The Republic of Virtue: The Republican Ideal in British and American Property Law

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Introduction

In the aftermath of the American Revolution, the United Kingdom and its former colonies split not only in their political ties, but also in systems of law. Even in years prior, a new philosophy concerning the legal system began to mount in America: a concept of "republicanism" that emphasized the importance of the common good and meritocracy over more traditional hierarchies of wealth and birth.[1] In order to foster a new civic republic and prevent the encroachment of aristocratic tendencies, the Founders and the

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1. *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 47 (1969).

philosophers they drew from gained a keen interest in using law to encourage "virtue" among citizens, hoping to prevent societal corruption and rot through use of public policies that combated any "aristocracy of wealth" and instead sought an "aristocracy of virtue and talent."[2] Though this ideal translated into a number of innovations in both constitutional law and the American political process, it also found its way into the broad and narrow strokes of property law. It viewed the ownership of property as a vital part of promoting civic virtue, by nurturing autonomy, liberating the owner to pursue personal development, and grounding oneself in a political community.[3]

With these ideas came reforms, ones that distanced and distinguished the emerging American common law from that of its former mother country. In contrast to the British legal system, the Founders set about a number of legal innovations with the hopes of promoting this new republican ideal of property law, such as the notable campaigns against the traditional fee tail and primogeniture inheritance laws.[4] However famed these reforms might have been, however, they were by no means the only experiments made by the Founders in promoting a new republicanism through the boundaries of property law. This Note will seek to compare the American and British property law systems both before the Revolutionary War and soon after it, and to find what other changes the Founders considered and made when they tried to create a new legal path for a newly born nation. This Note argues that several innovations were directly influenced by the republican ideal that much of the American Revolution was predicated upon, seeking to promote virtue in the new republic by means of personal property and how the law treated it. Furthermore, this Note will apply republicanism to a more contemporary problem. Specifically, it will examine whether the theory of republicanism and property can be used to justify the estate tax, a long-standing part of the American and British tax codes that has recently come under significant pressure for repeal within the United States.

Part I of this Note examines the origins of this republican idea of property, tracing its roots from more ancient philosophies of Greece, through the British common law system, to its moment of fruition in colonial America. It will detail the exact contours and parameters that republicanism was predicated upon, so as to better illustrate how those ideas were (or were not) translated into British and American law.

Part II will look more closely at the schism that transpired between the United Kingdom and the fledgling United States on the subject of property. Specifically, it will examine several of the well-known reform measures taken regarding the fee tail and primogeniture inheritance schemes that

2. Thomas Jefferson, *Autobiography*, *in* 1 THE WORKS OF THOMAS JEFFERSON 3, 58 (Paul Leicester Ford ed., 1904).

3. *See* J.G.A. Pocock, *The Mobility of Property and the Rise of the Eighteenth-Century Sociology*, *in* VIRTUE, COMMERCE, AND HISTORY 103, 103 (1985).

4. *See* GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION 182–84 (1993).

still permeated British law, as well as the statements made by the Founders about how republicanism could best fit into a new American common law.

Part III will argue that the estate tax is a practice not at all alien to the ideals of republicanism, but is instead a means of curtailing the inequalities in wealth that the Framers thought a threat to republican society. In greater detail, it will examine the history of estate and inheritance tax policy in the United States and compare that with policies adopted in other nations like the UK. It will go on to examine the role that changes in property law play in the larger republican ideal envisioned by the Founders. Furthermore, it will examine whether the theory of republicanism can be used to justify the continued existence of a contemporary issue in redistributive policies: the much beleaguered estate tax. By both applying the tenets of republicanism to the issue and by examining the words of great republican thinkers both within the Framers and without, it will demonstrate just how the idea of an estate tax fits within the republican framework.

Finally, the Conclusion will summarize the argument that the estate tax can be justified on republican grounds. In so doing, it will draw on all the information laid out beforehand and demonstrate the roots of the estate tax in republican theory and practice.

