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Henry Lowenstein

Kathryn Kisska-Schulze

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# A HISTORICAL EXAMINATION OF THE CONSTITUTIONALITY OF THE FEDERAL ESTATE TAX

Henry Lowenstein\* and Kathryn Kisska-Schulze\*\*

## INTRODUCTION

During the 2016 presidential campaign debate, Democratic candidate Hillary Clinton vowed to raise the Federal Estate Tax to sixty-five percent,<sup>1</sup> while Republican candidate Donald Trump pledged to repeal it as part of his overall tax reform proposal.<sup>2</sup> Following his election into the executive seat, President Trump signed into law the Tax Cuts and Jobs Act (TCJA) on December 22, 2017, which encompasses the most comprehensive tax law changes in the United States in decades.<sup>3</sup> Although the law does not completely repeal the Estate Tax, it temporarily doubles the estate and gift tax exclusion amounts for estates of decedents dying and gifts made after December 31, 2017, and before January 1, 2026.<sup>4</sup>

Following candidate Trump's campaign pledge to repeal the Estate Tax,<sup>5</sup> and his subsequent signing of the TCJA into law during his first year of presidency,<sup>6</sup> an interesting question resonating from these initiatives is whether the Estate Tax is even constitutional. Although the United States Supreme Court upheld the constitutionality of this tax in its 1921 decision *New York Trust Company v. Eisner*,<sup>7</sup> it could be argued that the Court did not adhere to the "strict constructionist" view of constitutional interpretation when making its decision. Since that determination almost a century ago, it has been widely accepted that the tax—which has generally targeted the wealthy—is constitutional.<sup>8</sup>

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\* PhD, Professor of Management and Law, Coastal Carolina University.

\*\* JD, LL.M., Assistant Professor, School of Accountancy, Clemson University.

<sup>1</sup> See Emily Stephenson, *Clinton Proposes 65 Percent Tax on U.S. Billionaire Estates*, REUTERS (Sept. 22, 2016, 3:29 PM), <https://www.reuters.com/article/us-usa-election-clinton-tax-idUSKCN11S2GN> [<https://perma.cc/LG45-TMZJ>].

<sup>2</sup> See Rebecca Lake, *How Trump's Estate Tax Proposal Might Affect the Wealthy*, SMART ASSET (Jan. 23, 2017), <https://smartasset.com/taxes/how-trumps-estate-tax-proposal-might-affect-the-wealthy> [<https://perma.cc/86EK-R83C>].

<sup>3</sup> See Donald J. Trump, Remarks by President Trump at Signing of H.R. 1, Tax Cuts and Jobs Bill Act, and H.R. 1370 (Dec. 22, 2017), <http://www.whitehouse.gov/briefings-statements/remarks-president-trump-signing-h-r-1-tax-cuts-jobs-bill-act-h-r-1370> [<https://perma.cc/2VQF-JY6D>] [hereinafter Remarks by President Trump].

<sup>4</sup> See H.R. 1, 115th Cong. (2017) (enacted).

<sup>5</sup> See Lake, *supra* note 2.

<sup>6</sup> See Remarks by President Trump, *supra* note 3.

<sup>7</sup> 256 U.S. 345 (1921).

<sup>8</sup> *Eisner* itself was the last full challenge to the constitutionality of the Estate Tax. See 256 U.S. 345 (1921). See also discussion *infra* Part III.

Despite the high political profile of the Estate Tax, scholarly literature is scarce in analyzing this tax's constitutionality.<sup>9</sup> Further, the modern Federal Estate Tax, issued during a 1916 populist era, has not seen a substantive Supreme Court examination of the issue since the 1920s.<sup>10</sup> Even within its early analyses, the Court's rulings skirted key constitutional issues of enumerated power.<sup>11</sup>

This Article takes a fresh look at the Federal Estate Tax, fitting during an era of a Supreme Court consisting of a majority of adherents to a more "strict constructionist" point of view of constitutional interpretation. In a recent 6–2 Supreme Court decision in *Star Athletica, LLC v. Varsity Brands*,<sup>12</sup> Justice Thomas opined, "[t]he controlling principle in this case is the basic and unexceptional rule that courts must give effect to the clear meaning of statutes as written . . . . We thus begin and end our inquiry with the text, giving each word its 'ordinary, contemporary, common meaning.'"<sup>13</sup> The Roberts Court has not hesitated to reevaluate federal and state tax overreach issues in line with the original intent of the reading of the Constitution, most notably in its 2015 decision in *Comptroller of the Treasury of Maryland v. Wynn*,<sup>14</sup> where the Court struck down part of Maryland's personal income tax as violating the Constitution's dormant commerce clause.<sup>15</sup>

Newly appointed Justice Neil Gorsuch, in his first opinion on the Supreme Court, relied on the strict meanings of words,<sup>16</sup> the printed text of statutes,<sup>17</sup> and the proper roles of Congress and the courts,<sup>18</sup> to aid in his determination that the law passed by

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<sup>9</sup> Very few academic publications have specifically queried the actual constitutionality of the Federal Estate Tax. *See, e.g.*, Peter J. Kosydar III, Note, "Death and Taxes" or Death Without Taxes?, 37 J. LEGIS. 224 (2012) (specifically analyzing the constitutionality of the retroactive Estate Tax); Charles L.B. Lowndes, *The Constitutionality of the Federal Estate Tax*, 20 VA. L. REV. 141 (1933) (analyzing the constitutionality of the Federal Estate Tax); James G. Wilson, *The Unconstitutionality of Eliminating Estate and Gift Taxes*, 48 CLEV. ST. L. REV. 771 (2000) (arguing that the repeal of the Estate Tax may be constitutional legally, but unconstitutional from a social sense).

<sup>10</sup> *See* discussion *infra* Part III.

<sup>11</sup> This is perhaps due to the Supreme Court choosing to follow the election returns rather than an application of constitutional principles. *See* FINLEY PETER DUNNE, MR. DOOLEY'S OPINIONS 26 (1901).

<sup>12</sup> 137 S. Ct. 1002 (2017).

<sup>13</sup> *Id.* at 1010 (citations omitted) (quoting *Walters v. Metro. Ed. Enters., Inc.*, 519 U.S. 202 (1997)).

<sup>14</sup> 135 S. Ct. 1787 (2015).

<sup>15</sup> *Id.* at 1792. Justice Alito's opinion on behalf of the majority was a recitation of the Constitution's history on taxation and how Maryland's law violated the very historical principles on which the framers placed limits on the taxing power. *See The Supreme Court, 2014 Term—Leading Cases*, 129 HARV. L. REV. 181, 183 (2015).

<sup>16</sup> *See* *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1722 (2017) (opining on grammar etiquette and the correct use of the past participle tense).

<sup>17</sup> *See id.* (applying *noscitur a sociis* to determine the meaning of the word "owed" within the applicable statute).

<sup>18</sup> *See id.* at 1724–25 ("And while it is of course our job to apply faithfully the law Congress

Congress to guard against abusive, deceptive, and unfair debt collection methods does not apply to people trying to collect debts owed to themselves.<sup>19</sup> Delivering the Court’s unanimous decision, Justice Gorsuch noted, “it is never our job to rewrite a constitutionally valid statutory text.”<sup>20</sup> With the recent addition of Justice Gorsuch to the bench—who ascribes to an “ardent textualist” interpretation of the Constitution<sup>21</sup>—the constitutionality of the Federal Estate Tax may eventually be ripe for a new review.

The purpose of this Article is to examine the constitutionality of the Federal Estate Tax from a classical approach. To meet this objective, we: (i) provide a historical analysis of the origins and intent of our nation’s federal taxing power, (II) explore the establishment and evolution of the modern Federal Estate Tax, (III) analyze the judicial constitutional challenges to the Estate Tax, (IV) theorize that the Federal Estate Tax lacks a constitutional foundation legitimizing its inclusion in the Federal tax code, and (V) conclude that the Federal Estate Tax infringes on the United States Constitution from a “strict constructionist” viewpoint.

#### I. A HISTORICAL FRAMEWORK OF THE ORIGINS OF FEDERAL TAXING POWER

The federal tax system of the United States government is often referenced as a “voluntary” system.<sup>22</sup> The concept of *voluntarism* dates back to the founding of the Republic and the ultimate tax structure established by the Framers in the Constitution.<sup>23</sup> Students of American history will recall that key underpinnings of the American Revolution (1775–1781)<sup>24</sup> were based primarily upon protests of “taxation without representation.”<sup>25</sup> The Thirteen American Colonies of Great Britain, loyal

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has written, it is never our job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone’s account, it never faced.”).

<sup>19</sup> See *id.* at 1721 (explaining the findings of the district court and the Court of Appeals for the Fourth Circuit which the Court ultimately affirmed).

<sup>20</sup> *Id.* at 1725.

<sup>21</sup> Eric Citron, *Potential Nominee Profile: Neil Gorsuch*, SCOTUSBLOG (Jan. 13, 2017, 12:53 PM), <http://www.scotusblog.com/2017/01/potential-nominee-profile-neil-gorsuch/> [https://perma.cc/32SH-T834].

<sup>22</sup> See, e.g., Leslie Book, *Refund Anticipation Loans and the Tax Gap*, 20 STAN. L. & POL’Y REV. 85, 113 (2009) (identifying “the contestation that arises from a voluntary federal tax system”); Joseph M. Landolfi, Jr., Note, *The Internal Revenue Service Under Equitable Attack*, 9 ST. THOMAS L. REV. 443, 456 (1997) (noting that the United States’ federal tax system has been “classified as a voluntary system”). See also Mark Berggren, Note, *I.R.C. § 6103: Let’s Get to the “Source” of the Problem*, 74 CHI.-KENT L. REV. 825, 832 (1999) (equating the Federal tax system with a voluntary system).

<sup>23</sup> See *infra* notes 58–71 and accompanying text.

<sup>24</sup> The American Revolution ended with the British surrender at Yorktown in 1781 and formally by the Treaty of Paris in 1783.

<sup>25</sup> See Grant Dorfman, *The Founders’ Legal Case: “No Taxation Without Representation” versus Taxation No Tyranny*, 44 HOUS. L. REV. 1377, 1378 (2008) (noting that “no taxation without representation” was the “mother’s milk” of American history education).

to Imperial Britain under King George III and Parliament, became subject to a series of oppressive taxes allegedly imposed to pay for Britain's expenses in the French and Indian War.<sup>26</sup> The seeds of discontent on oppressive taxation, however, began long before.

### A. Early Colonial Taxation

Twenty years prior to the American Revolution, colonial citizens under Great Britain were increasingly limited by its mercantile laws on purchasing goods exclusively from British sources.<sup>27</sup> Beginning with the Navigation Acts of 1650, 1651, and 1660, the Royal British government mandated the nature and type of purchases made by American colonists to those of British origin on British ships, depriving Americans of less expensive competitive trade.<sup>28</sup> This also assured Britain's unrestricted ability to tax transactions for its own revenue. Taxes imposed without any representation of those taxed in the colonies included, among others: wool, hats, molasses, iron, and sugar.<sup>29</sup>

The most notorious tax was the Stamp Act of 1765,<sup>30</sup> which led to a major uproar in the colonies.<sup>31</sup> Colonial citizenry pressure led to the establishment of the Stamp Act Congress, forerunner of the later Continental Congress.<sup>32</sup> The British government

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<sup>26</sup> The French and Indian War was the North American extension of Europe's Seven Years' War. Britain sought to stop French expansion into the Northwest and Western parts of North America including French Canada. The British ultimately won the war, with France conceding its claims in the Treaty of Paris (1763). Though the British claimed expenses to the American Colonies, in reality, the militias of the thirteen Colonies under Royal Commanders incurred major expenses in funds and lives defending American territory. Indeed, most of the lead generals of the American Revolution, including George Washington, were veteran officers of the French and Indian War. *See French and Indian War/Seven Years' War, 1754–1763*, U.S. DEP'T OF STATE, <https://2001-2009.state.gov/r/pa/ho/time/cp/90614.htm> [<https://perma.cc/MW87-4NLT>] (last visited Oct. 15, 2018).

