

January 2012

New Life for the Death Tax Debate

Elizabeth R. Carter

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

Elizabeth R. Carter, New Life for the Death Tax Debate, 90 Denv. U. L. Rev. 175 (2012).

This Article is brought to you for free and open access by the Denver Law Review at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

New Life for the Death Tax Debate

NEW LIFE FOR THE DEATH TAX DEBATE

ELIZABETH R. CARTER[†]

ABSTRACT

This Article examines the ascendancy of wealth redistribution as the policy underpinning the federal estate tax through the lens of sociology and argues that by attempting to ensure equal access to the American dream by penalizing only those who have fulfilled its promise, the federal estate tax places fundamental American values in irreconcilable conflict. The reason that the current system does not work, I argue, is rooted more in history and sociology than it is in economics. The solution is not necessarily the repeal of the federal estate tax. Nor is the solution replacing the estate tax with an inheritance tax, an accessions tax, or taxing inheritances as income, as proposed by other commentators. The estate tax plays, or should play, an important role in ensuring vertical and horizontal equity in our federal tax system. Perhaps more importantly, it also has the potential to provide a safety net of revenue during times of exigency, such as that currently faced by our nation. In order to achieve these goals, however, we must first correctly recognize the fundamental problem with the current system. When the history of the tax is examined from a sociological and historical vantage point, the real problem becomes clear.

TABLE OF CONTENTS

I. INTRODUCTION	178
II. SOCIOLOGY AND CORE AMERICAN VALUES	179
<i>A. Sociological Values</i>	179
<i>B. Values and Political Attitudes</i>	181
III. TAXING DEATH	183
<i>A. Tax the Receipt of Property</i>	184
1. Income Tax Approach	184
2. Inheritance Tax Approach	186
<i>B. Tax the Transfer of Property</i>	186
IV. TAX POLICY AND THE NATURE OF POLICY DEBATES	187
<i>A. Typical Policy Debate: Home-Mortgage Interest Deduction</i>	187
<i>B. Atypical Policy Debate: The Federal Estate Tax</i>	189

[†] Assistant Professor of Law, Louisiana State University. LL.M. in Taxation, University of Alabama; J.D., Tulane University School of Law; B.S., University of Memphis; B.A., University of Memphis. The author thanks S. Frazer Rankin, Mark Mintz, and Jennifer Kitner for inspiring this Article. The author also thanks her research assistants, Kathryn Theriot Trew and Edward Waters for their invaluable assistance.

V. VIEWING THE HISTORY OF FEDERAL ESTATE TAX THROUGH A SOCIOLOGY LENS.....	192
<i>A. Revolutionary Core American Values and Politics</i>	192
<i>B. Early American Inheritance Law and Policy</i>	194
<i>C. Early Federal Death Taxes</i>	198
<i>D. Rise of the Manufacturing Aristocracy and an Era of Change</i> ...	199
<i>E. Enactment of the “Modern” Estate Tax</i>	202
<i>F. Andrew Mellon and the Framing of the Opposition</i>	205
<i>G. Subsequent Developments</i>	208
VI. REFRAMING THE ISSUE	208

Pop Quiz. Which of the following quotes best describes the necessity of the federal estate tax?

- (a) “Dynastic wealth, the enemy of a meritocracy, is on the rise. Equality of opportunity has been on the decline A progressive and meaningful estate tax is needed to curb the movement of a democracy toward plutocracy.”

—Warren Buffett¹

- (b) “[T]he death tax . . . taxes income that has already been taxed once before, and which encourages elaborate schemes for transferring wealth.”

—Mitt Romney²

- (c) “The death tax results in the double taxation of many family assets while hurting the source of most new jobs in this country—America’s small business and farms.”

—George W. Bush³

- (d) “I believe that those of us who have benefited so greatly from our country’s investment in our lives should be asked to give a portion of our wealth back to invest in opportunities for the future. Society has a just claim on our fortunes and that claim goes by the name estate tax.”

—Bill Gates Sr.⁴

1. Kevin Drawbaugh, *Buffett Backs Estate Tax, Decries Wealth Gap*, REUTERS, Nov. 14, 2007, available at <http://www.reuters.com/article/2007/11/14/us-buffett-congress-idUSN1442383020071114> (quoting Warren Buffett).

2. Mitt Romney, *Obama Would Tax Economy to Death*, BOSTON HERALD, Mar. 1, 2012, at 19.

3. Chelsea Trull, *House Votes Down Federal Estate Taxes*, MICH. DAILY, Apr. 13, 2005, <https://www.michigandaily.com/content/house-votes-down-federal-estate-taxes> (quoting George W. Bush).

Feeling confused? Ambivalent? Outraged? Vindicated? In any case, you are probably in good company. These men know how to pull at your heartstrings. They intentionally framed the issue in terms of your core values. How do they know what values are important to you? That part is easy. Sociology tells us that Americans have a collective set of core values and that they use these values to evaluate political issues.⁵ Politicians and other public figures vying for our support on a particular issue know this, and they will frame their particular stance in terms of these values. However, when we are presented with the issue already framed in terms of conflicting core values or conflicting interpretations of the same core values, many of us become confused, fail to evaluate the issue ourselves, or become ambivalent.⁶

The men in your pop quiz are not helping matters. All four men are college-educated Americans.⁷ All four earned graduate degrees in law, economics, or business.⁸ All four are millionaires, and at least one is a billionaire.⁹ And yet, this seemingly homogenous group cannot agree on the mere existence of the federal estate tax. They all framed the issue slightly differently, and yet you likely felt some sort of emotional response to each argument. That gut feeling you experience when confronted with issues framed in terms of ideas like equality, democracy, and opportunity is natural, but it is also the federal estate tax's biggest problem.

This Article examines the ascendancy of wealth redistribution as the policy underpinning the federal estate tax through the lens of sociology, and argues that by attempting to ensure equal access to the American

4. Bill Gates, Sr., *Strengthening the Estate Tax to Strengthen the Country*, HUFFINGTON POST (Dec. 17, 2009, 6:16PM), http://www.huffingtonpost.com/bill-gates-senior/strengthening-the-estate_b_396444.html.

5. See Paul R. Brewer, *Values, Political Knowledge, and Public Opinion About Gay Rights*, 67 PUB. OPINION. Q. 173, 173 (2003).

6. See *id.* at 177–78.

7. See *About Mitt*, MITT ROMNEY, <http://www.mittromney.com/learn/mitt> (last visited Sept. 14, 2012); *George W. Bush*, THE WHITE HOUSE, <http://www.whitehouse.gov/about/presidents/georgewbush> (last visited Sept. 14, 2012); *Warren Buffett*, BIOGRAPHY, <http://www.biography.com/people/warren-buffett-9230729> (last visited Sept. 14, 2012); *William H. Gates, Sr.*, BILL & MELINDA GATES FOUND., <http://www.gatesfoundation.org/leadership/Pages/william-gates-sr.aspx> (last visited Sept. 14, 2012).

8. See sources cited *supra* note 7.

9. See Steve Holland & Kim Dixon, *Mitt Romney Tax Returns Released: Paid Just 13.9% Rate in 2010, Had Swiss Bank Account*, HUFFINGTON POST (Jan. 23, 2012, 11:24PM), http://www.huffingtonpost.com/2012/01/24/mitt-romney-tax-returns-released_n_1225247.html; *The Net Worth of the American Presidents: From Washington to Obama to ___*, BUS. INSIDER (Jan. 9, 2012, 1:26PM), <http://www.businessinsider.com/american-presidents-republican-candidates-net-worth-2012-1?op=1>; *Warren Buffett*, *supra* note 7. William H. Gates Sr.'s millionaire status is inferred based upon his son's approximate net worth of \$61 billion and status as the second wealthiest person in the world, in addition to Gates Sr.'s professional background as a founding partner at K&L Gates (formerly Preston Gates & Ellis), a Seattle law firm where partners averaged \$890,000 in profits in 2012. Cf. *Firm Profiles: K&L Gates*, AM. LAW., <http://www.americanlawyer.com/firmProfile.jsp?name=K%26L+Gates> (last updated Jan. 1, 2012); *The World's Billionaires*, FORBES, <http://www.forbes.com/billionaires/> (Apr. 24, 2012); *William H. Gates, Sr.*, *supra* note 7.

dream by penalizing only those who have fulfilled its promise, the federal estate tax places fundamental American values in irreconcilable conflict. The *reason* that the current system does not work, I argue, is rooted more in history and sociology than in economics. The solution is not necessarily the repeal of the federal estate tax. Nor is the solution as simple as replacing the estate tax with an inheritance tax, implementing an accessions tax, or taxing inheritances as income, as proposed by other commentators.¹⁰ The estate tax plays, or should play, an important role in ensuring vertical and horizontal equity in our federal tax system. Perhaps more importantly, it also has the potential to provide a safety net of revenue during times of financial exigency, such as that currently faced by our nation. In order to achieve these goals, however, we must first correctly recognize the fundamental problem with the current system. When the history of the tax is examined from a sociological and historical vantage point, the real problem becomes clear.

I. INTRODUCTION

The primary goal of any system of taxation is to raise revenue.¹¹ However, the federal estate tax, and by extension the federal gift tax, has two concurrent goals. In addition to providing a source of revenue, the tax promotes a supposedly important social goal of preventing “excessive” accumulations of inherited wealth.¹² This social aspect of the tax pits conservatives and liberals against each other in an increasingly toxic debate. Yet, the modern federal estate tax has not accomplished *either* goal with much success.

Understanding the evolution of the wealth redistribution goal and the public reaction to that goal is critical to understanding the futility of the current debate and in analyzing how to move forward. The current rhetoric surrounding the estate tax is no different from that of the past. This Article argues that the real source of this debate is a conflict between several core American values. Regardless of where your personal opinions may lie in this debate, the sociological history of the estate tax reveals several truths: (1) we are unlikely to *ever* reach a consensus regarding the appropriateness of the supposed wealth redistribution policy; (2) that policy is what converts a useful and potentially fair tax to a politically polarizing one; and (3) the estate tax has the potential to provide much needed revenue during times of national exigency. To achieve this potential, we must remove any wealth redistribution policy from the tax.

10. See, e.g., Joseph M. Dodge, *Beyond Estate and Gift Tax Reform: Including Gifts and Bequests in Income*, 91 HARV. L. REV. 1177, 1178–79 (1978).

11. See Reuven S. Avi-Yonah, *The Three Goals of Taxation*, 60 TAX L. REV. 1, 3 (2006).

12. See, e.g., Joseph J. Thorndike, *What's the Estate Tax Supposed to Do, Anyway?*, HUFFINGTON POST (Dec. 16, 2010, 9:52AM), http://www.huffingtonpost.com/joseph-j-thorndike/whats-the-estate-tax-supp_b_797577.html.