I. Republicanism and Property

A. Republicanism Defined

"Republicanism" itself was an idea that had greater implications for Americans "than simply the elimination of a king and the institution of an elective system," as difficult as those tasks might have been.[5] Rather, it stood for a broader idea that "private 'interests' could and should be subordinated to the common welfare of the polity," thus seeking to discourage selfish and destructive instincts for the sake of the common good of all.[6] Rather than viewing a "Lockean emphasis on the protection of individual rights . . . as the sole foundation of American constitutional thought," scholarship can identify classical republicanism as a heavy influence on the Founders.[7] That influence manifests in a focus on the common good, a wariness of pure democracy rather than mixed government, and—perhaps surprisingly—a certain degree of skepticism for some aspects of "commerce and capitalism" due to its rural and agrarian sensibilities.[8]

In this sense, American politics at the founding was most concerned not with "the protection of individual freedoms against collective encroachment," but instead with "protecting the political liberty of the collective" itself—fostering measures that defended public rights against corruption and "aristocratic privileges."[9] Republicanism can thus be contrasted with

5. Wood, *supra* note 1, at 47.
6. Gregory Alexander, Commodity and Propriety 29 (1997).
7. Linda K. Kerber, *Making Republicanism Useful*, 97 Yale L.J. 1663, 1663 (1988).
8. *Id.* at 1664.
9. *See* Alexander, *supra* note 6, at 29.

liberalism, with the former standing for "communitarianism" as opposed to "the latter's individualism."[10] Whereas liberalism focused on the "moral primacy" of the individual, republicanism was concerned with the interests of the community as a whole, and generally put that interest above individual interests.[11]

Unlike conceptions of "possessive individualism," which imagined property as a means of protecting individuals from the tyranny of the collective, civic republicanism instead saw property's primary role as "facilitat[ing] a publicly active, self-governing citizenry," with ownership of property becoming a "necessary foundation for virtue."[12] Virtue in this scheme was in many ways "a synonym for autonomy in action," which functioned "not merely [as] a moral abstraction," but rather as "a human necessity" that could help drive a political society.[13] Owning one's own property meant a citizen had a degree of autonomy, rather than dependence on others, and furthermore served "as a means of anchoring the individual in the structure of power and virtue and liberating him to practice these activities."[14] By contrast, a citizen lacking in property finds oneself utterly dependent upon others, thus lacking the independence to act on their own behalf or with the will to function as a virtuous citizen in an enlightened and well-governed republic.[15]

B. The Aristotelean Origin

Republican thought originated not in America itself nor in Britain, but rather in the more ancient theories of classical Greece, most notably with Aristotle.[16] In Aristotle's conception of politics, the most practical form of government was one rooted in moderation of political extremes, achieved via mixing forms of aristocracy, monarchy, and democracy in the name of stable and virtuous government.[17] From this framework rose what we refer to as Aristotelian republicanism, a brand that was "exclusively concerned with the citizen," specifically on "his chances of escaping corruption."[18] To Aristotle, "man is by nature a political animal"—he exists as a member of a larger community, whether that be family, clan, tribe, *polis*, or eventually nation.[19] Within this system, "it is better for property to be private," but that "citizens become such as to use it in common," with the task of the lawmaker being to encourage this kind of community-minded senti-

10. Frank Michelman, *Tutelary Jurisprudence and Constitutional Property*, *in* LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 127, 130 (Ellen Frankel Paul & Howard Dickman eds., 1990).

11. *See id.*

12. ALEXANDER, *supra* note 6, at 30–31.

13. POCOCK, *supra* note 3, at 122.

14. JOYCE APPLEBY, CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S 9 (1984).

15. *See* ALEXANDER, *supra* note 6, at 74.

16. *See id.* at 29.

17. *See* ARISTOTLE, POLITICS 114–17 (Carnes Lord trans., U. Chi. Press 2d ed. 2013).

18. J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION 329 (1975).

19. *See* ARISTOTLE, *supra* note 17, at 4.

ment in their fellow citizens.[20]

The reason for this is that differences in the degree of property ownership—and thus wealth—among citizens can lead to conflict: a city populated only by the extremely poor and the extremely wealthy quickly descends into "a city not of free persons but of slaves and masters," with the former "consumed by envy" and the latter consumed "by contempt."[21] "Nothing is further removed from affection and from a political community," and few things have as deleterious an effect on civic virtue.[22] Thus, Aristotle proposes that the city "be made up of equal and similar persons to the extent possible," cultivating a large class of "middling" people who, with a moderate amount of property in which they feel both attachment and contentment, are able to best conduct political matters while not desiring "the things of others."[23] Property ownership in Aristotle's republicanism mirrors his larger conception of politics: it encourages a middle ground that avoids both "rule of the people in its extreme form," a crude and destructive anarchy, or "unmixed oligarchy" that—without the restraint of a mixed government—results in "tyranny."[24]