<sup>27</sup> *See infra* notes 28–35 and accompanying text.

<sup>28</sup> *See* William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1753 (1996) (noting that the various Navigation Acts were damaging to the early colonial economies due to restrictions on free trade).

<sup>29</sup> Henry J. Sage, *The British Imperial Economic System: Mercantilism—or “State Capitalism,”* SAGE AM. HIST., [http://sageamericanhistory.net/colonies\\_empire/topics/mercantilism.html](http://sageamericanhistory.net/colonies_empire/topics/mercantilism.html) (last updated Jan. 18, 2017) [<https://perma.cc/K28S-UMKK>]. George Washington himself complained bitterly about these conditions. Author Chernow quotes: “For instance, the finest salt for curing fish came from Lisbon, but England's mercantilist policies forced [Washington] to import inferior salt from Liverpool. He constantly felt snarled in a tangled web of perverse economic regulations drawn up by London bureaucrats.” RON CHERNOW, *WASHINGTON: A LIFE* 142 (2010).

<sup>30</sup> *See* George Elliott Howard, *Preliminaries of the Revolution: 1763–1775*, in 8 THE AMERICAN NATION: A HISTORY 137 (Albert Bushnell Hart ed., 1905).

<sup>31</sup> *See id.* at 142 (“But appearances were deceptive: there was a smouldering fire of popular resentment which might at any time be stirred into a living flame.”).

<sup>32</sup> *See* Fabio Arcila, Jr., *The Framers' Search Power: The Misunderstood Statutory History of Suspicion & Probable Cause*, 50 B.C. L. REV. 363, 388 (2009).

quickly repealed the tax in 1766.<sup>33</sup> Further attempts to tax the colonies and place restrictions viewed as unfair and oppressive returned shortly after in the Townshend Acts (Revenue Act of 1767).<sup>34</sup> Though partially repealed in 1770 following deaths in the Boston Massacre, it later led to the infamous 1773 Tea Act.<sup>35</sup> Explosive Bostonian reaction resulted in the Boston Tea Party.<sup>36</sup>

The economic die had been cast against taxation wrapped in the patina of independence and liberty by Samuel Adams and his “Sons of Liberty”,<sup>37</sup> as well as other vocal figures in the colonies, including Patrick Henry of Virginia.<sup>38</sup> Colonists formed the First Continental Congress to induce Parliament and King George III to adopt a less oppressive tax system,<sup>39</sup> which was hugely unsuccessful.<sup>40</sup> In April 1775, the first shots of the American Revolution were fired at Lexington and Concord, Massachusetts.<sup>41</sup> In England, Lord North passed the Prohibitory Acts which declared that failure to pay taxes or to boycott the same was treason under British law.<sup>42</sup>

On July 4, 1776, the Second Continental Congress issued its Declaration of Independence.<sup>43</sup> Eight days later it drafted the Articles of Confederation and Perpetual Union (the nascent United States’ first constitution).<sup>44</sup> Sensitive to the issue of taxation, Article VIII spelled out specifically the enumerated powers of Federal taxation:

All charges of war, and all other expences that shall be incurred  
for the common defence or general welfare, and allowed by the

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<sup>33</sup> *Id.* at 391.

<sup>34</sup> REVENUE ACT OF 1767, 7 Geo. 3, c. 46. *See also* Richard A. Westin, *Americans’ Unwillingness to Pay Taxes Before the American Revolution: An Uncomfortable Legacy*, 13 J. JURIS. 11, 16–18 (2012).

<sup>35</sup> TEA ACT OF 1773, 13 Geo. 3, c. 44; *see also* Westin, *supra* note 34, at 18–19, 21.

<sup>36</sup> *See* KEVIN PHILLIPS, 1775: A GOOD YEAR FOR REVOLUTION 95 (2012).

<sup>37</sup> *See Boston Tea Party*, ENCYCLOPEDIA BRITANNICA (last updated Dec. 14, 2017), <https://www.britannica.com/event/Boston-Tea-Party> [<https://perma.cc/SU5U-2T6P>] (noting that monopolistic practices led colonists to join Samuel Adams and his Sons of Liberty).

<sup>38</sup> In a speech made to the Second Virginia Convention in 1775, Patrick Henry, rallying for independence, spoke the now famous phrase, “[G]ive me liberty, or give me death!” Paul E. Fitzmorris, *The Right to Dissent—An American Heritage*, 41 N.Y. ST. B.J. 467, 468 (1969).

<sup>39</sup> *See* PHILLIPS, *supra* note 36, at 96.

<sup>40</sup> The British instead enacted the Restraining Acts in 1775. The New England Trade and Fisheries Act, 15 Geo. 3, c. 10 (Eng.); Trade Act 1775, 15 Geo. 3, c. 18 (Eng.).

<sup>41</sup> *See* PHILLIPS, *supra* note 36, at 10; Ryan Patrick Alford, *The Rule of Law at the Crossroads: Consequences of Targeted Killing of Citizens*, 2011 UTAH L. REV. 1203, 1243 (opining that the Restraining Act of 1775, in conjunction with the Navigation Act of 1761, the Stamp Act of 1765, and the Intolerable Acts of 1774 helped spawn the Revolution).

<sup>42</sup> *See* PHILLIPS, *supra* note 36, at 266.

<sup>43</sup> THE DECLARATION OF INDEPENDENCE (1776). *See generally* Carlton F.W. Larson, *The Declaration of Independence: A 225th Anniversary Re-Interpretation*, 76 WASH. L. REV. 701 (2001) (providing an in-depth, historical perspective of the Declaration of Independence).

<sup>44</sup> 5 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 545–46 (Worthington Chauncey Ford ed., 1906). Final ratification was not completed by all the states until 1781.

united states in congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states in proportion to the value of all land within each state, granted or surveyed for any Person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the united states in congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the legislatures of the several states within the time agreed upon by the united states in congress assembled.<sup>45</sup>

Effectively, federal taxing power would be subject to the consent of the states, not a centralized federal government.<sup>46</sup> Congress had no taxing power, resulting in its inability to pay the debts of the new nation in financing the war against Britain.<sup>47</sup> Failures of the Articles of Confederation led to the establishment of the current United States Constitution,<sup>48</sup> which guaranteed strict enumerated powers to Congress,<sup>49</sup> leaving any powers not enumerated by Congress to the states,<sup>50</sup> and those not enumerated to the states to the people.<sup>51</sup>

Faced with debts and fiscal requirements, the Framers faced the challenge of structuring a tax system that would prevent the social and economic upheaval that precipitated the American Revolution. The Framers were well versed in a history of taxation going back to the Romans and even Biblical times;<sup>52</sup> a seemingly infinite array of innovative and often unfair, oppressive devices invented by sovereigns, as Thomas Jefferson elucidated in the Declaration of Independence against King George III, “[f]or imposing Taxes on us without our Consent . . . He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our people, and eat out their substance.”<sup>53</sup>

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<sup>45</sup> 19 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 217 (Gaillard Hunt ed., 1912). Art. VI, cl. 3 of the Articles of Confederation added a further restriction on states interfering with commerce by foreign treaty: “[n]o state shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the united states in congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by congress, to the courts of France and Spain.” *Id.* at 216.

<sup>46</sup> *See id.* at 217.

<sup>47</sup> *See* RON CHERNOW, ALEXANDER HAMILTON 224 (2004) (describing the money problems that pervaded under the Articles of Confederation).

<sup>48</sup> *See id.* at 243–69.

<sup>49</sup> U.S. CONST. art. I.

<sup>50</sup> U.S. CONST. amend. X.

<sup>51</sup> *Id.* *See also* U.S. CONST. amend. IX.

<sup>52</sup> *See* Saul K. Padover, *The World of the Founding Fathers*, 25 SOC. RES. 191, 196–99 (1958).

<sup>53</sup> THE DECLARATION OF INDEPENDENCE paras. 12, 19 (U.S. 1776).

The Framers' discussion of the role of taxation by the federal government has generally been reflected in the Federalist Papers, particularly Federalist Nos. 30–36, presumed authored by Alexander Hamilton.<sup>54</sup> Hamilton argued for a strong federal taxing system of both internal and external taxes, particularly to cover war and natural disasters.<sup>55</sup> He theorized that the peoples' representatives in Congress would prevent usurpation of state taxing powers and abuses by the central federal government.<sup>56</sup> Anti-Federalists regarded Hamilton's views as creating a strong central government akin to a monarchy, ultimately tyrannical; a situation the revolution did not wish to duplicate.<sup>57</sup>

The Framers ultimately drafted a Constitution encompassing compromise, furnishing proscriptive language to establish Article I's first enumerated power of Congress: "[t]he 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."<sup>58</sup> Congress's taxing power reflected the apprehensions of the Framers that the federal government's taxing power be strictly limited to two specific categories—(1) Import-Export Taxes referenced as "Duties and Imposts," and, (2) Consumption Taxes known as "Excise" taxes.<sup>59</sup> (The specificity of these taxing categories and decision to not include property taxes, income taxes or taxes on estates, had to be conscious intent by the Framers as these forms of taxation were in force in one form or another under British Rule, while others were traditionally thought to be inherent state powers.) The Constitutional taxing powers were further set to ensure that federal taxes would be fair across all states, prescribing specific tax law uniformity principals.<sup>60</sup>

First, the federal tax system effectively established "economic intercourse," or volunteerism.<sup>61</sup> Internal excise taxes were imposed on the likes of stamps and spirits,

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<sup>54</sup> See THE FEDERALIST NOS. 30–36 (Alexander Hamilton); CHERNOW, *supra* note 47, at 255–56.

<sup>55</sup> See CHERNOW, *supra* note 47, at 256 ("Not only would taxes underwrite operating expenses, but they would enable the country to pay off its debts, restore its credit, and raise large loans in wartime.").

<sup>56</sup> THE FEDERALIST NOS. 28, 31 (Alexander Hamilton); CHERNOW, *supra* note 47, at 256.

<sup>57</sup> John C. Pinheiro, *Assessing the Anti-Federalists*, 20 RELIGION & LIBERTY 4, 4–5 (2010), <https://acton.org/pub/religion-liberty/volume-20-number-2/assessing-anti-federalists> [<https://perma.cc/F3XM-SKTW>]. Anti-federalists included Elbridge Gerry (Massachusetts), Patrick Henry (Virginia), and George Clinton (New York). *Id.* at 4.

<sup>58</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>59</sup> See *infra* notes 61–67 and accompanying text.

<sup>60</sup> See *infra* notes 68–71 and accompanying text.

