LOOKING TO THE PAST IN PLANNING FOR THE FUTURE: DOES THE MODERN ESTATE TAX FIT WITHIN THE IDEALS OF THE FOUNDING FATHERS?

*Alica Lerud**

I. INTRODUCTION

In recent years, the federal estate tax has garnered a great deal of attention from lawmakers, the media, and the general public.[1] Dubbed the "death tax," the federal estate tax is levied upon estates that exceed a certain value.[2] The estate tax has been attacked as being immoral and unfair by opponents.[3] Supporters of the estate tax have argued that it is essential in the preservation of democracy.[4] Regarding this debate, one commentator has said:

> Never in the course of human taxation has so much furor been generated by so many about a tax that affects so few. While only 2 percent of estates in this country are taxed and account for slightly more than 1 percent of all federal revenues, tempers over the estate tax continue to flare in a strange combustion of moral indignation and economic erudition.[5]

Essentially, the estate tax debate has become one of inherent freedoms, societal obligations, and fundamental fairness.

The federal estate tax finds its constitutional basis in Article I, Section 8 of the United States Constitution, which reads, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[6]

---

* J.D. candidate 2006, University of Nevada, Las Vegas, William S. Boyd School of Law. B.S., University of Nevada, Reno, 2003. The author would like to thank Professor Steve Johnson for his help and insights in preparing this Note. The author would also like to thank Terry Lerud and Eva Wick-Lerud for their constant support.

1 Karen C. Burke & Grayson M.P. McCouch, *Estate Tax Repeal: Through the Looking Glass*, 22 VA. TAX REV. 187, 188 (2002).

2 Estate tax is levied only on the portion of the estate that exceeds the unified credit. In 2005, the amount of the credit was $1,500,000. From 2006 through 2008, the amount of the credit will be $2,000,000. In 2009, the credit will be raised to $3,500,000. I.R.C. § 2010. (2004).

3 Burke & McCouch, *supra* note 1, at 188.

4 *See* James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825 (2001) (concluding that the estate tax works to further democracy by decreasing the concentration of dynastic wealth and raising revenue).

5 Jim Grote, *The Estate of the Union*, PLANNED GIVING TODAY, April 2001, at 1, *available at* http://pgtoday.com/pgt/articles/the_estate_of_the_union.htm (last visited Mar. 20, 2006).

6 U.S. CONST. art. I, § 8, cl. 1.

With this clause, the Founders granted the United States Congress power to impose taxes on the citizenry of the United States, with very few limitations.[7]

Although many have tried to attack the constitutionality of the federal estate tax on the basis of unequal treatment, this argument has repeatedly failed.[8] In upholding the constitutionality of the estate tax in 1921, writing for the court Justice Holmes said:

> [The] matter . . . is disposed of . . . , not by an attempt to make some scientific distinction, which would be at least difficult, but on an interpretation of language by its traditional use—on the practical and historical ground that this kind of tax always has been regarded as the antithesis of a direct tax . . . . *Upon this point a page of history is worth a volume of logic.*[9]

What history has to show us with regard to the estate tax will be an increasingly important topic in upcoming years as Congress continues to debate the estate tax. The purpose of this Note is not to debate the constitutionality of the federal estate tax, but rather to examine how our Founding Fathers would view the modern estate tax, and how the modern estate tax works to further the founding vision. In 1789, Benjamin Franklin was quoted as saying, "In this world nothing can be said to be certain, except death and taxes."[10] The question that this Note examines is whether Franklin, and other members of the Founding Generation, would advocate these two certainties of life coinciding at the same moment in time.

In order to discern whether the Founders would support the modern formulation of the estate tax, this Note first examines the purpose and history behind the federal estate tax. Although much debate regarding the estate tax revolves around its use as a way to level inherited wealth, the estate tax has historically been a revenue-generating device.[11] In addition, historical death taxes were used only during times of exigency and war.[12] The modern estate tax was originally enacted in 1916 to raise revenue for World War I.[13] However, unlike previous taxes, the estate tax was not repealed at the conclusion of World War I, and today continues to exist in largely the same form.[14]

A close analysis of the federal estate tax provides evidence that the Founders did not foresee the use of a federal estate tax as a permanent means by which to generate everyday revenue. Instead, the Founders apparently intended to primarily use taxes upon commerce to fund the federal government, while

---

[7] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 540 (1869).

[8] *See, e.g.*, Knowlton v. Moore, 178 U.S. 41, 109 (1900); New York Trust Co. v. Eisner, 256 U.S. 345, 348 (1921); and Florida v. Mellon, 273 U.S. 12, 17 (1927).

[9] *New York Trust Co.*, 256 U.S. at 349 (emphasis added).

[10] JOHN BARTLETT, FAMILIAR QUOTATIONS 310 (16th ed., 1992).

[11] *See* Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223 (1956).

[12] For a full discussion on the role of the estate tax as a way to generate revenue in times of war, see Eisenstein, *supra* note 11, at 224-31.

[13] *Id.* at 230.

[14] *See* JOINT COMM. ON TAXATION, 105TH CONG., PRESENT LAW AND BACKGROUND RELATING TO ESTATE AND GIFT TAXES PART I.B. (Comm. Print 1998).

state governments could employ other modes of taxation.[15] Early federal death taxes generally excluded the real property from the tax base,[16] lending credibility to the opinion that the Forefathers did not envision real property as being a proper subject for federal death taxation. As a final point, evidence supports the idea that the Founders intended the nation to be supported by a system of proportional taxation.[17] In contrast to this, the federal estate tax serves as a progressive centerpiece in the modern federal taxation system.[18]

Because the federal estate tax varies from founding views in at least three important ways—the intended use of federal death taxation, the inclusion of real property, and progressivity versus proportionality—this Note concludes that the modern use of the federal estate tax is inconsistent with the vision of the Founding Generation.

II. Purpose of the Estate Tax

What is the purpose of the modern estate tax? This question is one of the most essential in determining whether the tax fits within the founding vision. The estate tax works to both raise revenue and to limit the amount of inherited wealth that can be passed from generation to generation.[19] However, a disproportionate amount of the public debate seems to focus on the social aspect of the tax, with many going so far as to say that the tax could be abolished with no discernible effect on revenue since its annual yield is so low.[20]

Historically, the tax was used as a way to finance war,[21] making its historical purpose one of revenue generation. To what degree the estate tax continues to serve as a means by which to raise revenue is an on-going topic of debate. In 2004, the federal estate tax generated $24 billion in revenue.[22] While this is by no means a small sum of money, it accounted for only 1% of total 2004 federal revenues.[23] Because the estate tax raises such a small amount with respect to total federal revenue, commentators have largely dismissed its revenue-generating role.[24] Yet, despite this relatively low yield,

---

15 James Madison, *Letter 1: Madison on the Tariff*, *in* 4 The Debates in the Several State Conventions On the Adoption of the Federal Constitution 600, 605 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 4 Debates in the State Conventions].

16 Only the 1864 amendments to the Civil War inheritance tax provided for the inclusion of real property. Act of June 30, 1864, ch. 173, §§ 127-147, 13 Stat. 223, 287-91 (1864) [hereinafter Act of 1864].

17 *See infra* notes 218-221 and accompanying text.

18 Randolph E. Paul, Taxation in the United States 714 (1954).

19 Lee Anne Fennell, *Death, Taxes and Cognition*, 81 N.C. L. Rev. 567, 572 (2003).

20 *See* Joel C. Dobris, *A Brief for the Abolition of All Transfer Taxes*, 35 Syracuse L. Rev. 1215 (1984) (arguing that the estate tax should be repealed because it produces negligible revenue); Charles O. Galvin, *To Bury the Estate Tax, Not to Praise It*, 52 Tax Notes 1413 (1991) (suggesting revenues lost from estate tax repeal could be made up through changes to the income tax).

21 Eisenstein, *supra* note 11, at 224-31.

22 Carolyn Lochhead, *House OKs repeal of estate tax—fate in Senate uncertain*, San Francisco Chron., Apr. 14, 2005, at A-5.

23 *Id.*

24 Martin J. McMahon, Jr., *The Matthew Effect and Federal Taxation*, 45 B.C. L. Rev. 993, 1050 (2004) (arguing that that revenue generation is a secondary purpose of the estate tax).

many legal scholars agree that that the purpose of the estate tax continues to be the generation of revenue.[25]

Most public estate tax debate has focused on the social policy aspect of the tax.[26] Beginning in the late 1800s, Americans began to protest the accumulation of American fortunes.[27] Among the public, a tax upon inherited wealth was an appealing option for fighting against growing American fortunes.[28] A tax on inheritances was publicly advocated for by Professor Seligman and his former student, Dr. Max West, in 1893 and 1894 as a way to redistribute wealth.[29] By the early 1900s, Theodore Roosevelt was pushing for an inheritance tax as a means by which to level inherited wealth.[30] Campaigning for an inheritance tax before Congress in 1907, Roosevelt said:

> Our aim is to recognize what Lincoln pointed out—to insist that there should be an equality of right before the law, and at least an approximate equality in the conditions under which each man obtains the chance to show the stuff that is in him when compared to his fellows.[31]

While the 1916 estate tax was enacted to raise revenue for World War I,[32] many have speculated that the failure to repeal it at the conclusion of the war, and the estate tax's persistence today, can be attributed to the social objective of the tax.[33]

In 1955, Louis Eisenstein explained the preoccupation with social role of the estate tax in writing:

> I suspect that a good deal of the emphasis on the social objective of the tax, as distinguished from its fiscal objective, is skillfully contrived to keep its yield as low as possible. The reasoning is simple. Why collect more revenue through the estate tax if the tax is not really expected to raise revenue in the first place?[34]

Although the social role of the estate tax is recognized, this Note will focus on the tax as a revenue generating mechanism, the role that it plays in a progressive tax system, and whether it is within the founding vision to raise federal revenues through the taxation of estates.

---

[25] Alana J. Darnell, *Comment: Toward an Integrated Treatment of Gifts and Inheritances*, 34 SETON HALL L. REV 671, 683 (2004) (citing James R. Repetti, *The Case for the Estate and Gift Tax*, 86 TAX NOTES 1493 (2000)); *see also* Eisenstein, *supra* note 11.

[26] Owen Ullmann, *New Wealth Will Make 'Death Tax' Hit Home*, USA TODAY, Jan. 25, 2000, at 1A (stating that the estate tax generally lacks public support because (1) it is not believed that death, alone, should trigger a tax, and (2) the tax results in the breakdown of family farms and businesses).