C. From Florence to Great Britain and Elsewhere

Aristotle's idea of republicanism, both in politics and in property, found fertile ground outside of his own country and own era. Much of the republican tradition can be traced to its adoption by various Florentine political thinkers, most notably in the works of Niccolo Machiavelli.[25] He and other Renaissance figures found in classical republicanism a political theory that was rich in its implications for life in the new *polis* of their time, but perhaps also brittle, "tend[ing] to reduce politics to the structure within which the individual asserted his moral autonomy" with little regard given to the role of legislation or the "positive" use of power.[26] What Machiavelli produced himself, alongside others, was a "Renaissance rephrasing" of Aristotle's republicanism, one that incorporated distinct theories of military and political science "in the service of a basically Aristotelian method" of describing the functions of a city and how the collision of these elements "lead to stability, instability, or change in the polity."[27]

This variation gave a breath of fresh life into an ancient theory, lending it "a high degree of capacity for dealing with the social phenomena of

20. *See id.* at 31.
21. *Id.* at 115.
22. *Id.*
23. *Id.*
24. *See id.* at 116.
25. *See* POCOCK, *supra* note 18, at 316 ("[T]he most vivid impression remaining should be that of the continuity of a basically Aristotelian republicanism from which Machiavelli did not seem . . . to have greatly departed.").
26. *Id.* at 329 ("[A] view of politics which confined it to the assertion of values, or virtues, by individuals in public acts discouraged, every time that it encouraged, any attempt to treat it as the concurrent exercise of different kinds of power.").
27. *See id.* at 317.

the seventeenth and eighteenth centuries."[28] It was precisely this Florentine interpretation of Aristotle's republicanism that was later referred to by political thinkers in Britain and revolutionary America, all whilst retaining its essential "moralist concern with liberty and corruption" that "present[ed] politics as the erection of conditions under which men might freely exercise active virtue."[29]

The entrance of republicanism into American parlance began on the opposite side of the Atlantic, with seventeenth-century British theorists such as James Harrington who followed the Machiavellian tradition.[30] Analyzing the strengths of governments from a historical perspective, Harrington espoused the republican theory that any polity overly focused upon "the one, the few and the many" will be doomed to decline and fall, and instead it is the duty of legislators to create "a government so compounded of all three elements that the degenerative tendencies held one another in check."[31] Harrington agreed with his predecessors in finding that government has a duty to promote virtue in its citizens, for the sake of defeating "its corresponding vice" that would eventually bring down a morally compromised order.[32]

However, Harrington also staked out a crucial—and innovative—difference from his predecessor Machiavelli, one rooted in the role of property in addressing virtue.[33] Contrary to what his Florentine model presumed, "Harrington denies Machiavelli's conviction that a people once thoroughly corrupt cannot be saved even by the wisest legislator."[34] Instead, Harrington's conclusion is that "the causes of corruption are in an unjust distribution of land," and that such inequalities of property can be addressed by a government enforced by an appropriate constitution.[35]

Harrington's interpretation of Aristotle's "balance" of classes is one that envisions a government where "great accumulations of wealth [are] dispersed," with citizens instead owning small parcels of land that allow an individual to be independent.[36] This independence is vital to be a true citizen: without it, the citizen is little more than a servant lacking "distinct interests" of his own, and being "bound to the wills of others," he is incapable of "properly participat[ing] in government as [a] free agent[ ]."[37] Due to his own experience in living as part of a largely agrarian society, Har-

28. *Id.*

29. *Id.* ("It was in the Aristotelian and civic humanist channel that the stream of republican tradition was to flow, and Machiavelli as a historical figure, to whom theorists like Harrington and Adams referred, was to swim quite successfully in that channel.").

30. *See* J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY 129 (1957).

31. *Id.* at 145.

32. *See id.*

33. *See id.* at 146.

34. *Id.*

35. *See id.*

36. *See* James Cotton, *James Harrington as Aristotelian*, 7 POL. THEORY 371, 379–80 (1979).