<sup>61</sup> See Sam Kalen, *Dormant Commerce Clause's Aging Burden*, 49 VAL. U.L. REV. 723, n.71 (2015) (citing BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 47–49 (1993) (discussing how Marshall broadened the Commerce Clause to include all economic intercourse)).



which the colonists protested against vehemently.<sup>62</sup> A person who did not purchase whiskey, for example, was not subject to the Whiskey Tax. Modern day foreign governments have embraced this similar concept of “consumption taxes”<sup>63</sup> by way of their implementation of value-added tax systems (VAT).<sup>64</sup>

The second established tax principle was an external tax, likewise based on volunteerism, and included “imposts” or “duties” on imported goods.<sup>65</sup> Tariffs had been a well-established and minimally controversial form of taxation worldwide and American colonists were used to them.<sup>66</sup> Consumers rarely felt the effect of these taxes as they were passed through in the price of goods sold; although they tended to disproportionately affect southern states who utilized higher imports of goods.<sup>67</sup>

The third principle formed by the Framers was federal tax uniformity.<sup>68</sup> The concept of tax uniformity was to comport with the Constitution’s Full Faith and Credit Clause, assuring that states be treated equally.<sup>69</sup> In fact, two other provisions were included in the base of the Constitution itself, one being “apportionment”—that is, taxes had to be laid in proportion to state populations<sup>70</sup>—and the other to prohibit one state from taxing the product of another state.<sup>71</sup>

This tax structure ran the fiscal business of the government until the 1913 enactment of the Sixteenth Amendment, which established the income tax.<sup>72</sup> Nevertheless, public antipathy to federal taxes, even those authorized under Article I, remained an

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<sup>62</sup> See Arcila, *supra* note 32, at 387–88 (addressing that in the eyes of the early colonists, Parliament’s “external” tax regulation funded “regulatory apparatus,” but Parliament’s taxing power was illegitimate with respect to “internal” taxes, which included an excise tax resonating from the Stamp Act).

<sup>63</sup> Alan Schenk, *Value Added Tax: Does This Consumption Tax Have a Place In The Federal Tax System?*, 7 VA. TAX REV. 206, 225–26 (1987).

<sup>64</sup> *Id.* Schenk explains that the VAT is a tax imposed on the “value added” to goods as they move through production and distribution, and to services as they are rendered. This tax is generally passed on to the customers via increased prices of goods and services. See *id.*

<sup>65</sup> See U.S. CONST. art. I, § 8, cl. 1 (stating that the taxing power is subject to the requirement that all duties, imposts, and excises “be uniform throughout the United States”).

<sup>66</sup> See Arcila, *supra* note 32, at 382–88 (describing the shift from colonial acceptance of British regulatory measures to disdain).

<sup>67</sup> See Wiecek, *supra* note 28, at 1752–53 (noting that the southern colonies relied on tobacco exports to generate wealth and British regulatory acts, such as the various Navigation Acts, damaged the southern economy by restricting exports and raising the price of imports).

<sup>68</sup> U.S. CONST. art. I, § 8, cl. 1 (detailing all taxes must be “uniform throughout the United States”).

<sup>69</sup> U.S. CONST. art. IV, § 1.

<sup>70</sup> U.S. CONST. art. I, § 9, cl. 4 (“No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”).

<sup>71</sup> U.S. CONST. art. I, § 9, cl. 5 (“No Tax or Duty shall be laid on Articles exported from any State.”).

<sup>72</sup> U.S. CONST. amend. XVI. The one exception to the tax structure preceding the Sixteenth Amendment was Lincoln’s imposition of an income tax during the Civil War, which was later declared unconstitutional. See *Springer v. United States*, 102 U.S. 586 (1880).

intense public matter.<sup>73</sup> James Madison, considered the “Father of the Constitution,”<sup>74</sup> faced continual backlash on federal taxes and tax collections while serving as the nation’s fourth president.<sup>75</sup> In 1813, nearly a quarter century after the ratification of the Constitution and its taxing power to Congress, Madison proposed an increase in excises and imposts to pay for the War of 1812 and preserve the nation’s credit honor.<sup>76</sup> Madison’s own party leaders objected, stating, “to look upon a tax gatherer as a thief, if not to shoot him as a burglar.”<sup>77</sup> Five years later, Chief Justice John Marshall in *McCulloch v. Maryland*,<sup>78</sup> invoked the premise that the power to tax is the power to destroy.<sup>79</sup>

### B. American Civil War Taxation

Notwithstanding the strong *stare decisis* directing Congress toward only those specific federal taxes allowed by the Article I enumerated power, an exception occurred during the era of the American Civil War.<sup>80</sup> To raise funds, President Lincoln signed the Revenue Act of 1861, imposing a three percent income tax on incomes over \$800.<sup>81</sup> Perhaps because of the intensity of citizen loyalty to the Union and dedication to winning the war, the income tax did not incur an immediate constitutional challenge.<sup>82</sup> That challenge, however, arose a decade after its repeal in the 1880 Supreme Court case *Springer v. United States*,<sup>83</sup> whereby the constitutionality of the income tax (then since amended) was pitted against a state Estate Tax.<sup>84</sup>

William Springer argued the Civil War era income tax was an impermissible direct tax on his estate by the federal government, not apportioned among the states

<sup>73</sup> See *infra* notes 75–79 and accompanying text.

<sup>74</sup> James S. Liebman & Brandon L. Garrett, *Madisonian Equal Protection*, 104 COLUM. L. REV. 837, 839 (2004). Liebman & Garrett’s article provides an in-depth discussion of Madison’s role in the framing of early constitutional aspirations.

<sup>75</sup> See Nelson Dingley, Jr., *The Sources of National Revenue*, 168 N. AM. REV. 297, 298–99 (1899).

<sup>76</sup> See *id.* at 300–01.

<sup>77</sup> CHARLES J. INGERSOLL, 1 HISTORICAL SKETCH OF THE SECOND WAR BETWEEN THE UNITED STATES AND GREAT BRITAIN 120 (1845).

<sup>78</sup> 17 U.S. 316 (1819).

<sup>79</sup> *Id.* at 327 (“An unlimited power to tax involves, necessarily, a power to destroy; because there is a limit beyond which no institution and no property can bear taxation.”).

<sup>80</sup> The American Civil War lasted from 1861 to 1865. Warren W. Hasslet & Jennifer L. Webber, *American Civil War*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/event/American-Civil-War> [<https://perma.cc/6WQL-GKZS>] (last updated May 2, 2018).

<sup>81</sup> Act of Aug. 5, 1861 ch. 45, § 49 12 Stat. 292, 309 (1861) (repealed in 1871).

<sup>82</sup> Lincoln was not one during the war to dwell on the limitations imposed by the Constitution. He notoriously suspended the constitutional right of habeas corpus, notwithstanding admonitions from the Supreme Court. DAVID HERBERT DONALD, LINCOLN 303–04 (1995) (citing Chief Justice Taney’s decision in *Ex Parte Merryman*, 17 F. Cas. 144, 149 (1861)).

<sup>83</sup> 102 U.S. 586 (1881).

<sup>84</sup> *Id.*

in violation of the Constitution's Article I taxing power.<sup>85</sup> The Court avoided addressing whether the income tax was an unauthorized Article I taxing power of Congress and hence unconstitutional, instead holding:

The tax here . . . is not a tax on the “whole personal estate” of the individual, but only on his income, gains, and profits during a year, which may have been but a small part of his personal estate, and in most cases would have been so. This classification lends no support to the argument of the plaintiff in error.<sup>86</sup>

The *Springer* court further concluded that “direct taxes, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate, and that the tax of which the plaintiff in error complains is within the category of an excise or duty.”<sup>87</sup> The implication, though not explicitly stated in *Springer*, was that a tax on personal assets (estates) by the federal government would not be constitutional.<sup>88</sup> Fifteen years later, the Supreme Court ruled the income tax an unconstitutional direct tax in *Pollock v. Farmers' Loan & Trust Co.*<sup>89</sup>

### C. Populism and the Federal Estate Tax of 1916

Post-Civil War, the United States entered an era of economic growth known as the “Gilded Age,” where it witnessed a rapid and manifest rise of industrialism and national income.<sup>90</sup> As industrialists used their economic power to the detriment of farmers, small businesses, and consumers, widespread public bitterness ensued, leading to the establishment of antitrust laws in the Sherman Act.<sup>91</sup>

Simultaneously, the rise of the Farmers' Alliance—a socio-political organization successor to the Granger Movement<sup>92</sup>—became the stimulus for what was later known

<sup>85</sup> *Id.* at 588.

<sup>86</sup> *Id.* at 598.

<sup>87</sup> *Id.* at 602.

<sup>88</sup> *See id.*

<sup>89</sup> 157 U.S. 429 (1895) (“We are of the opinion that the law in question, so far as it levies a tax on the rents or income of real estate, is in violation of the Constitution; and is invalid.”). This decision was negated by the adoption of the Sixteenth Amendment in 1913. *See* U.S. CONST. amend. XVI.

<sup>90</sup> The author Mark Twain first coined the term “Gilded Age.” MARK TWAIN & CHARLES DUDLEY WARMER, *THE GILDED AGE: A TALE OF TODAY* (1874). The term references the post-Civil War period of rapid growth in the United States from approximately 1870–1900. *See also* T. ADAMS UPCHURCH, *HISTORICAL DICTIONARY OF THE GILDED AGE* (2009).

<sup>91</sup> DORIS KEARNS GOODWIN, *THE BULLY PULPIT* 192 (2013). *See also* Sherman Antitrust Act 15 U.S.C. §§ 1–2 (1890).

<sup>92</sup> *See Granger Movement*, ENCYCLOPEDIA BRITANNICA (July 21, 2014), <https://www.britannica.com/event/Granger-Movement> [<https://perma.cc/A8X3-5SPM>] (“The Granger movement [encompassed a] coalition of U.S. farmers, particularly in the Middle West, that fought monopolistic grain transport practices during the decade following the American Civil War.”).

as the Populist Party wing of the Democratic Party,<sup>93</sup> pressing against Wall Street,<sup>94</sup> large businesses' concentration of wealth,<sup>95</sup> and even demanding nationalization of all United States railroads.<sup>96</sup> President Theodore Roosevelt dismissed the members of this early movement as "pinheaded, anarchistic, crank[s],"<sup>97</sup> even as he too railed against the dangers of concentrated economic power, particularly by John D. Rockefeller's Standard Oil Trust.<sup>98</sup>

Among the largest, wealthy industrialists portrayed in the press as "Robber Barons,"<sup>99</sup> there had operated an unwritten "social contract."<sup>100</sup> While these capitalists accumulated great wealth, they also made great unwritten quid pro quo contributions to their communities and society in general.<sup>101</sup> Such capitalist tradition was shattered

<sup>93</sup> See *Populist Movement*, ENCYCLOPEDIA BRITANNICA (Jan. 19, 2018), <https://www.britannica.com/event/Populist-Movement> [<https://perma.cc/4W6P-BWXH>].

<sup>94</sup> One Populist Leader declared, "Wall Street owns the country. It is no longer a government of the people, by the people and for the people but . . . of Wall Street, by Wall Street and for Wall Street." Walter Adams, *The Sherman Act and its Enforcement*, 14 U. PITT. L. REV. 319, 320 (1953).

<sup>95</sup> See *Populist Movement*, *supra* note 93.

<sup>96</sup> See Army Appropriations Act of 1916, ch. 418, 39 Stat. 619, 645 (1916) (authorizing the President to take control of transportation systems during wartime); see also Proclamation No. 1419 (1917).

<sup>97</sup> GOODWIN, *supra* note 91, at 193.

<sup>98</sup> See Daniel A. Crane, Essay, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L. REV. 2025, 2027 (2015) (noting that Theodore Roosevelt was widely characterized as a "trustbuster" for his role as president against the likes of Rockefeller and other "Robber Barons").

<sup>99</sup> See Robert McNamara, *Learn the Meaning and History of the Term Robber Baron*, THOUGHTCO., <https://www.thoughtco.com/robber-baron-definition-1773342> [<https://perma.cc/TN36-JCFD>] (last updated May 1, 2018) ("'Robber Baron' was a term applied to a businessman in the 19th century who engaged in unethical and monopolistic practices, utilized corrupt political influence . . . and amassed enormous wealth. The term itself . . . dated back centuries . . . [and] was originally applied to noblemen in the Middle Ages who functioned as feudal warlords and were literally 'robber barons.'").