Part II of this Article explores what sociologists call our “core American values” and examines how these values affect our political attitudes. Part III of this Article briefly summarizes the various methods of taxing gratuitous property transfers at death. Part IV summarizes the nature of a tax policy debate and argues that the federal estate tax debate is somewhat unique. Part V examines the history of the federal estate tax through a sociological lens in an effort to provide insight to the current debate. Part V argues that the current debate can be traced back to two sources, both of which are utterly inapplicable in modern times. Proponents of the tax owe their lineage to revolutionary Americans and their efforts to change a political system that was stacked against them. Opponents of the tax owe their lineage largely to Andrew Mellon, a Treasury Secretary who embarked on a mission to destroy the estate tax. The Article concludes in Part VI by reframing the federal estate tax as an efficient and practical mechanism for raising revenue during times of crisis.

II. SOCIOLOGY AND CORE AMERICAN VALUES

A. Sociological Values

What characteristics define Americans? What is American culture? Sociologist Robin M. Williams Jr. went in search of the answers to these questions more than sixty years ago. In his seminal text, *American Society: A Sociological Interpretation*, Williams identified a list of core American “values.” In the sociological context, the term “value” refers to “broad cultural principles that most people in a society consider desirable.”¹³ Values, as Williams explained, “are not the concrete goals of action, but rather the *criteria* by which goals are chosen.”¹⁴ As a result, people sharing the same values might express those values differently, or they might extrapolate them into different expressions of sociological norms.¹⁵

Looking at the work of other observers, Williams noted that several traits could be seen in American society during all major historical periods. These traits included

associational activity, democracy, and belief and faith in it; belief in the equality of all as a fact and as a right; freedom of the individual in ideal and in fact; disregard of law—“direct action;” local government; practicality; prosperity and general material well-being; puritanism; emphasis on religion, and its great influence in national life; uniformity and conformity.¹⁶

13. JON M. SHEPARD, *SOCIOLOGY* 67 (10th ed. 2010).

14. ROBIN M. WILLIAMS, JR., *AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION* 440 (3d ed. 1970).

15. See SHEPARD, *supra* note 13.

16. WILLIAMS, *supra* note 14, at 453.

Williams saw these recurring themes and sought to reduce them to their abstract forms—that is, their core essence as a “value.”¹⁷ Williams explained that from a historical standpoint, our values developed “out of religious tradition, frontier experience, ceaseless change, vast opportunity, and fluid social structure.”¹⁸ The experiences of colonial and revolutionary Americans set the course for development of an American culture that is distinct and identifiable in terms of our collection of values. In his quest to understand America, Williams eventually identified fifteen core American values. Those values were later summarized as follows:

Table 1: Williams List of Central American Values¹⁹

1. *Achievement and success* as the primary goal of every individual.
2. *Activity and work*, with little emphasis on leisure and a disdain for laziness.
3. *Moral orientation*, including the absolute judgments of good and bad or right and wrong.
4. *Humanitarianism* realized through philanthropy and aid to those in need or crisis.
5. *Efficiency and practicality*, as demonstrated by seeking the fastest and least costly means of achieving a goal.
6. *Process and progress*—a belief in future development and technological advancement.
7. *Material comfort*, sometimes articulated as “the American Dream.”
8. *Equality* in its most abstract form—as an ideal rather than a policy.
9. *Freedom* expressed by emphasizing rights of the individual over the state.
10. *External conformity*, meaning that one strives to be a “team player” and does not “rock the boat.”
11. *Science and rationality* as the primary vehicles by which to master the environment for material benefits.
12. *Nationalism* and the belief that U.S. values and institutions are the very best in the world.
13. *Democracy* based on personal freedom and equal opportunity.

17. *See id.*

18. *Id.* at 458–59 (citation omitted).

19. Karen A. Cerulo, *Social Relations, Core Values, and the Polyphony of the American Experience*, 23 Soc. F. 351, 352 (2008).

14. *Individualism* or the emphasis of personal rights and responsibilities.
15. *Racism and group superiority* or the edification of a white, Anglo-Saxon, or northern European racial background.

The values Williams identified are both interrelated and contradictory.²⁰ For instance, the value of achievement/success is clearly related to activity/work and material comfort. On the other hand, the values of individualism and freedom are, in some respects, contradictory to the values of external conformity and group superiority. Williams recognized the potential for conflict, explaining that “persistent and widespread value-tension leads to political struggle, schismatic cleavages, or the segregation of various groupings into a kind of mosaic society.”²¹ Later sociologists expanded on this theme, finding that although these core values are always present, they also shift in terms of importance over time and among individuals.²² The expression of these values as societal norms and behaviors changes over time and from person to person.²³

B. Values and Political Attitudes

Our values play an important role in shaping public opinion regarding political issues.²⁴ Not only do Americans use their core values to decide where they stand on a specific issue, the manner in which public figures frame those issues for us directly impacts our opinions.²⁵ “Values are within everyone’s mental grasp, so they [can] be employed as a general evaluative standard for generating and organizing reactions to political issues.”²⁶ Politicians and pundits know this, and they use it to their advantage. The “ability to frame issues . . . is undoubtedly one of the most important ‘tools’ that political elites have at their disposal.”²⁷ As a result, “policy controversies confronting the public are, themselves, almost always phrased in terms of values.”²⁸ When politicians disagree on an issue, for whatever reason, they often frame the issue in terms of “widely shared values.”²⁹

Politicians know that framing an issue in the light of a core American value affects how people react to that issue.³⁰ Of course, in the realm

20. SHEPARD, *supra* note 13, at 68.

21. WILLIAMS, *supra* note 14, at 452.

22. See Cerulo, *supra* note 19, at 353.

23. See SHEPARD, *supra* note 13, at 68; Cerulo, *supra* note 19, at 353.

24. See William G. Jacoby, *Value Choices and American Public Opinion*, 50 AM. J. POL. SCI. 706, 716 (2006).

25. See *id.*

26. *Id.* at 715–16.

27. Brewer, *supra* note 5, at 176 (alterations in original) (quoting William G. Jacoby, *Issue Framing and Public Opinion on Government Spending*, 44 AM. J. POL. SCI. 750, 751 (2000)) (internal quotation marks omitted).

28. Jacoby, *supra* note 24.

29. See Brewer, *supra* note 5, at 176.

30. See *id.*

of politics, we are usually presented with conflicting interpretations of the same value or with competing values. The manner in which politicians and other public figures frame the issues for us significantly impacts our ultimate opinions. “[T]he specific language employed to convey information about the opposing positions on an issue could well prime individuals to think about certain values and ignore others while working out their own responses.”³¹

When we are presented with conflicting applications of the same values, several things can happen. Consider the value of equality in the context of the estate tax. Suppose opponents of the tax tell you that it works against equality because it results in family farms and businesses being taxed on the same income twice. Suppose proponents of the tax tell you that it is necessary to ensure equality of opportunity for all Americans by limiting inherited wealth. Sociology and public opinion research suggests several possible reactions. You might just become confused and fail to form an opinion on the issue.³² You might feel some connection to both arguments and end up feeling confused or ambivalent.³³ You might reject both arguments and conclude that equality is not relevant to the issue of the estate tax.³⁴

Similar responses can occur when an issue is framed in terms of competing values. Suppose that opponents of the estate tax tell you that it punishes hard work and success. Therefore, in order to protect those values, you should eliminate the tax. Meanwhile, proponents of the tax tell you that it is necessary to ensure equality of opportunity and democracy by limiting inherited wealth. Therefore, we must keep the tax in order to protect those values. You could have some of the same responses you had when presented with competing views of the same value. But, you might find the argument framed in terms of success and work more compelling than the argument framed in terms of equality and democracy. Or, you might find the equality and democracy argument more compelling than the success and work argument.

Research suggests that when presented with competing values, your opinion may be shaped by which value you find more important.³⁵ We are all different, so it comes as no surprise that “there is extremely wide variability in personal judgments about value importance.”³⁶ Most people have “meaningful value *hierarchies*.”³⁷ In other words, most people

31. Jacoby, *supra* note 24.

32. See Brewer, *supra* note 5, at 177.

33. See *id.* at 178.

34. See *id.*

35. See Jacoby, *supra* note 24, at 720.

36. *Id.*

37. *Id.*

“seem to recognize that some values are more important than others, and [such people] make the requisite choices between them.”³⁸

Your pop quiz illustrates the most popular competing frames constructed around the federal estate tax. As discussed in Part V below, these frames have existed for a century or more. In that time, they have proven to be deeply divisive. I argue that these frames are also outdated, misguided, and utterly unsupported by the facts. Public figures on both sides of the debate who perpetuate these frames are irresponsible. They needlessly perpetuate an illogical debate. As a result, they impede the possibility for us to make an important and useful safety net of revenue available during a time of national financial crisis. If we are going to move forward, we should reframe the issue in terms of efficiency and practicality.³⁹

III. TAXING DEATH

The goal of the federal tax system, as a whole, is to raise revenue for the federal government in a manner that is “fair.”⁴⁰ To achieve “fairness,” we evaluate the tax system in light of concerns for vertical and horizontal equity.⁴¹ Principles of horizontal equity require that “similarly situated individuals . . . be taxed similarly . . .”⁴² Meanwhile, principles of vertical equity provide that “individuals . . . be taxed according to their ability to pay.”⁴³ To achieve both horizontal and vertical equity, most tax scholars agree that the system should include multiple tax bases.⁴⁴ For example, in an effort to achieve “fairness,” the current federal tax system includes “income, property or wealth, and consumption” in the mix of tax bases.⁴⁵ Of course, this is a grossly generalized description. People fundamentally disagree about what is “fair,” which persons are “similarly situated,” and how we determine an individual’s “ability to pay.”⁴⁶

To understand the debate surrounding the federal estate tax, it is also important to understand, in basic terms, what the federal estate tax is and what other options are available. A good portion of the scholarly debate over the federal estate tax examines the possibility of moving

38. *Id.*

39. *See infra* Part VI.

40. *See, e.g.,* Linda M. Beale, *Congress Fiddles While Middle America Burns: Amending the AMT (and Regular Tax)*, 6 FLA. TAX REV. 811, 818 (2004); Leo P. Martinez, “*To Lay and Collect Taxes*”: *The Constitutional Case for Progressive Taxation*, 18 YALE L. & POL’Y REV. 111, 115 (1999); Nancy E. Shurtz, *A Critical View of Traditional Tax Policy Theory: A Pragmatic Alternative*, 31 VILL. L. REV. 1665, 1669–71 (1986).

41. *See* STEPHANIE J. WILLBANKS, *FEDERAL TAXATION OF WEALTH TRANSFERS: CASES AND PROBLEMS* 10 (2d ed. 2008).

42. *Id.*; *see also* David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL’Y REV. 43, 43 (2006).

43. WILLBANKS, *supra* note 41; *see also* Shurtz, *supra* note 40, at 1671.

44. *See* WILLBANKS, *supra* note 41; Shurtz, *supra* note 40.

45. *See* WILLBANKS, *supra* note 41.

46. *See, e.g.,* Beale, *supra* note 40; Shurtz, *supra* note 40, at 1671.

from a federal estate tax to some other taxing regime.⁴⁷ These other regimes could affect aspects of horizontal or vertical equity. The merits of those arguments are beyond the scope of this Article.

Any time money or property changes hands we have an opportunity to tax the transaction. In an overly simplistic sense, we have two options: (1) tax the transferee on the *receipt* of property; or (2) tax the transferor on the *transfer* of property. The federal tax system utilizes both options. With respect to the gratuitous transfer of property occurring at death, both options are feasible and likely constitutional.

