

## The Case for a Federal RAP

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Eric A. Kades, *A New Feudalism: Selfish Genes, Great Wealth and the Rise of the Dynastic Family Trust (“DFT”)* (2019), available at [SSRN](#).

In a majority of U.S. jurisdictions, at least for purposes of trust law, the Rule Against Perpetuities (“RAP”) is dead. Yes, it’s true. In recent years most states either substantially weakened or completely eliminated their Rules Against Perpetuities. This fact has major implications for the wealthy, and more so for the ultra-wealthy. Freed from the restrictions of the RAP, those with the means and inclination can now create trusts that entrench great wealth within their families forever.

Eric Kades is concerned about this. In his second article addressing the potential repercussions of RAP repeal, *A New Feudalism: Selfish Genes, Great Wealth and the Rise of the Dynastic Family Trust (“DFT”)*, Kades proposes a reinstatement of the RAP, this time in federal form, something he wants to call “The National Anti-Feudalism Act.” This prescription comes after he engages in a kind of predictive analysis of the imagined estate planning of the ultra-wealthy, improbably informed by his reading of evolutionary biology. According to Kades, evolutionary biology should play a “significant role” in “explaining patterns of inheritance behaviors.”

If you read Kades’s last article on the implications of perpetual trusts born of RAP repeal (*Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*),<sup>1</sup> his conclusions here might come as a surprise. In that article, although Kades expressed a concern about the “significant evidence of a positive correlation between inequality and undemocratic governance,” he pointedly refrained from arguing for a reinstatement of the RAP. Instead, based on his identification of two arcane economic problems that might be caused by long-term trusts, Kades offered prescriptions in the form of bespoke taxes designed to offset those problems. (Readers looking for a more thorough encapsulation can access my review of Kades’s 2019 article [here](#).) But the current article is not technically inconsistent with the prior one—at least not in all respects.

Kades remains very concerned about the political implications of permanent concentrations of great wealth in a “small circle” of families. He makes reference to the outsized political and economic power wielded by the ultra-wealthy, wealth’s potential to undermine democracy, and its tendency to skew “life chances in favor of the fortunate few.” He further points out that today’s legal tools make it far easier to create a “feudal caste system” (he refers to it as a “New Feudalism”) than did the comparatively crude English common law traditions of primogeniture and the fee tail.

But while in the prior piece Kades set aside the political objections and suggested that we could tolerate permanent family trusts so long as their potential negative economic effects were curbed by targeted taxation schemes, here he wants them stamped out entirely. And here he dispenses with sophisticated and technical economic arguments and focuses instead on the simple facts of the imagined features of estate plans of ultra-wealthy families enabled by perpetuities repeal. After speculating on the wealth and status-entrenching features of these plans, he ticks off the potential social harms of inequality, and concludes with his federal prescription: prohibit them with a federal RAP.

As mentioned above, Kades’s professed insight into the specific features of the trusts that he is sure will

result from RAP repeal is gained from general principles of evolutionary biology, applied to the presumed motivations of the ultra-wealthy. Diving into the relevant literature, he points out that evolution has selected humans to “strike a nuanced balance between the quality/status of their descendants and the number of such descendants.” Much recent research in evolutionary biology has apparently focused on “the central role that status-seeking has played in human evolution.” In modern society, high placement in the status hierarchy has a positive effect on reproductive opportunities—among humans as well as apes. This explains why those at the top economically often have fewer, not more, children. When resources are limited, it is easier to confer status on a few, and thereby give those few greater reproductive opportunities.

Importantly, status is “a *relative or positional* good.” One cannot achieve status without competitors; it is only obtained in *relation* to others. This means that one must invest in the status of offspring with a view toward surpassing the status of others—one’s offspring’s place in the hierarchy is all that counts. A kind of arms race is created, with parents in competition to confer status on their children so that they may at least keep up with, if not surpass, those of other parents. Evidence shows that this is a good evolutionary bet. Humans at higher points on the status hierarchy survive myriad disasters and crises at higher rates. And biological selective pressures are ongoing. “Either as a proxy for long-term fitness or as a maladaptive holdover from simpler times, the driving force behind fertility and inheritance decisions appears to be seeking high status for children rather than simply having a maximal number of them,” Kades writes.

How is this done in contemporary society? The raw material is wealth, of course, and while humans have massive amounts of it, its distribution among them is massively unequal. The tools that mobilize that wealth are the extraordinary cognitive abilities of humans in relation to other animals, along with complex legal and other devices enabled by “pervasive powerful legal institutions.” Armed with the requisite resources and tools, humans seeking status for their progeny will set about creating that status. But there being “essentially nothing in the inheritance literature on status maximization,” Kades is free to speculate on how this might be accomplished. And he is not concerned with wealth transfer techniques of the masses remember, but rather those of the super wealthy in a post-RAP environment.

What does Kades’s “rational dynast” do? Here is where Kades begins getting conjectural, using what he has learned of the general principles of evolutionary biology to speculate on quite concrete features of his typical dynast’s estate plan. He contends that the focus will be on family rather than individual status, with a goal to “maximize [the dynast’s] bloodline’s standing in society.” His dynast eschews short-term thinking and will implement a plan that will maintain or increase long-term family status. In an admitted departure from his earlier article mentioned above, Kades now maintains that his dynast will deemphasize generational focus in favor of individual descendants who are most likely to achieve very high status. Kades also takes some of his thinking here from his review of the English history of primogeniture and fee tail. And not all of his thinking is speculative. He conducted interviews of lawyers who exclusively represent ultra-high net worth clients in their estate planning.

The more detail Kades provides as to the various contours of the trusts he envisions (“Dynastic Family Trusts,” the “DFTS” of his title), the more he strays into a less tethered conjecture. And some of the features he envisions are based on assumptions or summaries of trust law that lack nuance. But that’s not to take away from his major points, which land quite well. “We are in the early days of a RAP-free America. Dynastic trust planning is in its infancy. We simply do not know the extent to which extremely wealthy aspiring dynasts will leave their large estates in DFTs with terms like those explored here, and we don’t know how effective such trusts would be in projecting family status and power for generation after generation,” he writes.

That claim is hard to argue with, as are his points about the potential of these trusts to further distort

the political system and subvert democracy. The ever-expanding American conception of absolute freedom of disposition at bottom is, as Kades aptly puts it, “a deontological statement of faith rather than a case rooted in the social values of efficiency and fairness.” A federal RAP may not be the only or even “the surest means for preventing the rise of a New Feudalism,” as Kades maintains, but it would certainly be a step in the right direction.

1. 60 **B.C. L. Rev.** 145 (2019)

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