<sup>100</sup> Ron Chernow, *Philanthropy the Smart Way*, N.Y. TIMES (Sept. 27, 1999), <https://nyti.ms/2O5zq6u>.

<sup>101</sup> See PETER KRASS, *CARNEGIE* (2002) (describing how Andrew Carnegie, who personally advocated against inherited wealth, built public libraries throughout communities and small towns and established a non-profit foundation for teachers' pensions); see also Jon W. Bruce & D. Don Welch, *Vanderbilt Law School in the Nineteenth Century: Its Creation and Formative Years*, 56 VAND. L. REV. 497, 508 (2003) (noting that Vanderbilt University's name references the institution's recognition of the financial contributions of Cornelius Vanderbilt); Daniel A. Crane, *Did We Avoid Historical Failures of Antitrust Enforcement During the 2008–2009 Financial Crisis?*, 77 ANTITRUST L.J. 219, 219 (2010) (offering that the Robber Barons, which included J.P. Morgan, rose to fix the problem during the panic of 1893); Thomas Cothran, Note, *The Sophistic Method?: Dialectic and Eristic in Legal Pedagogy*, 100 KY. L.J. 177, 180 (2012) (examining the history of the Carnegie Foundation); *History of the Morgan*, MORGAN LIBR. & MUSEUM, <http://www.themorgan.org/about/history>

by the unsavory business conduct of Standard Oil's John D. Rockefeller.<sup>102</sup> Becoming one of the richest men in America, Rockefeller was notorious for giving relatively little back to civic or community charitable organizations or causes, raising the ire of both political parties at the concentration of personal wealth widely viewed as accumulated by unethical, distasteful means.<sup>103</sup>

Rockefeller was not unaware of the growing political tides against the wealthy and the risks to his and other similarly situated families' estates posed by taxation's "public redistribution" of his accumulated wealth.<sup>104</sup> Creating non-profit foundations exempt from state estate taxation became a key strategy.<sup>105</sup> Andrew Carnegie chartered his foundation in 1911 and Rockefeller followed suit in 1913, funding the Rockefeller Foundation with \$100 million.<sup>106</sup> These efforts protected a large part of the industrialists' estates from any estate taxation.<sup>107</sup>

In the 59th Congress (1907), during President Roosevelt's final term, Democratic members of Congress failed to pass legislation for an income tax and a national inheritance tax.<sup>108</sup> The income and inheritance taxes became the platform and campaign banner of the Democratic Party under William Jennings Bryant in the 1908 Presidential election.<sup>109</sup> Bryant lost to Republican William Howard Taft.<sup>110</sup> Post-election, federal tax policy remained constitutional "excises, duties, and imposts."<sup>111</sup>

In 1909, President Taft proposed a two-percent excise tax on corporations in an attempt to bypass the *Pollock* ruling that a federal income tax was unconstitutional.<sup>112</sup>

-of-the-morgan [<https://perma.cc/2CD5-TXTR>] (last visited Oct. 15, 2018) (addressing J.P. Morgan's influence on the Pierpont Morgan); Charles Molesworth, *How a Capitalist and a Critic Shaped Metropolitan Museum of Art*, N.Y. POST (Mar. 6, 2016), <http://nypost.com/2016/03/06/how-a-capitalist-and-a-critic-shaped-metropolitan-museum-of-art/> [<https://perma.cc/PX2J-5PDT>] (articulating Morgan's contributions to the Met).

<sup>102</sup> See RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER*, SR. 563 (2004).

<sup>103</sup> *Id.*

<sup>104</sup> See *id.*

<sup>105</sup> See Matthew F. Jones, *The Other Family Tree: Leaving Your Legacy in a Private Foundation*, 62 ALB. L. REV. 567, 582 (1990) (explaining the tax benefits of placing assets in a foundation).

<sup>106</sup> CHERNOW, *supra* note 102, at 566. See also Tanya Marsh, *A Dubious Distinction: Rethinking Tax Treatment of Private Foundations and Public Charities*, 22 VA. TAX REV. 137, 143–44 (2002) (discussing the importance of both Rockefeller and Carnegie in setting the precedent for professional philanthropy).

<sup>107</sup> CHERNOW, *supra* note 102, at 566.

<sup>108</sup> GOODWIN, *supra* note 91, at 516–17.

<sup>109</sup> *Id.* at 548.

<sup>110</sup> *William Jennings Bryan*, ENCYCLOPEDIA BRITANNICA (Mar. 12, 2018), <https://www.britannica.com/biography/William-Jennings-Bryan> [<https://perma.cc/B4QE-MHV8>].

<sup>111</sup> *William Howard Taft*, HISTORY, <https://www.history.com/topics/us-presidents/william-howard-taft> [<https://perma.cc/H6V5-UDV9>].

<sup>112</sup> See Marjorie E. Kornhauser, *Corporate Regulation and the Origins of the Corporate Income Tax*, 66 IND. L.J. 53, 98–100 (1990) (discussing the inception of the Corporate Excise Tax).

Congress, pressured by populist fever in both parties,<sup>113</sup> passed the Sixteenth Amendment granting Congress additional enumerated power to impose an income tax and to abolish the Article I restriction on apportionment of taxes based on population.<sup>114</sup>

The income tax was viewed as social justice—a public catharsis by Progressives opposed to wealthy businessmen and by Conservatives as a way to end the age-old conflicts over tariffs—thus garnering unique bipartisan support in Congress.<sup>115</sup> Though there had been simultaneous clamoring for a federal inheritance [Estate] tax,<sup>116</sup> that power was not included in the Sixteenth Amendment.<sup>117</sup> Constitutional principles remained in place; Congress, absent a war emergency, lacked the enumerated power to issue a Federal Estate Tax.<sup>118</sup>

Notwithstanding Republican administration victories in major antitrust cases,<sup>119</sup> Progressive demands to take back or reduce the concentrated wealth of the Robber Barons directly continued. In 1912, Republican control of the Executive and Legislative branches changed with the election of Democrat President Woodrow Wilson.<sup>120</sup> Three years later, under the Wilson Administration, Congress by statute—but absent direct enumerated constitutional power to do so—enacted what we now know as the modern Federal Estate Tax.<sup>121</sup>

#### *D. The Birth of the Modern Federal Estate Tax*

The first attempt to establish an Estate Tax at the federal level was the Stamp Tax of 1797.<sup>122</sup> Reminiscent of the British Stamp Act leading to the Revolutionary War, this was a tax on the paperwork in processing wills in probate and estate administration for the purpose of funding the United States Navy.<sup>123</sup> These were flat fees,<sup>124</sup> similar to stamp fees imposed by local governments in transacting real estate deeds. The tax was bitterly unpopular and repealed in 1802.<sup>125</sup>

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<sup>113</sup> *See id.* at 93.

<sup>114</sup> U.S. CONST. amend. XVI.

<sup>115</sup> *See* Kornhauser, *supra* note 112, at 98–99.

<sup>116</sup> *See id.* at 93, 95–96.

<sup>117</sup> U.S. CONST. amend. XVI.

<sup>118</sup> *See id.* (giving Congress only the power to issue a federal income tax, not an estate tax).

<sup>119</sup> *See, e.g.*, Northern Securities Co. v. United States, 193 U.S. 197 (1904).

<sup>120</sup> *United States Presidential Election of 1912*, ENCYCLOPEDIA BRITANNICA (Oct. 4, 2016), <https://www.britannica.com/event/United-States-presidential-election-of-1912> [<https://perma.cc/9485-P68E>].

<sup>121</sup> Revenue Act of 1916, ch. 463, 39 Stat. 756 (repealed 1918).

<sup>122</sup> Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 844 (2006).

<sup>123</sup> *Id.*

<sup>124</sup> *See id.* (“The rate was relatively modest, ranging from \$0.25 on a legacy of \$50 to \$100 (a rate of 0.25% to 0.5%) to \$1 per \$500 of a larger legacy (a rate of 0.2%).”).

<sup>125</sup> Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, 27 STAT. INCOME

The American Civil War and its emergency revenue needs led Congress, at the urging of President Abraham Lincoln, to enact taxes which in later years were found unconstitutional or extra-constitutional.<sup>126</sup> Much as experienced with Lincoln's enactment of an unconstitutional income tax, Congress enacted the Revenue Act of 1862, which established a comprehensive estate tax and collection methodology.<sup>127</sup> The law created both an inheritance tax and a stamp tax on the transfer of estates at graduated rates.<sup>128</sup> Increased revenue needs by 1864 caused an increase in rates and the addition of a legacy tax.<sup>129</sup> As was the case with most of the Civil War taxes, Congress repealed these taxes shortly after the war ended—the inheritance tax in 1870 and the stamp tax in 1872.<sup>130</sup>

Post-war, an attempt was made to challenge the constitutionality of the Civil War era succession [sic estate] taxes in *Scholey v. Rew*.<sup>131</sup> The Court ruled the “succession tax” constitutional through a tortured interpretation of the Article I taxing power:

[B]ut it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of those provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare. Such a tax or duty is neither a tax on land nor a capitation exaction, as subsequently appears from the language of the section imposing the tax or duty . . . .<sup>132</sup>

Here, the Court reacted to the preamble language of the Article I, Section 8, taxing power, i.e., the tax “provide[d] for the common defence”<sup>133</sup>—effectively a war tax—rather than on the specific issue of enumerated power.<sup>134</sup> The Court made no

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BULL. 118, 119 (2007), <https://www.irs.gov/pub/irs-soi/ninetyestate.pdf> [<https://perma.cc/LBH3-T8W6>].

<sup>126</sup> See discussion *supra* Section I.B.

<sup>127</sup> Revenue Act of 1862, ch. 119, 12 Stat. 432 (amended 1864). See also David J. Herzig, *Justice For All: Reimagining the Internal Revenue Service*, 33 VA. TAX REV. 1, 17–18 (discussing the inception of the Revenue Act of 1862).

<sup>128</sup> See Elizabeth R. Carter, *New Life for the Death Tax Debate*, 90 DENV. U. L. REV. 175, 198 (2012) (noting that graduated rates were imposed depending on the degree of familial relationship between the decedent and the recipient of the property).

<sup>129</sup> *Id.* at 198–99 (discussing the inception of the Revenue Act of 1864 through which Congress increased the inheritance tax rates and included real property transfers within the parameters of the inheritance tax).

<sup>130</sup> See *id.*; Jacobson et al., *supra* note 125, at 119.

<sup>131</sup> 90 U.S. 331 (1874).

<sup>132</sup> *Id.* at 346.

<sup>133</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>134</sup> See *Scholey*, 90 U.S. at 346.

effort to detail the definition of an excise tax of which the Estate Tax lacks fit. Perhaps this was a political decision to protect revenue during the Civil War, and with the Act repealed, the Court did not wish to open the door to further constitutional scrutiny.<sup>135</sup>

The *Scholey* Court, in giving the apparent “green light” to impose an Estate Tax as a constitutional excise to support war [sic the *common defense*], allowed the Estate Tax to raise its head once again in the guise of a war tax by way of the War Revenue Act of 1898.<sup>136</sup> The Act, bitterly debated, placed an Estate Tax on personal property.<sup>137</sup> Its unpopularity resulted in Congress scaling back the law with major exemptions in the War Revenue Reduction Act of 1901.<sup>138</sup> With the end of the Spanish-American War in 1902, the Estate Tax was repealed by the War Revenue Repeal Act of 1902.<sup>139</sup>

World War I once again raised the specter of the Estate Tax as a means of war funding.<sup>140</sup> Adding to the political environment of the times was growing public ire against the concentration of economic power and wealth of the Robber Baron class,<sup>141</sup> highlighted by the parsimony and notoriety of Rockefeller, then the richest man in America.<sup>142</sup> The mix of these circumstances led Congress to enact by statute what became the beginning of the modern Federal Estate Tax, the Revenue Act of 1916.<sup>143</sup>

The new Estate Tax, for the first time, allowed the federal government to tax the estate (property) directly instead of heirs.<sup>144</sup> The tax, targeted at the wealthy, had a \$50,000 exemption for residents and for non-residents imposed a one percent tax on the first \$50,000 of estate value and ten percent tax on \$5 million or more.<sup>145</sup>

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<sup>135</sup> See *id.* at 348 n.9.