37. *Id.* at 380.

rington added an additional wrinkle to republicanism that the more urbane Machiavelli neglected, providing an idea that would find fertile soil in colonial America.[38]

II. Republicanism in Practice: Contrasting Britain and America

After crossing the Atlantic, the Harrington conception of republicanism and property became "a clear influence upon the early formulation of American politics," to the extent that "the American Founding can be linked to the Atlantic Republican Tradition."[39] Several of the Founders followed this strain of republicanism, noting "the importance of property divisions in preserving state Republican governments."[40] The American revolution itself can be understood as a "condemnation of the [British] system as irretrievably tainted" and a subsequent "departure to construct a mixed government along republican lines."[41] American rhetoric at the time was itself steeped in precisely the same espousal of "the virtue of the citizen as the only guard against corruption" that graced much of republican thought in prior eras, and viewed the breaking from Great Britain and creation of a new government based around a separation of powers to be the proper means of promoting virtue.[42]

Thomas Jefferson, specifically, expressed a distinctly republican belief that "society creates property rights and ought continually to control them," a marked difference from the Lockean idea of inviolable property rights.[43] Like Aristotle, Jefferson believed man to be "social by nature," and furthermore that it was necessary for men to subdue "selfish passions" for civilization and "rule based on natural equality" to triumph.[44] Yet Jefferson can be distinguished from Locke in that he "did not consider preserving [property] to be the chief end of government."[45] Instead, Jefferson believed in a "*summum bonum*, a greatest good" that could be achieved by citizens, one that was made available through an individual's self-sufficiency and a government that promoted "safety and happiness."[46]

Following the end of the Revolution, the nascent United States faced a new question: "how their free institutions were to be kept from corruption," the kind that republicanism was eternally concerned with halting.[47]

38. *See* POCOCK, *supra* note 30, at 146–47.

39. David Schultz, *Political Theory and Legal History: Conflicting Depictions of Property in the American Political Founding*, 37 AM. J. LEGAL HIST. 464, 474 (1993).

40. *Id.* at 476.

41. J.G.A. POCOCK, THE VARIETIES OF BRITISH POLITICAL THOUGHT, 1500–1800 285 (1993).

42. *See id.* at 295.

43. *See* ALEXANDER, *supra* note 6, at 27.

44. DAVID TUCKER, ENLIGHTENED REPUBLICANISM: A STUDY OF JEFFERSON'S *Notes on the State of Virginia* 74 (2008).

45. *Id.* at 88 ("[Jefferson's belief in property's lesser importance] is why he replaced 'property' with 'the pursuit of happiness' when enumerating inalienable rights in the Declaration of Independence," and "advised Lafayette to remove the word 'property' from the proposed Declaration of the Rights of Man.").

46. *See id.* at 88–89.

47. *See* POCOCK, *supra* note 41, at 295.

During the nation's formative years, political figures like James Madison said explicitly that the Union would be one organized along republican grounds, with a representative government as opposed to a strictly democratic one.[48] This meant the development of new political structures, such as divided legislatures, federalism, and separation of powers, all of which were designed to avoid the dreaded excesses thought to undermine virtuous authority.[49] In other ways, the Founders looked to English sources as guides for creating a legitimate government.[50] However, stark differences between the republicanism of a newly-born America and their former mother country arose swiftly; certain reform measures taken before and after the Revolution make clear that the Founders saw their own enterprise as distinct from that of prior English thinkers, affirming certain parts of English law while deliberately leaving others behind.[51]

A. Property in the Constitution

The new republic created by the Founders would be one centered around a constitution, one that was meant at least in part to enshrine certain property rights.[52] Property itself is explicitly found in two sections of the United States Constitution: the Fifth Amendment and the later-added Due Process Clause of the Fourteenth.[53] In the former, property is brought up in the context of the Takings Clause, which guarantees that a citizen's private property cannot "be taken for public use, without just compensation."[54] In the latter, the restrictions of the Fifth Amendment are also directed to the states, ensuring that no state within the nation can "deprive any person of life, liberty, or property, without due process of law."[55]

While the Fourteenth Amendment arose almost a century after the Founders first passed the Constitution, it promotes the same idea of "procedural due process" that was seeded during the American Revolution.[56] The Fifth Amendment's Takings Clause arose from the outrage over British actions that allowed for the confiscation of property in ways that "abridged common law criminal procedures," with the colonists believing that "Parliament lack[ed] the authority to deprive them of core procedural protections."[57] This same attitude found its way into the state constitutions as well, with all but two of the states adopting written constitutions by 1780, and a vast majority of those constitutions including "law-of-the-land provi-