[27] The wartime economy brought about by the Civil War resulted in the accumulation of large American fortunes during the 1860s and 1870s. These fortunes persisted through the economic downturn of the 1880s, resulting in public condemnation of the large fortunes, which continued to flourish. *See* KEVIN PHILLIPS, WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH 3-47 (2002).

[28] Barry W. Johnson & Martha Britton Eller, *Federal Taxation of Inheritance and Wealth Transfers*, *in* INHERITANCE AND WEALTH IN AMERICA 61, 64 (Robert K. Miller, Jr. & Stephen J. McNamee eds., 1998).

[29] PAUL, *supra* note 18, at 66.

[30] Eisenstein, *supra* note 11, at 228.

[31] Theodore Roosevelt, State of the Union Message (Dec. 3, 1907), http://www.theodore-roosevelt.com/sotu7.html.

[32] Darnell, *supra* note 25, at 678.

[33] *Id.* at 681.

[34] Eisenstein, *supra* note 11, at 225.

III. History of the Estate Tax

Throughout U.S. history, inheritance taxes came and went on three different occasions before an estate tax was permanently enacted in 1916.[35] In each of these instances, inheritance taxes were levied to raise wartime revenue, and were repealed at the end of conflict.[36] The 1916 tax was initially enacted to raise revenue for World War I, but at the end of the war the tax was not repealed as it had been on previous occasions.[37]

A. *Revenues to Raise a Navy*

The first U.S. death tax was enacted in 1797 in the form of a stamp duty,[38] although death taxes had been proposed in 1794[39] and 1796.[40] The Revenue Act of 1797[41] was enacted to raise revenue for the raising of a Navy.[42] In pertinent part, the statute provided that stamp duties would be levied on:

> any receipt or other discharge for or on account of any legacy left by any will or other testamentary instrument, or for any share or part of a personal estate divided by force of any statute of distributions, the amount whereof shall be above the value of fifty dollars, and shall not exceed the value of one hundred dollars, twenty-five cents; where the amount thereof shall exceed the value of one hundred dollars and shall not exceed five hundred dollars, fifty cents; and for every further sum of five hundred dollars, the additional sum of one dollar.[43]

---

35 *Id.* at 224-230.
36 *Id.*
37 Darnell, *supra* note 25, at 678-80.
38 Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527.
39 On April 17, 1794, Alexander Hamilton brought the proposal of the Special Committee on Finance before Congress and recommended a duty on "[r]eceipts for legacies, or shares of personal estate, in cases of intestates." 5 American State Papers 277 (Walter Lowrie & Matthew St. Clair Clarke eds., William S. Hein & Co 1998) (1832). Proposed duties were 25¢ for legacies between $50 and $100, 50¢ on legacies between $100 and $500, and $1 on each additional $500. The proposal was not to extend to "wives, children or grand-children." *Id.* This proposal was a stamp duty imposed on the *recipients* of legacies and intestate shares, and is essentially, what Congress later enacted in 1797. *Compare id.*, *with* Act of July 6, 1797, 1 Stat. 527.
40 In 1796, a duty on inheritances was again proposed. 5 American State Papers, *supra* note 39, at 409. William Smith, speaking for the Ways and Means Committee, proposed "[t]hat a duty of two per centum [in proportion to the product's value] ought to be imposed on all testamentary dispositions, descents, and successions to the estates of intestates, excepting those to parents, husbands, wives, or lineal descendants." *Id.* The duty was "to be imposed on all testamentary dispositions," indicating that the intent may have been to impose the duty before it was given to heirs. *Id.* While this language is not clear, it appears that the Ways and Means Committee intended to impose a two percent duty on estate shares before they passed to beneficiaries. If this was the intent behind the 1796 proposal, this proposal would be closer in structure to the 1916 estate tax than to the flat-rate, 1794 proposal. Like the 1794 proposal, the 1796 proposal was not adopted by Congress. *Id.*
41 *Id.*
42 Johnson & Eller, *supra* note 28, at 64.
43 Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527 (1797). Compared to modern rates, the rates enacted in 1797 were very modest. A straight comparison of the 1797 inheritance duty and the modern estate tax cannot be made because of the structural differences between the two taxes. However, simple math shows that the rate imposed by the 1797 duty would have ranged from 0.25% to 0.5% on the amount of an estate between $100 and $500, and could have been as low as 0.05% on every $500 of value thereafter. This is in comparison to

The inheritance duty of 1797 was repealed in 1802 after there was no longer an urgent need for revenues.[44]

B. *Civil War Death Tax*

Death taxes did not reappear in the United States until the advent of the Civil War.[45] On December 9, 1861, Secretary of the Treasury Chase proposed a graduated legacy and succession tax that would apply to both direct and collateral heirs.[46] An inheritance tax was applauded as a way to generate revenue while inciting little public criticism.[47]

Under the 1862 Act, a stamp duty was levied on letters of probate or administration, with the amount of the duty increasing according to the value of the property to be disposed.[48] This duty was levied in addition to duties on a variety of other things.[49] Perhaps more importantly, the 1862 Act laid a tax on legacies and distributive shares of personal property. The Act imposed a "duty or tax" on any "property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after

---

modern estate tax rates which range from 22% to 46%, depending on the size of the estate. *See* I.R.C. 2001(c) (current rate schedule).

[44] *See* Eisenstein, *supra* note 11, at 225 (citing Act of Apr. 6, 1802, ch. 17, 2 Stat 148).

[45] Although the War of 1812 did not produce a succession tax, Secretary of the Treasury Dallas did propose an inheritance tax in 1815 as a potential source of revenue. Eisenstein, *supra* note 11, at 225. The proposed tax was intended to raise revenue, in part, to pay off public debt created by the war. 6 AMERICAN STATE PAPERS 887 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833). The proposal included two succession taxes, the first "upon inheritances and devises, to be paid by the heirs or devisees . . . to produce $900,000." The second proposed tax was "upon bequests, legacies, and statutory distribution, to be paid by the legatees, or legal representatives . . . to produce $500,000." *Id.* The Treaty of Ghent ended the War of 1812 before these taxes could be acted upon. Johnson & Eller, *supra* note 28, at 64.

[46] PAUL, *supra* note 18, at 15.

[47] *Id.* In talking about the inheritance tax, Democratic Senator McDougall who was generally opposed to the levying of taxes (*see infra* note 49), declared that "[t]hose who pay it, never having had it, never feel the loss of it." PAUL, *supra* note 18, at 15. McDougall said that

> A stamp tax put . . . upon wills to be probated . . . can be made so that the country will not feel it, and only men of commerce will have to do with it, and they will pay promptly, and it will yield really a large and substantive revenue.

CONG. GLOBE APP., 37th Cong., 2d Sess. 227, 231 (1862).

In making this statement, it appears that McDougall was providing early support for a progressive system of taxation. In essence, McDougall was arguing that it is best to lay a tax upon "men of commerce," not only because they were more able to pay, but because they would be more willing to pay.

[48] The lowest stamp tax rate of fifty cents applied to estates valued at less than $2,500, while the highest rates of upwards of twenty dollars applied to estates exceeding $100,000 in value. Act of July 1, 1862, ch. 119, 12 Stat. 432, 483. Estates valued between $100,000 and $150,000 were assessed a duty of $20. An additional duty of $10 was assessed on each additional $50,000, or portion thereof. *Id.*

[49] *See id.* at 479-85. The proposed stamp duties affected so many facets of life that Senator McDougall declared that "little girls will be computing what each stamp costs, and how many stamps there are in the house, and the boys will be doing the same, and the wives will be inquiring into the same matter." CONG. GLOBE APP., 37th Cong., 2d Sess. 227, 231 (1862).

the death of the grantor or bargainor."[50] The tax applied only to legacies in excess of $1000, and the rate was dependent upon the degree of consanguinity.[51] Additionally, the statute provided that "all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person who died possessed . . . shall be exempt from tax or duty."[52] The initial tax, as enacted in 1862, applied only to personal property with real property being exempt.

In 1864, Congress made substantial changes to the legacy tax that had been passed in 1862.[53] The 1864 Act raised the slightly increased tax rates.[54] More importantly, the 1864 Act included a tax on the succession of real estate.[55] This tax applied to "every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any perso[n] shall become beneficially entitled, in possession or expectancy, to any real estate . . . upon the death of any person dying after the passing of this act."[56] The rates on succession of real estate were the same as the rates imposed on legacies of personal property.[57] However, while transfers of personal property between spouses remained exempt,[58] transfers of real estate between spouses were initially taxed, presumably at the same rates as transfers between strangers in blood.[59] Congress went on to retroactively exempt succession shares of widows.[60] Still later, legacies of personal property to minor children were exempted up to $1000 in value.[61]

There were some significant differences between the Civil War inheritance tax and the modern estate tax. As already discussed, tax rates varied according to degree of kinship.[62] Under both the 1862 and the 1864 acts, charitable organizations were taxed at the highest rate in accordance with other cor-

50 12 Stat. at 485.

51 *Id.* at 485-86 (showing rates of 0.75% for lineal issue, lineal ancestor, brother or sister; 1.5% for any descendant of a brother or sister of the decedent; 3% for aunts, uncles, or any descendant thereof; 4% for great aunts, uncles, or any descendant thereof; and 5% for collateral relatives not already mentioned, strangers in blood, or corporations). *Id.*

52 *Id.* at 486.

53 *See* Act of June 30, 1864, ch. 173, §§ 124-150, 13 Stat. 223, 285-291.

54 § 124, 13 Stat. at 285-86. The rates provided for by this section were: 1% for lineal issue, lineal ancestor, brother or sister; 2% for any descendant of a brother or sister of the decedent; 4% for aunts, uncles, or any descendant thereof; 5% for great aunts, uncles, or any descendant thereof; and 6% for collateral relatives not already mentioned, strangers in blood, or corporations. *Id.*

55 §§ 126-147, 13 Stat. at 287-91.

56 § 127, 13 Stat. at 287-88.

57 § 133, 13 Stat. at 288-89.

58 § 124, 13 Stat. at 285-86.

59 As originally written, the statute did not provide for spouses at all. *See id.* The only category that could include spouses would be that of strangers in blood. Later in 1864, the House of Representatives instructed the Ways and Means Committee to "inquire into the expediency of so amending the laws . . . imposing taxes on inheritances as to exempt . . . all estates and interests of widows in the estates of their deceased husbands." H.R. Res. 124, 38th Cong. (1864), *available at* http://memory.loc.gov (transcript of original used).