<sup>136</sup> Ch. 448, § 29, 30 Stat. 448, 464–65 (1898).

<sup>137</sup> Jacobson et al., *supra* note 125, at 120 (noting the tax provided a \$10,000 exemption to exclude small estates from the tax and also exempted bequests made to a surviving spouse).

<sup>138</sup> Ch. 806, 31 Stat. 938 (1901).

<sup>139</sup> Ch. 500, § 7, 32 Stat. 96 (1902).

<sup>140</sup> Jacobson et al., *supra* note 125, at 120.

<sup>141</sup> See *id.*

<sup>142</sup> Chase Peterson-Withorn, *From Rockefeller to Ford, See Forbes' 1918 Ranking of the Richest People in America*, FORBES (Sept. 19, 2017, 8:03 AM), <https://www.forbes.com/sites/chasewithorn/2017/09/19/the-first-forbes-list-see-who-the-richest-americans-were-in-1918/#25ca8b364c0d> [<https://perma.cc/P4CD-DJ2U>] (evaluating Rockefeller's net worth in 1918 at \$1.2 billion, which in 2017 was the equivalent of \$21 billion).

<sup>143</sup> Ch. 463, tit. 2, 39 Stat. 756, 777 (1916).

<sup>144</sup> Jacobson et al., *supra* note 125, at 120.

<sup>145</sup> *Id.* To demonstrate the targeted wealth intent of the Estate Tax, \$1.00 in 1916 equals \$22.96 in 2016. These figures adjusted to 2016 dollars would have resulted in the following equivalent values: \$1.148 million exemption, one percent tax on \$1.148 million, and ten percent tax on estates over \$114.8 million. See *Inflation Calculator*, DOLLARTIMES, <https://www.dollartimes.com/inflation> [<https://perma.cc/E34J-N4QJ>] (last visited Oct. 15, 2018). Further, contrast these figures with the fact that the average American in 1915 had an annual income of \$687 (equating to \$15,774.00 in 2016 dollars). See Carol Boyd Leon, *The Life of American Workers in 1915*, MONTHLY LAB. REV. (Feb. 4, 2016), <https://www.bls.gov/opub/mlr/2016/article/pdf/the-life-of-american-workers-in-1915.pdf> [<https://perma.cc/A7UL-CNKM>].



Estate Taxes by and large impacted only the wealthy who had the means to take advantage of legal loopholes, asset transfers, and estate planning tactics.<sup>146</sup> Business lobbyists were paid, advocating to Congressmen additional exemptions, exclusions, and other devices to ensure Estate Taxes would stay at acceptably low levels.<sup>147</sup> Nevertheless, without a detailed judicial review challenging its constitutionality, the Estate Tax continued unfettered. World War I ended on November 11, 1918,<sup>148</sup> but unlike the situation in prior wars, Congress did not repeal the Estate Tax. Instead, it became a political football among partisan parties in Congress and for presidential candidates for the remainder of the twentieth century and into the twenty-first century.<sup>149</sup>

## II. THE MODERN ESTATE TAX

Throughout the 2016 presidential election debates, Republican candidate Donald Trump made the repeal of the death tax a key precept of his overall tax reform proposal.<sup>150</sup> A repeal of the Federal Estate Tax would be a victory for the small percentage of wealthy families falling within the tax's target threshold, incentivizing dynastic levels of wealth within the United States.<sup>151</sup> However, Trump's campaign proposal to eliminate the Estate Tax was not the first attempt in modern history to target the repeal of the tax.<sup>152</sup> In fact, the evolution of the Estate Tax in the modern legislative era has been a key political edifice in the nation's democratic system.

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<sup>146</sup> See *supra* notes 105, 144–45 and accompanying text. The average American worker in 1915 making \$687 a year would fall within the Estate Tax's \$50,000 exception. Those wealthy enough to have assets over the exception were perceptive enough to shield themselves from the Estate Tax such as through a trust.

<sup>147</sup> See Stephen Martin, *America's Un-American Resistance to the Estate Tax*, ATLANTIC (Feb. 23, 2016), <https://www.theatlantic.com/business/archive/2016/02/resistance-estate-tax/470403/> [<https://perma.cc/E69J-JUFS>].

<sup>148</sup> John Graham Royde-Smith & Dennis E. Showalter, *World War 1*, ENCYCLOPEDIA BRITANNICA (Feb. 20, 2018), <https://www.britannica.com/event/World-War-I> [<https://perma.cc/7P6U-LWDE>].

<sup>149</sup> See, e.g., Jeremy Scott, *So Much For the Estate Tax Compromise*, FORBES (Sept. 13, 2016, 9:55 AM), <https://www.forbes.com/sites/taxanalysts/2016/09/13/so-much-for-the-estate-tax-compromise> [<https://perma.cc/59HM-5R6U>] (discussing the 2016 presidential candidates—Donald Trump and Hillary Clinton—and their ideas about the Estate Tax and American Taxpayer Relief Act (ATRA)).

<sup>150</sup> Ashlea Ebeling, *Will Trump Victory Yield Estate Tax Repeal?*, FORBES (Nov. 9, 2016, 11:09 AM), <http://www.forbes.com/sites/ashleaebeling/2016/11/09/will-trump-victory-yield-estate-tax-repeal/> [<https://perma.cc/2LFX-WEEW>].

<sup>151</sup> See *id.* Numerically, in tax year 2015 only 4,918 estates fell subject to the tax, with collected revenue of about \$17 billion, accounting for less than one percent of all federal revenue. *Id.*

<sup>152</sup> See Chris Edwards, *Tax Policy Under President Bush*, CATO INSTITUTE, <https://www.cato.org/publications/commentary/tax-policy-under-president-bush> [<https://perma.cc/LM7U-E8KJ>] (discussing President George W. Bush's promise to repeal the Estate Tax) (last visited Oct. 15, 2018).

The establishment of the modern Estate Tax in 1916 created a tax on the transfer of wealth from an estate to its beneficiaries (rather than a tax levied directly on beneficiaries).<sup>153</sup> Following its enactment, the first major modification to the Estate Tax was the addition of a gift tax on *inter vivos* transfers under the Revenue Act of 1932.<sup>154</sup> Congress ordained such an adaptation to deter wealthy individuals from avoiding the Estate Tax by transferring wealth during their lifetimes.<sup>155</sup> Three years later, the Revenue Act of 1935 provided for an “optional valuation date election,” which allowed an estate to be valued one year after a decedent’s death for tax purposes.<sup>156</sup>

Just over a decade later, a significant adjustment to the Estate Tax came with the Revenue Act of 1948.<sup>157</sup> This Act established the estate and gift tax marital deduction, which allowed a decedent’s adjusted gross estate to deduct one-half of the value of property passing to a surviving spouse.<sup>158</sup> A similar deduction was allowed for *inter vivos* gifts made to a spouse.<sup>159</sup> Following this legislative enactment, Congress fell relatively silent with respect to the Estate Tax for over thirty years until the enactment of the Tax Reform Act (TRA) of 1976.<sup>160</sup>

The TRA created an estate and gift tax framework consisting of unified graduated tax rates imposed on *inter vivos* gifts and testamentary dispositions.<sup>161</sup> Before the enactment of the TRA, Estate Tax rates varied from an initial rate of one to three percent (depending upon the tax year) on the first \$50,000 of an estate to upwards of seventy-seven percent on the portion of an estate falling within the highest bracket.<sup>162</sup>

In contrast, again prior to the TRA, gift tax allowances not only afforded similar exemption amounts to those of the Estate Tax, but also provided for annual gift tax exclusion amounts ranging from \$3,000 to \$5,000 depending upon the year, and maximized at a rate of fifty-eight percent (as compared to the highest Estate Tax rate of seventy-seven percent).<sup>163</sup> Such vast differentials between estate and gift tax rates

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<sup>153</sup> Revenue Act of 1916, ch. 463, tit. 2, § 201, 39 Stat. 756, 777 (1916). *See also* Jacobson et al., *supra* note 125, at 120.

<sup>154</sup> Ch. 209, tit. 3, § 501, 47 Stat. 169, 245 (1932). *See also* Jacobson et al., *supra* note 125, at 121–22 (explaining that this addition of a gift tax became a permanent feature in 1932).

<sup>155</sup> Jacobson et al., *supra* note 125, at 122.

<sup>156</sup> Revenue Act of 1916 Sec. 202, Pub. L. No. 407. Although the idea of the optional valuation date election still exists today, it is now referred to as the alternate valuation date and the timing has been reduced to six months following a decedent’s date of death. *See also* 26 U.S.C. § 2032 (2017).

<sup>157</sup> Ch. 168, 62 Stat. 110 (1948).

<sup>158</sup> Jacobson et al., *supra* note 125, at 122.

<sup>159</sup> *Id.*

<sup>160</sup> Pub. L. No. 94-455, Stat. 1520 (2017).

<sup>161</sup> Jacobson et al., *supra* note 125, at 122.

<sup>162</sup> *See id.* at 122 Fig. D: Estate Tax Exemptions and Tax Rates.

<sup>163</sup> *See Federal Estate and Gift Tax Rates, Exemptions, and Exclusions, 1916–2014*, TAX FOUNDATION (Feb. 4, 2014), <http://taxfoundation.org/federal-estate-and-gift-tax-rates-exemptions-and-exclusions-1916-2014/> [<https://perma.cc/3TVG-XHW5>].

amounted to a growing concern that wealthy families were being incentivized to give property away during life rather than dispose of it at death in order to save tax dollars.<sup>164</sup>

The merging of the estate and gift tax exclusions into a “single, unified estate and gift tax credit” effectively eliminated the ability of individuals to gift property at lower tax rates during their lifetimes.<sup>165</sup> The TRA retained a \$3,000 annual gift exclusion per donee, included an annual increase in the Estate Tax filing exemption, and introduced a tax on generation-skipping transfer trusts (GSTs).<sup>166</sup>

The Economic Recovery Tax Act of 1981 (ERTA) brought additional changes to the Estate Tax.<sup>167</sup> Included in this legislative evolution was the allowance of marital deductions on non-terminable estates of qualified terminable interest property (QTIP), unlimited estate and gift tax marital deductions, a phased increase in the unified transfer tax credit and annual gift tax exclusion, and a phased reduction in the highest estate, gift, and GST tax rates.<sup>168</sup> Congress later passed the Taxpayer Relief Act of 1997,<sup>169</sup> which, among other things, promulgated the incremental increase of the unified tax credit, “effectively raising the Estate Tax filing threshold to \$1 million.”<sup>170</sup>

President George W. Bush made the repeal of the Estate Tax a critical component of his first term in office in a staunch effort to save small businesses and farms.<sup>171</sup> In fact, for years leading up to 2001, numerous commentators and politicians called for a repeal of the Estate Tax.<sup>172</sup> During Bush’s first year as president, Congress passed the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).<sup>173</sup> This provided extensive changes to the transfer tax system, including gradually phasing out Estate Tax rates while increasing exemption amounts until 2010. In 2010, the Estate Tax was set to be abolished for a single year, followed by a return to the original 2001 rates in 2011.<sup>174</sup> The scheduled repeal of the tax for just

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<sup>164</sup> See Jacobson et al., *supra* note 125, at 122.