48. *See id.* at 296.
49. *See id.* at 295.
50. *See* ALEXANDER, *supra* note 6, at 44.
51. *See id.* at 44-46.
52. *See* James Y. Stern, *Property's Constitution*, 101 CAL. L. REV. 277, 279 (2013).
53. *See id.* at 277.
54. U.S. CONST. amend. V.
55. U.S. CONST. amend. XIV, § 1.
56. *See* Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, YALE L.J. 1672, 1700 (2012).
57. *Id.* at 1699-1700.

sions" that protected property rights.[58] In terms of how the Constitution approaches property rights, constitutional property law doctrine is understood to center around "*changes* in property rights," forbidding "certain alterations to existing allocations of property rights."[59]

B. Inheritance in Early America

When British settlers first began their colonization of America, they brought many aspects of the "English gentry and landed aristocracy" with them. As a result, early settlements like Jamestown were ruled by "a small group of leaders drawn from the higher echelons of English society."[60] This hierarchy was deeply engrained into the social structure of Great Britain at the time, such that "nothing could be more alien" than a demand "that competition for political leadership should be open to all levels of society." Instead, the "proper response" to new challenges arising for public servants "was not to give power to the skilled but to give skills to the powerful."[61] So entrenched were these attitudes that "[i]n the first years of settlement no one had reason to expect that this characteristic of public life would fail to transfer itself to the colonies."[62] However, in the case of Britain's oldest colonies in Virginia, "this governing elite did not survive a single generation, at least in its original form," and in due time "their number had declined to insignificance."[63] While a new style of aristocracy did eventually grow in American soil, it was one immediately distinguishable from their peers across the Atlantic in their treatment of property.[64]

1. Primogeniture and Entailment

The two "most glaring vestiges of a corrupt past" in property law, according to American adherents of republicanism, were the systems of primogeniture in inheritance law and the entailment of land.[65] Eighteenth-century England made use of inheritance and ownership devices to ensure the "descent of landed estates," a system that was meant to guarantee the eldest son—born or otherwise—would accede to his family's property by "entailing its descent."[66] Entailment itself dated back to medieval times, a practice designed specifically by the nobility to "secure and protect their families' hold on the land" they came to own.[67] The entail of property essentially acted as a 'dead hand' upon an estate even after the owner died,

58. *See id.* at 1705.
59. *Id.* at 287.
60. Bernard Bailyn, *Politics and Social Structure in Virginia, in* 1 NEW PERSPECTIVES ON THE AMERICAN PAST 38–39 (Stanley N. Katz ed., 2d. 1969).
61. *Id.*
62. *Id.* at 39.
63. *Id.* at 40.
64. *See id.* at 52.
65. *See* ALEXANDER, *supra* note 6, at 39.
66. *See* Bailyn, *supra* note 60, at 52.
67. *See* John V. Orth, *After the Revolution: "Reform" of the Law of Inheritance*, 10 L. & HIST. REV. 33, 36–37 (1992).

due to it restricting the ability of the heir to alienate the land he received.[68] Once the entail was created voluntarily by the land's original owner, any successive holder would be restricted or prevented from altering the arrangement, regardless of their own voluntary choices, thus allowing a past owner to control its future scions.[69]

This mechanism of property ownership was effective enough that "perhaps half the land of England was bound" through it—all but ensuring "continuity over generations for the landed aristocracy."[70] Thus, it happened that a member of the landed gentry of England "could dispose more or less freely of his wherewithal by will," in a manner that "operated clearly in favor of his immediate family."[71] Having been transported across the Atlantic along with the British colonists, America as well would look forward to enjoying the benefits of "one of the most complicated and least satisfactory branches of English law."[72]

At the same time, however, this means of preserving aristocratic control of lands failed to take root in America.[73] Part of this can be ascribed to circumstance: unlike in England, land was not at all scarce in Colonial America, where the colonists could enjoy a large and recently depopulated continent's worth of territory to settle and exploit.[74] On the other hand, America was also home to a "social and political structure" that was "vastly less aristocratic" than its English counterpart, a fact that led to a longstanding campaign for reform against the inheritance laws.[75] Some attempts were made at forbidding entailment prior to the Revolution, such as a Virginian act allowing them only in certain circumstances, but for the most part the inheritance law "largely adhered to the English system," with attempts to abolish it undercut by subsequent legislation that restored the docking of entails.[76]

