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An Historical Overview of Farmland Ownership and the Rise of the Dynasty Trust

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Abstract

This paper traces the historical roots of farmland ownership, showing how English, and ultimately American, property law has developed through centuries of exchanges among English monarchs, their subjects, and the courts. It was these interplays that gave us concepts such as inheritance taxes, trusts, and limits to corporate ownership. Beginning in England's feudal period, farmland was held largely by a wealthy few with incentives to keep the land in the family to preserve their dynasties. A few key court decisions were able to chip away at the dynasty-friendly protections, particularly the Duke of Norfolk's Case in 1682. The result was the Rule Against Perpetuities (RAP), which limited the time an owner could control land after death. Adopting much, but not all, of these English traditions, U.S. property laws have taken steps toward reviving the possibility of an enduring dynasty as evidenced by the generation-skipping trust (GST) and the repeal of the RAP by several U.S. states. From these policies, the dynasty trust was born: a tool whose impact has yet to be fully understood and may merit further study.

INTRODUCTION

Recent years have seen a growing concentration of land in perpetual-type legal entities. These include legal structures such as dynasty trusts, conservation easements, Real Estate Investment Trusts (REITs), and other corporate structures. The most recent Census of Agriculture in 2017 showed a near tripling of the number of farms in the ownership category covering these vehicles over a 15-year period. This paper aims to explore the legal and public policy path underpinning these current developments.

There is a long history of literature in agricultural economics in land economics, which has its own *Journal of Economic Literature* code (Q15). For example, determinants of land values have been widely written about and significant papers include Burt (1986), Featherstone and Baker (1987), and Taylor and Brester (2005). Furthermore, Borchers, Ifft, and Kuethe (2014)

and Baker, Boehlje, and Langemeier (2014) have discussed recent developments in farmland. This journal has published more than 60 papers on various aspects of land economics since 1982. Land reform has been a widely covered topic in the post–World War II era, with Adams (1973) providing a detailed review of land reform in more than 20 countries.

As a former English colony, the United States maintains a strong English legal tradition from nearly 1,000 years ago. While this tradition has influenced U.S. farmland ownership, land tenure in the United States has taken on a distinctly American path. In this context, farmland denotes agricultural, ranch, and similar types of land. A key difference between the two countries is the availability and importance of farmland on an individual level. Land ownership in England was the main basis for wealth and often accompanied status signified by titles of nobility. As a result, much of England's agricultural land has been held by the same families for centuries. Alongside this reality, a system of oftentimes multigenerational tenancy developed. Due to the later development of the United States, land ownership was only one of many means for achieving wealth and social status as legal structures were being established. The broad ownership of land was so central to U.S. social ideals that the Homestead Act of 1862 allowed individuals to receive conditional title to farmland regardless of one's background, with the Kinkaid Act of 1904 increasing standard allotments of farmland based on land quality.

We begin this paper with an introduction to England's medieval period and how feudal policies set into motion a robust system of property law. We first examine the "medieval use"—a tool that began as a loophole to strict land ownership requirements but eventually evolved into the common and well-established legal tool known as the trust. From there, we examine the concept of perpetuities and how policy surrounding it has greatly affected the level of concentration in farmland ownership. Changes to U.S. federal tax law and state-level responses have brought the issue of perpetuities to the fore. These machinations have the potential to significantly shift the distribution of farmland ownership.

ENGLAND'S FEUDAL SYSTEM UNDERLIES CURRENT U.S. FARMLAND OWNERSHIP STRUCTURE

In 1066, William the Conqueror won the Battle of Hastings and became England's first Norman king. In a departure from Anglo-Saxon tradition, William decreed that allodial (i.e., "god-allotted") title to all of England's land belonged to the Crown. This began England's feudal period and the foundation of modern English property law. The origins of the modern-day perpetual ("dynasty") trust rest on the "perpetuity" and the "trust." It is necessary to understand the process of how families sought to control their wealth through land across generations, which resulted in the concentration of farmland in England.

The Medieval Use: The Precursor to Modern Trusts

As Baker (2019) explains, the king enjoyed many perquisites, called incidents, from his tenants-in-chief. Similarly, these tenants-in-chief became landlords, and a chain of landlord-tenant relationships continued down the hierarchy of society through a process of "subinfeudation." These landlord-tenant relationships were usually for life, with the tenant holding the property "in fee." At death, the tenancy was passed on to the eldest male heir due to the custom of primogeniture. In general, primogeniture was the norm, for it was simple and prevented fractionalization of land by eliminating the possibility of subdivision among heirs. Despite these benefits, many tenants sought to sidestep this practice by setting up a "use," the precursor to the modern-day trust. Specifically, the tenant in fee would transfer legal title of his land to a group of trusted friends while maintaining beneficial use, such that when the tenant died, the trustees would carry out the will of the tenant and deliver title of the land to the desired beneficiaries. Later, "uses" were created as a means of avoiding paying incidents to landlords.