<sup>165</sup> *Id.* (citing HOWARD ZARITSKY & THOMAS RIPPY, *FEDERAL ESTATE, GIFT, AND GENERATION SKIPPING TAXES: A LEGISLATIVE HISTORY AND DESCRIPTION OF CURRENT LAW* 18 (1984)).

<sup>166</sup> Jacobson et al., *supra* note 125, at 122–23 (noting the Estate Tax filing exemption increased from \$60,000 to \$120,000 for 1977 decedents).

<sup>167</sup> Pub. L. No. 97-34, 95 Stat. 172 (1981); Jacobson et al., *supra* note 125, at 123.

<sup>168</sup> See Jacobson et al., *supra* note 125, at 123.

<sup>169</sup> Pub. L. No. 105-34, 111 Stat. 788 (1997).

<sup>170</sup> Jacobson et al., *supra* note 125, at 123 (noting that other changes enacted in 1997 included adding a family business deduction for estates in which businesses made up at least fifty percent of the gross estate).

<sup>171</sup> Matthew B. Gaudin, Note, *The Federal Estate Tax and the National Debt: Why the Debt Forces a Defense of the Tax*, 45 *IND. L. REV.* 159, 159 (2011).

<sup>172</sup> Jay A. Soled & Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 *WASH & LEE L. REV.* 257, 267 (2015) (citing Joel C. Dobris, *A Brief for the Abolition of All Transfer Taxes*, 35 *SYRACUSE L. REV.* 1215, 1216 (1985)).

<sup>173</sup> Pub. L. No. 107-16, 115 Stat. 38 (2001).

<sup>174</sup> See Gaudin, *supra* note 171, at 160; see also Economic Growth and Tax Relief Reconciliation Act of 2001, 115 Stat. 38.

one year resulted in a plethora of news commentary about beneficiaries incentivizing heirs to live to 2010, but not beyond.<sup>175</sup> This included an article in *The New York Times* by Nobel prize-winning economist Paul Krugman who penned EGTRRA as the “Throw Momma From the Train Act of 2001.”<sup>176</sup>

Due to federal budgetary constraints, estates of persons dying in 2011 and beyond were set on a trajectory reversion back to the 2001 Estate Tax exemption amount of \$1 million under EGTRRA.<sup>177</sup> In late December 2010, Congress, with Democratic President Barack Obama in the White House, enacted the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (2010 Tax Relief Act).<sup>178</sup> This finessed the Estate Tax by providing for a two year rate of thirty-five percent with an exclusion amount of \$5 million.<sup>179</sup> Two years later, in the final hour of January 1, 2013, Congress passed the American Taxpayer Relief Act of 2012 (Act),<sup>180</sup> which averted the fiscal cliff imposed by the 2010 Tax Relief Act (the Estate Tax exemption was scheduled to return to \$1 million) by permanently setting the federal estate, gift, and GST transfers at \$5 million, indexed for inflation.<sup>181</sup>

On December 22, 2017, President Trump signed into law the TCJA, which temporarily doubles the estate and gift tax exclusion amount.<sup>182</sup> Specifically, the law sets a new \$10 million base exemption amount for estate, gift, and generation-skipping taxes.<sup>183</sup> The exemption, however, is indexed for inflation, which will allow an individual to shelter \$11.2 million in assets from the Estate Tax.<sup>184</sup> With regard

<sup>175</sup> See Joseph Brownstein, *Lack of Estate Tax in 2010: Now Cheaper to Die?*, ABCNEWS (Jan. 1, 2010), <http://abcnews.go.com/Health/HealthCare/lack-estate-tax-2010-now-cheaper-die/story?id=9412614> [<https://perma.cc/W2GB-6DGW>].

<sup>176</sup> Paul Krugman, *Reckonings; Bad Heir Day*, N.Y. TIMES (May 30, 2001), <https://nyti.ms/2MhPAYE>. One of the more prominent examples of this period entailed the owner of the New York Yankees and Yankee Stadium, George Steinbrenner, who died at age eighty in July 2010 leaving an estate estimated to be worth \$1.6 billion. His heirs benefitted from Steinbrenner dying in 2010 because his estate saved nearly \$600 million in federal estate taxes. See *How Steinbrenner Saved His Heirs a \$600 Million Tax Bill*, WALL ST. J.:METROPOLIS BLOG (July 13, 2010, 2:11 PM), <http://blogs.wsj.com/metropolis/2010/07/13/how-steinbrenner-saved-his-heirs-a-600-million-tax-bill/>.

<sup>177</sup> See Michael S. Kutzin, *The Estate Tax is Back, but With Some Twists—and Opportunities*, GOLDFARB ABRANDT SALZMAN & KUTZIN LLP, <http://www.seniorlaw.com/the-estate-tax-is-back-but-with-some-twists-and-opportunities-2/> [<https://perma.cc/3BF9-R7XV>] (last visited Oct. 15, 2018).

<sup>178</sup> Pub. L. No. 111-312, 124 Stat. 3296.

<sup>179</sup> See Soled & Gans, *supra* note 172, at 269.

<sup>180</sup> Pub. L. No. 112-240, 126 Stat. 2313.

<sup>181</sup> See Soled & Gans, *supra* note 172, at 270.

<sup>182</sup> Harris Beach PLLC, *Federal Estate, Gift and GST Tax Exemption Amounts Spike*, JDSUPRA (Mar. 14, 2018), <https://www.jdsupra.com/legalnews/federal-estate-gift-and-gst-tax-34058/> [<https://perma.cc/8FM8-MB8H>].

<sup>183</sup> See H.R. 1, 115th Cong. (2017) (enacted).

<sup>184</sup> Ashlea Ebeling, *Final Tax Bill Includes Huge Estate Tax Win For the Rich: the \$22.4 Million Exemption*, FORBES (Dec. 21, 2017, 8:46 AM), <https://www.forbes.com/sites/ashlea>

to the Federal Estate Tax, the TCJA provides enormous planning opportunities for the wealthy while remaining virtually inapplicable to most Americans.<sup>185</sup> At least through the sunset period established in the Act, it appears the Estate Tax is here to stay.

Since 2013, the modern Estate Tax makes up only about 0.7 percent of the total annual federal revenue source, in large part because few individuals have estates large enough to exceed the exemption amount.<sup>186</sup> Although the debate over whether to continue the imposition of an Estate Tax covers a vast political continuum, arguments for and against the tax generally lean on the premise of competing values.<sup>187</sup> Amidst the turbulent evolution of the modern Estate Tax, the underlying question of whether the tax is even constitutional has seemingly failed to take shape.

Perhaps the striking absence of argument within the political spectrum as to whether the Estate Tax is constitutional is due in large part to the Supreme Court's upholding of the tax as constitutional in two very early twentieth century cases.<sup>188</sup> To appreciate the argument that the Estate Tax, in its inherent unfairness, is a literal taking of private property rights, we next briefly analyze the judicial historical protection of the Estate Tax.

### III. ANALYSIS OF THE CONSTITUTIONAL CHALLENGES TO THE ESTATE TAX

Nowhere within the spectrum of the United States Constitution is the power to tax the estates of deceased persons explicitly granted.<sup>189</sup> Article I of the Constitution defines the role of Congress, while Section 8 dictates the enumerated powers of the federal government as delegated to Congress.<sup>190</sup> However, the Estate Tax has historically solidified its constitutional roots within the general stricture of the Constitution which states, "[t]he 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."<sup>191</sup>

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ebling/2017/12/21/final-tax-bill-includes-huge-estate-tax-win-for-the-rich-the-22-4-million-exemption/ [https://perma.cc/859Y-M5DH].

<sup>185</sup> See *id.*

<sup>186</sup> Jane McGrath, *The History of the 'Death Tax,'* HOWSTUFFWORKS (Nov. 13, 2014), <http://money.howstuffworks.com/personal-finance/personal-income-taxes/history-of-death-tax4.htm> [https://perma.cc/SD4K-VUWC]. According to the Center on Budget and Policy Priorities, in 2016 the exemption amount was \$5.45 million and the top statutory rate was 40%. *The Federal Estate Tax*, CTR. BUDGET & POL'Y PRIORITIES (Aug. 14, 2017), <http://www.cbpp.org/research/policy-basics-the-estate-tax> [https://perma.cc/2QR9-ZFG5].

<sup>187</sup> See Carter, *supra* note 128, at 189 (noting that opponents of the modern Estate Tax advocate for the elimination of the tax in order to retain hard-earned income, while proponents advocate its use to curtail inherited wealth).

<sup>188</sup> See *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921); *Knowlton v. Moore*, 178 U.S. 41 (1900).

<sup>189</sup> Lowndes, *supra* note 9, at 142.

<sup>190</sup> U.S. CONST. art. I, § 8.

<sup>191</sup> U.S. CONST. art. I, § 8, cl. 1.

The imposition of the Estate Tax has perpetually stood as a controversial area of political debate.<sup>192</sup> As noted previously, prior to World War I the country was in need of revenue,<sup>193</sup> and academics have opined that the Estate Tax historically provided a legitimate means of generating necessary (war) income.<sup>194</sup> Others have argued that the purpose of the Tax was to minimize “wealth being amassed by powerful families in an effort to avoid budding aristocracy in the United States.”<sup>195</sup>

Since its creation, the Supreme Court has contributed significant jurisprudence to the interpretation of constitutional tax clauses, with the majority of cases argued in the nineteenth and early twentieth centuries.<sup>196</sup> However, only a very limited number of the highest Court’s cases have dealt specifically with the constitutional issues of the Estate Tax.<sup>197</sup>

The general postulate requires that a federal tax on the ownership of property would, as a direct tax, present genuine constitutional obstacles.<sup>198</sup> The Supreme Court has avoided this impasse by characterizing a tax imposed on the happening of an event, such as transfer of title upon death, as an indirect tax.<sup>199</sup> In its 1921 case *New York Trust Co. v. Eisner*,<sup>200</sup> the Court upheld the constitutionality of a Federal Estate Tax, holding that an estate tax is an indirect rather than direct tax on a decedent’s property.<sup>201</sup>

Relying on one of its previous opinions, *Knowlton v. Moore*,<sup>202</sup> Justice Holmes delivered the majority opinion in denying recovery of the Estate Tax levied by Congress.<sup>203</sup> Despite the fact that the *Knowlton* Court dealt with a legacy (inheritance) tax while the *Eisner* Court analyzed the Estate Tax, Holmes found the distinction immaterial.<sup>204</sup> In the final lines of his opinion, Justice Holmes noted that the Estate Tax was not one that was imposed directly on intestate successors, but rather it preceded them, and the fact that beneficiaries of an estate may have received less or

<sup>192</sup> See Susan K. Hill, Comment, *Leaping Before We Look?: Repeal of the State Estate Tax Credit and the Consequences for States, Americans, and the Federal Government*, 32 PEPP. L. REV. 151, 158 (2004).

<sup>193</sup> See *supra* notes 139–42 and accompanying text.

<sup>194</sup> *Id.* at 157 (citing Krisanne M. Schlachter, Note, *Repeal of the Federal Estate and Gift Tax: Will It Happen and How Will It Affect Our Progressive Tax System?*, 19 VA. TAX REV. 781, 782 n.7 (2000)).

<sup>195</sup> *Id.* at 157–58.

<sup>196</sup> Evgeny Magidenko, *Classifying Federal Taxes For Constitutional Purposes*, 45 U. BALT. L. REV. 57, 63–64 (2015).

<sup>197</sup> *Id.* at 90, 98 (explaining the holdings of *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921) and *Fernandez v. Wiener*, 326 U.S. 340 (1945) respectively).

<sup>198</sup> Barbara Redman, *Rethinking the Progressive Estate and Gift Tax*, 15 AKRON TAX J. 35, 42 (2000).