A. Tax the Receipt of Property

Two methods of taxing the receipt of property from a decedent are commonly proposed: (1) including inheritances within the income tax; and (2) imposing an inheritance tax. The proposals are similar in many respects.

1. Income Tax Approach

A relatively simple way to tax property transferred at death is to include inheritances within the scope of gross income.⁴⁸ The federal income tax imposes a tax on the receipt of “income” by a taxpayer during the calendar year.⁴⁹ Every law student in an introductory income tax course learns that income includes all “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”⁵⁰ If not for a specific exception, this broad definition of income would clearly include any inheritance received by a taxpayer. However, the Internal Revenue Code (IRC) specifically *excludes* inheritances and gifts from the definition of gross income.⁵¹ A very simple way to tax gratuitous transfers of property is to simply repeal that exclusion and include the receipt of any inheritance within gross income of a taxpayer.⁵² This approach would likely meet constitutional requirements and

47. See Anne L. Alstott, *Equal Opportunity and Inheritance Taxation*, 121 HARV. L. REV. 469, 493–96 (2007); Lily L. Batchelder, *What Should Society Expect From Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 2 (2009); Dodge, *supra* note 10, at 1178–80; Joseph M. Dodge, *Comparing a Reformed Estate Tax with an Accessions Tax and an Income-Inclusion System, and Abandoning the Generation-Skipping Tax*, 56 SMU L. REV. 551 *passim* (2003); Joseph M. Dodge, *Replacing the Estate Tax With a Reimagined Accessions Tax*, 60 HASTINGS L.J. 997 *passim* (2009); Joseph M. Dodge, *Taxing Gratuitous Transfers Under a Consumption Tax*, 51 TAX L. REV. 529 *passim* (1996); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283, 350–56 (1994).

48. See WILLBANKS, *supra* note 41, at 8.

49. See 26 U.S.C. § 1 (2006 & Supp. V 2011).

50. *Comm'r v. Glenshaw Glass Co.*, 346 U.S. 426, 431 (1955).

51. See 26 U.S.C. § 102(a) (2006).

52. See WILLBANKS, *supra* note 41, at 8.

would be fairly simple to administer.⁵³ Additionally, taxing inheritances as income could simplify the tax code.⁵⁴

In all likelihood, the real problem with implementing this approach is that gifts and inheritances have specifically been excluded from the scope of the federal income tax for 100 years. Scholars and politicians have many explanations and justifications for the exclusion.⁵⁵ In reality, it may just be a historical accident of sorts.⁵⁶ For instance, some contend that including inheritances in the federal income tax system might be somehow “unfair.” The federal income tax imposes a tax based on the value of property received by an individual taxpayer in any given year.⁵⁷ Income taxes are typically subject to a progressive rate scale, meaning that larger accumulations of wealth in a given year are subject to progressively higher tax rates.⁵⁸ If a taxpayer receives an exceptionally and uncharacteristically large amount of income in one year, the IRC generally treats him no differently than a taxpayer receiving that amount of income every year. In other words, this approach essentially treats an inheritance as a windfall and would tax it no differently from any other windfall—for example, lottery winnings. Some people perceive a distinction between property passing to you by death—often from a close family member—and a winning lottery ticket or exceptionally large earnings. As a result, some people believe the income tax approach is inherently unfair because it would “tax[] unusually large receipts at progressively higher rates.”⁵⁹ In other words, including inheritances within the scope of the income tax would run afoul of principles of horizontal equity. A person receiving an inheritance is, perhaps, not similarly situated to other taxpayers with comparable amounts of income. Moreover, taxing inheritances as income could violate principles of vertical equity where the property is illiquid or not fungible. In that case, the taxpayer would not have the same ability to pay as a taxpayer holding cash.⁶⁰ On the other hand, some commentators specifically endorse including inheritances within the scope of gross income as a way to regulate inherited wealth.⁶¹ As one advocate of this approach explains, “[B]y imposing the tax directly on those who receive the money, Congress could have a more honest discussion regarding the appropriate taxation of inherited wealth.”⁶²

53. See *id.* at 8–9.

54. See Dodge, *supra* note 10, at 1191.

55. See, e.g., Marjorie E. Kornhauser, *The Constitutional Meaning of Income and the Income Taxation of Gifts*, 25 CONN. L. REV. 1, 38 (1992).

56. See *id.*

57. See 26 U.S.C. § 1 (2006 & Supp. V 2011).

58. See *id.*

59. WILLBANKS, *supra* note 41, at 9.

60. See Sergio Pareja, *Taxation Without Liquidation: Rethinking “Ability to Pay,”* 2008 WIS. L. REV. 841, 858–59 (proposing a wealth transfer system that treats liquid and illiquid assets differently in light of ability-to-pay concerns).

61. Ray D. Madoff, *Give Up on the Estate Tax*, N.Y. TIMES, Dec. 14, 2010, at A31.

62. *Id.*

2. Inheritance Tax Approach

A second way to tax the gratuitous receipt of property at death is the inheritance tax.⁶³ Like an income tax, an inheritance tax taxes the receipt of property by a particular beneficiary.⁶⁴ However, inheritance taxes, which are fairly common at the state and local tax level, typically operate independently of the income tax system.⁶⁵ Inheritance taxes, therefore, are not subject to the same rate scales as income taxes. That result could be achieved within the income tax setting by simply imposing a different rate of tax on inheritances, much as we do for long-term capital gains.⁶⁶ However, every existing inheritance tax ties the rate of tax imposed to the familial relationship between the decedent and the recipient.⁶⁷ Specifically, receipts from close relatives are subject to lower rates of tax than receipts from distant relatives or non-relatives.⁶⁸ For that reason, the policy implications are somewhat distinct from the implications of taxing an inheritance as income.

The familial relationship-based rate structure essentially requires the government to enact legislation defining a taxpayer's family and effectively ranking degrees of familial relations, a particularly problematic prospect given the changing views of family and society. Furthermore, familial relationship-based rate structures can create horizontal and vertical inequity. By treating taxpayers differently based on government notions of family, an inheritance tax may ignore economic reality.⁶⁹ The inheritance tax presupposes that close relatives are not similarly situated to other heirs. Furthermore, by favoring transfers to close relatives, an inheritance tax wholly ignores their ability to pay. Finally, this approach seems to actually encourage accumulating wealth within the family rather than spreading the wealth around.

B. Tax the Transfer of Property

The modern estate tax imposes a tax on the transferor of property, the decedent, and his estate.⁷⁰ Sometimes described as "an excise tax on the privilege of transferring property at death,"⁷¹ the estate tax looks at

63. By extension, this could include an accessions tax.

64. WILLBANKS, *supra* note 41, at 8.

65. See, e.g., Ashlea Ebeling, *Where Not to Die in 2012*, FORBES (Dec. 22, 2011, 1:11PM), <http://www.forbes.com/sites/ashleaebeling/2011/12/22/where-not-to-die-in-2012> (providing an interactive map of state-level inheritance and estate taxes).

66. See 26 U.S.C. § 1(h) (2006 & Supp. V 2011).

67. See, e.g., Lily L. Batchelder, *What Should Society Expect from Heirs? The Case for a Comprehensive Inheritance Tax*, 63 TAX L. REV. 1, 78 (2009) ("It is true that every U.S. state and nineteen of the twenty-three countries with an inheritance tax impose higher taxes on gifts and bequests received from nonrelatives. Often, the tax rate rises or the exempt amount falls as the relationship to the donor becomes more attenuated.").

68. *Id.*

69. See Bridget J. Crawford, *The Profits and Penalties of Kinship: Conflicting Meanings of Family in Estate Tax Law*, 3 PITTSBURGH TAX REV. 1, 5-6 (2006).

70. See 26 U.S.C. § 2002 (2006); Treas. Reg. § 20.2002-1 (1960).

71. WILLBANKS, *supra* note 41, at 7.

the value of all of the property a decedent owned at the time of his death and applies a tax directly on the gratuitous transfer of that property.⁷² Unlike the income tax and the inheritance tax approaches, the estate tax looks at the property in the hands of the decedent rather than the property received by any particular beneficiary.⁷³ Thus, the decedent's estate, not the beneficiary is primarily liable for the payment of the tax.⁷⁴ The current federal system employs an estate tax.⁷⁵ However, the current system does not apply an estate tax in the strict sense. For instance, like an inheritance tax, transfers to certain beneficiaries—namely charities and surviving spouses—are treated favorably.⁷⁶ In fact, these transfers are essentially exempt from the estate tax.⁷⁷ Furthermore, decedents receive a credit against the tax.⁷⁸ Under the current system, the credit is so large the decedent will not face any estate tax until the amount of property he transfers to someone other than a charity or his surviving spouse exceeds \$5 million.⁷⁹ As a result, very few estates are subject to the tax, and it does not raise a significant amount of revenue.⁸⁰ However, keeping the current federal estate tax system in place, this could easily be changed by adjusting the various credits and deductions available.

IV. TAX POLICY AND THE NATURE OF POLICY DEBATES

Congress uses tax laws in order to promote a variety of social and political policies. The heart of most current tax debates stems from the non-revenue purposes of the tax laws, namely (1) the redistribution of wealth, and (2) the regulation of private sector activity.⁸¹ Although Americans disagree about the amount of revenue that should be raised, the simple notion of imposing a variety of taxes to raise revenue is not particularly controversial. Using the federal tax system to achieve some social-engineering function, however, is a different story,⁸² and that is the source of a good deal of policy debate. Because the federal tax system is one of the federal government's most powerful tools, regulatory and redistributive policies are absolutely pervasive in the federal tax system.

A. Typical Policy Debate: Home-Mortgage Interest Deduction

To understand the nature of a tax policy debate from a sociological perspective, let's begin with a familiar example: the income tax deduc-

72. See 26 U.S.C. § 2001 (2006 & Supp. V 2011).

73. See *id.*

74. See 26 U.S.C. § 2002.

75. See 26 U.S.C. § 2001.

76. See 26 U.S.C. § 2055 (2006 & Supp. V 2011) (charitable deduction); 26 U.S.C. § 2056 (2006) (marital deduction).

77. See sources cited *supra* note 76.

78. 26 U.S.C. § 2010 (2006 & Supp. V 2011).

79. *Id.*

80. See, e.g., James R. Repetti, *The Case for the Estate and Gift Tax*, 86 TAX NOTES 1493, 1493 (2000).

81. Avi-Yonah, *supra* note 11.

82. See *id.*

tion allowed for home-mortgage interest. Few people seriously debate the fundamental legitimacy of the federal income tax as a means for raising government revenue. Rather, the major arguments surround the social engineering aspects of the tax. Congress often expresses a redistributive or regulatory goal in the form of a deduction or credit, which amounts to a government expenditure promoting the activity.