Medieval "uses" were created to sidestep primogeniture as well as to avoid paying incidents, akin to inheritance taxes. By transferring legal ownership to trustees prior to death, the tenant's heir could avoid paying some of the feudal incidents that arose upon inheriting land—specifically, wardship, relief, and primer seisin. Wardship occurred when the heir was too young to fulfill the duties required of the tenant. Here, the lord maintained temporary ownership and collected the profits from the property until the heir came of age (Baker, 2019). The idea of a "relief"—that is, payment for the right to inherit—derived from the fact that William's original tenants-in-chief were granted their lands as payment for their past services. It was thus logical for heirs to similarly earn their right to possess the land. Reliefs were often equivalent to one year's revenue from the piece of property that the heir had inherited. Similarly, primer seisin allowed the landlord to possess the dead tenant's land until the new tenant paid relief and did homage (Baker, 2019).

By transferring one's land to a "use" during one's life (i.e., *inter vivos*), the land was *conveyed* to the heir as opposed to passing by descent (i.e., inheritance). This small distinction cost landlords—particularly the king—significant revenues. Unsurprisingly, the avoidance of these incidents did not sit well with landlords, especially the king, who were now losing valuable income. Even before the widespread adoption of "uses," landlords suffered from the subinfeudation of property to a corporate entity such as a church. Unlike human tenants, where an overlord enjoyed feudal incidents upon the grantee's inevitable demise (e.g., wardship or relief), when land was instead granted to a church, these incidents would never manifest because a corporation cannot die. In a sense, the land falls into "dead hands" or, in Latin, *mortmain*. One early attempt of recovering some of this vital revenue was through the passage of the Statutes of Mortmain in 1279, which prohibited alienations of land to religious houses (Baker, 2019). This prohibition hastened and popularized the medieval "use" as an alternative means of avoiding the payment of feudal incidents.

As the "use" gained popularity, the English Crown grew increasingly wary of the subsequent loss of revenues. King Henry VIII persuaded Parliament to pass the Statute of Uses in 1535, which attempted to limit tax evasion through "uses." The statute held that equitable and legal title now was to be held by the beneficiary of the "use" such that when the tenant died, payments of incidents could not be avoided. The Statute of Wills followed shortly in 1540 and finally allowed tenants to devise (i.e., leave to someone by will) most of their land to an heir of one's choice. These changes were made concurrent to the Dissolution of the Monasteries (1536–1541). Trusts were no longer just a means to circumvent primogeniture or to avoid paying taxes, but largely to accommodate more complexities in the needs and desires of landowners. From these statutes, the modern-day trust emerged.

The evolution of the medieval "use" is one of many examples of innovations arising from a governed populace reacting to the incentives of some imposed legal or economic structure. There is often a feedback loop between the governed and the sovereign, with policy incentivizing certain behaviors which in turn cause revisions to the policy. Such feedback loops have been ever present in England and continue on in the United States. Nearly 1,000 years later, the U.S. Congress routinely passes laws and modifications to close loopholes in response to the ingenuity of modern inheritance-tax avoiders.

The Perpetuity and Its Abolition

A parallel history exists for a related feature of English property law, called a "perpetuity," that carries through the modern U.S. tradition. The concept of devising land in perpetuity first arose in grants to the Catholic Church (Baker, 2019). While churches and charities were, and still are, valid recipients of perpetuities in the eyes of the law, the same was not true with devises of land to one's own family. Legislation in 1285 containing the clause *De Donis Conditionalibus* strengthened a type of estate in land known as the "fee tail." The "fee tail," also known as an entail, was a conveyance of land taking the form "to [Person] A and the heirs of his body." Besides being the premise of the television melodrama "Downton Abbey," this language allowed for successive life estates in the direct descendants of the grantee, Person A in this case, until there were no more descendants. This mimicked a perpetuity in that, theoretically, a piece of property could be kept in the family for thousands of years so long as there continued to be lineal descendants. The enabling feature behind the "fee tail" was its prohibition of the alienability of the land; that is, the inability of the tenant in tail to sell the property (Biancalana, 2001).

In practice, however, early post–*De Donis* courts usually allowed for alienability within one to four generations of entailed heirs. The effectiveness of building family dynasties through "fee tails" was further frustrated by the concept of common recovery, which allowed tenants in tail to "bar" the entail or convert the "fee tail" to a "fee simple" for purposes of a sale. While *De Donis* may have made sense at the time of its adoption, over the centuries, the idea of inalienability of land was becoming less practical. The practice of barring an entail became common throughout England and was used up until the "fee tail" was formally abolished in 1925. In the United States, only Delaware, Maine, Massachusetts, and Rhode Island allow its use. The ingenuity of England's wealthy landowners had led to a new approach of furthering the reach of their "dead hands": future interests. If settlors could not limit their heirs' alienability of land in "fee simple," and common recovery had taken the teeth from "fee tails," the logical next step would be to add contingencies to inheriting. This began with the use of contingent remainders, and later, the executory interest (Baker, 2019).

