Thomas P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284 (2000).

<sup>230</sup> See *id.* at 288–89 (arguing that Professor Simes's utilitarian theory is flawed because it is limited to the satisfaction of present and future property owners instead of focusing on the aggregate satisfaction of present and future societies).

<sup>231</sup> Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2600 (2003).

<sup>232</sup> Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 53 (1992).



unequal and undue influence in a republic, and prove in manifold instances the source of great contention and injustice.”<sup>233</sup>

Generalizing this point about the founding generation’s concern with the “undue” political influence that dynastic wealth might wield, Chester observed that “[i]t would appear that the American fondness for dead-hand control as an extension of our individualism may be enabling the creation of the very aristocracy that our country originally rebelled against.”<sup>234</sup>

In the first decades of the 1900s, when the nation enacted first an estate tax and then an income tax, politicians from both major parties, along with scholars, uniformly echoed this centuries-old concern. Repetti compiled the evidence including: Theodore Roosevelt stating that society needs to prevent “the owner of one of these enormous fortunes to hand more than [a] certain amount to any one individual.”<sup>235</sup> Franklin Roosevelt, decades later, declared that large pools of dynastic wealth “amount to the perpetuation of great and undesirable concentration of control in a relatively few individuals over the employment and welfare of many, many others.”<sup>236</sup> Irving Fischer, one of the greatest American economists of the early 1900s, and no wild-eyed radical, had a similar take, favoring an estate tax to guard against the “danger [that] hereditary plutocracy” poses to “democratic ideals.”<sup>237</sup>

This Brandeisian belief that excessively concentrated wealth is inconsistent with democracy<sup>238</sup> is not merely speculative. In addition to the long historical pedigree just limned, there is significant evidence of a positive correlation between inequality and undemocratic governance.<sup>239</sup> Even though both theory and evidence weigh heavily in favor of Brandeis’ contention that excessively concentrated wealth undermines democracy, the paramount reason to reduce economic inequality, this Article proceeds in a different direction. In particular, the following Section identifies the unnoticed costs imposed by dynastic wealth. All of these costs flow from the counterintui-

<sup>233</sup> Orth, *supra* note 16, at 31.

<sup>234</sup> RONALD CHESTER, FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND 21 (2007).

<sup>235</sup> James R. Repetti, *Should We Tax the Gratuitous Transfer of Wealth? An Introduction*, 57 B.C. L. REV. 815, 816 (2016) (quoting CHESTER, *supra* note 234, at 60) (in turn quoting an April 14, 1906 speech given by President Theodore Roosevelt at the House of Representatives).

<sup>236</sup> Franklin D. Roosevelt, President of the U.S., Message to Congress (June 19, 1935), in H.R. REP. NO. 74-1681, at 2 (1935).

<sup>237</sup> Irving Fisher, *Some Impending National Problems*, 24 J. POL. ECON. 694, 711 (1916).

<sup>238</sup> See *supra* note 152 and accompanying text.

<sup>239</sup> For a thorough overview, see generally Daron Acemoglu et al., *Democracy, Redistribution, and Inequality*, in 2 HANDBOOK OF INCOME DISTRIBUTION 1885 (Anthony B. Atkinson & François Bourguignon eds., 2015). Causation of course is much harder to demonstrate than correlation, and so the relationship between societies’ governance and their distribution of wealth remains contested. See *id.* at 1887 (noting the lack of scholarly consensus).

tive but theoretically and empirically supported fact that too much saving can negatively impact the economy and hence most citizen's welfare. These costs are incontrovertible and substantial. More importantly, these costs more than justify the normative measures advocated in Part V.

*C. The True Costs of Perpetuities: Economic Harms Resulting from the Dead-Hand Control of the Savings Rate*

Legal scholars analyzing perpetuities generally adhere to conventional wisdom and consequently view saving as an unmitigated good—"the more the better." Hirsch and Wang, for example, justify permitting donors to exercise perpetual control over the distribution of trust income based in part on their assertion that "intergenerational distribution restrictions . . . bring benefits in the form of increased wealth conservation."<sup>240</sup> Elaborating, they go on to say that:

Conservation of wealth is generally believed to avail society by contributing to long-term economic growth. Indeed, granting a testator the right to lengthen a chain of future interests encourages saving in two ways. Such a right contributes to the testator's own incentive to save, even as it obligates her beneficiaries to follow suit. To the extent that intergenerational allocations inspire a higher rate of saving, they provide at least one public benefit . . . .<sup>241</sup>

In Subsection 2 below we will disprove the assertion that savings always fuels *long-term* growth. First, however, we show that an excessively high savings rate can reduce national income in the short run via the "paradox of thrift."

### 1. The Paradox of Thrift

Olivier Blanchard begins his explanation of the "paradox of thrift" by observing that although when "we grow up, we are told the virtues of thrift," modern macroeconomic models tell "a different and surprising story."<sup>242</sup> The "paradox of thrift" (or "paradox of saving") is the label given to

---

<sup>240</sup> Hirsch & Wang, *supra* note 232, at 50.

<sup>241</sup> *Id.* at 37–38.

<sup>242</sup> BLANCHARD, *supra* note 121, at 60; *see also* KARL E. CASE & RAY C. FAIR, *MACROECONOMICS* 162 (6th ed. 2002) (noting although usually associated with Keynesian models, the paradox of thrift has a long historical pedigree); *see* Robert T. Nash & William P. Gramm, *A Neglected Early Statement of the Paradox of Thrift*, 1 *HIST. POL. ECON.* 395 (1969) (discussing the idea of a paradox of thrift appears to have even deeper roots than Keynes thought). Keynes himself

the idea that “attempts by people to save more lead to both a decline in output and to unchanged saving.”<sup>243</sup> This idea is not complex. If everyone started stuffing most of their pay under their mattresses at home instead of spending it on consumption items at each other’s businesses, everyone would suffer a reduction in income.<sup>244</sup> Krugman limns the process cogently:

Suppose a large group of people decides to save more. You might think that this would necessarily mean a rise in national savings. But if falling consumption causes the economy to fall into a recession, incomes will fall, and so will savings, other things equal. This induced fall in savings can largely or completely offset the initial rise.<sup>245</sup>

If, instead of putting cash under their mattresses, people *invested* their savings in each other’s businesses, consumption would fall but investment would rise and the economy would be saved from a recession (a drop in income).<sup>246</sup> In recessions, however, people tend to seek out very safe assets like treasury bills and bonds that are essentially cash as opposed to capital investment.<sup>247</sup> This ultimately differs little from putting money under a mattress, and causes disconnect between the increased desires to save with the unchanged investment on the other that at root explains recessions.<sup>248</sup>

Krugman highlighted the continuing relevance of the paradox of thrift relatively early into the Great Recession. After observing that “the paradox of thrift is one of those Keynesian insights that largely dropped out of economic discourse,”<sup>249</sup> he rhetorically asked if it was “actually visible in the data? The answer is, and how!”<sup>250</sup> Krugman highlighted the relevant eco-

cited Manderville’s work, pre-dating his own writings by over 200 years. See BERNARD MANDEVILLE, *THE FABLE OF THE BEES* 9–19 (1714) (noting Mandeville’s articulation of the notion appears to date back to an earlier poem he wrote). For that poem, see Bernard Mandeville, *The Grumbling Hive: or, Knaves Turn’d Honest* (1705), <http://www.writersreps.com/feature.aspx?FeatureID=85> [<https://perma.cc/B66E-M5M4>].

<sup>243</sup> BLANCHARD, *supra* note 121, at 60.

<sup>244</sup> *See id.*

<sup>245</sup> Paul Krugman, Opinion, *The Paradox of Thrift—for Real*, N.Y. TIMES: THE CONSCIENCE OF A LIBERAL (July 7, 2009), [https://krugman.blogs.nytimes.com/2009/07/07/the-paradox-of-thrift-for-real/?mcubz=0&\\_r=0](https://krugman.blogs.nytimes.com/2009/07/07/the-paradox-of-thrift-for-real/?mcubz=0&_r=0) [<https://perma.cc/G9SK-PW6M>].

