Waging War on Dynastic Wealth with a Wealth Tax

Author : Phyllis C. Taite

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Eric Kades, *Of Piketty and Perpetuities: Dynastic Wealth in the Twenty-First Century (and Beyond)*, 60 **B. C. L. Rev.** 145 (2019).

Nothing incites more dread in law students and professors than the words "Rules Against Perpetuities" (RAP). As states continue to pass laws abolishing or effectively nullifying the doctrine, professors celebrate deleting this topic from their syllabi. Professor Kades demonstrates why, from a social policy perspective, society at large should dread the death of the RAP. In this article, he challenges this trend and demonstrates the negative consequences resulting from dynasty trusts, following the demise of the RAP.

Prof. Kades starts with a brief discussion of wealth and income inequality. Relying, in part, on Thomas Piketty's research, Prof. Kades discusses how wealth inequality has a greater impact on wealth concentration than income inequality. His research supports the notion that wealth inequality has outpaced income inequity amongst the top wealth holders. He attributes this phenomenon, in part, to a mixture of wealthier individuals earning a higher rate of return on investments and their ability to save a larger part of their income. As inequality grows, individuals have more property to transfer via inheritance.

Prof. Kades argues how growing wealth precipitates increased wealth transfers which in turn contributes to further wealth and inheritance inequality. Prof. Kades provides historical data illustrating periods in which inequality was tempered and when it rose. Tying wealth to property ownership, the research demonstrates that periods of wealth decrease coincide with periods when capital property prices decrease. This history also tends to show that the rate of return on capital assets significantly exceeds the growth rate for world output. He argues this phenomenon further increases wealth and inheritance inequality. As a result, each generation has more capital, which in turn increases their capacity to accumulate yet more capital.

The RAP comes out of a particular historical context. The English Judiciary, through judicial decisions, converted fee tails to fee simple estate to make land alienable. Alienability remains a primary concern for property owners, but it is not the only justification for the RAP. For example, some scholars justify the RAP as a balance between present and future generations of property owners, although others question the claim that the RAP promotes greater utility than permitting perpetual restrictions. Professor Kades's view is that property owners seek to avoid restrictions on their control over their devises. The RAP exists to make property more alienable and to limit "dead-hand" control in order to maximize the efficient use of property. Now, however, more than half of the states have abolished or diluted their RAP laws, and the tax laws have not made adjustments to address the consequence of allowing property ownership in perpetuity. Consequently, wealthy donors may place property in trust for descendants multiple generations down and this property may never be taxed if the donor allocates his generation-skipping transfer tax exclusion to the trust and the property remains in trust. Prof. Kades argues the estate tax has the capacity to be one of the most effective weapons against dynastic wealth, but it has been used ineffectively.

Holding accumulated capital in dynasty trusts, combined with the abolition of the RAP, exacerbates wealth and inheritance inequality. Prof. Kades argues that in addition to the negative effects of dynastic wealth, that wealth hoarding itself creates economic harms. He points out the economic health of the United States (U.S) relies on consumption and spending by the government and the private sector. The multiplier effect of government spending increases national income by encouraging consumer spending. However, dynastic trusts are not designed for spending. Instead, dynastic trusts are designed for maximum saving—for generations. As a result, government dollars used to purchase goods and services from businesses owned by dynasty trusts will reduce the multiplier, which negatively impacts the national income and inhibits the government's ability to stimulate the economy.

Next, Prof. Kades introduces the concept of the "paradox of thrift," which occurs when too much income is saved. When a large amount of wealth is held in dynastic trusts, it limits the government's ability to respond to recessions, which has the greatest impact on individuals in the lowest wealth brackets. He argues that a savings rate that maximizes consumption—the "golden rule"—is equal to the sum of the depreciation rate for capital and the rate of growth of the population; he asserts that the U.S. rate has averaged substantially below this rate. In turn, this makes the economy ripe for economic decline.

Capital locked in dynasty trusts has another negative impact. The beneficiaries of dynasty trusts have major restrictions on their access to their property. In contrast, beneficiaries of non-dynastic trusts and estates have the ability to exercise control of their property, such that they may consume or dispose of it at will. They have the freedom to liquidate their property, spend assets, and leave nothing for the next generation. While this wasteful spending may be the type of behavior that estate planning professionals are hired to guard against, he argues donors should not have the power to lock up wealth to prevent future generations from spending it.

As a solution for these problems, Prof. Kades proposes tax-based solutions to curtail the negative effects of dynasty trusts. He highlights how the RAP and estate tax were designed to work together to curtail wealth concentration. Dynastic wealth benefits a few of the wealthiest families but has the potential to harm the majority of society by the negative impact it has on the economy. Even so, Prof. Kades does not advocate for reinstating the RAP. He points out that economists suggest that an effective way to curtail undesirable behavior is to institute a tax at a rate that reflects the external costs imposed on society by the undesirable activity. This solution would allow the government to raise revenue without deadweight loss.

To that end, Prof. Kades proposes taxing perpetuities at the federal level because of the systematic way states have passed laws with "race-to-the bottom" legislation to gain trust business. Further, dynastic wealth has a national impact on the economy, therefore, he argues the solution must be imposed on a national level. He identifies three specific harms associated with dynastic wealth: the paradox of thrift, the failure to save consistently with the golden rule, and the absence of wealth dissipation. In response to these harms, he offers a multilevel approach.

First, he proposes instating a mandatory minimum spending amount for trusts to encourage consumption, and a special income tax on dynasty trusts that have excess savings amounts that pull the national savings rate above the golden rule. Prof. Kades asserts these measures help to avoid the negative externalities associated with depressed consumption. In order for the special tax to be effective, he suggests a tax rate that would equal the amount of excess savings on all dynasty trusts with a savings rate above the golden rule rate based on the trust's end of year value. The tax would automatically trigger only during times when the national saving rate rises above the golden rule level.

To address the paradox of thrift, Prof. Kades proposes a different short-term tax, since this phenomenon occurs during a recession. He does not propose a specific method, fraction, or amount but suggests the tax should automatically trigger during a recession. The amount should be determined based on the amount needed for employment restoration. Implemented correctly, he argues this tax will operate as an automatic stabilizer to counteract recessions because it will free funds destined for excess savings and redirect them to consumption or production of goods for consumption. Alternatively, he suggests that these funds could be used to cut taxes for low-income households.Together these taxes would discourage the type of excess saving that pose a threat to consumption-based economies.

Overall, Prof. Kades presents compelling proposals to curtail the negative effects of wealth concentration currently exacerbated by dynasty trusts. Relying on Piketty's work, he outlines the drawbacks of dynasty trusts when combined with the abolition of the RAP in a majority of American jurisdictions. This article methodically outlines the harmful consequences of allowing dynasty trusts to continue without effective measures to combat wealth and inheritance inequality. I recommend this article to professors teaching Property, Trusts and Estates, Taxation, and tax policy courses. I also recommend this article to scholars interested in normative solutions to wealth, income, and inheritance inequality.

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