60 Act of March 3, 1865, ch. 78, 13 Stat. 469, 481.

61 Act of July 13, 1866, ch.184, § 8, 14 Stat. 98, 140.

62 Representative John Armour Bingham did offer an amendment to make the rates uniform, much like the modern estate tax. PAUL, *supra* note 18, at 15.

porate beneficiaries.[63] Also, the acts contained the beginnings of the modern transfer tax system.[64]

Despite congressional allure with taxing inheritances,[65] and despite being equally in need of revenue, the Confederacy chose not to tax inheritances during this same time period. Instead, the Confederate government laid a tax on "any property" acquired by its citizens during the Civil War, but specifically exempted inheritances.[66]

The federal inheritance tax was repealed in 1870 after the conclusion of the Civil War.[67] Two years later, the stamp duty on letters of probate and administration was repealed.[68] The taxes had not invoked widespread protest, but the repeal was in accordance with the assumption that taxes accompany war, and are significantly decreased at the end of conflict.[69]

C. *The Spanish American War Tax*

Inheritance taxation did not technically reappear in the United States until 1898 with the advent of the Spanish American War.[70] "An Act to provide ways and means to meet war expenditures and for other purposes" was enacted by Congress in 1898 in an effort to raise revenue for the Spanish American War.[71] As part of this act, a tax was levied on all personal property transferred after death.[72] As with the inheritance tax of 1862, transfers of real property

---

[63] Attempts to exempt charitable organizations failed in both 1862 and 1864. In 1862, Republican Representative William Payne Sheffield offered a proposal to exempt religious, charitable, and literary organizations. *Id.* at 15. In 1864, Republican Senator Francis Kernan requested that bequests to charity be exempt from inheritance taxation. 34 CONG. GLOBE, 34th Cong., 1st Sess. 1718, 1881 (1864).

[64] For instance, where any transfer of real estate "purport[ed] to take effect presently," but beneficial ownership remained with the grantor, the tax applied as if the transfer was "a succession derived from the person making the disposition as the predecessor." *Compare* 1864 Revenue Act, ch. 173, §132, 13 Stat. 223, 288, *with* I.R.C. § 2038 (2004). In addition, the 1864 Act included that real property passed during one's lifetime, and not accompanied by valuable consideration, would be "held and taken to confer upon the grantee a succession within the meaning of this act." 1864 Revenue Act, ch. 173, § 131, 13 Stat. at 288. This clause represents the first gift tax to appear in the United States. Johnson & Eller, *supra* note 28, at 65.

[65] PAUL, *supra* note 18, at 15. "No one objected when a congressman observed that 'there is no property on which a tax can better be laid than upon inheritances.'" *Id.*

[66] 7 JOURNAL OF THE CONGRESS OF THE CONFEDERATE STATES OF AMERICA 638 (February 23, 1865).

[67] Act of July 14, 1870, ch. 255, §3, 16 Stat. 256.

[68] Act of June 6, 1872, ch.315, § 36, 17 Stat. 256.

[69] Eisenstein, *supra* note 11, at 226.

[70] In 1894, Congress enacted the first wide-reaching income tax. Act of August 27, 1984, ch.349, § 27, 28 Stat. 509. Under this act, all income exceeding $1,000 annually was taxed at a rate of 2%, with income including "money and the value of all personal property acquired by gift or inheritance." *Id.* at 553. Therefore, while this act did not levy an inheritance tax, per se, inheritances of personal property were taxed as income. In contrast, inheritances of real property continued to go untaxed. The income tax was short-lived, and was invalidated by the Supreme Court in 1895. Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895), *rehearing*, 158 U.S. 601 (1895).

[71] Act of June 13, 1898, ch.448, §§ 29-30, 30 Stat. 448.

[72] *Id.* at 464.

were excluded from taxation. Also, transfers between spouses were not taxed.[73]

Tax rates under the 1898 Act depended on both the size of the total estate and the degree of consanguinity of the beneficiary, causing legal scholars to split on whether the tax should be classified as an inheritance tax or an estate tax.[74] Smaller estates were taxed at a lower rate, with estates valued at between $10,000 and $25,000 taxed between 0.75% and 5%, and estates valued at over one million dollars taxed between 2.25% and 15%.[75] Assessing a tax based on the value of the full estate, rather than the value of individual legacies, differed markedly from previous inheritance taxes in which only the size of the legacy was considered. At the same time, levying a tax on the full value of the estate is closer in structure to the modern estate tax than the 1797 and Civil War taxes.

The 1898 Inheritance Tax brought with it the first real public controversy with regard to an inheritance tax.[76] By 1898, private American fortunes had begun to accumulate, causing the public to look at an inheritance tax as a means by which to limit inheritance.[77] Within the Senate, Henry Cabot Lodge

[73] *Id.* at 465.

[74] PAUL, *supra* note 18, at 66. "The emphasis of the tax was on the transmission of property; from this standpoint it was, therefore, in a technical sense, a modified estate duty imposed upon the estate itself, or the right to transmit the property in the estate, rather than an inheritance tax, which would fall upon the recipients of the estate distributed, or their right to receive the estate." *Id.* *But see* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 977 (2000) (noting that first U.S. estate tax was enacted in 1916).

[75] § 29, 30 Stat. at 464-65. The following table delineates the applicable tax rates based both on the size of the estate and the degree of consanguinity between the decedent and beneficiary.

	Lineal issue, lineal ancestor, or sibling	Descendant of sibling	Sibling of parent, or descendant of parent's sibling	Sibling of grandparent, or descendant of grandparent's sibling	Any other degree of consanguinity, stranger in blood, a body impolitic or corporation
Estate valued at less than $10,000	-0-	-0-	-0-	-0-	-0-
$10,000 to $25,000	0.75%	1.5%	3%	4%	5%
$25,000 to $100,000	1.125%	2.25%	4.5%	6%	7.5%
$100,000 to $500,000	1.5%	3%	6%	8%	10%
$500,000 to $1,000,000	1.875%	3.75%	7.5%	10%	12.5%
Estate valued at over $1,000,000	2.25%	4.5%	9%	12%	15%

[76] Johnson & Eller, *supra* note 28, at 69.

[77] PAUL, *supra* note 18, at 66. Among those arguing that inherited wealth should be limited by a tax upon inheritances was Andrew Carnegie, who published his "Gospel of Wealth" in

and Stephen V. Elkins were the main opponents of the inheritance tax.[78] Elkins said that an inheritance tax was a very dangerous measure, which a small war such as the Spanish American War did not justify.[79] Also, Lodge and Elkins stated that inheritance taxation should be left exclusively to the states.[80] These arguments play a significant role in determining whether federal taxation of inheritances is within the founding vision. Voices of dissent, with regard to an inheritance tax, had not previously been expressed in the United States.

In 1898, during discussion on the repeal of the inheritance tax, Congressman Oscar Underwood declared, "The inheritance tax is levied on a class of wealth, a class of property, and a class of citizens that do not otherwise pay their fair share of the burdens of Government."[81] Despite Congressman Underwood's argument, the inheritance tax of 1898 was repealed in 1902 shortly after the conclusion of the Spanish American War.[82]

D. *Modern Estate Tax*[83]

Four years after the repeal of the Spanish American War tax, Theodore Roosevelt began advocating for the return of an inheritance tax in order to "improve the distribution of the tax burden."[84] This represents the first major push in which federal death taxation was proposed as a means by which to control hereditary wealth.[85] Pressure to enact a tax on inherited wealth continued over the next decade.[86]

1890. In it, he argues that there is no injustice in denying heirs an inheritance, as they had done nothing to earn such wealth, and that a heavy inheritance tax should be enacted to prevent the transmission of large accumulations of wealth. *Id.* at 65-66. Carnegie gained much public support for his proposal, although among his own class he was largely viewed as a traitor. Eisenstein, *supra* note 11, at 226.

78 PAUL, *supra* note 18, at 67.

79 *Id.*

80 *Id.* In the more general sense, Elkins argued that an inheritance tax "favors spending as you go, on the theory the Government will take it away when you die. What will be the incentive to accumulation if you can tax inheritances? . . . [W]e are . . . breaking down ancient traditions." 31 CONG. REC. 5082 (1898).

81 35 CONG. REC. 1830 (1902). The implication of Congressman Underwood's statement is that without the inheritance tax, the wealthy were not paying their "fair share" of the burden of government. This is contrary to statements made by McDougall, who in 1862 supported the inheritance tax not because he felt that the wealthy were not paying their fair share, but because "men of commerce" are both more able to pay taxes and more willing. *See supra* note 47, and accompanying text. The distinction between these statements highlights ideological differences between a proportional tax system and a progressive tax system.

82 Act of Apr. 12, 1902, ch. 500, § 7, 32 Stat. 96, 97.

83 This section covers only major changes to the federal estate tax and should not be viewed as a comprehensive history of the federal estate tax since 1916. For a complete overview of the federal estate tax since 1916, see JOINT COMMITTEE ON TAXATION, 105TH CONG., PRESENT LAW & BACKGROUND RELATING TO ESTATE AND GIFT TAXES (Comm. Print 1998).

84 Eisenstein, *supra* note 11, at 228. Roosevelt proposed a progressive tax that would "put a constantly increasing burden on the inheritance of those swollen fortunes which it is certainly of no benefit to this country to perpetuate." *Id.* at 229 (quoting 17 WORKS OF THEODORE ROOSEVELT 434 (Memorial ed. 1925)).

85 *See id.* at 228.

86 The 1906 inheritance tax proposal failed for lack of Congressional support. Johnson & Eller, *supra* note 28, at 72. Three years later, in 1909, Congressman Sereno Payne proposed

Amidst calls for a tax on inheritances to be used to level inherited wealth, the advent of World War I finally gave Congress the impetus to pass the federal estate tax.[87] The Revenue Act of 1916[88] provided for a progressive estate tax,[89] with rates ranging from between 1% and 10%.[90] Following the conclusion of World War I in 1918, instead of repealing the estate tax as had been done with previous federal death taxes, Congress reduced rates on smaller estates but did not reduce the maximum rate for large estates.[91]

Congress' choice to reduce the estate tax after the conclusion of World War I, instead of repealing the tax, represented a significant change in the use of federal estate taxation. Estate taxation was no longer a means by which to raise revenue in times of exigency. Rather, estate taxation became a way to fund day-to-day government operations.[92]

Significant changes to the rate and structure of the estate tax were made in 1924.[93] The late 1920s ushered in the Mellon Era, during which Secretary of

---

a progressive inheritance tax with the endorsement of President William Howard Taft. The inheritance tax was proposed as a way to counteract the shortages that had resulted from the bank panic of 1907. *Id.* Although Representative Payne described the tax as being both "correct in principle and easy to collect," the Senate dropped the inheritance tax after they instead enacted a corporate excise tax. *Id.* In 1912, the Progressive Party added its support for an inheritance tax, viewing the inheritance tax as a way to equalize holders of property. Eisenstein, *supra* note 11, at 229. Despite growing support, in 1913, Congress failed to pass another proposal for a federal inheritance tax. *Id.*

87 Eisenstein, *supra* note 11, at 230.

88 Revenue Act of 1916, ch. 463, §§ 200-212, 39 Stat. 756, 777-80 (1916).

89 An exemption of $50,000 was allowed, below which no estate tax was levied. § 203(a)(2), 39 Stat. at 778. The taxable estate included all property owned by the decedent at death, certain lifetime transfers made for inadequate consideration, transfers not intended to take effect until death, and transfers made in contemplation of death. § 202(b), 39 Stat. at 777-78.