<sup>246</sup> CASE & FAIR, *supra* note 242, at 162.

<sup>247</sup> For a recent validation of the commonly-held belief that people rush to buy secure assets when facing economic adversity, see generally Brian L. Boscaljon & John M. Clark, *Do Large Shocks in VIX Signal a Flight-to-Safety in the Gold Market?*, 23 J. APPLIED FIN. 120 (2013) (documenting surge in demand during the Great Recession for gold, often perceived as the safest store of wealth).

<sup>248</sup> BLANCHARD, *supra* note 121, at 60.

<sup>249</sup> Krugman, *supra* note 245.

<sup>250</sup> *Id.*

economic statistics: the personal savings *rate* was rising while personal incomes continued to plummet and concluded that “it’s quite clear that we’re in serious paradox of thrift territory here.”<sup>251</sup> Alluding to its short-run nature, he conceded that “we won’t always face the paradox of thrift,” but immediately emphasized that “right now it’s very, very real.”<sup>252</sup>

The case for classic Keynesian fiscal policy responses to economic downturns has strengthened as the Great Recession exhibited phenomena, like the paradox of thrift, that vindicated Keynesian Economics notions that had gone out of fashion.<sup>253</sup> Fiscal policy generally means either increased governmental spending or tax cuts (or both) funded with debt—that is, deficit spending.<sup>254</sup> Government deficit spending directly increases demand for goods and services, thus giving the economy a boost.<sup>255</sup> Perhaps more important are the secondary (and tertiary) effects of this spending, as those receiving payment from the government in turn spend a good portion of this money on private goods and services, these second-hand beneficiaries do the same, and so on.<sup>256</sup> The stimulus from deficit spending thus reverberates through the economy in waves of spending. Tax cuts operate in a similar fashion, but the spending starts in the private sector as less-burdened taxpayers use some of the proceeds of the tax cut on consumption and successive waves of purchases increase the demand for goods and services.<sup>257</sup>

These successive waves of spending are called the *multiplier effect* of fiscal policy (spending or tax cuts). The key parameter summing up the effectiveness of fiscal policy is the *multiplier*, which tells us how much each dollar of spending (or tax cut) increases national income. A multiplier of three, for example, means that each dollar of deficit spending raises national income by three dollars. Multipliers need not be greater than one and can even be zero or negative. This can happen if citizens react to increased government spending by spending less instead of more. One prominent argument, for example, pos-

<sup>251</sup> Paul Krugman, Opinion, *Paradox of Thrift*, N.Y. TIMES: THE CONSCIENCE OF A LIBERAL (Feb. 3, 2009), <https://krugman.blogs.nytimes.com/2009/02/03/paradox-of-thrift/?mcubz=0> [<https://perma.cc/K28E-JXRZ>].

<sup>252</sup> *Id.*

<sup>253</sup> For an extended argument that the Great Recession of 2007 and its aftermath vindicated Keynesian theories that had been out of favor among many academic economists, see generally ROGER BACKHOUSE & BRADLEY W. BATEMAN, *CAPITALIST REVOLUTIONARY: JOHN MAYNARD KEYNES* (2011).

<sup>254</sup> See N. GREGORY MANKIW, *MACROECONOMICS* 305–17 (8th ed. 2013).

<sup>255</sup> *See id.*

<sup>256</sup> *See id.* at 308–09 (explaining the “government-purchases multiplier,” which quantifies how much incomes rise with every additional dollar of government spending); *id.* at 310–11 (explaining the “tax multiplier” which quantifies how much incomes change with every additional dollar of government taxation).

<sup>257</sup> *See id.* at 310–11.

its that the multiplier is zero because taxpayers save instead of spend in reaction to deficit spending in anticipation of higher tax bills in the future to pay off the debt.<sup>258</sup> Empirical estimates of the fiscal multiplier, however, are rarely negative and typically range from around 0.1 to 2.5.<sup>259</sup>

Although a number of factors determine the multiplier,<sup>260</sup> one of the most important parameters is the *marginal propensity to save* (MPS).<sup>261</sup> This parameter tells us, on average, what portion of an extra dollar in income households will save. If the MPS is one, then households save every cent of extra income they receive. As is readily apparent, a MPS of one would insure that the multiplier for government deficit spending was no more than one: after the government makes its purchases, recipients simply stash away every last cent, robbing the economy of multiple waves of spending.<sup>262</sup> At the other extreme, a MPS of zero implies an *infinite* multiplier (ignoring other limiting parameters): each dollar that the government spends gets re-spent again and again, without limit. Generalizing this story, the higher the MPS the lower the multiplier.<sup>263</sup>

This brings us back to perpetuities and dynastic trusts. We have seen that maintaining dynastic trusts generation after generation requires very high savings rates out of investment income—rates up to ninety percent or more.<sup>264</sup> This high savings rate means that fiscal multipliers will be much lower. When the government buys goods and services from firms, dividends paid on shares owned by dynastic trusts will be saved instead of spent—the root explanation for why higher savings rates reduce the multiplier. Similar-

<sup>258</sup> See Robert J. Barro, *Are Government Bonds Net Wealth?*, 82 J. POL. ECON. 1095, 1101–06 (1974). The basic idea can be traced back to David Ricardo's 1820 work. See David Ricardo, *Essay on the Funding System*, in THE WORKS OF DAVID RICARDO 515, 515 (John R. McCulloch ed., 1846). For a modern, non-technical introduction to this so-called "Ricardian equivalence theorem," see MANKIW, *supra* note 254, at 554–60.

<sup>259</sup> See Charles J. Whalen & Felix Reichling, *The Fiscal Multiplier and Economic Policy Analysis in the United States* 11–12 tbls.1 & 2 (Cong. Budget Office, Working Paper No. 2015-02, 2015), [https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/workingpaper/49925-FiscalMultiplier\\_1.pdf](https://www.cbo.gov/sites/default/files/114th-congress-2015-2016/workingpaper/49925-FiscalMultiplier_1.pdf) [<https://perma.cc/66S6-LWBS>].

<sup>260</sup> Among other things, the extent of foreign trade, wage rigidity, and other economic policies can affect the multiplier. See NICOLETTA BATINI, INT'L MONETARY FUND, FISCAL MULTIPLIERS: SIZE, DETERMINANTS, AND USE IN MACROECONOMIC PROJECTIONS 6–7 (2014), <https://www.imf.org/external/pubs/ft/tnm/2014/tnm1404.pdf> [<https://perma.cc/E535-XFLZ>].

<sup>261</sup> BLANCHARD, *supra* note 121, at G-6 (defining MPS). Note that the literature tends to focus on the marginal propensity to consume. This is simply the fraction of incremental income spent and not saved, that is: 1 - MPS. Since one defines the other, it does not matter whether we frame discussion in terms of savings (MPS) or consumption (MPC).

<sup>262</sup> An MPS of one would mean that the multiplier for a deficit-financed tax cut was zero: households save every cent of tax saving and so there is never any stimulus to begin with.

<sup>263</sup> MANKIW, *supra* note 254.