The home-mortgage interest tax deduction is an example most Americans will understand and is a good illustration of this idea. The IRC allows individual taxpayers to deduct the interest paid on their home mortgage from their gross income.⁸³ As a deduction, this aspect of the federal income tax does not raise revenue. Rather, its main goals relate to taxation's other two purposes: redistribution and regulation. The deduction is redistributive because it amounts to a governmental expenditure aimed at assisting taxpayers in acquiring property.⁸⁴ This would help taxpayers literally buy in to the American dream of home ownership.⁸⁵ The deduction is regulatory because it supposedly "steer[s] private sector activity in the directions desired by government[.]"⁸⁶ In theory, home ownership results in many societal economic benefits; therefore, our government seeks to incentivize ownership through this deduction.⁸⁷

After the housing market collapse, some commentators questioned the wisdom of this incredibly popular deduction.⁸⁸ Opponents of the deduction argue that it incentivized overinvestment in housing, which contributed to the collapse in the housing market.⁸⁹ Moreover, the benefits of the deduction increase with the taxpayer's income and the size of his mortgage, prompting opponents to characterize it as "the most inequitable and inefficient provision in the Internal Revenue Code."⁹⁰ Both sides of this argument have merit.⁹¹ But, repeal is very unlikely: this deduction is *incredibly* popular. Naturally, many Americans support the deductions for which they are eligible. But it is more than that. Knowing what we do about issue framing, that is unsurprising. Proponents framed their argument in terms of promoting the "American dream," and this dream drew on a number of core values. The opposition, in contrast, primarily frames

83. See 26 U.S.C. § 163(h) (2006).

84. See Roberta F. Mann, *The (Not So) Little House on the Prairie: The Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1352–53 (2000).

85. See Robert Hardaway, *The Great American Housing Bubble: Re-Examining Cause and Effect*, 35 U. DAYTON L. REV. 33, 51–52 (2009); see also Mann, *supra* note 84, at 1348–50; Ben Steverman, *A Taxing Debate: The Mortgage-Interest Deduction*, BLOOMBERG (Oct. 18, 2011, 9:13AM), <http://www.bloomberg.com/news/2011-10-17/a-taxing-debate-the-mortgage-interest-deduction.html>.

86. Avi-Yonah, *supra* note 11.

87. See, e.g., Mann, *supra* note 84, at 1354 (discussing various arguments that homeownership improves society and the economy).

88. See, e.g., Hardaway, *supra* note 85, at 33; Steverman, *supra* note 85.

89. See, e.g., Hardaway, *supra* note 85, at 46; Steverman, *supra* note 85.

90. Steverman, *supra* note 85 (quoting Dennis J. Ventry Jr., a tax law specialist from the University of California Davis School of Law); see also Hardaway, *supra* note 85, at 50–51.

91. See Mann, *supra* note 84, at 1353.

its argument in terms of practicality and efficiency—values which may rank lower in many Americans' value hierarchies. And, perhaps more importantly, the opposition has not attained a significant level of media saturation compared to proponents. As a result, many Americans are likely unfamiliar with the opposition's frame.⁹²

B. Atypical Policy Debate: The Federal Estate Tax

The federal estate tax, and by extension the federal gift tax and generation-skipping transfer tax, is an example of this type of debate taken to the extreme. Unlike other tax policy debates, the extreme positions are expressed not only by academics, but also by widely recognized public figures, as illustrated by your pop quiz. And their positions are *truly* extreme. Given what we know about sociology, issue framing, and public opinion, their positions are problematic and irresponsible. Rather than challenging a single aspect of the overall estate tax system, like a specific credit or deduction, opponents advocate eliminating the tax in its entirety.⁹³ And some proponents go so far as to advocate using it to entirely eliminate inherited wealth.⁹⁴ Other proponents would keep the tax regardless of actual revenue need.

For that reason, this debate is inherently different from other tax policy debates. The debate concerning the redistributive and regulatory policies of the home-mortgage interest deduction, for instance, rarely results in calls for repeal of the federal income tax *in its entirety*. That debate, and similar debates, focuses on the legitimacy of the policy advanced and the effectiveness of the IRC in promoting the policy. The estate tax debate, however, is full of extremists and particularly plagued by misleading rhetoric framed in terms of core American values. Opponents are willing to fully abandon a constitutional source of federal revenue, during a time when that revenue is badly needed, because of the social engineering goals of the tax. Some proponents support the social aspects of the tax so passionately that they would keep the tax even during times of government surplus. And these arguments are particularly infuriating when we consider that in its century-long existence, the modern estate tax has never *actually* accomplished its purported goal of regulating inherited wealth.⁹⁵

Your pop quiz illustrates the current debate and the fundamental fallacies it perpetuates. Both sides frame the debate in terms of fundamental American values. The values they point to are contradictory. To propo-

92. See Brewer, *supra* note 5.

93. See, e.g., *Does the Death Tax Have a Date with the Grim Reaper?*, LIFEHEALTHPRO (Mar. 1, 2012), <http://www.lifehealthpro.com/2012/03/01/does-the-death-tax-have-a-date-with-the-grim-reape>.

94. See Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69, 72–73 (1990).

95. See DANIEL MILLER, JOINT ECON. COMM., 105TH CONG., THE ECONOMICS OF THE ESTATE TAX 5–6 (1999).

nents, the estate tax ensures the core American values of democracy and equality of opportunity by taking wealth out of the hands of the richest Americans and returning it back into society.⁹⁶ The redistribution furthers democracy by ensuring equality of opportunity.⁹⁷ It ensures that no one starts life on better footing simply by winning the “parent lottery.” These are emotionally powerful arguments supported by few facts. For instance, consider Warren Buffett’s argument: “Dynastic wealth, the enemy of a meritocracy, is on the rise. Equality of opportunity has been on the decline A progressive and meaningful estate tax is needed to curb the movement of a democracy toward plutocracy.”⁹⁸ Recent reports do seem to support a part of Buffett’s argument—that is, that America’s wealth is concentrated in the hands of relatively few Americans.⁹⁹ Furthermore, excessive concentrations of wealth *do* result in very real social harms and tend to undermine our values of equality and democracy.¹⁰⁰ However, very little, if any, evidence indicates this situation directly results from inherited wealth.¹⁰¹ Although Buffett and others correctly identify a potential problem, little evidence supports the argument that the estate tax is an appropriate or even effective remedy to that problem.¹⁰² Despite its existence for nearly 100 years, “[n]o one knows whether the estate tax minimizes concentrations of wealth.”¹⁰³ In truth, the modern problem of wealth inequalities more likely stems from problems with our economic system, not our political system.¹⁰⁴

The quotation from Bill Gates Sr. takes a slightly different approach by arguing that those Americans who financially benefit the most during life owe a debt to this country.¹⁰⁵ Gates is appealing, in part, to our humanitarian values. He is also appealing to our equality values. To Gates and other proponents, our core American values enabled their families to achieve such great success, and as a result, those who benefit the most from American society owe society a debt for that success. In Gates’s words: “Society has a just claim on our fortunes and that claim goes by the name estate tax.”¹⁰⁶ However, that is merely political rhetoric.¹⁰⁷ Although wealthy Americans might have some moral obligation to give

96. See Drawbaugh, *supra* note 1.

97. See *id.*

98. *Id.* (quoting Warren Buffett).

99. See *Income Distribution: Poor, Rich, and Richest*, HUFFINGTON POST (Oct. 25, 2011, 12:53PM), http://www.huffingtonpost.com/2011/10/25/income-distribution-in-2008_n_1030201.html.

100. See WILLBANKS, *supra* note 41, at 13.

101. See *id.*

102. See *id.* at 14.

103. *Id.*

104. See *e.g.*, James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825, 831–33 (2001).

105. See Gates, *supra* note 4.

106. *Id.*

107. Cf. William G. Gale & Joel Slemrod, *Rhetoric and Economics in the Estate Tax Debate*, 54 NAT’L TAX J. 613, 623–24 (2001).

back to society, this does not necessarily mean Americans should have a legal obligation to do so. Moreover, it is unclear whether the estate tax, or any tax for that matter, is an appropriate, effective, or efficient mechanism for compelling compliance with that obligation. In fact, history indicates the contrary is true.¹⁰⁸

Arguments made by opponents of the tax are equally flawed. To opponents, the estate tax is antithetical to many of our core American values, including achievement/success, activity/work, and material comfort. The estate tax punishes achievement and success by taxing income that has already been taxed once during life. Similarly, the estate tax prevents activity and work by harming family farms and businesses. Again, these are emotionally powerful arguments. But they are also arguments unsupported by the facts. Both Mitt Romney and George W. Bush make the double-taxation argument in your pop quiz. That argument is flawed in some respects and an oversimplification in others. The federal tax system taxes taxpayers, not assets, and “[i]t is a *fact* that money used to make bequests . . . *may* be taxed more than once.”¹⁰⁹ In truth, many assets in our economy are subject to multiple layers of tax, of which the estate tax is only one.¹¹⁰ Nothing is inherently unfair about that outcome. On the flip side, many assets taxed at death were *never* taxed by the income tax.¹¹¹ And, if they were taxed, they were likely taxed at preferential capital gains rates.¹¹²

The quote from former President Bush reflects the other prominent argument made by opponents: the estate tax “hurt[s] the source of most new jobs in this country—America’s small business and farms.”¹¹³ The family-farm-and-small-business argument invokes another aspect of the American dream: work and activity should be rewarded, not punished. We should not impose burdens on those job creators. By framing the issue this way, opponents make an incredibly powerful argument, particularly in a struggling economy when people tend to place a high value on their own immediate job security. At its core, this argument supposedly reflects the concern that some business owners may lack the cash liquidity at death to pay the estate tax without having to sell an interest in their business.¹¹⁴ As a result, opponents contend, hard work is punished, businesses are destroyed, and jobs are lost. But the facts do not support this argument.¹¹⁵ Quite simply, the contention that the estate tax destroys

108. See *infra* Part V.

109. Gale & Slemrod, *supra* note 107, at 624.

110. *Id.* at 624–25.

111. *Id.*

112. *Id.*

113. Trull, *supra* note 3 (quoting George W. Bush).

114. WILLBANKS, *supra* note 41, at 17.

115. See *id.* at 17–18; see also Gale & Slemrod, *supra* note 107, at 618; Robert Frank, *Does the Estate Tax Hurt Farmers and Family Businesses?*, WALL ST. J. (Dec. 16, 2010, 11:51AM), <http://blogs.wsj.com/wealth/2010/12/16/does-the-estate-tax-hurt-farmers-and-family-businesses/>.

family farms and small businesses is a myth.¹¹⁶ Moreover, the IRC itself provides many accommodations aimed at alleviating harsh results of this largely illusory problem.¹¹⁷

V. VIEWING THE HISTORY OF FEDERAL ESTATE TAX THROUGH A SOCIOLOGY LENS

The issue framing in the current federal estate tax debate is toxic and irresponsible. In a time of national exigency, when revenue is desperately needed, the federal estate tax has the potential to provide a safety net. History shows us that potential. But history also shows us where we went wrong. Attaching a social policy to the tax in its entirety, rather than one credit or deduction, rendered that safety net unusable. The social policy placed fundamental and deeply entrenched American values in irreconcilable conflict with each other. Moreover, history shows us that the manner in which the debate is presently framed no longer makes sense, if it ever did. Proponents frame the issue in terms that made sense during colonial and revolutionary times. The economic landscape of our country has obviously changed dramatically since those days. As a result, this argument is no longer applicable. Opponents frame the issue in the manner outlined by Treasury Secretary Andrew Mellon in the 1920s. His positions were largely motivated by a single unique case, the Estate of Frick. His positions were not really supported by the facts when he made them nearly 100 years ago. They remain equally unsupportable today. Yet, because both sides framed the issue so powerfully in terms of core American values, the debate continued along the same lines relatively unaltered. Enough is enough. The time has come to reframe the issue in terms that are actually supported by facts.