90 § 201, 39 Stat. at 777. The following rates were in effect for the value of taxable estate in excess of the $50,000 exemption: 1% for the first $50,000 of taxable estate; 2% on the excess value between $50,000 and $150,000; 3% on the excess value between $150,000 and $250,000; 4% on the excess value between $250,000 and $450,000; 5% on the excess value between $450,000 and $1,000,000; 6% on the excess value between $1,000,000 and $2,000,0000; 7% on the excess value between $2,000,000 and $3,000,000; 8% on the excess value between $3,000,000 and $4,000,000; 9% on the excess value between $4,000,000 and $5,000,000; and 10% on any value exceeding $5,000,000. *Id.* As World War I intensified, these rates were raised by 50% in early 1917, resulting in rates that ranged from 2% on the first $50,000 of taxable estate to a maximum rate of 25% on estates exceeding $10 million in value. Eisenstein, *supra* note 11, at 230-231 (citing Revenue Act of Oct. 3, 1917, ch. 63, § 900, 40 Stat. 300, 324).

91 Eisenstein, *supra* note 11, at 231 (citing Revenue Act of 1918, § 401).

92 *See infra* Part IV.

93 Perhaps most importantly, in 1924, Congress passed a gift tax to prevent taxpayers from avoiding the tax through *inter vivos* giving. *Id.* at 232; JOINT COMMITTEE ON TAXATION, 105TH CONG., PRESENT LAW & BACKGROUND RELATING TO ESTATE AND GIFT TAXES (Comm. Print 1998). The maximum estate tax rate was raised to 40%. Eisenstein, *supra* note 11, at 232 (citing Revenue Act of 1924, §§ 301, 319-24). The tax was also broadened so as to include jointly owned property and retained interests in property, which continues to be in effect today. *See* I.R.C. 2038 (2004). A credit, not to exceed 25% of the federal estate tax, was added to allow for amounts paid in state inheritance tax. Eisenstein, *supra* note 11, at 232. The state credit has since been replaced with a deduction for state inheritance taxes. I.R.C. § 2058. (2004).

Treasury Andrew Mellon mounted an attack against the federal estate tax.[94] Recent events aside, the Mellon era was the last great challenge to the federal estate tax.[95] The Mellon led attack against the federal estate tax came to its conclusion when in 1931, faced with a mounting deficit attributable to the Great Depression, Mellon advocated for an increase in the estate tax rates.[96] By 1941, the top estate tax rate had reached 77% in anticipation of World War II.[97]

Between the conclusion of World War II and the signing of the Economic Growth and Tax Relief Reconciliation Act in 2001,[98] the federal estate tax underwent a variety of changes,[99] the most significant of which were contained in Tax Reform Act of 1976[100] and the Economic Recovery Act of 1981.[101]In December of 1998, the Joint Economic Committee issued a report on the eco-

---

[94] Andrew Mellon served as Secretary of the Treasury from 1921 until his death in 1932. During his tenure, Mellon opposed the estate tax for two chief reasons. "First, Mellon complained that an estate tax was a tax on capital used to finance the ordinary expenses of government." M. Susan Murnane, *Andrew Mellon's Unsuccessful Attempt to Repeal Estate Taxes*, 108 TAX NOTES 1177, 1183 (2005). Second, Mellon believed that the need "to pay large taxes out of estate assets caused the market value of those assets to decline significantly." *Id.* Based on these two arguments, Mellon argued for the complete repeal of all estate taxes. Congress, however, was unwilling to pass a full repeal of the tax, and instead reduced the rates in 1926 and raised the exemption amount from $50,000 to $100,000. Revenue Act of 1926, ch. 27, § 303(a)(4), 44 Stat. 9, 73. The federal gift tax, however, was fully repealed. § 324, 44 Stat. at 86.

[95] Murnane, *supra* note 94, at 1177.

[96] Eisenstein, *supra* note 11, at 234. In answer to Mellon's advocacy, Congress imposed new rates that started at one percent on the first $10,000 of taxable estate, and went as high as 45% on estates in excess of $10 million. Revenue Act of 1832, ch. 209, § 401(b), 47 Stat. 169, 243-244. In addition, the exemption was lowered back to $50,000 (§ 401(c)), the credit for state inheritance taxes was repealed (§ 402(a)), and a new gift tax was imposed (§§ 501-532)).

[97] JOINT COMMITTEE ON TAXATION, 105TH CONG., PRESENT LAW & BACKGROUND RELATING TO ESTATE AND GIFT TAXES PART I B (Comm. Print 1998).

[98] Pub. L. No. 107-16, 115 Stat. 38 (2001).

[99] Aside from the Tax Reform Act of 1976 and the Economic Recovery Act of 1981, a significant amount of legislation was passed between 1984 and 1997 affecting the federal estate tax. For a summary of these changes see JOINT COMMITTEE ON TAXATION, 105TH CONG., PRESENT LAW & BACKGROUND RELATING TO ESTATE AND GIFT TAXES PART I B (Comm. Print 1998).

[100] Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520. In 1976, a unified credit was enacted, which exempted $175,625 worth of transfers from estate and gift taxation, and the maximum tax rate was decreased to 70%. The Act provided for an irrebuttable presumption that all transfers of property made within three years of death were made in contemplation of death, and therefore subject to estate taxation. *Id.* Also, a $250,000 marital deduction was provided for which allowed for the transfer of property between spouses without incurring tax liability. *Id.*

[101] Among other changes, the Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 401, 95 Stat. 172, provided for an unlimited marital deduction so long as certain requisites were met. § 403, 95 Stat. at 172. The act also increased the amount of the unified credit to $600,000 and reduced the top estate tax rate from 70% to 50% over a four year period. §§ 401-402, 95 Stat. at 172. The phase-in of the lower tax rate was delayed for several years. *See* JOINT COMMITTEE ON TAXATION, 105TH CONG., PRESENT LAW & BACKGROUND RELATING TO ESTATE AND GIFT TAXES PART I.B. (Comm. Print 1998). On December 31, 1992, the top estate tax rate finally dropped to 50%. However, subsequent legislation retroactively raised the top rate to 55%, dating back to January 1, 1993. *Id.*

nomics of the estate tax and ultimately recommended repeal.[102] In the executive summary, the estate tax is described as being in violation of "the basic principles of a good tax system: it is complicated, unfair and inefficient."[103] The report advanced several arguments against the estate tax. Most notably, that the estate tax hinders entrepreneurial ventures and depletes the nation's capital.[104] Inherited wealth was not found to be a problem in the United States.[105] It was also found that the estate tax was ineffective at generating revenue because of the federal revenue lost as a result of tax avoidance,[106] and because estate tax avoidance led to increased administration costs that cut against net revenue generated from the tax.[107]

Presumably, in response to these concerns, in 2001, Congress passed Economic Growth and Tax Reconciliation Act, which President George W. Bush later signed into law.[108] The act represents a compromise between those who oppose estate taxation and those who believe that the tax furthers democratic principles.[109] Prior to estate tax repeal in 2010, it can be assumed that the estate tax will once again be discussed on the Congressional floor. The remaining portions of this paper examine the principles of our Founding Fathers in order to discern whether the estate tax fits within the founding vision.

IV. Funding a Nation: Expectations with Respect to Everyday Revenue

The modern estate tax has several elements that differ from its predecessors. Most importantly among these differences is that the modern estate tax is used to finance the day-to-day operations of the federal government, whereas

---

[102] Joint Economic Committee, 105th Cong., The Economics of the Estate Tax (1998), *available at* http://www.house.gov/jec/fiscal/tx-grwth/estattax/estattax.htm. Murnane notes that in large part, the arguments against the estate tax advanced in this report match the arguments advanced by Andrew Mellon in the 1920s. Murnane, *supra* note 94, at 1177.

[103] Joint Economic Committee, 105th Cong., The Economics of the Estate Tax iii (1998).

[104] *Id.*

[105] The report states that, "Far from being a static economy where wealth is permanently locked in the hands of a few families, the American economy is best characterized as fluid and dynamic, where new wealth is constantly created and old wealth is naturally dispersed though intergenerational transfers." *Id.* at 6-7.

[106] A study by Stanford University economist Douglas Bernheim found that federal income tax revenue is lost as a result of parents shifting income to children, who are generally in lower tax brackets, in an effort to avoid estate tax liability after death. *Id.* at 14. (citing B. Douglas Bernheim, *Does the Estate Tax Raise Revenue?*, *in* 1 Tax Policy and the Economy 113-38 (Lawrence H. Summers ed., 1987)).

[107] *See id.* at 14.

[108] *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, 115 Stat. 38, (2001). Since the passage of the act, estate tax rates have been gradually decreasing while the exemption gradually increases. *See* I.R.C. § 2001(c) (2004) (schedule for decreased estate tax rate) *and* I.R.C. § 2010(c) (2004) (schedule for increasing unified credit). In the year 2010, the estate tax will be facing repeal. § 2010. As it presently stands, in 2011 the estate tax will return, with a top rate of 45% and a unified credit amount of $1,000,000. § 2010(c).

[109] Jeffery A. Cooper et al., *State Estate Taxes After EGTRRA: A Long Day's Journey Into Night*, 17 Quinnipiac Prob. L.J. 90, 92 n.11 (2003).

historical death taxes were used only in times of war.[110] Whether the current use of the federal estate tax falls within the founding vision is largely dependent upon whether the Founders would have viewed the estate tax as an appropriate, permanent mechanism by which to raise everyday revenue.

In order to make this determination, it first becomes important to discern how our Founders intended to finance the nation. Of course, there is no easy answer to this. The Founders came from varying backgrounds, had differing philosophies, and were destined to have divergent views from one another; the views of one of these men cannot serve to speak for all of the Founding Fathers. Also times have changed dramatically since the founding,[111] as have the financial needs of the country.[112] While the Constitution was built to grow with a developing nation, the period of its creation will forever remain the late 1700s. To determine how the estate tax fits in with the founding vision, eighteenth century ideals must be translated into the modern reality of the twenty-first century.