<sup>264</sup> See *supra* note 103 and accompanying text.

ly, funds freed up by tax cuts will not be spent. By raising the average economy-wide saving rate, dynastic trusts will reduce fiscal multipliers. This will enervate the power of fiscal stimulus to pull the economy out of recessions. Although economists for decades believed that monetary policy alone could keep the economy on track, the Great Recession has undermined that conviction. Simply put, if excessive amounts of wealth end up in dynastic trusts, the higher savings rate will tend to attenuate the effect of fiscal policy measures and leave the government without sufficiently potent policy measures to shorten recessions and ameliorate the widespread, often acute financial distress that they visit on most of the population—with the greatest pain felt by those at the bottom of economic ladder.<sup>265</sup>

## 2. Reduction in Long-Term Rate of Consumption

Although it cuts against the grain of previously discussed intuition and folklore,<sup>266</sup> combating the paradox of thrift requires relatively short-term deviations from cultural biases in favor of saving. This fact might help voters and policymakers temporarily overcome predispositions and enact policies encouraging consumption that can end a recession and restore prosperity. By contrast, this subsection, examines an economic phenomenon that cuts much harder and deeper against traditional predispositions in favor of saving. It is a bedrock principle of modern growth theory that an excessively high savings rate permanently reduces consumption. Savings is but an instrument to enable greater total consumption over some sufficiently long horizon. Thus, a savings rate so high that it permanently reduces consumption is another undesired paradox.

The core reason that sustained excessive savings rates eventually reduce consumption is diminishing returns to investments made with all of those savings. The fundamental lesson of Solow's growth model, one of "the workhorse models of macroeconomics,"<sup>267</sup> is that as capital *per worker* increases, the added production (marginal productivity) from these investments gets smaller and smaller. If all workers are already paired with ninety-nine machines, how much is left to gain by adding a hundredth machine for each? Past some point, capital investments yield so little in incremental

---

<sup>265</sup> Marianne Bitler & Hilary Hoynes, *Heterogeneity in the Impact of Economic Cycles and the Great Recession: Effects Within and Across the Income Distribution*, 105 AM. ECON. REV. 154 (2015) (highlighting that recessions have the greatest negative effect on black, latino, and low-income families).

<sup>266</sup> See *supra* notes 118–120 and accompanying text.

<sup>267</sup> DARON ACEMOGLU, INTRODUCTION TO MODERN ECONOMIC GROWTH, at xvi (2009).

goods and services that society would be better off if instead of making the investment it had diverted the wealth to consumption.

The savings rate that maximizes consumption is called the “golden rule” rate and is equal to the sum of the depreciation rate for capital (roughly, the annual rate at which capital wears out) and the rate of growth of the population.<sup>268</sup> We have already cited evidence that  $g$  is at most about 2–3% in developed economies.<sup>269</sup> The depreciation rate for private capital in developed nations is around 11%.<sup>270</sup> Thus the golden rule savings rate, to err on the high side, is at most around 15% but more likely 13% or 14%.

The U.S. savings rate has bounced around in the range of 2.5–7.5% since the late 1990s, with an average of about 5%.<sup>271</sup> As the nation is nowhere near the golden rule rate, over the long run saving more would increase not only national income but consumption as well. Indeed, the gap is large: the savings rate would have to roughly triple to approach the golden rule rate. Savings rates have rarely if ever approached the golden rule level. During the 1970s the savings rate did average around 12.5% and spiked for a single month above 15%, but since then it has trended down to around 5% and since fluctuated around that level.<sup>272</sup> It would seem that only extraordinary change could threaten to lift the saving rate to the inefficiently high levels above the golden rule rate.

Dynastic trusts may embody just such extraordinary change. We have shown that donors who are serious about setting up dynastic trusts must impose trust income savings rates of around 90% in perpetuity to maintain high real incomes for a growing body of descendants.<sup>273</sup> The share of wealth owned by potential dynasts, defined as those in the top 1% of the wealth distribution, has been trending up: it now stands at about 34%.<sup>274</sup> If Piketty is correct, this number has begun an upward trajectory towards 60%.<sup>275</sup> Capital’s share of national income has trended up to about 40% and Piketty’s work suggests that this could keep rising to at least 50% and per-

<sup>268</sup> Edmund Phelps, *The Golden Rule of Accumulation: A Fable for Growthmen*, 51 AM. ECON. REV. 638, 642 (1961). For a modern undergraduate-level treatment, see ANDREW B. ABEL ET AL., *MACROECONOMICS* 233–34 (9th ed. 2016).

<sup>269</sup> See *supra* Table 1 & note 45.

<sup>270</sup> INT’L MONETARY FUND, *FAD INVESTMENT AND CAPITAL STOCK DATABASE 2017: MANUAL AND FAQ—ESTIMATING PUBLIC, PRIVATE, AND PPP CAPITAL STOCKS* 4 tbl.1, <https://www.imf.org/external/np/fad/publicinvestment/data/info122216.pdf> [<https://perma.cc/XXN9-ZKZ4>].

<sup>271</sup> See FED. RESERVE BANK OF ST. LOUIS, *Personal Saving Rate (PSAVERT)*, <https://fred.stlouisfed.org/series/PSAVERT> [<https://perma.cc/D5JZ-JAYK>].

<sup>272</sup> See *id.*

<sup>273</sup> See *supra* note 103 and accompanying text.

<sup>274</sup> See *supra* Table 1 & note 45.

<sup>275</sup> PIKETTY, *supra* note 11, at 340 fig.10.1 (noting data from France); *id.* at 344 fig.10.3 (noting data from England).

haps higher.<sup>276</sup> If we round out the picture by assuming that non-dynasts save only 5% of their income and that half of all those in the top 1% of the wealth distribution decide to establish dynastic trusts, we end up with a savings rate of 17%—significantly above the 15% “golden rule” rate.<sup>277</sup>

It is important to stop and think about exactly what would be happening in this scenario. On top of the dramatic increase in inequality embodied in the concentration of wealth in the top 1% and the rising share of national income claimed by that capital, the desire of the privileged few to establish dynastic wealth would lead to a savings rate that reduced *everyone's* consumption indefinitely. This is exactly what happens when savings exceed the golden rule rate. Only part of this cost would be borne by the dynasts. They would also drag down the consumption level of the remaining 99%.<sup>278</sup> This is a *very* long-run phenomenon and the costs would be borne by generation after generation of the bottom 99%.

### 3. In Praise of Dissipation

The previous two subsections showed that the dead-hand directives to save most of the *income* generated by large pools of capital in dynastic trust will result in both long-term and short-term excessive savings. This subsection refocuses on the use of the *principal*—the capital itself—in those dynastic trusts. Heirs to fortunes who are free of dead-hand dynasty-preserving constraints have the ability to live lavishly and spend not just the income from their inheritances but also to sell off the assets as well. They can liquidate their stocks and bonds and spend the proceeds on second (third, fourth, et cetera?) mansions, opulent cars, and other luxuries. The relative rarity of family dynasties lasting more than a few generations suggests that many heirs indeed do dissipate much of their wealth and leave their children with substantially diminished fortunes.<sup>279</sup> This subsection argues that such dissipation of family fortunes can be a potent tool for breaking up dynastic family wealth and increasing socioeconomic mobility.

Undeniably, if policymakers employ the RAP purely as a tool to prevent the formation of dynastic wealth they are banking on the fact that some heirs will dissipate large parts of a donor's largesse. If each generation in a long sequence of heirs is willing to forego lavish consumption and save

---

<sup>276</sup> See *Id.* at 41–42.

<sup>277</sup> The details of this calculation appear in Appendix A.

<sup>278</sup> This rather clearly raises an important policy question: is there any plausible argument that the benefits of enabling feudal-like perpetually wealthy bloodlines for a small slice at the top exceed the costs of foregone consumption among the vast majority of society, for generation after generation?

<sup>279</sup> See *infra* notes 284–287 and accompanying text.



family trust income at a sufficiently high rate, they can establish a dynasty without the need for a single founding scion to mandate such behavior from beyond the grave.