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

<sup>200</sup> 256 U.S. 345 (1921).

<sup>201</sup> See *id.* at 349–50.

<sup>202</sup> 178 U.S. 41 (1900).

<sup>203</sup> *Eisner*, 256 U.S. at 349.

<sup>204</sup> *Id.* at 348–49; Magidenko, *supra* note 196, at 90.

different amounts upon the distribution of an estate because of statute was of no concern to the United States.<sup>205</sup>

The *Knowlton* case, issued sixteen years before the inception of the modern Estate Tax, was premised on the War Revenue Act of 1898.<sup>206</sup> The case specifically considered the validity of a succession tax on legacies and distributive shares of personal property.<sup>207</sup> Nevertheless, the *Knowlton* Court took a superficial view of the death tax's constitutionality:

Death duties were established by the Roman and ancient law, and by the modern laws of France, Germany and other continental countries, England and her colonies, and an examination of all shows that tax laws of this nature rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit or the transmission from the dead to the living on which such taxes are more immediately vested . . . . The provision in section 8 of article I of the Constitution that "all duties, imports [sic] and excises shall be uniform throughout the United States," refers purely to a geographical uniformity, and is synonymous with the expression "to operate generally throughout the United States."<sup>208</sup>

There appear to be significant historical errors in the legal reasoning backing this opinion. The history of the American Revolution and the Framers' constitutional construction was intent to precisely distance the new nation from European and Roman law that had hamstrung government and liberty of citizens, the abuses of which led to the Revolution itself.<sup>209</sup>

Rome's Estate Tax history provides a particularly dark example. During the Triumvirate of Tiberius Gracchus (The Gracchi) in 133 B.C., an estate tax was imposed to limit the size of estates and recapture wealth from landowners.<sup>210</sup> The oppressive tax proved to be unpopular and offensive to the Roman ruling classes.<sup>211</sup> History records what followed when Gracchus ran for reelection to the Roman Senate and Triumvirate:

<sup>205</sup> *Eisner*, 256 U.S. at 349.

<sup>206</sup> *Knowlton*, 178 U.S. at 43. *See also* War Revenue Act of 1898, ch. 448, 30 Stat. 448 (1898).

<sup>207</sup> *Knowlton*, 178 U.S. at 43–44. The 1898 Act was technically distinguishable as a legacy tax versus the more modern Estate Tax.

<sup>208</sup> *Id.* at 42.

<sup>209</sup> *See supra* notes 27–53 and accompanying text.

<sup>210</sup> VALERIO LINTNER, *A TRAVELER'S HISTORY OF ITALY* 34 (7TH ed. 2004) ("[Gracchus] proposed to enforce the legal limit on the size of estates, which had up to now been conveniently ignored, to repossess the surplus and redistribute it to the poor.").

<sup>211</sup> *Id.*

“A mob led by Scipio Nasica disrupted the senate and started a riot in which Tiberius Gracchus and 300 of his followers were clubbed to death.”<sup>212</sup> His successor Gaius Gracchus in 121 B.C. was also assassinated, along with 3,000 of his followers.<sup>213</sup> These events led to the end of the Roman Estate Tax experiment of that era.<sup>214</sup>

Nearly 100 years later under the rule of Augustus Caesar (Octavian), the Roman system was changed to use estate law to encourage inheritance to those who married and increased the birth rate of a then declining Roman population: “The Lex Julia, which was aimed at increasing the birth-rate, deprived unmarried or childless men of the right to inherit [estates], and other Measures provided tax incentives for large families.”<sup>215</sup>

Consequently, the *Knowlton* Court’s analogy of Rome and Europe erred by ignoring a history of confiscatory income and wealth taxes, abuses of due process, and capital punishments. As a result, the specific limitations of the federal taxing power were intended by the Constitutional Framers to avoid the Euro-Roman historical liberty infringing history.<sup>216</sup> To accept the *Knowlton* Court’s logic is to dismiss the need for the enumerated taxing power in the Constitution itself. The Framers were clear in their determination that Congress’s power was to be strictly limited to consumption (purchase) taxes [hence the concept of *volunteerism*], which they limited to excise and imposts other than income later granted by the Sixteenth Amendment.<sup>217</sup>

The *Knowlton* court laid a dangerous precedent: any time Congress declares a new innovative tax as an “excise” tax—no matter how remote to an established definition of an excise tax—the Court will accept that characterization for expediency of the federal government or popular politic of the moment.<sup>218</sup> Leading the majority, Justice Holmes did not wish to go down the road of previous Courts and hold to the plain reading of enumerated powers specified in the Constitution. The Justices’ views on the Constitution were more pragmatist and evolutionary, rather than devoted to the Constitutional Framer’s bedrock reading.<sup>219</sup>

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 35.

<sup>214</sup> *Id.* (“Thus ended the sincere, but on reflection rather naive, attempt by the Gracchi brothers to reform the republic.”).

<sup>215</sup> *Id.* at 42.

<sup>216</sup> See *supra* notes 27–53 and accompanying text.

<sup>217</sup> See *supra* notes 58–72 and accompanying text.

<sup>218</sup> See *Knowlton v. Moore*, 178 U.S. 41, 84–85 (1800) (“The two contentions then may be summarized by saying that the one asserts [unequal individual treatment] . . . and the other that [Congress is restrained on excise taxes only that it must be geographic in form].”).

<sup>219</sup> See *Gompers v. United States*, 233 U.S. 604, 610 (1914). Justice Holmes, once again delivering the majority opinion, expounded on his reading of the Constitution:

[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.



Justice Holmes, akin to other Justices past and present, was cognizant of the Court not straying too far from the tenor of the citizenry. Decisions of law based on political rather than firm constitutional bases often have adverse consequences to the nation.<sup>220</sup> In the face of the plain text of Article I of the Constitution, Supreme Court Justices of the early twentieth century lived in a society of intense public sentiment against the Robber Barons,<sup>221</sup> leading to more “progressive” Republican presidents including Theodore Roosevelt and William Howard Taft.<sup>222</sup> Under Democratic President Woodrow Wilson, however, Congress and Progressives took aim at wealthy individuals,<sup>223</sup> and the Supreme Court found nothing to gain by opposing them, even if that meant a clear misreading of constitutional intent and limited authority. Without sufficient and detailed analysis, the 1921 Court presumed the constitutionality of the Estate Tax would remain.<sup>224</sup>

Six years after the *Eisner* decision, the Court once again took up a case challenging the Federal Estate Tax in *Florida v. Mellon*.<sup>225</sup> Florida, by *parens patriae*, challenged the constitutionality of the tax—not based on it being beyond the enumerated powers of Congress—but rather, that since its state constitution forbade an Estate Tax, its residents could not receive a credit against the Federal Estate Tax for state taxes paid.<sup>226</sup> Florida argued:

[T]hat [it] is directly interested in preventing the unlawful discrimination against its citizens which is effected by § 301 and in protecting them against the risk of prosecution for failure to comply with the enforcement provisions of the act; that the several states, except Florida, Alabama, and Nevada, levy inheritance taxes, but by reason of the provisions of its constitution Florida cannot place its citizens on an equality with those of the other states in respect of the tax in question, and [therefore] the tax is not uniform throughout the United States as required by § 8 of Article I of the federal Constitution.<sup>227</sup>

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<sup>220</sup> See, e.g., *Korematsu v. United States*, 323 U.S. 214 (1944). This case is a glaring example of the Supreme Court’s turning a blind eye to the Constitution, allowing the internment of United States citizens of Japanese descent during WWII (without like treatment of German or Italian Americans).

<sup>221</sup> See *supra* notes 91–98 and accompanying text.

<sup>222</sup> *Theodore Roosevelt and the Progressive Movement*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/United-States/Theodore-Roosevelet-and-the-Progressive-movement> [<https://perma.cc/42E8-7SUM>] (last updated Sept. 2, 2018) (noting Taft thought of himself as a progressive).

<sup>223</sup> See *id.* (explaining Wilson’s strong push toward antitrust reform).

<sup>224</sup> See *New York Trust Co. v. Eisner*, 256 U.S. 345, 349–50 (1921).

<sup>225</sup> 273 U.S. 12 (1927).

<sup>226</sup> See *id.* at 15–16.

<sup>227</sup> *Id.* at 16.

Similar to its analysis in *Eisner*, the Court refused to entertain any discussion of the constitutionality of the Estate Tax, claiming it was settled law under prior rulings.<sup>228</sup> The Court further dismissed constitutional claims for lack of uniformity:

The contention that the federal tax is not uniform because other states impose inheritance taxes while Florida does not, is without merit. Congress cannot accommodate its legislation to the conflicting or dissimilar laws of the several states nor control the diverse conditions to be found in the various states which necessarily work unlike results from the enforcement of the same tax. All that the Constitution (Art. I, § 8, cl. 1) requires is that the law shall be uniform in the sense that by its provisions the rule of liability shall be the same in all parts of the United States.<sup>229</sup>

Again, as in *Eisner*, the Court deferred to political expediency in supporting the Estate Tax and refused to engage in a detailed analysis of the tax's legitimacy under the Constitution.<sup>230</sup> Without further analysis, the Court stated that the Estate Tax was an "excise."<sup>231</sup> Neither the *Eisner* nor *Florida* Courts heeded the famous sentiment of Chief Justice Marshall in *Marbury v. Madison* when he noted, "[i]f . . . courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply."<sup>232</sup>

Major challenges to the Estate Tax remained essentially quiet thereafter. Perhaps the Stock Market Crash of 1929 and the resulting financial impact of the Great Depression made moot a majority of those who would have been impacted. Only a small number of extremely wealthy persons remained relatively unscathed. The advent of World War II again put tax policy into focus under war powers and the need to finance victory. It was not until 1960—forty-four years after the first enactment of the modern Estate Tax—when another challenge to the Estate Tax fell in to the hands of the Supreme Court.<sup>233</sup>

In *United States v. Manufacturers Nat'l Bank of Detroit*,<sup>234</sup> such a challenge emerged from a technicality in the application of the Estate Tax by the Internal Revenue Service (IRS).<sup>235</sup> The decedent at issue had purchased insurance policies which during his lifetime he had assigned ownership to his wife, though he continued to pay the

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<sup>228</sup> *See id.* at 17.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *See id.* Here the Court took the famous position articulated in *Marbury v. Madison* that "[i]t is emphatically the duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137 (1803).

<sup>232</sup> *Marbury*, 5 U.S. at 178.

<sup>233</sup> *See United States v. Manufacturers Nat'l Bank of Detroit*, 363 U.S. 194 (1960).

<sup>234</sup> *Id.*

<sup>235</sup> *See id.* at 196–97.

premiums.<sup>236</sup> Upon his death, his wife received the proceeds of the policies.<sup>237</sup> The IRS took the position that only the amounts paid in insurance premiums should be included in the estate.<sup>238</sup> Consequently, “[t]he executor claimed that because the decedent had divested himself of all interest in the policies in 1936, the tax constituted an unapportioned direct tax on property, invalid under Article I, Sections 2 and 9, of the Constitution.”<sup>239</sup>

Again the Court refused to delve into a detailed analysis of the constitutionality of the Estate Tax itself. With a brush of the judicial hand in a very brief opinion, the Court held steadfast to *Knowlton* and *Eisner* stating, “the tax is clearly constitutional without apportionment. For such a tax has always ‘been treated as a duty or excise, because of the particular occasion which gives rise to its levy.’”<sup>240</sup> The Court dismissed all other arguments and held the insurance was part of the estate.<sup>241</sup>

#### IV. THE TIME IS RIPE—REVISITING THE CONSTITUTIONALITY OF THE ESTATE TAX

2016 represented the centennial of the birth of the modern Federal Estate Tax.<sup>242</sup> Through its decisions in *Knowlton* and *Eisner*, the Supreme Court, without any detailed analysis, declared the Estate Tax to be an *excise tax*—thus treating it as constitutional—without further elaboration.<sup>243</sup> However, such ardent declaration without reasonable backing begs the question of whether the Estate Tax is, in fact, constitutional. Any re-examination of this issue by the high Court would open up the possibility of overturning *Knowlton*.