Providing government revenue for the colonial and early American governments was a wholly different venture than it is today. Public expenditures during the colonial era were modest and central government had few responsibilities; public works were "trivial," there were no social welfare appropriations, and government officials served as volunteers, resulting in little need for government revenue.[113] Nevertheless, the colonial tax system, consisting primarily of poll, faculty and property taxes, and duties on commerce, was "inadequate even for . . . modest needs."[114]

The Articles of Confederation did not provide for a system of taxation, which has historically been cited as one of its major downfalls.[115] "The lawyers at the Continental Congress were more adept with words than at the job of providing money."[116] Under the Articles of Confederation, the national government survived by requisitioning the states in proportion to value of land and improvements.[117] The states largely regarded these requisitions as "voluntary

---

[110] *See supra* Part III.

[111] In case there is any doubt about how time effectuates change, consider that in an 1862 speech, Senator John Alexander McDougall opposed the taxation of lawyers' incomes, stating, "How can you tax the income of a lawyer who keeps no books? It is not the habit of lawyers to keep an exact account either of their expenditures or incomes." CONG. GLOBE. APP., 37th Cong., 2d Sess. 227, 231 (1862) (Speech of Hon. J.A. McDougall). Today, most lawyers working in law firms would find this to be a wholly inaccurate reflection of the inner workings of modern law practice.

[112] From 1789 to 1849, government outlays totaled $1,090,000,000. For the year 2006, it is estimated that government outlays will total $2,369,105,000,000. OFFICE OF MGM'T & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, HISTORICAL TABLES, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2003, at 25-26 (2003), *available at* http://www.whitehouse.gov/omb/budget/fy2003/pdf/hist.pdf.

[113] PAUL, *supra* note 18, at 3.

[114] *Id.*

[115] *Id.* at 4.

[116] *Id.*

[117] Federal requisition of the states entailed the government telling states that they owed a certain amount in taxes. The states would be responsible for collecting this amount from its residents, and forwarding it to the federal government. CALVIN H. JOHNSON, RIGHTEOUS ANGER AT THE WICKED STATES 15 (2005) [hereinafter JOHNSON, RIGHTEOUS ANGER] (citing to ARTICLES OF CONFEDERATION, art. VIII). Ostensibly, Federal requisitions were appor-

contributions" or "alms," and according to Paul, the federal requests were "generally ignored."[118] With time, "the payment of taxes came . . . to be regarded as a romantically honorable act, or even as a sort of amiable and quixotic manifestation of eccentricity."[119]

By 1782, government vaults were literally empty and the national government defaulted on its debt.[120] In the last requisition before the Constitution, Congress "mandated that states pay $3,800,000 [in requisitions], but it collected only $663."[121] Regarding the failure of requisitions, James Madison wrote, "A radical vice of the requisition system . . . was its assumption that the states would respect the Republican cause and pay their requisitions, without opposition."[122]

Legal scholar Calvin Johnson hypothesizes that failure of the Articles of Confederation can almost be entirely attributed to the failure of the states to pay requisitions and to approve a federal impost.[123] In the words of Johnson, the "action of the states in their defaults of requisitions and in veto of the impost was sin, disease, wickedness, and vice."[124] Angry with the states for their failure to pay requisitions, the Framers of the Constitution determined that a stronger federal government, with the power to tax the people directly, was necessary for the preservation of the Union.[125] Requisition had already failed, and taxation proved to be a more appealing option than "the ancient device of escheat," even though the difference between taxation and escheat may be the difference between "tweedledee and tweedledum."[126]

---

tioned among the states according the value of the state's land and improvements. However, under the Articles of Confederation, the value of a state's land and improvements was determined by using a census count. Therefore, in reality, requisitions were apportioned among the states according to population, rather than the value of the land. Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL RTS. J. 1, 2 (1998) [hereinafter Johnson, *Apportionment of Direct Taxes*].

[118] PAUL, *supra* note 18, at 5.

[119] *Id.* In contrast to this point of view, Brown says that "state governments met a greater proportion of their quotas than is often recognized." ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 13 (1993). Rather, the states actually made substantial contributions to the requisition system, showing an overall rate of compliance of 37% between October 1781 and August 1786. *Id.* at 12. However, by the end of 1786, state compliance fell to 2 percent. *Id.* at 25.

[120] *Id.*

[121] JOHNSON, RIGHTEOUS ANGER, *supra* note 117, at 15. The final requisition before to the enacting of the Constitution occurred in 1786. *Id.*

[122] Id. at 4 (citing James Madison).

[123] So that it would not have to rely entirely on requisitions, Congress proposed a 5% tax on imports in 1781. This tax was known as the impost. Under the Articles of Confederation, in order for the impost to take effect, all thirteen states had to endorse it. Rhode Island vetoed the impost. *Id.* at 27. Johnson hypothesizes that the states' failure to pay requisitions, and the failure of Rhode Island to approve the impost, ultimately led to the creation of a strong federal government under the Constitution. *See id.* at 1-11.

[124] *Id.* at 3.

[125] *Id.* at 1-5.

[126] James Hagerman, Jr., *The Federal Estate Tax: Grounds for Adoption of this Method of Taxation in America, Brief Comment on U.S. Supreme Court Decisions on the Subject, and Suggestion of Certain Inequities in Operation that Might Be Removed*, 8 A.B.A. J. 92, 92 (1922).

Ratification of the Constitution was a hotly debated topic, and the final version of the Constitution represents the embodiment of the compromises that were necessary in order to sway the votes needed for ratification.[127] Because some of the words of the Constitution were penned only in the spirit of compromise, they may not accurately reflect the full intentions of the Founders. This is perhaps nowhere more true than it is with regard to the issue of federal taxation, which was central in the Constitutional debate.[128]

A. *Construing the Words of the Constitution*

The constitutionality of the federal estate tax is not at issue, as the matter has been decided by the Supreme Court on multiple occasions.[129] However, constitutional intent is relevant in trying to determine whether the use of a permanent estate tax falls within the founding vision. Two tax-specific issues arise when trying to discern constitutional intent with regard to taxation. The first of these issues involves the intended scope of the Congressional taxing power. The second issue is whether the estate tax would be considered a direct tax, and whether such a distinction would place additional limits on its use.

As ratified in 1787, Article I, section 8, of the United States Constitution states, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."[130] The scope of the congressional power to tax was originally limited by the Direct Taxation Clause, which provides that direct taxes laid by Congress "shall be apportioned among the several states."[131] Under the Direct Taxation Clause, Congress could only impose those "direct taxes" that could be evenly apportioned among the states; the power to lay all other direct taxes was reserved to the states.[132]

From the earliest days of the Constitution, it was known among the drafters that the words of the Constitution did not adequately reflect the intent behind the General Welfare Clause and the Direct Taxation Clause, thereby calling into question even U.S. Supreme Court opinions interpreting the clauses. For example, James Madison found himself involved in debates on the Congressional floor regarding the scope of the general welfare provision,[133] and Founders sitting on the early Supreme Court defined direct taxes "creatively" in order to "avoid the apportionment requirement in cases in which

---

[127] Aaron J. O'Brien, *States' Repeal: A Proposed Constitutional Amendment to Reinvigorate Federalism*, 44 CLEV. ST. L. REV. 547, 552-53 (1996) (stating that compromise dominated the Constitutional Convention).

[128] JOHNSON, RIGHTEOUS ANGER, supra note 117, at 1-11.

[129] *See supra* note 8 and accompanying text.

[130] U.S. CONST. art. I, § 8.

[131] U.S. CONST. art. I, § 9, cl. 4, *amended by* U.S. CONST. amend. XVI (1913).

[132] In *Pollock*, the Supreme Court said that "the acceptance of the rule of apportionment was one of the compromises which made the adoption of the Constitution possible . . . [B]y calling a tax indirect when it is essentially direct, the rule of protection could be frittered away, one of the great landmarks defining the boundary between . . . Nation and . . . States." Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429, 583 (1895).

[133] *See* JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 98 (1999).

apportionment would have been unreasonable."[134] Such ambiguity has resulted in a situation in which the intent behind the Constitution, rather than the words of the Constitution, must be used to determine whether the estate tax fits within the founding vision.

1. *The General Welfare Clause*

Despite the presence of the Direct Taxation Clause, the General Welfare Clause of the Constitution still reserves to Congress a broad power of taxation, which opponents of the Constitution viewed as a danger to states' rights.[135] At the Virginia convention, George Mason interpreted the General Welfare Clause as a "second Necessary and Proper Clause allowing Congress to legislate in any way it pleased, and in that light opposed it."[136]

However, the Framers of the Constitution did not intend for Congress to take full advantage of the power of taxation granted under the Constitution in order to fund the day-to-day operations of the government.[137] In responding to Mason's concerns, George Nicholas and Edmund Randolph told the Virginia convention that the General Welfare Clause would only permit the federal government to pay the debts of the United States.[138] Speaking on the Congressional floor, James Madison advocated for a narrow reading of the General Welfare Clause for the purposes of spending, arguing that Congressional spending was limited to the enumerated powers listed in Article I, section 8 of the Constitution.[139] By extrapolation, it can be presumed that Madison would have favored the idea that the General Welfare Clause no more gave Congress the power to tax without limitation, than it gave Congress the power to spend without limitation.

Likewise, the states that ratified the Constitution did not expect Congress to take full advantage of its broad power of taxation. At least five states ratified the Constitution, only on the condition that

> Congress [would] not lay direct taxes but when the moneys arising from impost, excise, and their other resources, are insufficient for the public exigencies, nor then, until Congress shall have first made a requisition upon the states to assess, levy, and pay, their respective proportions of such requisition, agreeably to the census fixed in the said Constitution, in such way and manner as the legislature of the state shall think best.[140]

---

134 Johnson, *Apportionment of Direct Taxes*, *supra* note 117, at 3.

135 In general, anti-federalists felt that the Constitution granted too much control to the federal government, especially with regard to issues of taxation. For example, in 1788 before the Virginia Ratifying Convention, Patrick Henry opposed the Constitution on the basis that it gave the federal government, among other things, "a power of direct taxation, unbounded and unlimited." Speech of Patrick Henry, *in* THE ESSENTIAL FEDERALIST AND ANTI-FEDERALIST PAPERS 31 (David Wootton ed., 2003).

136 LYNCH, *supra* note 133, at 99.

137 As evidence of this, James Madison had originally advocated that the federal government should have a limited power of taxation. However, the final version of the Constitution grated plenary power of taxation. JOHNSON, RIGHTEOUS ANGER, *supra* note 117, at 126.

138 LYNCH, *supra* note 133, at 99.

139 *Id.* at 98.