Shepard puts a common normative spin on this point, stating that “the RAP addresses the ‘problem’ of dynastic accumulations of wealth only, and only to the extent, that it diminishes overall social welfare by championing and facilitating the squandering or mal-investment of capital. Such a move is definitionally inefficient, and pretty patently unjust as well.”<sup>280</sup> Shepard’s normative take is deeply rooted in the commonly-held view that more saving is always better—a position seriously undermined by the economic theories brought to bear in the last two subsections.<sup>281</sup>

Beyond the previously-discussed *efficiency* costs of over-saving, this Section emphasizes a separate equitable benefit of profligate heirs: the frittering away of large inheritances on high living has a strong tendency to reduce income and wealth inequality. Unless prodigal heirs’ consumption preferences are quite odd, the beneficiaries of their spending will be a wide circle of common workers. For example, building a new mansion employs many laborers, including numerous relatively low-wage unskilled laborers. Buying a fancy new car translates into manufacturing jobs from assembly plants to parts makers to steel miners. Traveling in luxury increases the demand for airline and hotel workers, tour guides, masseuses, and a host of other professions offering only modest wages. Luxury expenditures raise the demand for all of these forms of labor, thus expanding the number of jobs and putting upward pressure on wages.<sup>282</sup> Dissipation of inherited wealth thus offers a form of trickle-down economics that likely works—not only to improve the welfare of the middle and lower classes but also to reduce overall inequality.<sup>283</sup>

Piketty acknowledges that profligate heirs could reduce the concentration of wealth he is forecasting for the twenty-first century, but questions its impact. “It would in any case be rather imprudent to rely solely on the eternal but arbitrary force of family degeneration to limit the future proliferation of billionaires.”<sup>284</sup> He may, however, be underestimating the potency of wealth dissipation. Although there is scant hard data, what evidence we

<sup>280</sup> Shepard, *supra* note 194, at 594.

<sup>281</sup> *Id.*

<sup>282</sup> Michael J. Silverstein & Neil Fiske, *Luxury for the Masses*, HARV. BUS. REV. (Apr. 2003), <https://hbr.org/2003/04/luxury-for-the-masses> [<https://perma.cc/8HW8-C4Y2>] (illustrating how America’s middle market consumers are spending more on luxury goods and explaining how that new-found consumption is impacting the economy).

<sup>283</sup> See Piketty et al., *supra* note 127, at 24–26; see also *supra* notes 124–127 and accompanying text (discussing how trickle-down economics is not working in the general labor market).

<sup>284</sup> PIKETTY, *supra* note 11, at 451.

have supports cross-cultural proverbs suggesting that family fortunes usually evaporate by the third generation.<sup>285</sup> Data gathered by a firm that counsels wealthy families on preserving their fortunes suggests that “70% of family wealth is destroyed by the second generation . . . . After three generations, the loss of wealth exceeds 90%.”<sup>286</sup> The second number strongly supports the first in that it implies that each generation fritters away 70% of the legacy it receives.<sup>287</sup> Piketty himself cites a large-scale historical episode providing further support for this “70%” rule, contrasting the large legacies left by French elite before World War I with the diminished sums left by wealthy decedents between the two world wars. He states:

From 1872 to 1912, the system appears to have been perfectly balanced: the wealthiest individuals passed on to the next generation enough to finance a lifestyle requiring 80–100 times the average wage or even a bit more, so that wealth became even more concentrated. This equilibrium clearly broke down in the interwar years: the wealthiest 1 percent of Parisians continued to live more or less as they had always done but left the next generation just enough to yield capital income of 30–40 times the average wage;

---

<sup>285</sup> The Chinese version of the proverb, purportedly dating back two millennia, is “富不过三代,” or transliterated, “Fu bu guo san dai,” which translates as: “Wealth does not pass three generations.” Douglas Tong, *From the Teacher’s Corner 24: Three Generations*, [http://ejmas.com/pt/2012pt/ptart\\_tong\\_teacher24-1210.html](http://ejmas.com/pt/2012pt/ptart_tong_teacher24-1210.html) [<https://perma.cc/GF65-4PKJ>]. Another version is: “From rice paddy to rice paddy in three generations.” *Id.* Similar proverbs exist in other societies. In America, one hears “shirtsleeves to shirtsleeves in three generations.” Its origins are unclear; some attribute it to Andrew Carnegie, but it does not appear in anything he wrote. *Shirtsleeves to Shirtsleeves in Three Generations*, *From*, OXFORD DICTIONARY OF PHRASE & FABLE (2006), <http://www.encyclopedia.com/humanities/dictionaries-thesauruses-pictures-and-press-releases/shirtsleeves-shirt-sleeves-three-generations> [<https://perma.cc/7M7R-LBGB>]. An English version is “clogs to clogs in three generations.” *Id.* Another English version dating back over three centuries goes: “And seldom three Descents continue Good.” *The Wife of Bath’s Tale*, in JOHN DRYDEN, *FABLES ANCIENT AND MODERN* 479, 493 (1700), <https://archive.org/details/fablesancientmod00dryduoft> [<https://perma.cc/RUH6-T3TN>]. In Scotland they say: “The father buys, the son builds, the grandchild sells, and his son begs.” DAVID MCALVANY, *THE INTENTIONAL LEGACY* 16 (2017). In Arab culture the idea appears in an extended form in IBN KHALDUN, *THE MUQADDISMAH*, AN INTRODUCTION TO HISTORY (Franz Rosenthal trans., 1969) (1377). The Spanish say: “who doesn’t have it, does it, and who has it, misuses it.” Richard Blanchard, *Shirt Sleeves to Shirt Sleeves in Three Generations*, *CORP MAG.* (July 1, 2008), <https://www.corpmagazine.com/special-interests/family-business/shirt-sleeves-to-shirt-sleeves-in-three-generations/> [<https://perma.cc/RHJ2-ZAWS>]. The Italians, “from stalls to stars.” *Id.*

<sup>286</sup> Brian Luster & Steven Abernathy, *Preparing for Inheritance*, *BARRON’S*, Nov. 9, 2015, at B63.

<sup>287</sup> If W leaves \$100 million to X, we are assuming that X spends \$70 million and thus leaves only \$30 million to Y. If Y spends 70% of what remains, she leaves only 30% of the already-diminished fortune to Z. Z will receive only \$9 million—which represents about a 90% reduction in the original \$100 million fortune.

by the late 1930s, this had fallen to just 20 times the average wage. For the rentiers, this was the beginning of the end. This was probably the most important reason for the deconcentration of wealth that we see in all European countries (and to a less extent in the United States) in the wake of the shocks of 1914–1945.<sup>288</sup>

Note the approximately 70% reduction in inheritances across the two generations (pre-war, post-war). Piketty credits shocks from the First World War and the Great Depression for destroying wealth and depressing returns, but this episode may in part also be explained by the timeless phenomenon of “shirtsleeves to shirtsleeves in three generations.”<sup>289</sup>

Whatever the ultimate explanation(s), maintaining dynastic wealth is apparently no mean feat. Prodigal children outnumber their frugal siblings by a margin of over two to one (seven to three based on sources cited in the previous paragraph).<sup>290</sup> In order to counteract this tendency, wealth advisors recommend extensive surveys of family member desires, coaching to help families avoid conflict and work together to preserve wealth, assembling customized plans for wealth preservation based on a family’s characteristics and desires, and tutoring prospective heirs on the myriad difficulties of preserving familial wealth.<sup>291</sup>

These are expensive interventions, and even so there is no data showing that in the end they reduce dissipation of family wealth. Preserving family wealth is challenging when the baseline is that 70% of the beneficiaries in each generation would prefer to live it up. This difficulty brings into sharp relief the societal threat posed by permitting donors to fund perpetual dynastic trusts. In one fell swoop we are replacing a very leaky bucket of heirs (70% wish to dissipate) with the absolute iron dead hand of a donor dead set on preventing dissipation forever. We have for centuries lived with the RAP under which fortunes dissipated rapidly, and so we simply have no notion of how powerful the dead iron hand may be in preventing dissipation, concentrating wealth, and perpetuating privilege perpetually.