Jefferson, however, embarked upon a sustained campaign to see these vestiges of English property law eliminated from the American system, reaching success on October 14, 1776 with legislation that abolished entails.[77] In this statute, a fee tail created by a landowner would be found as a fee simple instead, while any "remainder in tail following an estate for life" or any other, lesser estate would "be converted into a remainder in fee simple," ultimately undercutting the inalienability that made entailment so potent.[78] Explicitly done in the interest of a new policy on property ownership, Jefferson followed this with a statute some three years later that

68. *See* Stanley N. Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1, 10 (1977).
69. *See* Orth, *supra* note 67, at 37.
70. Bailyn, *supra* note 60, at 52.
71. Katz, *supra* note 68, at 10.
72. *Id.* at 9–10.
73. *See* Bailyn, *supra* note 60, at 52–53.
74. *See* Katz, *supra* note 68 at 11.
75. *See id.*
76. *See id.* at 12.
77. *See id.*
78. *See* Orth, *supra* note 67, at 39.

abolished primogeniture and "replace[d] it with partible inheritance in equal shares to the children of a decedent."[79] State constitutions followed suit, with legislatures in Pennsylvania and South Carolina creating provisions that openly called on the state lawmakers to take measures that would regulate or else eliminate entailment and primogeniture.[80] The resulting statutes would see primogeniture replaced with an inheritance scheme that evenly divided the decedent's property "among all children of either sex," while the entail was "hampered" to the point of being functionally abolished.[81] By contrast, England itself did not follow in abolishing primogeniture until 1925.[82]

2. *The Frontier and Republicanism*

The availability of land also played an important role in American republicanism. Jefferson and others like him were outspoken in their belief that the American frontier represented a unique opportunity in promoting a new society of small, independent farmers, with the promotion of measures that opened new territory for these agrarian-minded citizens to settle.[83] The process of actually seizing this vast tract of supposed wilderness was not immediate, and in fact the frontier itself did not see a mad rush of settlement until after the eighteenth century had already passed.[84]

But pass it did, and thus the strategy touted by Jefferson was revealed as an incomplete one.[85] It plotted out a means for the population to cultivate the virtues necessary in citizenship, but did not provide a way for such benefits to continue indefinitely—inevitably, the parcels of land acquired in the west would end where the frontier met its close.[86] Furthermore, it did little to prevent land transfers that would undermine republican virtue—citizens could, theoretically, sell or gift land in such a way that it allowed the aristocratic ownership Jefferson disdained to reemerge.[87] Jefferson's solution was one that favored equality in distribution where the government could naturally intervene, but restraint when it came to true redistribution.[88] Wary of the excesses of the British Crown, he and the other Framers had little sympathy toward forcibly seizing land and then dividing it out from its original owners—such actions reeked of the arbi-

79. Katz, *supra* note 68, at 12.

80. *See* Orth, *supra* note 67, at 33–34.

81. *Id.* at 34.

82. *See id.* at 35

83. *See* Lance Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 WM. & MARY Q. 3, 5 (1986),.

84. *See* Kenneth Lockridge, *Land, Population and the Evolution of New England Society, 1630-1790*, *in* COLONIAL AMERICA: ESSAYS IN POLITICAL AND SOCIAL DEVELOPMENT 466 (Stanley N. Katz ed., 1971) ("Yet at first Americans moved only slowly out into the wilderness. For most of the two hundred years preceding 1800 they clustered near the eastern coastline.").

85. *See* ALEXANDER, *supra* note 6, at 34.

86. *See id.*

87. *See id.*

88. *See id.*

trary monarchist actions the Revolution intended to dispense with.[89]

The fears of Jeffersonians over land was not limited to what may occur should there be a lack of it.[90] Rather, they feared also that it might lose its value as a means of promoting virtue.[91] Over time, not only would the availability of new land decrease, but the nature of holding land might change as well.[92] The rise of commerce and fast-paced trade could freehold land to become more fluid, more of a commodity than something that citizens might use for self-sufficiency and independence.[93] In turn, this commercialization of land would change social relations as well: people who might have thought of each other as brothers and citizens would instead see their peers only as buyers and sellers of the abstract economic good that land had become.[94]

Jefferson knew that the only means of combating this was to keep land available, circulating enough that its ownership was dynamic rather than static, and therefore unlikely to become centralized into the hands of the few.[95] This was a prime motivation behind his numerous attempts at combating English-style land laws, fighting against fee tails and inheritance statutes that would allow privileged families to hold land hostage.[96] What this demonstrates, however, is that the fear of there being not enough land for widespread ownership and too much freedom for it to be hoarded was founded on several philosophical points Jefferson believed strongly.[97] He was conscious of dangers that might result from a concentration of wealth such that the opportunity for ownership among the less wealthy shrank, and sought to increase alienability where possible to prevent that.[98] It is not hard to imagine, then, that Jefferson would have sought further measures at the time that land availability took a sharp decline, and where the chance of wealth concentration became ever greater.