A series of shifting executory interests, culminating in the Duke of Norfolk's Case (1682), brought about the famous Rule Against Perpetuities (RAP). The Rule's purpose was to simplify the validation of future interests by looking only at the time they needed to vest. Consequently, if settlors' (i.e., the person transferring the property to a trust) estate plans fell within the

determinably acceptable range of remoteness to vest, they could be certain that their settlements were valid. The modern reading of the Rule by John Chipman Gray (2003) is: "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." The certainty that it brought to creating future interests has allowed it to survive to this day.

To properly understand executory interests, one must understand the concept of vesting. First, one's interest in property vests when one's future or present interest cannot be taken away, hence the vested individual can freely transfer that interest to a third party. An example of B having a vested interest would be "to A for life, then to B." Here, because A is guaranteed to die at some point, B (or B's estate) is likewise guaranteed to inherit, thus B immediately has a vested interest. An executory interest is a type of future interest that vests after the occurrence of a stated event. A shifting executory interest occurs when the previous interest was held by someone other than the grantor (Legal Information Institute, 2021). An example would be "to A for life, but if A leaves England, then to B." Here, B's interest is not vested because it is unknown whether A will ever leave England. If A does leave England, A's interest "shifts" to B. A springing executory interest occurs when it is the grantor whose interest can be cut short. An example would be "O grants to A for life, then to B if B gets married." Here, O has a reversion because the land will revert back to O (or O's estate) if B dies without getting married. O's interest can be cut short by B who has a remainder interest subject to divestment.

In the Duke of Norfolk's Case in 1682, the Court put limits on how far these executory interests could reach. The limit is known as the RAP. To better appreciate the RAP, some additional examples may be helpful. Consider the following: "To A and his heirs so long as alcohol is never brewed on the property, then to B and her heirs." This conveyance fails the Rule in that it is unknown with certainty if and when alcohol will be brewed on the property. Hence, B's interest is not certain to vest, if at all, within the life of someone alive during the conveyance plus 21 years. Consider another example: "To A for life, then to A's wife for life, then to A's children." Suppose at the time of the conveyance, A's wife was B and together they had yet to have any children. Suppose A divorced and got remarried to C who was not yet born at the time of the conveyance. Because C was not a "life in being" and could live longer than 21 years after B's death, the future interest of A's children is too remote and thus violates the Rule. Finally, an example of a valid settlement is as follows: "To A for life, then to B if B has reached the age of 21, then to C." Whether C outlives A and B is irrelevant in that C's estate is a valid potential recipient of the property. Because A, B, and C are all lives in being during the conveyance, both contingent remainders will vest or not during the appropriate measuring period.

The RAP was a powerful force against the reach of the "dead hand," but once again, wealthy landowners found ways to preserve their dynasties. The method of choice was the "strict settlement." Here, land was given to the eldest son for life with successive remainders in tail to his younger siblings in descending order. Trustees were afforded powers to enforce the settlement terms should the son refuse to cooperate. Once the son's son came of age, and after inheriting as a tenant in tail, he could voluntarily bar the entail and resettle the same property for the next valid perpetuities period (Baker, 2019; Bujak, 2007). This method was, "in fact, employed by all the noble families, by almost all the substantial squires, but only by a minority of lesser squires" (Bujak, 2007). This greatly restricted the supply of farmland in England with roughly two-thirds locked into these settlements (Offer, 1991). Despite 1996 legislation banning the creation of any future entails, strict settlements have played a major role in the distribution of England's lands.

THE RISE OF DYNASTY TRUSTS IN THE U.S.

The 18th-century English jurist William Blackstone described English real property law as "the law of inheritance" (Priest, 2006). Wealth and status, then, were strongly correlated with a family's land ownership. "Americans from the founding era forward, however, viewed the greater circulation of land in America as the basis of a new political ideal—republicanism—that offered more opportunity for political participation than existed in European society" (Priest, 2006).

Land Ownership in the U.S. Is Not Exempt from Inheritance Laws

Amid political concerns over wealth inequality that seem as relevant today as they did a century ago, the 16th Amendment paved the way for a national income tax and was followed shortly by an estate tax in 1916. In 1932, the gift tax was permanently enacted to prevent wealthy individuals from evading the estate tax by gifting their estates away prior to death. Fifty years later, the Tax Reform Act of 1976 updated the estate tax system, creating a unified estate and gift tax credit, and sought to hinder family dynasties by introducing the generation-skipping transfer tax (GSTT).