As emphasized from the start, Piketty’s work suggests that this is a particularly inopportune time for licensing perpetual dynastic trusts.<sup>292</sup> Wealth is becoming increasingly concentrated among a smaller and smaller group at the top of distribution.<sup>293</sup> This small circle of extremely wealthy

<sup>288</sup> PIKETTY, *supra* note 10, at 369.

<sup>289</sup> See *supra* notes 133–165 and accompanying text.

<sup>290</sup> See *supra* notes 286–287.

<sup>291</sup> See, e.g., THE WILLIAMS GRP., <http://www.thewilliamsgrp.org/index.cfm> [https://perma.cc/H8UD-8MDM] (highlighting a consulting group that prepares family estate plans).

<sup>292</sup> See *supra* note 40 and accompanying text.

<sup>293</sup> See *supra* Table 1 & note 45.

households have the nine-, ten-, or eleven-figure wealth sufficient to provide lavish incomes to all of their descendants for generations on end—with no possibility of dissipation by even a single heir. One hundred years ago presidents, judges, academic economists, and very wealthy industrialists were convinced that such wealth was a malignant force inconsistent with democratic society.<sup>294</sup> What can be done to prevent the formation of a new nobility encastled in perpetual wealth?

#### V. TAXES ON PERPETUITIES (TOPS) INSTEAD OF A *RULE AGAINST* PERPETUITIES (RAP)

The traditional answer to this question, of course, has been the RAP and the estate tax. The RAP's role as an anti-dynasty device dates back centuries.<sup>295</sup> Since its advent in 1916,<sup>296</sup> the estate tax has buttressed the RAP in fending off dynastic impulses of the wealthy.

[The estate tax] was meant to ward off the emergence of a hereditary aristocracy in the United States. [It] was a populist response to the excesses of the Gilded Age. President Theodore Roosevelt pointed out that “most great civilized countries have an income tax and an inheritance tax.” Such taxation, he noted, should “be aimed merely at the inheritance or transmission in their entirety of those fortunes swollen beyond all healthy limits.”<sup>297</sup>

Thus, the nation adopted the estate tax mainly to work in tandem with the RAP to prevent “fortunes swollen beyond all healthy limits” and the attendant threats to democratic governance.<sup>298</sup>

This Article has compellingly shown that perpetual dynastic trusts give rise to separate, severe, additional costs, costs that have heretofore gone unnoticed. As described in the Part IV, Section C above, perpetual family

---

<sup>294</sup> See CHESTER, *supra* note 234 (quoting President Theodore Roosevelt); Repetti, *supra* note 235 (citing President Franklin Delano Roosevelt and Irving Fischer). Industrialist Andrew Carnegie in a famous essay wrote that “the growing disposition to tax more and more heavily large estates left at death is a cheering indication of the growth of a salutary change in public opinion . . . . Of all forms of taxation, [a progressive estate tax] seems the wisest.” Andrew Carnegie, *Wealth*, 148 N. AM. REV. 653, 659 (1889).

<sup>295</sup> See *supra* notes 133–165 and accompanying text.

<sup>296</sup> See DARIEN B. JACOBSON ET AL., INTERNAL REVENUE SERV., THE ESTATE TAX: NINETY YEARS AND COUNTING 118 (2007), <https://www.irs.gov/pub/irs-soi/ninetyestate.pdf> [<https://perma.cc/8B2K-ANHD>] (noting the history of the estate tax).

<sup>297</sup> Rosie Hunter & Chuck Collins, “Death Tax” Deception: Who’s Behind the Movement to Repeal the Nation’s Only Tax on Inherited Wealth?, DOLLARS & SENSE MAG. (2003), <http://www.dollarsandsense.org/archives/2003/0103hunter.html> [<https://perma.cc/LB7N-C56A>].

<sup>298</sup> *Id.*

trusts exacerbate the costs of concentrated wealth by raising the savings rate to inefficiently high levels and blocking desirable dissipation of family fortunes. These costs threaten to have a potent negative impact on the economy as a whole.

In order to craft appropriate policy responses to the harms threatened by perpetuities, we first need to accurately conceptualize them. Specifically, the costs imposed by dynastic trusts are best understood as negative externalities: dynastic wealth benefits a small circle of affluent families, but those benefits are almost certainly swamped by longer and deeper recessions and extended periods of stunted consumption due to the high savings rates required to sustain perpetual family wealth. Transactions costs based on the large number of parties on both sides makes any sort of private deal to eliminate the negative externality infeasible.<sup>299</sup>

Because these costs are best conceived as externalities, regulations, be they the RAP or otherwise, are not the answer. The RAP itself is a dated, extremely blunt, and weakly targeted instrument to address the costs of excess savings. Alternative regulatory schemes could be devised to address negative externalities, but economists generally believe that taxation constitutes the preferred policy tool. Specifically, they recommend taxing the undesirable activity at a rate that reflects the external costs imposed on society.<sup>300</sup> This achieves the efficient result by making the activity unprofitable for those who value it less than the tax while simultaneously raising revenue from those who value the activity sufficiently to pay the charge.<sup>301</sup> This raises revenue for the government without any deadweight loss<sup>302</sup>—indeed, an externality tax raises revenue while improving incentives.<sup>303</sup>

I therefore propose taxing perpetuities and moreover advocate that the tax be imposed by the national government. The last few decades have shown that the states are engaged in a serious race-to-the bottom<sup>304</sup> in abolishing the RAP.<sup>305</sup> It is essentially costless for decedents to choose the law of any jurisdiction to govern their estates,<sup>306</sup> and so if even one state deregulates perpetuities, then wealthy residents of all other jurisdictions can easily

---

<sup>299</sup> See RICHARD CORNES & TODD SANDLER, *THE THEORY OF EXTERNALITIES, PUBLIC GOODS, AND CLUB GOODS* 49–51 (2d ed. 1996).

<sup>300</sup> See *id.* at 68–78.

<sup>301</sup> See *id.*

<sup>302</sup> See NICHOLSON, *supra* note 115, at 429–30 (noting that deadweight loss of a tax is the net reduction in welfare caused by taxes that drive a wedge between the price buyers are willing to pay and that sellers actually receive).

<sup>303</sup> See *id.*

<sup>304</sup> See *supra* note 10 and accompanying text (discussing the race to the bottom phenomenon).

<sup>305</sup> See *supra* notes 133–165 and accompanying text.

<sup>306</sup> See *supra* note 158 and accompanying text.

establish a dynastic trust under cover of this state's permissive law. States' incentives to permit such trusts in order to attract trust business are powerful; as noted above, over half of the states have eviscerated or eliminated the RAP.<sup>307</sup> The harm dynastic trusts pose do not respect state borders. They can cause both short- and long-term economic harm to the national economy and so to all citizens in all jurisdictions.<sup>308</sup> Such interstate "spillover" effects are one of the primary policy justifications for federal intervention.<sup>309</sup>

The paradox of thrift, savings in excess of the "golden rule" rate, and the absence of wealth dissipation are three distinct problems, and each calls for a distinct, narrowly-tailored federal solution.<sup>310</sup> The bulk of this Section (Sections A through D) sketches taxes that would cure these negative externalities. First, we must explain why a tax is preferable to simply requiring dynasty trusts to make greater expenditures.

#### *A. Why Taxation Instead of Required Expenditures?*

The externalities in play here (adverse macroeconomic impacts of excessive saving) are unusual in that solving them does not require taxation. In more typical scenarios, such as a polluting factory, the owner emits contaminants because it is cheaper than any alternative (for example, filtration, or a different industrial process). In order to cure the externality, the government imposes a tax that forces polluters to factor the cost of their emissions on others into their business decisions.<sup>311</sup>

For dynasty trusts, the nature of the externality is fundamentally different. The problem is too much saving—equivalently, too little spending. The externality disappears if a trust grantor simply dictates more annual spending (less saving). Instead of a tax, then, the law could instead cure the excess saving externality by simply commanding the trustee to spend a greater share of trust income on something. It is not necessary to take value from the class of beneficiaries (that is, to tax them). Rather, all that is needed is spending more trust income when excess saving either (i) exceeds the golden rule level or (ii) is causing a paradox of thrift. In the dynastic trust setting there is an alternative to a classic externality tax: a legal mandate requiring dynastic trusts to spend more when excessive saving reduces national income.