A. Revolutionary Core American Values and Politics

Many of our core American values developed as a result of the shared experiences of colonial and revolutionary Americans, and that is particularly true of the values commonly seen in the federal estate tax debate. Williams explained that from a historical standpoint, our values developed “out of religious tradition, frontier experience, ceaseless change, vast opportunity, and fluid social structure.”¹¹⁸ For instance, activity and work were “required for *group* survival along the moving frontier from the first settlements until the continent had been won.”¹¹⁹ The Protestant religious tradition supported this value, viewing successful work and activity as a “sign of grace.”¹²⁰ Furthermore, the bulk of America’s early population originated from the working classes in Europe and

116. See WILLBANKS, *supra* note 41, at 17–18; see also David Cay Johnston, *Talk of Lost Farms Reflects Muddle of Estate Tax Debate*, N.Y. TIMES, Apr. 8, 2001, at A1.

117. WILLBANKS, *supra* note 41, at 18.

118. WILLIAMS, *supra* note 14, at 458–59 (citation omitted).

119. *Id.* at 459.

120. *Id.*

Britain.¹²¹ These same factors resulted in the emergence of equality of opportunity as a core value. Most colonists, being from middle- and lower-class origins, expressly rejected the class distinctions of Britain and Europe.¹²² As Williams observed, “Mass accessibility to abundant resources made it seem possible for ‘anyone to become a king on his own’ and thus helped to dissolve old hierarchies and social forms through movement, acquisition, and independence.”¹²³ The value of equality of opportunity was further made a part of our culture through “the deeply individualistic tendencies in Protestantism.”¹²⁴

These same factors shaped early American views on economics and politics. Revolutionary leaders were deeply concerned about the appropriate distribution of wealth and wanted to ensure equitable, but not necessarily equal, distribution.¹²⁵ To these leaders, appropriate wealth distribution could only be attained through appropriate political structures. Given the revolutionaries’ firsthand experience with the European and British class structures and monarchies, their concerns and beliefs were understandable. Political institutions had enabled and maintained these class distinctions. The decision to form a republic government was, in many ways, truly revolutionary. Americans understood that “if property were concentrated in the hands of a few in a republic, those few would use their wealth to control other citizens, seize political power, and warp the republic into an oligarchy.”¹²⁶ In the view of these early Americans, the political systems of Europe and Britain were the source of inequity.¹²⁷ The solution, in their minds, rested on the rejection of those political institutions. Specifically, they had to reject the political institutions that had enabled and maintained the aristocracy.

To the revolutionaries, appropriate wealth distribution depended on adopting a political system that utilized the labor theory of property, as epitomized by John Locke. Under this theory, “only an individual’s labor created property, and therefore the individual had sole right to possession and disposition of that property.”¹²⁸ “[P]roperty was the just reward of those who toiled” under this view.¹²⁹ Wealth achieved in a manner consistent with the American values of work and activity was acceptable and desirable. Aristocracy, and the policies that maintained it in Europe and

121. *Id.*

122. *Id.* at 472–73.

123. *Id.* at 473.

124. *Id.*

125. *Id.*

126. James L. Huston, *The American Revolutionaries, the Political Economy of Aristocracy, and the American Concept of the Distribution of Wealth, 1765–1900*, 98 AM. HIST. REV. 1079, 1080 (1993).

127. *Id.* at 1103–04.

128. *Id.* at 1081.

129. *Id.*

Britain, was the enemy of an appropriate distribution of wealth.¹³⁰ Given that mindset, the evolution of American inheritance laws is unsurprising.

B. Early American Inheritance Law and Policy

The origins of the federal estate tax, and the ensuing debate, are tied to the evolution of American inheritance laws. Early Americans relied heavily on English law in designing their own legal systems. The case of inheritance laws, however, was complicated by America's newly formed values, which were distinct from those of Britain.¹³¹ It was also complicated by America's desire to eradicate the political institutions that had enabled the aristocracy. From a philosophical standpoint, two views of inheritance were popular at the time. America could view the right to transfer property at death as a natural right or as a civil right, philosophies advocated by John Locke and William Blackstone, respectively.¹³² Both men, of course, were influential in shaping American law.

John Locke believed that men possessed certain inalienable, natural rights, including life, liberty, and property.¹³³ By extension, Locke contended that inheritance was similarly a natural right belonging to children.¹³⁴ This right, as Locke explained, went far beyond merely ensuring a decedent's children did not end up destitute.

For children being by the course of nature born weak and unable to provide for themselves, they have by the appointment of God himself, who hath thus ordered the course of nature, a right to be nourished and maintained by their parents; nay, a right not only to a bare subsistence, but to the conveniences and comforts of life as far as the conditions of their parents can afford it.¹³⁵

As a natural right, the right to inheritance was inalienable and could not be altered by law.

On the other hand, Blackstone took the position that inheritance was merely a civil right.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent

130. *See id.*

131. *See Repetti, supra* note 104, at 831.

132. *Id.* at 828–29.

133. Robert R. Baugh, *American Values: The Ties that Bind*, 112 *EDUC.* 217, 221 (2001).

134. 1 JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 68 (Thomas I. Cook ed., 1947) (1690).

135. *Id.*

right of property, vested in the ancestor himself, was no *natural*, but merely a *civil*, right.¹³⁶

Blackstone acknowledged that it was customary in many countries to leave property to your immediate family at your death.¹³⁷ However, in Blackstone's view, the fact that a decedent's family and children tended to be the recipients of his property did not mean that they were entitled to it as a matter of natural law.

America, ostensibly at least, adopted Blackstone's view of inheritance as a civil right.¹³⁸ Acceptance of that view had important consequences. As a civil right, inheritance was not necessarily a right that would later be protected by the Constitution.¹³⁹ As a civil, rather than a natural, right, government possessed a theoretically *unlimited* ability to regulate inheritances.¹⁴⁰ As one observer noted:

A right which exists solely by the creative act of the law can, of course, be taken away by law, or it can be limited or modified in any way which seems desirable. If the government should take the half or whole of every inheritance by its taxing power, no natural right would be violated.¹⁴¹

However, Americans probably never fully bought in to Blackstone's approach followed to its natural conclusion—that is, being able to transfer property at death is *merely* a privilege that government grants and that government can take away. That view would ultimately prove inconsistent with American values.

To colonial and revolutionary Americans, however, the civil-rights-versus-natural-rights debate was probably less important than the actual enactment of positive law. Although Americans accepted Blackstone's underlying theory of inheritance, they soon rejected the English law of inheritance as memorialized by Blackstone.¹⁴² English inheritance law in the time of Blackstone still maintained many aspects of its own complicated feudal past.¹⁴³ Eighteenth-century English inheritance law provided for the disposition of a decedent's property either pursuant to a will or, in the absence of a will, by the law of intestacy.¹⁴⁴ Progressive in some respects, feudal in others, “[t]he law controlling both testamentary and

136. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 11 (photo. reprint 2006) (1766).

137. See *id.* at 11–12.

138. See Ascher, *supra* note 94, at 77–78.

139. See *id.* at 84.

140. See *id.* at 78.

141. *The Federal Inheritance Tax*, THE OREGONIAN, Mar. 19, 1909, at 10.

142. See Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 9 (1977).

143. *Id.*

144. *Id.*

intestate succession was, to modern eyes, a frightfully complicated melange of half-modernized medievalisms."¹⁴⁵

Englishmen enjoyed fairly expansive freedom to dispose of property by will in whatever manner they deemed fit.¹⁴⁶ This was, in some respects, a departure from England's feudal past. However, some feudal practices remained. For instance, the doctrine of entail, a remnant of feudal England, allowed the testator to prevent certain beneficiaries from alienating the real property bequeathed to them, thus allowing the testator to continue controlling property from the grave.¹⁴⁷ The intestate scheme of property distribution showed even more aspects of feudal ideology. Primogeniture was the default intestacy scheme.¹⁴⁸ If a decedent died intestate, his eldest son inherited his real estate to the exclusion of other children.¹⁴⁹ The decedent's personal property was distributed among his children and his surviving spouse.¹⁵⁰

Both primogeniture and entail were critical to establishing and maintaining a landed aristocracy in England. To revolutionary Americans, these practices "were among the most important props of aristocratic society and generators of inequality."¹⁵¹ Initially, these practices continued in Colonial America.¹⁵² By the end of the Revolution, however, virtually all of the colonies expressly rejected primogeniture and entail.¹⁵³ At the time, Americans saw the abolition of primogeniture and entail "as one of the revolution's greatest achievements and guarantors of republican equality."¹⁵⁴ Revolutionary Americans knew from their own British and European experiences that large inheritances prohibited elective representative government.¹⁵⁵ Money is power and large accumulations of money *via* inheritance prevented men from having equal opportunity to participate in government.¹⁵⁶ Thus, Revolutionary Americans expressly rejected practices such as primogeniture and entail, which served mainly to preserve inherited wealth. Moreover, these English practices had "furnished the principle that defined the succession to the Crown and the peerage."¹⁵⁷ These were precisely the institutions Americans sought to eradicate.

145. *Id.* at 10.

146. *Id.*

147. *See id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. Huston, *supra* note 126, at 1090.

152. Katz, *supra* note 142, at 10-11.

153. *Id.* at 13.

154. Huston, *supra* note 126, at 1090.

155. Ascher, *supra* note 94, at 94.

156. *Id.* at 93-94.

157. Katz, *supra* note 142, at 11.

Looking to break with English tradition and embracing the new “American” values, Thomas Paine and Thomas Jefferson were two of the most vocal opponents of inherited wealth at the time.¹⁵⁸ Both men framed the issue in terms of core American values. These frames remain relatively unaltered in the modern federal estate tax debate—a debate for which they are no longer well suited. Thomas Jefferson argued that inherited wealth led to an “artificial aristocracy, founded on wealth and birth, without either talent or virtue.”¹⁵⁹ Paine similarly viewed inheritance as a possible threat to representative government.