140 In Convention of the Delegates of the People of the State of New Hampshire, June the 21st, 1788, *in* 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS AND THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter 1 THE

Broadly speaking, it was intended that Congress would primarily use taxes on commerce to fund the nation.[141] In a letter dated 1828, James Madison wrote that Congress' power to tax commerce was its primary means by which to raise revenue, with state taxation powers "limited to direct taxes on land or other property, to arbitrary assessments on invisible funds, and to the odious tax on persons."[142] Taxes on commerce were intended to supply the fledgling federal government with the majority of needed revenue, with other internal taxes to be turned to only in times of desperate need.

2. *The Direct Taxation Clause*

Whether taxes on inheritances and estates would have been considered direct taxes by the Founders remains an open question. The term "direct taxes" is not defined by the Constitution, which led to problems in early litigation as courts were forced to judge the constitutionality of federally imposed taxes.[143]

Prior to the Constitutional Convention, the term "direct tax" had rarely been used in the United States.[144] In the Federalist Papers, Alexander Hamilton said that direct taxes primarily included levies on land and buildings,[145] but records of debates from the Constitutional Convention do not support the contention that this was the definition adopted. The states that ratified the Constitution used the term "direct tax" in five different ways: "(1) as a tax on the states, (2) as a land tax, (3) as a land and poll tax, (4) as a poll tax, together with a general assessment on property, and (5) as a tax on land, together with the specific articles of personal property."[146] Members of the Convention used "direct tax" in at least three different ways.[147] At one point, "King asked the Convention what was the precise meaning of 'direct taxation' and Madison reports that 'no one answered.'"[148]

The phrase "direct taxation" was included in the Constitution after extensive debates regarding the inclusion of slaves into state census counts.[149] State census counts were to be used in determining representation in the House of Representatives.[150] Southern states wished to count slaves toward the total state population, so as to increase their representation in the Assembly.[151] Eventually, a compromise was reached whereby three-fifths of the number of

---

DEBATES IN THE SEVERAL STATE CONVENTIONS]. Contingencies from South Carolina, Rhode Island, Massachusetts and New York passed provisions almost identical to that of New Hampshire. 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra*, at 322-23, 325, 329, 335.

[141] Impost and excise duties are both taxes laid upon commerce. BLACK'S LAW DICTIONARY 605, 772 (8th ed. 2004).

[142] James Madison, Letter 1: Madison on Tariffs, *in* 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, *supra* note 15, at 600, 605.

[143] *See e.g.*, Hylton v. United States, 3 U.S. 171 (1796) (holding that a direct tax is one which can be apportioned among the states).

[144] PAUL, *supra* note 18, at 49.

[145] FEDERALIST NO. 36 (Alexander Hamilton).

[146] PAUL, *supra* note 18, at 49.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 49-52.

[150] *Id.*

[151] *Id.*

slaves would be counted toward state representation, but taxes would be apportioned among the states according to this same census count.[152] Therefore, while Southern states would benefit from the three-fifths compromise by getting to count the slaves toward representation, they could also suffer tax consequences.

As evidence of this, during the Convention, a motion was presented to strike "and direct taxes" from Article I, section 2, as it was "improperly placed in a clause relating merely to the constitution of the House of Representatives."[153] In response, Gouverneur Morris said, "The insertion here was in consequence of what had passed on this point; in order to exclude the appearance of counting the negroes in the *representation*. The including of them may now be referred to the object of direct taxes."[154] Because "direct taxation" is the product of an ancillary debate concerning slavery, the exact intent behind the inclusion of the phase is not known.

The U.S. Supreme Court first faced the difficulty associated with interpreting the term "direct taxes" in the case of *Hylton v. United States*.[155] *Hylton* presented the question of whether a federal tax levied on carriages was a direct tax under the Constitution, and would therefore be subject to the apportionment rule.[156] Reflecting upon the uncertainty of the meaning of "direct taxation," former Secretary of the Treasury Alexander Hamilton said, "We shall seek in vain for any antecedent settled legal meaning to the respective terms—there is none."[157]

Through a plurality opinion, the *Hylton* court held that direct taxes include only those taxes which Congress can apportion among the several states according to the census.[158] The same opinion was earlier expressed by Congressman Theodore Sedgwick, who believed that a "direct tax" could not be "incapable of apportionment."[159] This interpretation of direct taxes should be given special deference as the justices sitting on the Supreme Court at the time of *Hylton* had been "core Framers" with regard to apportionment and tax issues during the Constitutional Convention.[160]

Nearly 100 years later, the court in *Pollock v. Farmers' Loan & Trust Co.* held that the federal income tax was unconstitutional, because as a direct tax it

---

[152] Under the Articles of Confederation, federal taxes were collected through requisitions. *See supra* notes 117-22 and accompanying text. Because requisitions were apportioned according to population, any increase in the population meant an increase in the state's share of taxes. Therefore, the ability to count three-fifths of a state's slaves toward representation not only meant increased representation in the House of Representatives, but it also meant that the same census count would be used in apportioning taxes, thereby resulting in slave states being assessed increased taxes.

[153] James Madison, Journal of the Federal Convention 720 (E.H. Scott ed. 2002) (1787) (statements of Mr. Dickinson and Mr. Wilson).

[154] *Id.* at 720 (Gouverneur Morris' response to Mr. Dickinson's proposed amendment striking "direct taxes").

[155] Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796).

[156] *Id.* at 176,

[157] Paul, *supra* note 18, at 49.

[158] *Hylton*, 3 U.S. at 174.

[159] May 6, 1794, *in* 4 The Debates in the Several State Conventions, *supra* note 15, at 433.

[160] Johnson, *Apportionment of Direct Taxes*, *supra* note 117, at 74-75.

was required to be evenly apportioned among the states.[161] The *Pollock* court determined that the federal income tax was a direct tax because it taxed income derived from real and personal property, and a tax upon the income from property is an indirect (direct) tax upon the property itself.[162] *Hylton* held that a direct tax was one that could be apportioned, but *Pollock* overturned this definition. The result of *Pollock* was essentially a return to an indeterminate state in which the nation, once again, was without a concise definition of direct taxation. *Pollock*, however, became largely irrelevant after the ratification of the Sixteenth Amendment, which eliminated the apportionment requirement.[163] The public largely viewed the passage of the Sixteenth Amendment as a "recall" of the *Pollock* decision.[164]

The distinction between direct taxation and indirect taxation is important with regard to the estate tax as the ratification of the Constitution was based upon an understanding that Congress would levy direct taxes only as a last resort, after other revenue generating measures had failed.[165] Using the *Hylton* definition of direct taxes, the estate tax would not be considered a direct tax as Congress would be unable to apportion it.[166] Conversely, under *Pollock*, the estate tax would be a direct tax as it indirectly falls upon property.[167] Since the term was not defined, either in text or in debates, there is no solid evidence as to how the Founders would have viewed the estate tax. However, the holding of the *Hylton* court should be viewed as the most persuasive authority available since the case was decided by four of the Founding Fathers.[168]

V. Inheritances as an Appropriate Subject for Taxation

Based on the power of taxation granted by the Constitution, by 1794, "[i]t had been universally concluded, and never . . . denied . . . that the legislature . . . had authority to impose taxes on every subject of revenue."[169] Despite granting to Congress broad powers of taxation, the Founders were of the opinion that some subjects were more appropriate for taxation than others. For

---

[161] Pollock v. Farmers' Loan and Trust Co., 157 U.S. 429 (1895).

[162] This holding was overturned by the modern Supreme Court. *See* South Carolina v. Baker, 485 U.S. 505 (1988). For a more in-depth discussion of the *Pollock* and *Baker* decisions see Johnson, *Apportionment of Direct Taxes*, *supra* note 117, at 77.

[163] U.S. Const. amend. XVI.

[164] Johnson, *Apportionment of Direct Taxes*, *supra* note 117, at 77.

[165] *See supra* notes 140-42 and accompanying text.

[166] *See* Hylton v. United States, 3 U.S. (3 Dall.) 171, 174 (1796). Apportionment requires the federal government to levy taxes upon each of the states in proportion to population. This is not possible with an estate tax as Congress cannot control how many decedents will be present in each state, nor the wealth of decedents.

[167] *See* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429, 607 (1895). Like the federal income tax, the estate tax falls "indirectly" upon property. Without property, there will be no tax levying. Also, the tax base for the tax is computed using the value of property transferred.

[168] Johnson argues that the holding in *Hylton* should be viewed as a constitutional mandate because the "extraordinary actors" who decided *Hylton* were four of the Founding Fathers. Johnson, *Apportionment of Direct Taxes*, *supra* note 117, at 75. If constitutional construction is to be based upon founding intent, then *Hylton* embodies that intent. *Id.*

[169] *Direct Taxes*, *in* 4 Debates in the State Conventions, *supra* note 15, at 433 (statement by Mr. Sedwick).

instance, taxation of commerce was viewed not only as an effective means by which to raise revenue, but also as a mechanism by which to regulate commerce.[170]

Whether the Founders would have viewed inheritances as a proper subject for taxation can be analyzed from two different standpoints: first, whether personal property would have been viewed as an appropriate subject for taxation; and second, whether transfers of property at death would have been viewed as an appropriate subject for taxation. Because an inheritance tax was instituted as early as 1797,[171] a mere ten years after the adoption of the Constitution, there is some evidence that the idea of taxing inheritances was not overtly outlandish in the eyes of the Founders. However, "[s]ince taxes on . . . gifts [and] inheritances . . . were not in existence in 1787, it is impossible to state dogmatically what the Founders and the ratifiers of the Constitution would have thought of these taxes."[172]

A. *Real and Personal Property as Appropriate Subjects for Taxation*

The modern estate tax is grounded in the right to transfer property at death.[173] Still, this tax falls primarily upon the transferred property itself. If a person dies dispossessed of all property, then no estate tax will be levied because there will be nothing to transfer. Without property, estate tax liability ceases to exist. Therefore, in determining how the Founders would view the estate tax, it must first be determined whether the Founders believed that real and personal property were proper subjects for taxation.

The taxation of real property appears to be one of the primary subjects of taxation contemplated by early Americans. The early requisitions that were placed upon states under the Articles of Confederation were apportioned based upon the real property contained within the state.[174] Alexander Hamilton wrote that the nation's revenue needs "must fall with oppressive weight upon land."[175] Hamilton found a tax upon land to be one of the fairest forms of taxation, as "[n]o tax can be laid on land which will not affect the proprietor of millions of acres as well as the proprietor of a single acre."[176] He took the opposite view with regard to the taxation of personal property, describing personal property as being "too precarious and invisible" to levy taxes upon.[177]

Despite Hamilton's praise of real property as an ideal source of revenue, since the enacting of the Constitution, taxation of real property has primarily been reserved to the states.[178] Early American death taxes took a position opposite to that of Hamilton, excluding real property, and falling entirely on

---

170 Madison, *supra* note 15.

171 Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527 (1797).