---

<sup>307</sup> See *supra* note 157 and accompanying text.

<sup>308</sup> See *supra* notes 240–294 and accompanying text.

<sup>309</sup> Harvey S. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 OHIO ST. L.J. 503, 508 (1987) (asserting that national regulation is justifiable only to reduce spillover effects).

<sup>310</sup> See *supra* notes 240–294 and accompanying text.

<sup>311</sup> See CORNES & SANDLER, *supra* note 299.

There is precedent for such a mandatory spending requirement on trusts: § 4942 of the federal tax code in effect requires that charitable trusts (“private foundations”) distribute at least 5% of their endowment to beneficiaries.<sup>312</sup> A trust pays an immediate 30% tax on any shortfall, and a 100% tax on the shortfall if not cured in ninety days.<sup>313</sup> Such steep tax rates effectively force foundations to spend 5% of their assets on beneficiaries. Admittedly, the motivation for § 4942 bears no relation to the negative externalities discussed herein. Section 4942 is “designed to prevent indefinite accumulations of income without adequate justification.”<sup>314</sup>

Of greater moment than this difference in purpose is the tremendous workability advantage that § 4942 possesses over any analogous provision for dynasty trusts. It is relatively easy to determine if a charity is making required expenditures for its class of beneficiaries. An education trust will be cutting paychecks to teachers or tuition checks to students. A charity for the hungry will be buying beef and barley and paying cooks to make soup. A cancer foundation will hire scientists and build labs. It is relatively easy for tax officials to determine whether or not private foundations are spending required amounts in furtherance of their charitable purposes. These sorts of trusts either (a) spend income on a relatively narrow class of goods or services or (b) they save it.

The same cannot be said for dynastic trusts. In the face of a minimum expenditure requirement, a donor could insert all sorts of “spending” requirements that in truth served the purpose of preserving and growing the capital of the trust. The trust document could, for example, direct forced expenditures into real estate assets—second mansions for every beneficiary? Third, if necessary! Unoccupied properties could be rented out. Or a dynastic trust provision could direct required expenditures into precious gems and jewelry. Fine art work is another possibility. Gracefully aging wines another. The point should be clear: there is a virtually endless list of mixed consumption and saving goods *the purchase of which does not stimulate demand*. The buyer of such assets (for they are assets) is generally not increasing the demand for labor or capital; rather, she is exchanging one store of

---

<sup>312</sup> 26 U.S.C. § 4942 (2012).

<sup>313</sup> *Id.*

<sup>314</sup> BORIS I. BITTKER & LAWRENCE LOKKEN, FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS ¶ 101.5 (2017); see Joel H. Feld, Note, *Unreasonable Accumulation of Income by Foundations*, 16 CLEVELAND-MARSHALL L. REV. 362, 362 (1967) (observing that “unreasonable accumulations of income were evidence that the foundation was not organized for, or carrying out, a charitable purpose” (citing MARION R. FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 171–72 (1965))). Congress and the courts have expressed concern that some donors may abuse charitable trusts to accumulate capital income free from taxation. See Feld, *supra*, at 368.

wealth for another. The tax authorities could try to sort out the true “expenditures” from the disguised saving, but the task seems impossible.

Thus, in order to avoid the negative externalities that excess savings sometimes impose, the government needs to tax excess savings of dynastic trusts. Presumably the government will then spend the funds in any number of ways (for example, building or repairing public infrastructure; expanding government services) that do serve to alleviate saving in excess of the golden rule rate or a paradox of thrift. We next consider when the government would need to impose such taxes, and how it would impose them.

### *B. Taxing Dynastic Trust Savings in Excess of the Golden Rule Level*

I recommend a straightforward tax to counteract dynastic trust savings rates so extraordinarily high that they could pull the national savings rate above its “golden rule” level of approximately 15%.<sup>315</sup> First, the tax need only apply to trusts that dictate a savings rate in excess of the golden rate. Trusts that save less are not part of the negative externality targeted by the tax. Second, the tax need not apply as long as the national savings rate remains below the golden rule level. Until it exceeds that level, high dynastic trust savings rates do not depress consumption—the negative externality being targeted by the tax.

If and when dynastic trust over-saving drives the national savings rate above the golden rule level, the tax rate on those trusts should be set such that the expected revenue from the tax equals the dollar level of over-saving. To illustrate, assume as we did above that the golden rule rate for saving is 15% and that high rates of saving by dynastic trusts pull the economy’s savings rate up to 18%. If the national income were set at its 2016 end-of-year value of \$16.2 trillion dollars, dynasty trusts would be causing excess savings of about \$500 billion dollars.<sup>316</sup> The government can correct this by taxing all dynasty trusts saving more than 15% of their income at a rate designed to raise this \$500 billion. For example, if the total dollar amount of dynastic trust savings in excess of 15% were \$2 trillion, the government would set the tax rate at 25%. To illustrate the application of the tax at the taxpayer level, consider a trust containing \$1 billion in assets that earned a 5% return and thus enjoyed \$50 million in income. If the trust

---

<sup>315</sup> Other taxpayers, especially wealthy households, will also save at rates in excess of fifteen percent. This Article does not explore policy measures that should be taken to address this component of an economy-wide over-saving problem, as such taxpayers are subject to different incentives than the dead hands behind dynastic trusts and in particular can respond to altered incentives created by evolving legislation and tax policy.

<sup>316</sup> At the golden rate, the nation would save 15% of \$16.2 trillion, or about \$2.43 trillion. At 18%, it saves \$2.92 trillion. The difference is about a half a trillion dollars, or \$500 billion.



saved 90% of its income, the dollar level of savings would be \$45 million. The first 15% of this trust income (up to the golden rule rate), \$7.5 million, would be exempt from the tax. The remaining \$42.5 million (\$50 million less the \$7.5 million exemption) would be subject to the 25% tax, coming to \$10.6 million. In order to insure that this tax would indeed reduce the national savings rate to the golden rule level, the government would use the proceeds to either (i) fund public goods or (ii) cut taxes of households with high propensities to consume—the usual assumption for lower-income households.<sup>317</sup>

### C. Taxing Dynastic Trusts to Address the Paradox of Thrift

Addressing the shorter-term paradox of thrift calls for a different tax on perpetuities, albeit one with a number of parallels to the tax outlined in the preceding Section.<sup>318</sup> As the paradox of thrift occurs only in times of slack demand (that is, recessions),<sup>319</sup> this tax should be designed so that it does not go into effect unless the economy is sputtering. The key benchmark in setting the rate for this tax should be the size of the boost in aggregate demand needed to restore full employment.<sup>320</sup> Even with this guide, there is no single ‘right’ fraction of the burden to impose on dynastic trusts. In a paradox of thrift economy, *many* actors are trying to save more than is socially desirable. One simple and fair approach is (i) to estimate the (lower) national savings rate that would solve the paradox and raise demand enough to end the recession, and then (ii) tax all actors saving at a rate calculated to reduce overall savings to this target rate. Given the extraordinarily high savings rates necessary to make dynastic trusts viable,<sup>321</sup> this tax would impose a heavy burden on dynastic trusts during recessions.

This tax on excessive dynasty trust savings during recessions has an additional attractive feature as an “automatic stabilizer.” Economists use this label to describe policies and programs that, once in place, work automatically to counteract economic downturns.<sup>322</sup> Unemployment insurance and the higher deficits generated during recessions by falling tax revenues combined with relatively fixed government spending are common examples of such automatic stabilizers. The paradox of thrift tax works as an automat-

---

<sup>317</sup> See Dynan et al., *supra* note 60 and accompanying text (noting higher savings by the wealthy imply symmetrically that the marginal propensity to consume is higher among the less affluent).