To the evil of monarchy we have added that of hereditary succession; and as the first is a degradation and lessening of ourselves, so the second, claimed as a matter of right, is an insult and an imposition on posterity. For all men being originally equals, no one by birth could have a right to set up his own family in perpetual preference to all others for ever, and through himself might deserve some decent degree of honors of his contemporaries, yet his descendants might be far too unworthy to inherit them.¹⁶⁰

Both Paine and Jefferson presented various ideas for eliminating and preventing the perceived injustices perpetuated by English inheritance practices.¹⁶¹ They advocated for abolishing entail and primogeniture.¹⁶² They proposed more egalitarian schemes of intestacy that divided property among all children, or at least all male children, equally.¹⁶³ These propositions found their way into positive law. But Paine and Jefferson went further. Viewing inheritance as a merely civil right, both men suggested that government could limit the ability of any man to inherit a vast fortune.¹⁶⁴ For instance, Paine proposed a progressive inheritance tax that would limit the amount of wealth that could be inherited by any individual.¹⁶⁵ Under Paine’s proposal, the marginal tax rates rose to 100% on the largest estates, thereby prohibiting the inheritance of wealth beyond a certain predetermined point.¹⁶⁶ Paine and Jefferson painted their proposals as breaking from the English traditions of monarchy and aristocracy. Rather, their proposals promoted freedom and equality of opportunity. It is easy to see why these arguments were fairly well received. They appealed to the American values most prevalent at the time.

158. See Repetti, *supra* note 104, at 830–31.

159. 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, 538 (2005).

160. *Id.*

161. *See id.*; see also Katz, *supra* note 142, at 12–13.

162. *See* Lerud, *supra* note 159.

163. *Id.* at 538–39.

164. *See id.*

165. Ascher, *supra* note 94, at 94 n.134.

166. *Id.*

C. Early Federal Death Taxes

Early federal estate and inheritance taxes had little, if anything, to do with promoting any social policies related to inherited wealth. These taxes were enacted with the rather modest goal of generating needed revenue during times of war or crisis.¹⁶⁷ The American experience with taxing property transfers taking place at death officially began with the Stamp Act of July 6, 1797.¹⁶⁸ Despite its stated policy of neutrality, the United States was increasingly impacted by the unrest in Europe stemming from the French Revolution, which had begun some years earlier.¹⁶⁹ The various international tensions prompted Congress to improve and expand the American naval forces.¹⁷⁰ To raise the necessary revenue for this naval development, Congress enacted a system of stamp duties, which included certain stamp duties relating to death and probate.¹⁷¹ Specifically, the 1797 Stamp Act required the purchase and use of federal stamps in connection with various estate-related legal documents such as inventories, receipts for legacies, probates of wills, and letters of administration.¹⁷² Rates were fairly modest, and shares of the estate passing to surviving wives, children, or grandchildren were exempt.¹⁷³ Eventually, the international tensions abated and with them the need for additional revenue. Congress repealed the 1797 Stamp Act in 1802.¹⁷⁴

Americans did not see this sort of federal tax again until the Civil War, some sixty years later. Congress passed the Revenue Act of 1862 in order to raise the additional funds necessitated by the Civil War.¹⁷⁵ The Revenue Act of 1862 included a federal stamp tax on the probate of wills and letters of administration, much like the prior Stamp Act.¹⁷⁶ However, the new tax imposed an inheritance tax on the receipt of personal property rather than a stamp tax.¹⁷⁷ Like most inheritance taxes, the 1862 tax consisted of graduated rates depending on the closeness in the familial relationship between the decedent and the recipient of the property.¹⁷⁸ Once again, the rates were fairly modest.¹⁷⁹ Pursuant to the Revenue Act

167. See Lerud, *supra* note 159, at 517.

168. See JOHN R. LUCKEY, CONG. RESEARCH SERV., A HISTORY OF FEDERAL ESTATE, GIFT, AND GENERATION-SKIPPING TAXES 2 (2005); Louis Eisenstein, *The Rise and Decline of the Estate Tax*, 11 TAX L. REV. 223, 225 (1956).

169. See LUCKEY, *supra* note 168.

170. *Id.*

171. *Id.*

172. *Id.* at 3.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 4.

179. Rates varied from 0.75% to 5% depending on the degree of familial relationship between the decedent and beneficiary. Estates less than \$1,000 and bequests to the surviving spouse were exempt from the tax. See Darien B. Jacobson et al., *The Estate Tax: Ninety Years and Counting*, 27 I.R.S. STAT. OF INCOME BULL. 118, 119 (2007).

of 1864, Congress increased the inheritance tax rates and included the transfer of real property within the scope of the inheritance tax.¹⁸⁰ After the war, Congress quickly repealed these taxes.¹⁸¹

Along with the Spanish–American War came the re-emergence of federal taxes on transfers of property at death. These taxes were still not aimed at preventing inherited wealth. Congress passed the War Revenue Act of 1898, again with the simple goal of financing a war.¹⁸² The 1898 Act included a tax on the transfer of personal property at death.¹⁸³ As with prior incarnations of federal transfer taxes, the 1898 tax exempted transfers to surviving spouses.¹⁸⁴ Rates depended on both the size of the estate and the degree of familial relationship between the decedent and the beneficiary, resulting in a tax with characteristics of both an inheritance tax and an estate tax.¹⁸⁵ Once again, Congress repealed the tax shortly after the end of the war.¹⁸⁶

These first few incarnations of federal inheritance taxes were primarily, if not exclusively, motivated by the need for revenue.¹⁸⁷ Although the election to impose an inheritance tax rather than an estate tax could be indicative of some underlying social policy, it does not appear that much thought was given to any social policy at the time.¹⁸⁸ Rather, the taxes quite simply existed to raise revenue in a manner that would not place any undue hardship on taxpayers. The taxes were relatively uncontroversial, and most people assumed that death taxes would only be used in times of exigency.¹⁸⁹

D. Rise of the Manufacturing Aristocracy and an Era of Change

By the late 1800s, America's economic landscape had changed significantly.¹⁹⁰ By that point, achievement and success—particularly secular occupational achievement and success—were thoroughly entrenched in the American value system.¹⁹¹ For the first time, however, Americans faced a conflict between those values and the equally fundamental value of equality of opportunity.¹⁹² Rejecting the economic and social restraints faced in Britain and Europe “could only lead under the historical circumstances to the emergence of what [Tocqueville] called a manufacturing

180. Under the 1864 Act, rates ranged from 1% to 6%. *Id.*

181. *Id.*

182. *Id.* at 120.

183. Lerud, *supra* note 159, at 523.

184. *Id.* at 524.

185. *Id.*

186. *Id.* at 525.

187. Eisenstein, *supra* note 168, at 226.

188. *Id.*

189. *See id.*; see also LUCKEY, *supra* note 168, at 3.

190. Eisenstein, *supra* note 168, at 226.

191. WILLIAMS, *supra* note 14, at 454.

192. *Id.* at 473.

aristocracy.”¹⁹³ The era of the robber barons laid the groundwork for a major, unavoidable, and continuing tension between American values.

The Industrial Revolution and the transforming economy changed the concentration of wealth in America in measurable ways by the late nineteenth century. Americans saw vast amounts of wealth become concentrated in the hands of a few industrialists.¹⁹⁴ This “manufacturing aristocracy” presented a dilemma. On the one hand, Americans embraced the “rags to riches” stories embodied by these elite few.¹⁹⁵ As Williams observed, “The ‘success story’ and the respect accorded to the self-made man are distinctly American, if anything is.”¹⁹⁶ Therefore, the members of this manufacturing aristocracy embodied the upward mobility that was part of the promised American dream.¹⁹⁷ Through hard work, anyone could achieve great success.

On the other hand, the growing wealth inequities revived some of the concerns expressed by Jefferson and Paine regarding inherited wealth. Many Americans continued to believe that inherited wealth ran afoul of the principle of equality of opportunity because it gave some individuals a decided advantage due simply to parentage.¹⁹⁸ The economics *seemed* to support the concern that the dangers of inherited wealth would be soon realized. By the late 1800s, wealth inequality reached a high point. In the period between 1774 and 1900, the concentration of the country’s total wealth in the hands of the richest 1% of Americans rose dramatically: from 15% in 1774; to 29% in 1860; to 50% by 1900.¹⁹⁹ Thus, by 1900, Americans saw great disparities between the richest Americans and the poorest—and even between the richest Americans and everyone else.

Americans were conflicted. To many, the promise of America and capitalism was the potential for upward mobility. The industry barons of the era embodied this dream. But whether the descendants of these barons should inherit these vast fortunes was another story. The Jefferson and Paine position re-emerged, this time taking aim at the American manufacturing aristocrats. Jefferson and Paine argued against the evils of a political system that had enabled European and British aristocrats to maintain their power. That political system prevented non-aristocrats from participating in the government, economy, and society. Thus, the Jefferson–Paine argument seemed well founded at the time of the Revo-

193. *Id.* at 474.

194. J. Bradford DeLong, *A History of Bequests in the United States*, in DEATH AND DOLLARS: THE ROLE OF GIFTS AND BEQUESTS IN AMERICA 33, 35 (Alicia H. Munnell & Annika Sundén eds., Brookings Institution Press 2003).

195. *See* WILLIAMS, *supra* note 14, at 454.

196. *Id.*

197. *Id.*

198. DeLong, *supra* note 194.

199. *Id.* at 49.

lution. To avoid exclusively aristocratic participation, America had to design a political system that would not enable an aristocracy. By the 1900s, Americans saw a new “aristocracy” formed on their own soil, and they used the same revolutionary-era arguments to advocate political changes aimed at suppressing it. But times had changed.

The wealth disparity seen during the turn of the century had little, if anything, to do with inherited wealth. The rather extreme wealth disparities resulted from capitalism, industry, and the changing economic landscape of America. There is scant data to support the assertion that these numbers resulted from inherited wealth.²⁰⁰ Rather, this era was “witness to an unprecedented number of mergers in the manufacturing sector of the economy, fueled by the development of a new form of corporate ownership, the holding company.”²⁰¹ These economic changes “resulted in the concentration of wealth in a relatively small number of powerful companies and . . . the businessmen who headed them.”²⁰² An estate tax would not likely do anything to remedy this wealth-disparity problem.²⁰³ Yet, progressives argued that an estate tax was essential to remedy the inequity.²⁰⁴ Proponents of the tax framed the issue in terms of core American values, and the public found that framing irresistible.

One of the prominent voices in the growing movement to prevent inherited wealth was Andrew Carnegie. In his influential essay, *Wealth*, Carnegie epitomized the country’s uncomfortable position with its new economic landscape.²⁰⁵ On the one hand, Carnegie championed industry and wealth accumulation.

The price which society pays for the law of competition, like the price it pays for cheap comforts and luxuries, is also great; but the advantages of this law are also greater still, for it is to this law that we owe our wonderful material development, which brings improved conditions in its train. . . . We accept and welcome, therefore, as conditions to which we must accommodate ourselves, great inequality of environment, the concentration of business, industrial and commercial, in the hands of a few, and the law of competition between these, as being not only beneficial, but essential for the future progress of the race.²⁰⁶

To Carnegie and others, lifetime wealth accumulation was their just reward for great talent: “That this talent for organization and management is rare among men is proved by the fact that it invariably secures for its possessor enormous rewards, no matter where or under what laws

200. See WILLBANKS, *supra* note 41, at 13.

201. Jacobson et al., *supra* note 179, at 120.

202. *Id.*

203. See *infra* Part VI.

204. Jacobson et al., *supra* note 179, at 120.

205. Andrew Carnegie, *Wealth*, 148 N. AM. REV. 653, 653 (1889).

206. *Id.* at 655.

or conditions.”²⁰⁷ On the other hand, with this great wealth and power, came a duty to dispose of that wealth in a manner that benefitted society as a whole. Those who benefitted most from living in America, like Carnegie, owed the country the largest debt. To Carnegie, that did not mean leaving it to heirs who had done nothing to earn it.²⁰⁸ His sentiments echoed those of Paine and Jefferson. Simply allowing a child to inherit the wealth would cause irreparable harm to society.