172 SIDNEY RATNER, AMERICAN TAXATION: ITS HISTORY AS A SOCIAL FORCE IN DEMOCRACY 19 (1942).

173 Note, *Taxation—Inheritance Tax—Deduction of Federal Inheritance Tax*, 3 MINN. L. REV. 137, 138 (1918).

174 THE FEDERALIST No. 12 (Alexander Hamilton).

175 *Id.*

176 THE FEDERALIST No. 35 (Alexander Hamilton).

177 THE FEDERALIST No. 12 (Alexander Hamilton).

178 Jonathan Swain, *The Taxation of Private Interests in Public Property: Toward a Unified Theory of Property Taxation*, 2000 UTAH L. REV., 421, 464 (2000).

personal property.[179] Real property was not taxed under the death taxes of 1797, 1862 and 1898.[180] Out of the early taxes, only the 1864 amendment to the Civil War tax levied death taxes upon transfers of real property.[181]

Sources do not indicate whether the early non-inclusion of real property was out of deference to the right of the states to tax real property or for another, unspoken, reason. However, the consistency of the early taxes with respect to real property provides evidence that personal property was deemed a more appropriate subject for federal taxation than real property.

B. *Transfers of Property at Death as an Appropriate Subject for Taxation*

Taxes upon inheritances were first enacted in Great Britain through the Harcourt Act in 1894.[182] Sir William Harcourt, the sponsor of the Act, believed that because the right to transfer property at death is something created only by law, the state has first title upon the estate of a deceased, with beneficiaries having subsequent and subordinate title.[183] Harcourt viewed estate taxation as being upon the "property," not upon the "person."[184] This is different from the American view that estate taxation falls upon the *transfer* of property, rather than the property itself.[185]

However, with regard to the right to pass property after death, the United States has traditionally viewed inheritance as a civil right, much like Harcourt.[186] "The right to take property by devise or descent is the creature of the law, and not a natural right . . . . [I]t is the power to transmit, or the transmission from the dead to the living, on which such taxes [are based]."[187] Because the right to transfer property after death is granted only through law, the transfer is more susceptible to taxation than if it were a natural right.

In the late 1700s, the civil laws of entail[188] and primogeniture[189] bestowed upon children the right to inherit from their parents. Freedom of testation was virtually non-existent, resulting in familial wealth being handed down from one generation to the next, eventually leading to a concentration of both wealth and

---

179 Early wealth transfer taxes did not include real property in the tax base. *See supra* notes 39, 50-52, 72-73 and accompanying text.

180 *Id.*

181 Revenue Act of 1864, ch. 173, §§ 126-147, 13 Stat. 223, 287-91.

182 Hagerman, *supra* note 126, at 93. The U.S. estate tax enacted in 1916 is "clearly modeled on the English Act." Note, *The Federal Inheritance or Estate Tax*, 2 VA. L. REG. n.s. 702, 704 (1917).

183 Hagerman, *supra* note 126, at 93.

184 *Id.*

185 Ronald Chester, *Inheritance in America Legal Thought*, *in* INHERITANCE AND WEALTH IN AMERICA, *supra* note 28, at 29-30.

186 ROBERT K. MILLER, JR. & STEPHEN J. MCNAMEE, INHERITANCE AND WEALTH IN AMERICA 9 (1998).

187 Knowlton v. Moore, 178 U.S. 41, 55-56 (1900).

188 Laws of entail worked to limit the inheritance of an estate to only the decedent's issue or a class of issue. BLACK'S LAW DICTIONARY 572 (8th ed. 2004).

189 Primogeniture is the common law right of the firstborn son to inherit his ancestor's estate. BLACK'S LAW DICTIONARY 1230 (8th ed. 2004).

power.[190] Writing during Revolutionary times, Thomas Paine, one of the earliest American voices speaking against inherited wealth said,

> To the evil of monarchy we have added that of hereditary succession; and as the first is a degradation and lessening of ourselves, so the second, claimed as a matter of right, is an insult and an imposition on posterity. For all men being originally equals, no *one* by *birth* could have a right to set up his own family in perpetual preference to all others for ever, and though himself might deserve *some* decent degree of honors of his contemporaries, yet his descendants might be far too unworthy to inherit them.[191]

Likewise, Thomas Jefferson felt that inherited wealth created a dangerous "artificial aristocracy, founded on wealth and birth, without either talent or virtue."[192] During the first congressional session following the signing of the Declaration of Independence, Thomas Jefferson championed the elimination of laws of entail and primogeniture. In Jefferson's view, the elimination of these laws "removed the feudal and unnatural distinctions which made one member of every family rich, and all the rest poor."[193] Later, writing about the level of equality found in the United States, Alexis de Tocqueville also saw freedom of testation as a democratic equalizer. In *Democracy in America*, de Tocqueville described the abolishment of entail and primogeniture as "the last step toward equality."[194] Further discussing the American inheritance laws, de Tocqueville wrote, "As a result of the law of inheritance, the death of each owner brings about a revolution in property; not only do his possessions change hands, but their very nature is altered, since they are parceled into shares, which become smaller and smaller at each division."[195]

Abolishing entail and primogeniture were steps toward the minimization of inherited wealth. However, early steps were never taken toward the permanent taxation of inheritances, even though such taxes had been suggested by Thomas Paine.[196] In *Agrarian Justice*, Paine suggested that 10% of all inheritances be placed into a common fund for public use.[197] Every person, upon turning twenty-one, would receive from this fund fifteen pounds of sterling as a

---

190 Stephanie A. Weber, Note, *Rethinking the Estate Tax: Should Farmers Bear the Burden of a Wealth Tax?*, 9 ELDER L.J. 109, 115-17 (2001).

191 THOMAS PAINE, COMMON SENSE, ch.2, § 10.

192 Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), in THE THOMAS JEFFERSON PAPERS AT THE LIBRARY OF CONGRESS, 1606-1827: SERIES 1 GENERAL CORRESPONDENCE, 1651-1827, *available at* http://memory.loc.gov/ammem/collections/jefferson_papers/image1257 (transcript of original used).

193 Thomas Jefferson, July 27, 1821, Autobiography Draft Fragment, January 6 through July 27 (July 27 1821), in THE THOMAS JEFFERSON PAPERS AT THE LIBRARY OF CONGRESS, 1606-1827: SERIES 1 GENERAL CORRESPONDENCE, 1651-1827, *available at* http://memory.loc.gov/ammem/collections/jefferson_papers/ (transcript of original used). Jefferson also fought for removal of the laws of entail and primogeniture because of their religious roots. He felt that eliminating the laws would serve to further a separation of church and state. *Id.*

194 ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA ch. 3 (1835), *available at* http://xroads.virginia.edu/~HYPER/DETOC/toc_indx.html.

195 *Id.*

196 THOMAS PAINE, AGRARIAN JUSTICE (1797), *available at* http://www.ssa.gov/history/paine4.html.

197 *Id.*

"natural inheritance."[198] Also, every person over the age of fifty would receive ten pounds of sterling per year.[199]

Coincidentally, 1797, the year that *Agrarian Justice* was published, did bring about the first U.S. death tax. However, the 1797 tax was enacted strictly in an effort to generate revenue, not to create equality with regard to inherited wealth.[200] As evidence of this, immediately after Jefferson assumed office, the tax on inheritances was repealed,[201] despite Jefferson's strong stance against inherited wealth. Jefferson's willingness, if not eagerness, to repeal the tax so quickly indicates that while inheritances may have been an appropriate subject for taxation in emergency situations, it was not viewed as an appropriate source for permanent revenue. This position is supported by both the 1862 tax and the 1898 tax, both of which were repealed as soon as exigent circumstances ceased to exist.[202] Use of death taxation only in times of war is also consistent with the terms of state ratification of the Constitution.[203]

In summary, two patterns become apparent upon examination of the historical death taxes. First, with the exception of the 1864 amendment to the Civil War tax, real property was not historically included in death taxes, indicating that it was not viewed as an appropriate subject for federal death taxation. Second, despite the fact that death taxes were proposed as a means by which to eliminate some of the inequities associated with inheritance, death taxation was not used for this purpose until 1916. Prior to 1916, death taxation was used only as a way to raise revenue during times of war. The implication of such selective use of the death taxation is that it was not viewed as an appropriate source of permanent revenue.

VI. Would the Founders Have Approved of Progressive Taxes?

Is a progressive tax system consistent with the ideals of the Founding Generation? The modern estate tax, along with the federal income and gift taxes, forms the basis of the progressive tax system found in the United States.[204] Progressive taxes were not enacted at a federal level in the United States until the Civil War, at which time both the North and the South enacted progressive taxes.[205] The progressive Civil War taxes were repealed at the end of the war, and there was little public commentary regarding the appropriateness of progressive taxation until the 1880s. The 1880s were marked by an increase in American fortunes, eventually leading to public cries for heavy taxation of the rich.[206] Out of this process, a "soak the rich" tax policy emerged,[207] bringing about the federal income and estate taxes.

---

198 *Id.*
199 *Id.*
200 *See* Eisenstein, *supra* note 11 (arguing that the primary motivation behind historical estate taxation is revenue generation).
201 Paul, *supra* note 18, at 6.
202 Act of July 14, 1870, ch. 255, §3, 16 Stat. 256; Act of Apr. 12, 1902, ch. 500, § 7, 32 Stat. 96, 97.
203 *See supra* note 140, and accompanying text.
204 Paul, *supra* note 18, at 714.
205 *Id.* at 720.
206 Eisenstein, *supra* note 11, at 226.