<sup>318</sup> See *supra* 315–317 and accompanying text.

<sup>319</sup> See *supra* 242–265 and accompanying text.

<sup>320</sup> BLANCHARD, *supra* note 121, at 60.

<sup>321</sup> See *supra* note 103 (discussing the saving rate necessary to fund a perpetual trust can be ninety percent or more).

<sup>322</sup> CASE & FAIR, *supra* note 242, at 313.

ic stabilizer because during recessions it mechanically takes money that otherwise would go into excess savings and channels it to stimulate demand either through the purchase and production of goods and services or by cutting taxes on lower-income households likely to spend all or most of the windfall.

Before we move on, two points should be made about the externality taxes discussed in this and the prior Section.<sup>323</sup> First, unlike the current estate tax, there is no exemption level or progressive rate structure. Unlike the estate tax, these levies do not address fairness or equity concerns. They are designed to create disincentives to excessive savings, which poses a threat to the economy whether done by a small number of dynastic trusts with huge pools of assets or by a large number of dynastic trusts with relatively modest sums. Every excess dollar saved can stunt consumption growth and prolong recessions. In practice we expect most dynastic trusts to be created by the very wealthy as the per-beneficiary benefits flowing from a middle- or lower-class dynastic trust would be quite modest.

Second, these taxes likely will induce many if not most would-be dynasts either to refrain from setting up perpetual family trusts in the first place or to craft them in ways that avoid the heavy taxes outlined in this and the previous Section. Recessions occur with semi-predictable frequency<sup>324</sup> and each will trigger a large trust income tax bill for the duration of the recession. Combined with the potential for a second levy to drive savings below the golden rule rate, taxation will seriously erode the ability of a dynastic trust to provide undiluted benefits generation after generation.

Donors who nonetheless persevere with dynastic planning would prefer to divert trust income from heavily taxed saving to some form of consumption not subject to these taxes on perpetuities. Such trusts that avoid the high savings rates required for perpetual trusts to grow as fast as the class of beneficiaries impose neither of the negative externalities that motivated the taxes that I advocate in this and the previous Section.<sup>325</sup> There may be a few wealthy (and determined) donors who will nonetheless try to structure dynastic trusts to last as long as possible. That too poses no problem: if tax rates are set appropriately, trust fund tax payments will (roughly) compensate society for the harms caused by their excess savings.

---

<sup>323</sup> See *supra* 315–317 and accompanying text.

<sup>324</sup> There have been eleven recessions in the seventy-two years since World War II, or roughly one every six and a half years. The average duration has been about eleven months. Thus, the U.S. economy has been in recession about fifteen percent of the time since World War II. See *U.S. Business Cycle Expansions and Contractions*, *supra* note 110.

<sup>325</sup> See *supra* 315–317 and accompanying text.

### D. Fostering the Dissipation of Dynastic Wealth

The previous two Sections crafted externality tax solutions to the problems posed by dynasty trusts that over-save.<sup>326</sup> These are efficiency measures: they disincentivize savings rates so high that they actually shrink national income. We identified a separate, equitable problem with dynasty trusts: they lock wealth into family trusts, preventing equality-enhancing dissipation of wealth *forever*. The externality taxes described above do nothing to alleviate the undesirable freezing of wealth into bloodlines for all eternity.

The issue here revolves not around trust income but rather around trust principal. This is simply one form of wealth, and this suggests taxing dynastic trust principal instead of the trust income targeted in the previous two Sections.<sup>327</sup> As dynasty trusts are just one particularly stark example of the growing concentration of wealth that concerns Piketty, it is no surprise that his primary policy proposal fits for addressing the dissipation-blocking nature of such trusts.

Piketty's "ideal tool" to "avoid [the] endless inegalitarian spiral"<sup>328</sup> resulting from  $r > g$  is a progressive global tax on capital. He concedes that many will dismiss this as a "dangerous illusion," but observes that the income tax received similarly negative commentary when first proposed.<sup>329</sup> One of his main justifications for taxing capital is that those enjoying very large capital incomes can effectively hide their income and either postpone paying taxes or avoid them altogether.<sup>330</sup> He conceives of a wealth tax as substitute income taxation for those who own great wealth and therefore receive large capital income (in the form of dividends, interests, royalties, etc. . .). He conjectures that a top marginal wealth tax rate of 5% per year would suffice to prevent inequality from getting worse, and that a 10% rate could markedly reduce it.<sup>331</sup>

Dynastic trusts fit well within this framework. They are a particularly potent tool in the "endless inegalitarian spiral" that America finds itself, and they enable beneficiaries to significantly postpone trust income taxation. The goal of dissipating dynastic wealth requires a tax rate in excess of the

<sup>326</sup> See *supra* 315–325 and accompanying text.

<sup>327</sup> See *supra* 315–325 and accompanying text. As with the externality taxes described in prior sections, in theory we could use forced distributions instead of a tax to simulate the dissipation of family fortunes. As discussed at length in Part V.A, however, it is simply too difficult to make sure that such distributions do not end up being re-deposited into the dynasty trust, defeating the goal of dissipating dynastic family wealth. See *supra* notes 311–314 and accompanying text.

<sup>328</sup> PIKETTY, *supra* note 11, at 515.

<sup>329</sup> *Id.* at 516.

<sup>330</sup> *Id.* at 525.

<sup>331</sup> *Id.* at 530.

relatively high return to capital enjoyed by possessors of large fortunes.<sup>332</sup> The key parameter is how fast society wishes to dissipate dynastic fortunes. If, for example, legislators wish to simulate the folklore belief that descendants squander essentially all of a family fortune two generations after it is amassed they would set the “dissipation of wealth” tax rate on dynasty trusts at about 2% above returns enjoyed by the wealthy.<sup>333</sup> If, as some evidence suggests, wealthier actors earn returns in the 6–10% range,<sup>334</sup> Piketty’s call for a 10% wealth tax are within the range of reasonableness.

### *E. And What of Large Estates Not Bequeathed via Dynasty Trusts?*

None of the three taxes outlined in the preceding Sections would apply to large estates passed outside of dynastic trusts.<sup>335</sup> This omission does not signal tacit approval but rather limited focus. This Article shows how the imminent end of the federal estate tax, in tandem with the death of the RAP, enables the creation of dynastic wealth in America for the first time in the nation’s history. It then identifies the unnoticed social costs of dynasty trusts: inefficient excess saving and inequitable restraints on dissipation. Fairness in taxing estates not bequeathed via dynasty trusts falls outside of these domains.

The fairness case for taxing large pools of wealth is compelling. Andrew Carnegie, one of the wealthiest men of America’s Gilded Age, deemed a progressive taxation of estates the “wisest” tax,<sup>336</sup> and modern empirical work bears his view. Best evidence suggests that the estate tax does not disincentivize effort or saving and so imposes little deadweight loss.<sup>337</sup> On top of this attractive efficiency profile, the very progressive federal estate tax is eminently fair. It imposes tax burdens on those best able to pay and for whom the marginal utility of an extra dollar of disposable income is presumably low,<sup>338</sup> enabling the state to impose lower taxes on those least able to pay for whom

---

<sup>332</sup> See *supra* notes 56–58 and accompanying text.

<sup>333</sup> See *supra* notes 284–286 and accompanying text (citing both folklore and evidence from France that descendants dissipate about 70% of inherited fortunes in the course of each generation (25 years)). This implies an annual dissipation rate of the principal of about 2%, in solving the equation  $(1 - d)^{25} = 0.3$  for  $d$ , the annual dissipation rate.

<sup>334</sup> See *supra* notes 56–58 and accompanying text.