Why should men leave great fortunes to their children? If this is done from affection, is it not misguided affection? Observation teaches that, generally speaking, it is not well for the children that they should be so burdened. Neither is it well for the state. Beyond providing for the wife and daughters moderate sources of income, and very moderate allowances indeed, if any, for the sons, men may well hesitate, for it is no longer questionable that great sums bequeathed of tenuous work more for the injury than for the good of the recipients. Wise men will soon conclude that, for the best interests of the members of their families and of the state, such bequests are an improper use of their means.²⁰⁹

The movement against inherited wealth found other supporters.²¹⁰ However, it was still some time before the policy made its way into a serious political debate.

E. Enactment of the “Modern” Estate Tax

By the turn of the century, America embarked upon the beginning of several decades of sweeping social and political change. The great disparity in the concentration of wealth in America and the resulting conflict in fundamental American values provided the political will to make these changes. Much like the recent “Occupy” protestors, late nineteenth- and early twentieth-century reformers sought a variety of changes aimed at evening the playing field. The various reform movements largely reflected the attempt by the “little man” to impose some limits on the power of “big business.”²¹¹ The little man asked the government to step in and ensure equality of opportunity. However, some perceived this as an assault on achievement, success, and individualism. Although changes were widely popular, opposition began to grow.

Reformers sought to regulate corrupt corporations, eradicate the corrupting influences of alcohol and brothels, and break up large concentrations of wealth. Activists looked to the government as a mechanism for enforcing social change, rather than as an impediment to it. Congress established the Federal Trade Commission and passed the Clayton Anti-

207. *Id.*

208. *Id.* at 658.

209. *Id.*

210. See Eisenstein, *supra* note 168, at 235.

211. WILLIAMS, *supra* note 14, at 478.

trust Act. In 1906, Congress passed the Pure Food and Drug Act and the Meat Inspection Act. In 1911, the Supreme Court used the 1890 Sherman Antitrust Act to break up Standard Oil. In 1913, the Sixteenth Amendment was ratified, allowing the federal government to impose an income tax. These economic changes had a meaningful impact on America's economic landscape.

Against this backdrop of change, talk soon turned to using a federal tax in order to restrict inherited wealth. The proponents framed the argument in the same manner as did Paine and Jefferson, a frame that had wide popular appeal but was now inherently flawed. In 1906, President Theodore Roosevelt proposed

the adoption of some such scheme as that of a progressive tax on all fortunes, beyond a certain amount, either given in life or devised or bequeathed upon death to any individual—a tax so framed as to put it out of the power of the owner of one of these enormous fortunes to hand on more than a certain amount to any one individual.²¹²

Echoing Jefferson and Paine, Roosevelt continued to promote a tax to regulate inheritances. In his 1907 State of the Union Address, Roosevelt again framed the tax in terms of equality of opportunity.

The Government has the absolute right to decide as to the terms upon which a man shall receive a bequest or devise from another, and this point in the devolution of property is especially appropriate for the imposition of a tax.

. . . A heavy progressive tax upon a very large fortune is in no way such a tax upon thrift or industry as a like would be on a small fortune. No advantage comes either to the country as a whole or to the individuals inheriting the money by permitting the transmission in their entirety of the enormous fortunes which would be affected by such a tax; and as an incident to its function of revenue raising, such a tax would help to preserve a measurable equality of opportunity for the people of the generations growing to manhood.²¹³

This equality of opportunity frame caught on. In 1912, the Progressive Party announced: "We believe in a graduated inheritance tax as a national means of equalizing the holders of property."²¹⁴ The issue, however, was not without controversy. The debate generally turned on whether inheritance taxes should be reserved to state governments.²¹⁵

212. Eisenstein, *supra* note 168, at 228.

213. Theodore Roosevelt, State of the Union Address (Dec. 3, 1907), in H.R. Doc. No. 60-1, at xxi (1907).

214. Eisenstein, *supra* note 168, at 229.

215. Joseph J. Thorndike, *A Century of Soaking the Rich: The Origins of the Federal Estate Tax*, TAX ANALYSTS (July 10, 2006), <http://www.taxhistory.org/thp/readings.nsf/ArtWeb/880F5B5E62FE817F852571B0006851CA?OpenDocument>.

Opponents of the federal tax argued that it would impede the states' ability to raise much needed revenue.²¹⁶ Congress twice rejected the imposition of a federal estate or inheritance tax: once in 1909 and again in 1913.²¹⁷ But by 1916, things had changed.

Once again, America faced war. The First World War, and the events surrounding it, naturally caused Americans' value focus to temporarily shift. President Woodrow Wilson declared that "[t]he world must be made safe for democracy."²¹⁸ Making the world safe for democracy was an expensive proposition. Anticipating that, the Ways and Means Committee began investigating how best to raise additional revenue.²¹⁹ The Committee reported, "No civilized nation . . . collects so large a part of its revenues through consumption taxes as does the United States, and it is conceded by all that such taxes bear most heavily upon those least able to pay them."²²⁰ Thus, the Committee recommended a progressive estate tax as one of several mechanisms to more fairly raise the needed money.²²¹ Congress agreed and enacted the 1916 Revenue Act, which imposed a federal estate tax that is largely credited as being the first "permanent" federal estate tax.²²²

The 1916 tax shared many features with the current federal estate tax and is often referred to as the first "modern" estate tax. The tax was designed as an estate tax rather than an inheritance tax.²²³ As an estate tax, the 1916 tax was assessed based on the value of the decedent's estate as opposed to the value of any particular inheritance.²²⁴ Like the current estate tax, the value of the estate was increased for certain lifetime transfers made in contemplation of death, not intended to take effect at death, or for inadequate consideration.²²⁵ After taking into account certain exemptions for funeral expenses, administrative expenses, debts, losses, claims against the estate, and a general \$50,000 exemption, the 1916 tax was levied at progressive rates ranging from 1% to 10%.²²⁶

Some members of Congress *might* have been influenced by the popular equality of opportunity frame. However, the 1916 tax was not aimed at regulating inherited wealth. The primary reason Congress enacted the tax was the immediate need for additional revenue.²²⁷ In fact,

216. *Id.*

217. Eisenstein, *supra* note 168, at 229.

218. Woodrow Wilson, *Address to Congress Requesting Declaration of War on Germany (Apr. 2, 1917)*, in 2 DOCUMENTS OF AMERICAN HISTORY 132 (H. Commager ed., 10th ed. 1988).

219. Eisenstein, *supra* note 168, at 230.

220. *Id.*

221. *Id.*

222. *Id.*

223. LUCKEY, *supra* note 168, at 6.

224. *Id.*

225. *Id.*

226. *Id.* at 7.

227. See Eisenstein, *supra* note 168, at 231.

with a maximum rate of 10%, the tax could not impact inherited wealth in a meaningful way.²²⁸ Rates increased several times during the course of World War I, but each time was in response to an increased need for revenue.²²⁹ Some members of congress who voted in favor of increased rates may also have been looking to regulate inherited wealth, but that was not the overarching legislative intent.²³⁰ Nor was it the effect of the estate tax legislation.²³¹ As World War I ended, legislators considered whether to repeal or reduce the federal estate tax.²³² Before the 1916 tax, Americans largely assumed that an estate tax would only be used to raise the additional revenue needed in times of crisis.²³³ Although some political groups had advocated using the tax to regulate inherited wealth,²³⁴ most Americans probably never viewed that proposal as a serious possibility. In fact, the modern federal tax system was still very much in its infancy. Congress was just beginning to fully explore its ability to regulate the states and their citizens through its taxing and spending powers.

F. Andrew Mellon and the Framing of the Opposition

When Congress reduced but did not repeal the 1916 tax at the conclusion of the war, some people began questioning the appropriateness of the tax, and the modern debate began in full. The tenor of this debate was different from prior debates. Wealth disparities remained high in the early 1920s, and the idea of regulating inherited wealth retained popular appeal.²³⁵ If anything, the war had only made the members of the “manufacturing aristocracy” even richer.²³⁶ Thus, advocates of reform were anxious to retain the economic reforms attained during the war.²³⁷ In 1924, Congress actually *raised* the top rate from 25% to 40%.²³⁸ Congress additionally enacted a new gift tax to prevent evasion of estate tax through *inter vivos* gifts.²³⁹ Opponents of the tax were outraged.

Treasury Secretary Andrew Mellon called the rate increase “national suicide”²⁴⁰ and immediately embarked upon a very public campaign to repeal the tax in its entirety.²⁴¹ The estate tax was not Mellon’s only ob-

228. *See id.*

229. LUCKEY, *supra* note 168, at 6–7; Eisenstein, *supra* note 168, at 231.

230. Eisenstein, *supra* note 168, at 231.

231. *Id.*

232. *Id.*

233. *Id.*

234. *See* sources cited *supra* notes 213–14.

235. *See* Jeffrey A. Cooper, *Ghosts of 1932: The Lost History of Estate and Gift Taxation*, 9 FLA. TAX. REV. 875, 883, 885 (2010).

236. *See* Williams, *supra* note 14, at 474.

237. *See* Cooper, *supra* note 235.

238. Eisenstein, *supra* note 168, at 232.

239. Cooper, *supra* note 235, at 879.

240. *Estate Taxes*, TIMES-PICAYUNE (New Orleans), Apr. 6, 1924, § 4, at 4.

241. M. Susan Murmane, *Andrew Mellon’s Unsuccessful Attempt to Repeal Estate Taxes*, TAX ANALYSTS (Aug. 22, 2005), <http://www.taxhistory.org/thp/readings.nsf/ArtWeb/672746F8E859EA77852570900006AC21?OpenDocument>.

jective. Congress soon repealed a number of the taxes enacted during the war, repeals which largely benefitted the wealthy.²⁴²

Mellon was instrumental in framing the opposition's argument, and that frame remains the prominent frame today. Mellon recognized that when a business owner died, his estate might consist largely of stock in the business.²⁴³ Forcing a sale of that stock in order to pay estate taxes would cause the value of the stock to drop. The problem was described as follows:

[I]f the estate should consist of corporation shares, then 40 percent of those would have to be unloaded, perhaps on a market not at the time prepared to absorb them. There then might not merely be a loss to the heirs but also an unwarranted harm might be done the company involved by having a large block of stock poured into a nonreceptive market. Other and quite innocent stockholders might find their holdings depreciated in value merely because the government was getting out its death due.²⁴⁴

Although this aspect of Mellon's argument seems plausible, many experts contend that it is fundamentally flawed from a legal standpoint²⁴⁵ and unsupported by economic data.²⁴⁶ Mellon's conflict of interest in the matter was obvious. Mellon's hatred of estate and inheritance taxes partly resulted from a rather unusual and widely publicized case involving the death of Mellon's friend, wealthy industrialist Henry Clay Frick.²⁴⁷ The administration of Frick's estate was incredibly complicated for reasons largely unrelated to the federal estate tax. Mellon believed that selling assets in Frick's estate, in order to pay estate taxes unduly flooded the market with a supply in excess of demand.²⁴⁸ Mellon repeatedly pointed to this highly publicized case in support of his economic theory.²⁴⁹ However, the decline in value of the assets in Frick's estate after his death was more likely a result of a depressed national economy than an excess supply occasioned from a single estate.²⁵⁰

Mellon was not alone in challenging the estate tax, but he did lead the charge. Mellon grasped the problem with the way proponents framed the issue.