III. Republicanism, Policy, and Contemporary Problems

A. Republicanism and the Estate Tax

1. The Early History of the Estate Tax in the United States

The earliest form of estate tax in American history arrived shortly after the Constitution was adopted, with the Stamp Act of 1797.[99] In response to the fear of the French navy preying upon American shipping and sailors, Congress passed the Act to raise funds for national defense,

89. *Id.*
90. *See id.*
91. *Id.* at 34–35.
92. *Id.*
93. *Id.*
94. *See id.*
95. *Id.* at 35.
96. *See id.* at 34.
97. *See generally id.*
98. *See id.*
99. *See generally* Act of July 6, 1797, ch. 11, 1 Stat. 527 (1797) (repealed 1802) [hereinafter Stamp Act of 1797].

and did so with duties upon the stamps necessary for wills, inventories, letters of administration, and the "receipts and discharges from legacies and intestate distributions of property."[100] The tax upon these bequests was scaled based upon how large the bequest was, with additional amounts added to the tax as the amount bequeathed by the decedent grew.[101] Several decades later, Congress again passed a tax upon legacies, this time in response to a domestic crisis, with the Revenue Act of 1862. Unlike its predecessor, the Revenue Act included a tax that applied directly to personal property, though it originally did not include estates and was graduated based upon whom the decedent was specifying in the will, rather than on the value or size of the property in question.[102] In response to the rising costs of the Civil War, however, the Revenue Act was revised and reenacted in 1864, with new provisions that not only increased the legacy tax rate, but also added a tax on bequests of real estate.[103] Before the century ended, a new tax was proposed to similar effect: the War Revenue Act of 1898.[104] The Act of 1898 served as a more direct parallel to the modern conception of an estate tax: it was a tax that targeted the estate itself, rather than its beneficiaries, and was graduated based upon the size of the estate as well as the relationship the decedent shared with the legatee.[105]

2. The Modern Estate Tax

It did not take long for the first modern estate tax to be enacted, a duty that would not only focus on estates themselves, but would also continue to exist even after its wartime need expired: the Revenue Act of 1916.[106] The new tax would apply to net estates—the total sum of property that the decedent owned—and would be graduated such that only those estates worth over $50,000 would have any tax, with estates exceeding $5 million asked to pay ten percent.[107] In the following years, certain changes would be made to the existing estate tax to make it more wide-ranging and effective, such as rules that regulated the transfer of gifts so as to prevent individuals from escaping the estate tax via inter vivos transfers, or allowing deductions in certain situations, such as when the property transferred to the decedent's spouse.[108]

Following this, the estate tax remained largely unchanged until a major reform effort in 1976.[109] The Tax Reform Act passed in that year

100. Darien B. Jacobson, Brian G. Raub & Barry W. Johnson, *The Estate Tax: Ninety Years and Counting*, 27 STAT. INCOME BULL. 119 (2007).
101. Stamp Act of 1797, at 527.
102. Act of July 1, 1862, ch. 119, § 111, 12 Stat. 432, 485–86 (repealed 1872) [hereinafter Revenue Act of 1862].
103. *See* Jacobson, *supra* note 100, at 119.
104. *See generally* Act of June 13, 1898, ch. 448, 30 Stat. 448 (1898) [hereinafter War Revenue Act of 1898].
105. Jacobson, *supra* note 100, at 120
106. *See generally* Act of Sept. 8, 1916, ch. 463, 39 Stat. 756 [hereinafter Revenue Act of 1916].
107. *Id.* at 777–78.
108. Jacobson, *supra* note 100, at 122.
109. *See id.*

sought to create a more unified tax framework, in which both estate and gift taxes where imposed at a single, combined rate.[110] Prior to this change, the price of merely selling one's estate in life cost significantly less in tax than leaving property in death.[111] As a result, the tax system effectively gave an incentive for property owners to gift as much of that property as possible before their impending demise.[112] The aim in unifying the gift and estate taxes was to ensure that it was not significantly cheaper to gift property than to leave it in inheritance, thus cutting away one loophole that would allow accumulated wealth to build up intact.[113] In addition, the Tax Reform Act enacted new taxes on generation-skipping trusts, a means often used to circumvent the estate tax by leaving assets in a testamentary trust that the property owner's children will open.[114] By introducing new methods to ensure that these trusts could not wholly dodge taxation, Congress once again took a step to combat the tax-free inheritance of wealth.[115]