Progressivity has been identified as one of the "distinguishing characteristics of American taxation."[208] However, the high taxation of the wealthy seems contrary to the United States' "historical reluctance to erect governmental barriers to the individual 'pursuit of happiness.'"[209]

It is unlikely that the Founders, as a whole, envisioned a system of taxation in which the wealthy would bear a disproportionate burden with regard to government funding. Rather, evidence from the time supports the position that the majority of the Founders envisioned a proportionate system of taxation. For instance, John Adams, a supporter of the aristocracy, wanted to "protect the poor against excessive spoliation by the rich, and at the same time to defend the rights of the rich against attacks by 'communistic levelers.'"[210] Alexander Hamilton believed in a system of taxation in which each man was taxed in the same manner, without the burden of taxation falling heavily upon any one group.[211] Likewise, in 1776, economist Adam Smith wrote, "The subjects of every state ought to contribute towards the support of the government, as nearly as possible in proportion to their respective abilities, that is in proportion to the revenue which they respectively enjoy under the protection of the state."[212]

The premier early advocate for heavy taxation of the rich was Thomas Jefferson.[213] Speaking about early taxation, Jefferson wrote:

> We are all the more reconciled to the tax on importations, because it falls exclusively on the rich . . . . In fact, the poor man in this country who uses nothing but what is made in his farm or family, or within the U.S., pays not a farthing of tax on the general government . . . . [O]nce liberated by the discharge of the public debt . . . the farmer will see his government supported, his children educated, and the face of his country made a paradise by the contributions of the rich alone.[214]

However, Jefferson was seemingly alone in his viewpoint, and progressive taxation did not appear permanently in the United States until 1913.[215]

By the 1940s, the number of advocates for a strong progressive tax system had greatly increased in number.[216] Beginning in the 1940s, economic histo-

---

207 W. Elliot Brownlee, *Economic History and the Analysis of "Soaking the Rich" in 20th-Century America*, *in* THE ONGOING DEBATE: TAX JUSTICE 71, 71 (Joseph J. Thorndike & Dennis J. Ventry Jr. eds., 2002).

208 *Id.*

209 *Id.*

210 RATNER, *supra* note 172, at 29.

211 *See supra* notes 175-77, and accompanying text.

212 Richard A. Musgrave, *Equity and the Case for Progressive Taxation*, *in* THE ONGOING DEBATE: TAX JUSTICE, *supra* note 207, at 9, 10 (citing ADAM SMITH, THE WEALTH OF NATIONS 185 (Edwin Cannan ed., 1904) (1776)).

213 RATNER, *supra* note 172, at 32-33.

214 CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND PIERRE SAMUEL DU PONT DE NEMOURS 1798 – 1817, 133-34 (Dumas Malone, ed. 1930).

215 Dennis J. Ventry, *Equity versus Efficiency and the U.S. Tax System in Historical Perspective*, *in* THE ONGOING DEBATE: TAX JUSTICE, *supra* note 207, at 25, 31. Both a progressive income tax and a progressive estate tax were used during the Civil War, but Congress allowed the taxes to expire in 1872, following the conclusion of the war. *Id.* at 29. A progressive income tax was enacted in 1894, but was overturned by the Supreme Court in the case of *Pollock v. Farmers' Loan and Trust Co.*, 158 U.S. 601 (1895). *Ventry*, *supra*, at 30.

216 Ventry says that by the early 1900s, Senator Robert LaFollette, Theodore Roosevelt, and William Howard Taft all endorsed progressive income taxation. *Id.* at 31. In 1914, econo-

rian Sidney Ratner promoted progressive taxation "as preeminently fit for achieving and preserving the economic objectives of democracy."[217] On the other hand, although Ratner was an advocate for progressive taxation, his writing provides support for the argument that early America fought for a proportional tax system, rather than a progressive system. In 1942, Ratner wrote:

> The historic struggle for control of the state by the middle classes in . . . America during the seventeenth and eighteenth centuries was inspired to some degree by their desire to secure a more equitable tax system, one in which they would not bear the major tax burden without receiving commensurate benefits.[218]

The "benefit perspective" also appeared in Smith's model of taxation, in which the benefits received from the government come in the form of protection given to the income. The income, in turn, results in an ability to pay, and received benefits are valued according to that ability.[219] Because the benefits received rise proportionally to the income earned, this model supports the idea that the tax system should be proportional.

While progressive taxation serves as the cornerstone of modern American taxation, it clearly developed during the early twentieth century, rather than during the Founding era. However, the argument can be made that progressive taxation falls within the founding ideals because it reconciles two competing American principles: liberty and equality.[220] Through the redistribution of wealth, progressive taxation works to ensure that all Americans have an equal chance with regard to property rights, and other rights that derive from having property.[221]

From the writings of the Founding Generation, it appears that the general consensus was in favor of proportional taxation, rather than progressive taxation. Whether the gradual increase in both the size and number of great American fortunes would have caused the Founders to reevaluate progressive taxation remains largely unknown.

VII. Conclusion

The Founding Fathers of the United States envisioned a country in which freedom would be guaranteed and opportunity would abound. However, with regard to the right to inherited wealth, the concepts of freedom and equal opportunity are mutually exclusive. Freedom requires families to be permitted to keep their wealth solely within the family, if they desire to do so. Even if

---

mist Roy Blakely wrote that "[t]he tendency in all countries and among both the theorists and the masses, is strongly in the direction of graduated or progressive taxation." *Id.* In both 1916 and 1918, the Wilson administration raised income tax rates. *Id.* at 32. By the 1940s, President Franklin Roosevelt suggested capping after-tax incomes at $25,000. *Id.* at 25.

217 Ratner, *supra* note 172, at 14.

218 *Id.* at 15.

219 Musgrave, *supra* note 212, at 10-11.

220 *See* Marjorie E. Kornhauser, *Choosing a Tax Rate Structure in the Face of Disagreement*, 52 UCLA L. Rev. 1697, 1734-37 (2005) (arguing that progressive taxation supports liberty by enabling all Americans to have property rights while at the same time forging some degree of equality between right and poor).

221 *Id.*

great accumulations of familial wealth are detrimental to the democracy, freedom of testation requires that there be no governmental interference. In contrast, equal opportunity requires an equal playing field, and there cannot be an equal playing field as long as some are born into wealth while others are born into poverty.

The Founding Fathers found themselves in the unenviable position of having to reconcile the competing interests of freedom and opportunity, as they relate to inherited wealth. The abolition of entail and primogeniture were large steps toward freedom, but only minor steps toward equalization of opportunity. Equalization of opportunity would have required either heavy taxation of inheritances or a ban on inheritances, both of which would have cut drastically against freedom. Therefore, the Founders took what little action they could—they eliminated the laws that required inheritances to be passed solely along family lines, and they taxed inheritances when there was a dire need for revenue.

Had the Founders viewed inheritances as an appropriate source of permanent revenue, we should have seen early, permanent, taxation of inheritances. The enacting of a tax on inheritances in 1797,[222] and proposed taxes in both 1794[223] and 1796,[224] provides evidence that the Founders recognized the concept of inheritance taxation. However, the fact that the tax was repealed in 1802[225] and was not reinstated again until 1862,[226] despite revenue shortages during the early 1800s,[227] provides evidence that this mode of taxation was not viewed as an appropriate source of permanent revenue.

Of course, as originally written and ratified, the Constitution allowed the federal government to lay taxes in order to raise enough revenue to fund the day-to-day operations of the government.[228] However, evidence indicates that both the authors of the Constitution, and the states who ratified the Constitution, intended to use taxes upon commerce to provide the majority of government funding; "direct taxes" were only to be used as a last resort in government funding.

Another issue with the modern estate tax arises due to the inclusion of real property. As discussed, historical federal death taxes did not generally include real property in the tax base.[229] Early documentation does not give a definitive reason for the non-inclusion of real property in early taxes. However, it is known that taxes upon land were generally reserved for state use,[230] so the inclusion of real property into the gross estate works against this early view of states' rights.

---

222 Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527 (1797).

223 5 AMERICAN STATE PAPERS, *supra* note 39, at 277.

224 *Id.* at 409.

225 Act of Apr. 6, 1802, ch.17, 2 Stat. 148.

226 Act of July 1, 1862, ch. 119, 12 Stat. 432, 483.

227 The years leading up to the War of 1812, and the War itself, resulted in revenue shortages. *See supra* note 45.

228 *See* U.S. CONST. art. I, § 8, cl. 1.

229 *See supra* Part V.A.

230 Madison, *supra* note 153.

The progressive aspects of the modern estate tax are suspect only because the Founding Generation did not, generally, support progressive taxation.[231] Thomas Jefferson was one of the few Founders who openly advocated for progressive taxation.[232] In contrast, proportional taxation enjoyed widespread support from the Founders. Considering that the Founders had just recently escaped an aristocratic society, it would stand to reason that the Founders were aware that an aristocracy could also develop in the United States. Still, the majority of the Founding Generation supported a proportional taxation policy, rather than a progressive taxation policy which would help to prevent the formation of a New World aristocracy.

As stated at the outset of this Note, the difficulty in trying to ascertain whether the Founders would have supported the modern estate tax is that it requires applying eighteenth century ideals to the modern realities of the twenty-first century. When forming opinions about the structure of a tax system, and the limitations that should be imposed on such a system, the Founders were not anticipating an annual federal budget in excess of $2.3 *trillion*.[233] If the Founders had been able to foresee the future, then there is a realistic chance that their ideas and opinions regarding taxation would have been drastically different. Regardless of the difference in time periods, if Congress is going to stay true to the Founding Generation, the federal estate tax needs to be reexamined.

In a first step toward a revamping of the federal estate tax, the transmittal of real property should not be included in the taxable gross estate. By excluding real property, the modern estate tax would be a more accurate reflection of historical wealth transfer taxes, and presumably, would be more in-line with founding ideals. One of the chief criticisms of the modern estate tax is that it causes the breakdown of family businesses and farms.[234] The non-inclusion of real property in the gross estate could serve to eliminate some of this criticism as the real property associated with businesses and farms would no longer face estate tax, decreasing the need to liquidate businesses and farms in order to pay estate tax.

However, even if Congress was to eliminate the estate taxation of real property, the fact still remains that historically, wealth transfer taxation was used only to fund military operations and never for the everyday expenses of the nation. Therefore, in order to remain true to founding ideals, Congress should only utilize estate taxation to fund military operations. This can be accomplished by earmarking all estate tax revenues to be used specifically in defense spending. Since the enacting of the first U.S. wealth transfer tax in 1797,[235] defense spending has always been an approved use of wealth transfer taxation. Therefore, it can be presumed that the forefathers would continue to view defense spending as an appropriate use of estate tax revenues.

In its current form, the modern estate tax does not conform to founding ideals. By making two changes to the federal estate tax—excluding real prop-

---

231 *See supra* Part V.I.
232 *See supra* notes 192-95 and accompanying text.
233 *See* OFFICE OF MANAGEMENT AND BUDGET, *supra* note 112.
234 *See* Weber, *supra* note 190, at 118.
235 Act of July 6, 1797, ch. 11, § 1, 1 Stat. 527.

erty and earmarking estate tax revenues for defense spending—Congress would be able to save the federal estate tax while returning to the historical roots of wealth transfer taxation. Such changes would result in a tax that would reflect the historical foundation of wealth transfer taxation, embody the founding vision, and help to meet modern revenue demands.