<sup>335</sup> See *supra* notes 311–334.

<sup>336</sup> See *supra* Table 1.

<sup>337</sup> See, e.g., William G. Gale & Maria G. Perozek, *Do Estate Taxes Reduce Saving?*, in *RETHINKING ESTATE AND GIFT TAXATION* 216, 236 (William G. Gale et al. eds., 2001) (“Our . . . most striking finding is that under several different circumstances, higher tax rates on estates can raise saving.”).

<sup>338</sup> See NICHOLSON, *supra* note 115, at 204 fig.6.1.

the utility of a marginal increase in disposable income is high. Previous scholarship has made a strong fairness case for the estate tax.<sup>339</sup>

The estate tax, however, is not the only tax that achieves these ends. In particular, Piketty's progressive wealth tax would serve as an admirable replacement for the federal estate tax.<sup>340</sup> Piketty tailored this tax precisely to address the disequalizing effects of  $r > g$ —effects caused as much by wealth outside of dynastic trusts as within. In addition, imposing an annual wealth tax instead of a once-a-generation estate tax has a number of advantages over the traditional estate tax. To the extent that the large one-time burden of the estate tax forces the sale of family businesses or farms<sup>341</sup> and people feel such forced sales are undesirable, an annual wealth tax with a top marginal rate of 2% or 3% removes all such concerns. At these rates, net revenue from family-run enterprises would cover the annual tax bill. Even if forced sales due to the estate tax are rare or non-existent, they have been a powerful political talking point for those opposed to taxing wealth, and Piketty's wealth tax is immune to this rhetorical stratagem.

It is also much more difficult for taxpayers to avoid a wealth tax. The state imposes an estate tax only about once every generation, giving taxpayers decades to engage in planning to minimize their tax bill.<sup>342</sup> It is inherently more difficult to hide assets from a tax assessed annually. The current (annual) federal income tax, with its wide-ranging information gathering machinery, provides a strong foundation for accurately calculating and collecting an annual wealth tax.

## CONCLUSION

This Article argues that the demise of the RAP and the continuing decline of the estate tax are particularly untimely and thus there is a need for remedial measures. This may give the impression that there is no relation between widening socioeconomic inequality and these legal changes. To the extent that money affects politics and lawmaking, we would be surprised if the top 1% enjoying a skyrocketing share of national income and wealth did not use their financial muscle to push for laws enabling them to entrench

---

<sup>339</sup> See generally Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255 (2013).

<sup>340</sup> See generally PIKETTY, *supra* note 11, at 515–39.

<sup>341</sup> See *supra* notes 174–175 and accompanying text.

<sup>342</sup> For a sophisticated examination of estate tax avoidance, along with thoughtful comments on reform, see generally Paul Caron & James Repetti, *Revitalizing the Estate Tax: Five Easy Pieces*, 142 TAX NOTES 1231 (2014). The same authors have questioned the extent to which the estate tax can be avoided entirely. See generally Paul Caron & James Repetti, *The Estate Tax Non-Gap: Why Repeal a "Voluntary" Tax?*, 20 STAN. L. & POL'Y REV. 153 (2009).

their privilege and extend it to their descendants. We are at risk of entering a vicious cycle, in which an ever-wealthier elite use their fortunes to enact laws consolidating and extending their socioeconomic hegemony. The RAP and the estate tax are not the first targets, and almost surely will not be the last.

Piketty's *Capital in the Twenty-First Century* tells us that the economic landscape is tilting decidedly in the direction of concentrated and inherited wealth. It is unnerving to think that the wealthy already possess sufficient influence to tilt the playing field even more steeply in their own direction. It seems that we may have already entered a self-reinforcing cycle in which the wealthy buy laws that protect and extend their fortunes and therefore arm them with even more influence going forward.

Piketty's work sits at the center of a burgeoning literature on growing inequality, much of it motivated by equity and fairness concerns. The primary thrust of this Article, lies in the direction of efficiency. The death of the RAP and the weakened, possibly doomed federal estate tax pave the way for the creation of dynastic trusts. The high savings rate of trust incomes required to maintain privilege perpetually poses a real threat to both shorter-term management of business cycles (the paradox of thrift) and longer-term growth of welfare (saving rate exceeding the golden rule rate). Imposing these potentially large macroeconomic losses on everyone is a negative externality. The benefits of dynastic wealth to the top 1% are assuredly dwarfed by the costs of excessive savings, justifying the imposition of new taxes to (i) prevent saving above the golden mean rate, and (ii) avoid the paradox of thrift during recessions.

Although England may have led the evolution from feudalism to democracy, and further pioneered restrictions on perpetuities, it nonetheless maintained a relatively rigid class system into the dawn of the twentieth century. A foundational principle in America's violent separation from England was the rejection of a privileged landed gentry perpetuated by the maintenance of large estates in family blood lines generation after generation. At the decisive battle of Yorktown, France provided vital aid to America in shedding the yoke of the English system of inherited privilege and soon joined America in embracing democracy and rejecting aristocracy.

Today French assistance comes in a humbler academic cloak: Piketty's *Capital in the Twenty-First Century*. America has strayed from its egalitarian roots and ideals, stumbling from its traditional status as one of the most equal developed societies to one of the most unequal. Piketty has illuminated a formerly dark landscape and revealed powerful forces that are widening inequality and immobility in the twenty-first century. For the 99% of Americans who stand to be marginalized by these forces and the growing influence that goes with concentrated wealth, Piketty's insights should be as

welcome as Admiral de Grasse's ships at Yorktown. The enemy today of course is not the British. Rather, it is an emergent powerful homegrown American aristocracy, an aristocracy that may well be the moving force behind the demise of the RAP and continuing attenuation of the estate tax—with elimination remaining in their sights. Piketty has focused a spotlight on the threat to fundamental American ideals of equality and democracy. It remains to be seen whether the institutions of democracy possess the power to resist the growing power of concentrated wealth.

APPENDIX A: SCENARIO IN WHICH THE SAVING RATE EXCEEDS THE  
“GOLDEN RULE” LEVEL

This short appendix demonstrates that under plausible assumptions about parameter values, dynasty trusts could push the saving rate above the golden rule rate of 13–14%.<sup>343</sup>

Piketty’s work demonstrates that capital’s share of national income could reach 50% in the twenty-first century,<sup>344</sup> and that the top 1% could own 60% of this wealth.<sup>345</sup> This means that potential dynasts’ capital income will amount to

$$\begin{aligned} & (50\% \text{ capital share of national income}) * (60\% \text{ of capital owned by top} \\ & 1\%) \\ & = 30\% \text{ of national income.} \end{aligned}$$

If we assume that half of those in the top 1% form dynastic trusts and mandate that these trusts save 90% of their income to insure trust growth keeps up with beneficiary growth, the percent of national income saved by dynastic trusts comes to

$$(50\% \text{ of dynasts}) * (90\% \text{ savings rate}) * (30\% \text{ of national income}) = 13.5\%.$$

If the saving rate for the remaining 70% of national income is an historically low 5%, that translates to saving

$$(5\% \text{ savings rate}) * (70\% \text{ of national income}) = 3.5\%$$

of national income. Summing these two numbers yields an overall saving rate of 17%, in excess of the golden rule rate.

The assumption that half of the households in the top 1% establish or are beneficiaries of dynasty trusts is the only step in these calculations without modern empirical support. In feudal England, however, the historical record suggests that under permissive laws the vast majority of noble households engaged in primogeniture and attempted to keep estates in the family bloodline forever. By this measure, the assumption that only half of the wealthiest families in the twenty-first century will establish dynasty trusts now that the law permits them may be on the low side.

---

<sup>343</sup> See *supra* notes 267–270 and accompanying text.

<sup>344</sup> See *supra* Table 1 & note 45.

<sup>345</sup> Piketty & Zucman, *supra* note 50, at 1321 fig.15.11.