As in medieval England, wealthy individuals in the United States sought to minimize taxes by limiting the number of times property would pass to an heir by descent, thus limiting the occurrence of an inheritance tax. Bequests could be made entirely to grandchildren. The GSTT applied to transfers to someone two or more generations below the transferor, called a "skip person," and would impose the highest estate tax rate to the value of the property transferred (Layman, 1999). The Tax Reform Act of 1986 made the GSTT permanent, but with a corresponding exclusion of $1 million. From this arose the generation-skipping trust (GST), where property valued up to the exclusion amount could be passed down to two or more generations without incurring any estate or gift taxes. Moreover, any appreciation in the value of the property, while kept in the GST, is also free of estate or gift taxes. Even if the trust property accumulated value throughout its life, no extra estate tax would be levied. The only thing keeping GSTs from lasting hundreds of years without incurring any estate or gift taxes is the common law RAP.

Congress has used the tax code to offer relief in other ways as well. For example, prime Iowa farmland could be purchased for $255 an acre in 1920 (Murray, 1967). Normally, a sale of that land today—for perhaps $10,000 an acre—would result in $9,745 of taxable capital gains per acre. Congress, however, has granted beneficiaries of a deceased owner's land a "stepped-up" basis; that is, a readjustment of the tax value of the appreciated land to the current market value, resulting in a much more manageable tax liability (Internal Revenue Code §1014, 2015). Another related tax tool is the "1031 exchange," wherein farmers may sell less productive land and "exchange" it by purchasing better, more profitable land (Internal Revenue Code §1031, 2017). This tax policy allows the farmer to defer capital gains tax liability.

A Unitary English System vs. a Federal American System

Another departure from English law is American federalism—that is, a system with both state and federal laws. Prior to the enactment of the country's first modern federal estate tax in 1916, made possible by the 16th Amendment, all but six states had already enacted the tax at the state level (Cooper, 2006). Less than 10 years later, however, some states began repealing their own death taxes to entice wealthy retirees with promises of fewer taxes. Congress responded by providing a credit for state death taxes. Some states then reenacted their former state death taxes. In 2001, however, the state death tax credit was repealed and competition among states for the lowest marginal tax rates reignited. While states can decide whether to enact their own death taxes, they also, in the absence of a federal rule, can decide whether to adopt or amend the RAP. With the GSTT exemption after 1986, some states began weakening RAP. The selective repeal of RAP has resulted in a growth of dynasty trusts (Horowitz and Sitkoff, 2014).

THE USE OF DYNASTY TRUSTS IN THE U.S.

Similar to the English "fee tail," where landowners looked to avoid taxes and to hinder alienability by conveying land to their descendants in perpetuity, a modern U.S. version has emerged known as the dynasty trust. In 2022, a settlor can create and fund a dynasty trust with $12,060,000 of assets, allow the principal to appreciate for hundreds of years, and not incur a single dollar of estate or gift tax. Such trusts require institutional trustees because of their life span. Sitkoff and Schanzenbach (2005) show that by eliminating the RAP, states, on average, increased their trust assets by $6 billion and that about $100 billion of trust funds have been shifted to states that abolished the rule. In 2020, a leading law firm on the topic named South Dakota, Nevada, Tennessee, and Alaska as the top four most dynasty trust-friendly states (Oshins, 2020).

CONCLUSION

In a 1789 letter to Jean-Baptiste Le Roy, Benjamin Franklin famously wrote, "Our new Constitution is now established, and has an appearance that promises permanency; but in this world nothing can be said to be certain, except *death and taxes*" (Franklin, 1907). The modern-day "trust" was forged through a 1,000-year back-and-forth duel between the policies of the English king and the subsequent actions of his subjects. The tension between the state's perennial need for tax revenues and the desire of prosperous individuals to create and sustain perpetual family dynasties beyond death produced centuries of legal innovation. Through the resulting strategic feints and tactical ambushes, England Courts eventually refined early English tax laws and legal structures to develop many key concepts of today, including corporate ownership and various other vehicles for the perpetual holding of assets.

Beginning as a colony of England, the United States inherited much of the English legal tradition before forging a path of its own while grappling with many of the same human motivations and impulses. When mapping the evolution of the dynasty trust, one of the key elements resulted from changes to U.S. federal tax laws: namely, the creation of the GSTT and an

accompanying exclusion. The complying trusts that resulted enabled assets to be passed to grandchildren without incurring taxes. When certain states had repealed their respective RAP, effectively taking away any limits to trust duration and allowing for a tax-exempt accumulation of wealth to accrue indefinitely, describing trusts as "dynastic" became appropriate. Given the relative newness of this tax tool in generational time, the significance of these innovative structures is not yet fully understood. The authors believe that the resulting issues merit further study.

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