Throughout history the Court has reversed prior precedents that were later found to be unconstitutionally decided.<sup>244</sup> It is not accepted practice that merely because a law remains on the books for a long period without challenge, that it assumes constitutional legitimacy.<sup>245</sup> Indeed, the history of the Republic saw courts actively hold Congress to the prescriptions of its Article I power to limit taxes to true “excises and imposts.”<sup>246</sup> This forced Congress, as the Framers established, to seek a constitutional

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<sup>236</sup> *Id.* at 196.

<sup>237</sup> *See id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 196–97.

<sup>240</sup> *Id.* at 198 (citing to *Knowlton v. Moore*, 178 U.S. 41, 81 (1900) and *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

<sup>241</sup> *See id.* at 199.

<sup>242</sup> The modern Federal Estate Tax was enacted in 1916. Revenue Act of 1916, ch. 463, tit. 2, 39 Stat. 756, 777.

<sup>243</sup> *See supra* Part III.

<sup>244</sup> *See, e.g.*, *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>245</sup> For example, in *Horne v. Dep’t of Agriculture*, 135 S. Ct. 2419 (2015), the Supreme Court ruled USDA’s confiscation of farmers’ raisins under the guise of Depression era agricultural acts to be a blatant violation of the Fifth Amendment, even though the law and practice had existed for over seventy years.

<sup>246</sup> *See* Alica Lerud, Note, *Looking to the Past in Planning for the Future: Does the Modern Estate Tax Fit within the Ideals of the Founding Fathers?*, 6 NEV. L.J. 516, 516 (2005)

amendment to add any tax system beyond it, that being the Sixteenth Amendment allowing for income taxes.<sup>247</sup> Here the Estate Tax was expressly considered,<sup>248</sup> yet excluded in the final drafting of the Amendment.<sup>249</sup>

Congress, post–Civil War, was so concerned with Court interference by injunction on its policies to enact and collect taxes that in 1867 it passed the Tax Anti-Injunction Act,<sup>250</sup> prohibiting federal judges from enjoining a federal tax pending final judicial ruling of legal challenge.<sup>251</sup> Because the Estate Tax had such a relatively small constituency, it was easy for the judiciary to simply call it “legal,” thus avoiding the judiciary being charged with being in the pocket of the rich. What changed, of course, was rapid inflation post–World War II bringing unintended middle class citizens into the clutches of the Estate Tax.

Today’s post–World War II Baby Boom generation has entered its retirement age strata, many of whom have saved, invested in both real and personal properties—particularly small businesses, houses, and farms—and as a result, are now at risk of Estate Tax levies.<sup>252</sup> In the 2000s, Congress established a much higher Estate Tax exemption indexed to inflation.<sup>253</sup> The 2017 signing of the TCJA temporarily doubles the estate and gift tax exclusion amount.<sup>254</sup> Such high thresholds suggest that the Estate Tax has become effectively a moot issue for the majority of citizens, and thus the prospect of further constitutional challenges to the Supreme Court appear remote.

Nevertheless, the reality is the Estate Tax is more social-political theater than a sound revenue source for the federal government. In 2013, the Urban-Brookings Tax Policy Center estimated the average estate paying Estate Tax that year was \$22.7 million at an effective tax rate of 16.6 percent.<sup>255</sup> According to figures from the Office of Management and Budget, for Tax Year 2014 the United States government raised total tax revenue of \$3 trillion, of which \$19.3 billion, or 0.6 percent, was derived from the Estate Tax.<sup>256</sup> This percentage represented the lowest yield of any federal

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(summarizing the conception of the Art. 8, Sec. 1 language and how it influenced key pre-Sixteenth Amendment holdings).

<sup>247</sup> See *id.* at 533–35.

<sup>248</sup> See Kornhauser, *supra* note 112, at 93, 95–96.

<sup>249</sup> See U.S. CONST. amend. XVI.

<sup>250</sup> 26 U.S.C. § 7421(a) (2006).

<sup>251</sup> See *id.*

<sup>252</sup> See Erik Carter, *7 Steps For Baby Boomers To Take Now*, FORBES (Jan. 9, 2013, 9:00 AM), <https://www.forbes.com/sites/financialfinesse/2013/01/09/7-steps-for-baby-boomers-to-take-now/> [<https://perma.cc/S5QG-RHGS>].

<sup>253</sup> See Ashlea Ebeling, *IRS Announces 2017 Estate And Gift Tax Limits: The \$11 Million Tax Break*, FORBES (Oct. 25, 2016, 2:33 PM), <https://www.forbes.com/sites/ashleaebeling/2016/10/25/irs-announces-2017-estate-and-gift-tax-limits-the-11-million-tax-break/> [<https://perma.cc/B5Y2-SEEV>].

<sup>254</sup> See Harris Beach PLLC, *supra* note 182.

<sup>255</sup> Brian J. O’Connor, *Once Again, the Estate Tax May Die*, N.Y. TIMES (Feb. 18, 2017), <https://nyti.ms/2ltsbdg>.

<sup>256</sup> Andrew Lundeen, *The Estate Tax Provides Less than One Percent of Federal Revenue*,

tax revenue received.<sup>257</sup> Revenue derived from the Estate Tax continues to decline each year as the estate exemption is indexed to the cost of living.<sup>258</sup> Put another way, all of the proceeds of the Estate Tax for one year could barely pay for the United States Navy's three newest stealth ships.<sup>259</sup> The IRS reported Estate Tax revenue for 2015 of \$17.1 billion,<sup>260</sup> one of the smallest revenue streams in the federal budget.<sup>261</sup>

Eliminating the Estate Tax by federal statute would ultimately not resolve the overriding question of whether the tax itself is constitutional. As the Federal Estate Tax marks its century of existence, and as the TCJA now exponentially increases the exemption amounts through to the end of 2025,<sup>262</sup> it is unlikely that a judicial challenge is on the horizon. Rather, the growing trend of legislative actions at the state level to abolish estate taxes, along with its unpopularity in a majority Republican Congress, may make the issue moot in the future. Nevertheless, the detailed analysis and historical context of our national tax policy strongly suggests a fair reading of the Constitution would conclude the Federal Estate Tax is, in fact, unconstitutional as a taxing power not granted by the specific limitations of Article I or the Sixteenth Amendment.<sup>263</sup> Presently the tax has survived another round of scrutiny with its inclusion in the TCJA.<sup>264</sup> It lives yet another day.

#### CONCLUSION

The United States of America was born from a revolution against European sovereign-imposed taxation. That issue remained front and center in the Continental Congress, first through the Articles of Confederation which essentially removed the power of the federal government to tax, raising its revenue by state contribution.<sup>265</sup>

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TAXFOUNDATION (Apr. 7, 2015), <https://taxfoundation.org/estate-tax-provides-less-one-per-cent-federal-revenue/> [<https://perma.cc/TR4L-BJSA>].

<sup>257</sup> See *id.* Individual income taxes proved the highest source of federal tax revenue at 46.2%, closely followed by social insurance taxes at 33.9%. *Id.*

<sup>258</sup> See *Cost and Consequences of the Federal Estate Tax: An Update*, JOINT ECONOMIC COMMITTEE—REPUBLICANS (July 25, 2012), [https://www.jec.senate.gov/public/\\_cache/files/bc9424c1-8897-4dbd-b14c-a17c9c5380a3/costs-and-consequences-of-the-federal-estate-tax-july-25-2012.pdf](https://www.jec.senate.gov/public/_cache/files/bc9424c1-8897-4dbd-b14c-a17c9c5380a3/costs-and-consequences-of-the-federal-estate-tax-july-25-2012.pdf) [<https://perma.cc/524B-EXMP>].

<sup>259</sup> See Mike Fredenburg, *How the Navy's Zumwalt-Class Destroyers Ran Aground*, NAT'L REV. (Dec. 19, 2016), <https://www.nationalreview.com/2016/12/zumwalt-class-navy-stealth-destroyer-program-failure/> [<https://perma.cc/5PQ3-GNTY>] (noting that the Navy's three new ships are set to cost \$4.2 billion each, but with the \$10 billion development costs also accounted for, each ship will cost more than \$7 billion).

<sup>260</sup> INTERNAL REVENUE SERVICE, 2015 IRS Data Book, <https://www.irs.gov/pub/irs-soi/15databk.pdf> [<https://perma.cc/FZU7-KE6W>].

<sup>261</sup> *Id.*

<sup>262</sup> See Harris Beach PLLC, *supra* note 182.

<sup>263</sup> See discussion *supra* Section I.D.

<sup>264</sup> H.R. 1, 115th Cong. (2017).

<sup>265</sup> See 19 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 45, at 545–46.

The structure of the Articles proving unworkable, the Framers of the Constitution were meticulous in enumerating specific limits upon the power of the central government to tax its citizens.<sup>266</sup>

Those limitations were upheld for the most part throughout the later Eighteenth and Nineteenth centuries by a judiciary that adhered to the plain reading of Article I, Section 8, Clause 1 (“Taxing Power”), and effectively directed that if Congress desired to go beyond enumerated powers, the established method was by constitutional amendment.<sup>267</sup> However, beginning in the Twentieth Century, successive Supreme Court benches diverged from past traditional constitutional jurisprudence, advancing the theory that if Congress—as representative of “the People”—passed new taxes, then it would be up to voters to require that Congress reject or repeal them.

Populism impinged on constitutional analysis. The need to raise revenue in the immediacy of difficult times, particularly during war and massive social movements, became more compelling to judicial reasoning than a “constitutionalist” approach furthering the recognition of the Framers’ constitutional intent. Such was the situation in which the modern Federal Estate Tax emerged in 1916.

Notwithstanding historical challenges that the Estate Tax was neither an excise nor impost as prescribed in our nation’s Constitution, the Supreme Court adhered to its determination that the Estate Tax is an “excise” in *New York Trust Company v. Eisner*, without additional detailed analysis. Such dogma has since been maintained through the decades, without further re-examination by the Court. However, it is clear from a historical perspective that the 1921 Supreme Court failed to follow a “strict constructionist” constitutional analysis in making its decision.

President Trump’s election campaign pledge to repeal the Estate Tax failed. Instead, in 2017 he signed into law the Tax Cuts and Jobs Act,<sup>268</sup> which temporarily doubles the exemption amount for estate, gift, and generation-skipping taxes, making the Tax itself inapplicable to the vast majority of Americans. However, the law’s sunset provision means a reversion back to the original \$5 million base, or a movement by Congress or the Supreme Court to take action before the end of 2025.

With a Supreme Court bench consisting of a majority of adherents to a more “strict constructionist” point of view, we conclude that the time may be ripe for the current Supreme Court to re-examine and confront the constitutionality of the Federal Estate Tax. Such review is well within the long historical foundations of the Republic to assure government power is kept in check. The Estate Tax brings to mind the famous admonition of Thomas Jefferson, quoted by President Gerald F. Ford, “[a] government big enough to give you everything you want is a government big enough to take from you everything you have.”<sup>269</sup>

<sup>266</sup> See U.S. CONST. art. I, § 8, cl. 1.

<sup>267</sup> U.S. CONST. art. V.

<sup>268</sup> See *supra* notes 184–87 and accompanying text.

<sup>269</sup> President Gerald R. Ford, Address to Joint Session of Congress (Aug. 12, 1974), 1974 PUB. PAPERS 6 (1974).