242. See *id.*; see also Marjorie E. Kornhauser, *The Morality of Money: American Attitudes Toward Wealth and the Income Tax*, 70 *IND. L. J.* 119, 150-53 (1994); Eisenstein, *supra* note 168, at 232-36.

243. Murnane, *supra* note 241.

244. *Estate Taxes*, *supra* note 240.

245. Murnane, *supra* note 241.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

The social necessity for breaking up large fortunes in this country does not exist. Very wisely our forefathers declined to implant in this country the principle of primogeniture under which the eldest son alone inherited and kept the properties intact. Under our American law, it is customary for estates to be divided equally among the children; and in a few generations any single large fortune is split into many moderate inheritances. As a usual thing, the continuation of a single fortune through several generations has been proven to be impossible. It is an often quoted saying that "there are three generations from shirt sleeves to shirt sleeves."²⁵¹

The lasting aspects of Mellon's opposition are those framed by reference to core American values. Mellon argued that the tax would punish activity and work.²⁵² It would destroy the value of the property Americans worked so hard to earn.²⁵³ It was the enemy of the American dream. Casting his argument in terms of equality, Mellon argued:

The theory upon which this country was founded is equality of opportunity. So long as a man uses his abilities within the bounds of the moral sense of the community, monetary success is not a crime, but on the contrary adds to the total wealth of the country and to an increase in the standard of living as a whole.²⁵⁴

Mellon was aided by the emerging criticisms of Marxism, painting it as antithetical to American thought, thus playing to our nationalism values.²⁵⁵ For instance, Mellon argued that with an inheritance tax of 40%, "it would then be only two or three generations until private ownership of property would cease to exist."²⁵⁶ "Estate taxes, carried to an excess, in no way differ from the methods of the revolutionists in Russia."²⁵⁷

In the wake of the Great Depression, however, even Mellon capitulated.²⁵⁸ The Depression reduced income tax revenues while also increasing the need for revenue to finance new projects.²⁵⁹ Faced with that problem, Mellon himself advocated for an increase in the estate tax rate.²⁶⁰ Although ultimately unsuccessful in repealing the estate tax, Mellon and his colleagues were successful in framing opposition to the tax in terms of core American values.

251. ANDREW W. MELLON, *TAXATION: THE PEOPLE'S BUSINESS* 123–24 (1924).

252. *Id.* at 123.

253. *See id.*

254. *Id.*

255. *See WILLIAMS, supra* note 14, at 477.

256. MELLON, *supra* note 251, at 119.

257. *Id.* at 122.

258. Lerud, *supra* note 159, at 527.

259. LUCKEY, *supra* note 168, at 9.

260. Lerud, *supra* note 159, at 527.

G. Subsequent Developments

The federal estate tax underwent many changes in the following years. In anticipation of the Second World War, Congress raised estate taxes in order to finance military development.²⁶¹ Congress raised rates again after America's entry into the war in response to revenue demands.²⁶² Beginning in 1976, the tax underwent major revisions aimed at modernizing the assessment and collection of taxes.²⁶³ In the end, economics research supported Mellon's "shirt sleeves to shirt sleeves in three generations" contention.²⁶⁴ But that economic reality was lost amid the political rhetoric of family farms and ensuring equality of opportunity.

VI. REFRAMING THE ISSUE

The current public federal estate tax debate remains relatively unchanged. The men in your pop quiz, along with numerous other politicians and public figures, are irresponsible in the way they perpetuate this debate. Both sides of the argument are based upon "facts" that have not existed in more than ninety years. Yet America faces the largest wealth gap it has seen since the 1920s.²⁶⁵ That fact will undoubtedly shape politics and political debate for the next several years. We know from history that when that situation occurs, the "result has been a political realignment that tilted power and policy at least modestly away from the rich and big business."²⁶⁶

The Progressive Era of the 1900s is a prime example of that phenomenon. America moved from an agrarian society to a manufacturing society, and that change, not inherited wealth, fundamentally altered the distribution of wealth in this country. The changes in the American economy were not immediately accompanied by corresponding changes in law and policy. By the 1920s, the disparity in wealth reached record levels.²⁶⁷ When that disparity became the focus of popular discourse, the country was willing to support change.²⁶⁸ Legislation and policies enacted during the Progressive Era fundamentally changed the relationship

261. LUCKEY, *supra* note 168, at 10.

262. *Id.*

263. *Id.* at 11–13.

264. See Gary S. Becker, *Family Economics and Macro Behavior*, 78 AM. ECON. REV. 1, 9–10 (1988).

265. Mark Trumbull, *America's Big Wealth Gap: Is It Good, Bad, or Irrelevant?*, CHRISTIAN SCIENCE MONITOR (Feb. 14, 2012), <http://www.csmonitor.com/USA/Politics/2012/0214/America-s-big-wealth-gap-is-it-good-bad-or-irrelevant>.

266. *Id.*

267. See, e.g., *id.*

268. See, e.g., Kornhauser, *supra* note 242, at 120–21.

between government and its citizens.²⁶⁹ This theme has repeated itself often in our history.²⁷⁰

We are in the midst of that repeated theme again. Our economy no longer looks like it did in the 1900s or during the Revolution. But the concentration of wealth and its relationship to democracy remains a concern for many Americans.²⁷¹ Inherited wealth no longer plays a meaningful role in that very legitimate concern. Revolutionary Americans justifiably believed that inherited wealth prevented equal opportunity to participate in government because it fostered an elite ruling class of aristocrats.²⁷² Eradicating the institutions that had promoted that system was an important and meaningful decision. By the 1900s, inherited wealth, as Mellon pointed out, was not the problem. Wealth disparity was high, but inherited wealth was not the cause. As Tocqueville anticipated, equal access to participate in the economy without restraint led to the development of a “manufacturing aristocracy.” Although aimed at redressing that problem, the federal estate tax was not responsible for the changes seen in following decades.

A federal estate tax will not affect wealth inequities in the coming years. Money, and as a result political power, is again concentrated in the hands of a few.²⁷³ But our economy looks much different from what it looked like in earlier eras. Today our “aristocrats” look different. They are not the landed aristocracy or the manufacturing aristocracy of bygone eras. Rather, today’s “aristocrat” is the corporation and the political lobbyist.²⁷⁴ Through lobbying efforts, super PACs,²⁷⁵ and the like, corporations have an incredible ability to affect politics and legislation, particularly after the landmark *Citizens United v. Federal Election Commission*²⁷⁶ decision.²⁷⁷ The federal estate tax is ill suited to address those problems and it is certainly ill suited to affect how much wealth and, in turn, political power corporations hold.

269. See *id.* at 144–52.

270. See, e.g., *id.* at 120.

271. See, e.g., Trumbull, *supra* note 265.

272. See *infra* Part V.

273. See Trumbull, *supra* note 265.

274. See Paul Blumenthal, *Citizens United Reform, Requiring Corporations to Disclose Political Spending, Sought from SEC*, HUFFINGTON POST (Mar. 26, 2012, 4:22 PM), http://www.huffingtonpost.com/2012/03/26/citizens-united-reform-corporations-political-spending-sec_n_1380094.html.

275. Known as “independent expenditure-only committees,” super PACs are free of most of the constraints of traditional political action committees (PACs). See Dan Eggen & T.W. Farnam, ‘Super PACs’ Alter Campaign, WASH. POST, Sept. 28, 2010, at A01. Unlike traditional PACs, super PACs can raise funds from individuals, corporations, and other groups without legal limits. *Id.* Super PACs may not make contributions to or coordinate with candidate campaigns or political parties but may engage in unlimited political spending independently of the campaigns. *Id.* The groups must disclose the identity of their donors. *Id.*

276. 130 S. Ct. 876 (2010).

277. See Blumenthal, *supra* note 274.

That does not mean the estate tax is irrelevant. Many public figures and politicians will continue to debate the estate tax in the context of wealth disparity and will continue to utilize the same flawed frames of the past and they will base their frames in “facts” that no longer exist. Perpetuating the flawed issue framing of the past century is irresponsible and destructive because it prevents us from considering the real opportunities afforded by the tax. If properly reframed by both sides of the debate, the estate tax debate could be productive. In the aftermath of war and economic collapse, America is again in the throes of a financial crisis. The public is at odds as to how or if the government should raise additional revenue. The federal estate tax, if properly reframed, could play a meaningful role in that debate.

As Americans, we value efficiency and practicality.²⁷⁸ In practice, that means “seeking the fastest and least costly means of achieving a goal.”²⁷⁹ Efficiency and practicality are not always at the top of our personal or collective value hierarchies—but in the context of budget decisions, they are values that probably should be. Where do we find the revenue needed to address current government needs? A fast, inexpensive, and effective solution seems ideal.²⁸⁰ When facing the need for extra revenue in times of war or financial crisis in our early years, we as a nation turned to federal estate and inheritance taxes.²⁸¹ These taxes were fairly modest and applied to a wide array of estates.²⁸² They were not intended to cause social change²⁸³ and they did not seem to unduly burden taxpayers. They were effective and practical. These taxes repeatedly provided a revenue safety net. Perhaps for those reasons, they were initially uncontroversial. By helping to finance, among other exigencies, the Civil War, World War I, the New Deal, and World War II, the taxes undoubtedly helped America accomplish meaningful and important change. But the taxes themselves were not the instrument of that change. They were merely a practical and efficient mechanism for financing that change.

Not until politicians reframed the estate tax debate as a struggle between two compelling and irreconcilable American values—values on which the estate tax really had no bearing—did the tax become controversial. By moving from a tax whose primary goal was to raise revenue to a tax aimed at battling income inequality by curbing the accumulation of wealth across generations, we made the tax itself so controversial and divisive that using it to raise revenue proved challenging. And yet, the tax did not, and perhaps could not, ever achieve its redistributive and

278. Cerulo, *supra* note 19, at 352.

279. *Id.*

280. See Repetti, *supra* note 80, at 1495.

281. See *supra* Part V.

282. *Id.*

283. *Id.*

regulatory goals of wealth distribution. Nor did the tax cause the litany of harms alleged by its opponents. Our politics were so shaped by arguments that were improperly framed at the outset that we kept missing the real potential of the federal estate tax. Rather than considering how best to use the tax to raise revenue in a manner that is efficient, administrable, and equitable, the debate centered on issues that are not meaningfully impacted by the tax. The federal estate tax currently provides a small, but meaningful, portion of federal revenue. Not only could the tax continue to do so, but if we reframe the debate in proper terms, we could rationally consider using it to provide an even greater—and much needed—source of revenue in the future.