3. Repeal of the Estate Tax: The Recent Efforts

While the 20th century largely saw efforts to tinker with or build up the estate tax, closing loopholes and providing exemptions as need saw fit, the 21st century has seen a concerted effort to see that tax removed from the books.[116] During the first George W. Bush administration, Congress embarked on a new tax policy with the Economic Growth and Tax Relief Reconciliation Act (EGTRRA) of 2001, which deliberately targeted transfer taxes for review and repeal.[117] The most significant of these was the estate tax itself: the EGTRRA laid the groundwork for the estate tax's eventual repeal.[118] By gradually increasing the exemption amounts and outright immunizing anyone who died in the year 2010, the EGTRRA was intended to see the estate tax incrementally shrink to the point of uselessness, with the hope to fully repeal the tax later on.[119] The repeal never came: although the estate tax suffered a "near-death experience" in 2010, it nevertheless lived on.[120] In both 2010 and 2013, Congress would intervene to ensure that the estate and gift tax regimes would continue, albeit with higher exemption thresholds than in previous years.[121]

110. Pub. L. No. 94-455, § 2001, 90 Stat. 1520 (1976) [hereinafter Tax Reform Act of 1976].
111. Jacobson, *supra* note 100, at 122.
112. *See id.*
113. *See id.*
114. *See id.* at 123.
115. *See id.*
116. *See id.*
117. *Id.*
118. *Id.* at 123–24.
119. *See id.* at 124.
120. David G. Duff, *Alternatives to the Gift and Estate Tax*, 57 B.C. L. REV. 893, 893. (2016).
121. *See* STAFF OF JOINT COMM. ON TAXATION, 110TH CONG., HISTORY, PRESENT LAW, AND ANALYSIS OF THE FEDERAL WEALTH TRANSFER TAX SYSTEM 4 (Comm. Print 2015).

At the same time, however, the tax is still much diminished from its prior self, with the great increases in the tax-exempt threshold lowering its range and effectiveness significantly.[122] In its current state, the federal estate tax is limited only to the portion of an estate's value that goes beyond the maximum exemption level—currently, $5.49 million for an individual, and effectively twice that for a married couple due to spousal exemptions.[123] This amount is a stark difference even to the estate tax of barely two decades ago: in 2001, prior to many of these recent changes, the threshold for the estate tax was a much lower $650,000 for a given individual.[124] Because of this, only a fraction of a percent of Americans—an estimated 0.2%—are required to pay any income tax, let alone the highest possible rate of it.[125]

Even for those who are subject to the estate tax, the amount actually paid on their property rarely reaches the top rate of forty percent—on average, the most paid by an individual subject to the tax is less than half that, a mere seventeen percent.[126] Even with this lessened tax burden, the existence of common loopholes to avoid paying the estate tax, such as the use of grantor retained annuity trusts, have allowed property owners to effortlessly circumvent the tax and hold onto large amounts of otherwise taxable property.[127] At the same time, wider and wider deductions have also undermined the viability of the tax. Certain strategic avenues like the qualified terminable interest property marital deductions allow for the uninhibited transfer of large amounts of property without restriction, despite having little to do with the policy goals of marital deductions and costing the government significant amounts in revenue.[128] In a similar vein, charitable deductions are often allowed even where the purpose of donating is merely to benefit the donor. Certain pseudo-charitable donations free the donor from transfer taxes to the extent that it allows even more value to pass to a future beneficiary without fear of taxation.[129]

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122. *See id.* at 11–12

123. CHYE-CHING HUANG & CHLOE CHO, TEN FACTS YOU SHOULD KNOW ABOUT THE FEDERAL ESTATE TAX, CTR. ON BUDGET & POL'Y PRIORITIES, D.C. 1 (2017), available at https://www.cbpp.org/sites/default/files/atoms/files/1-8-15tax.pdf [https://perma.cc/TC6A-4KAD].

124. *Id.* at 2.

125. STAFF OF JOINT COMM. ON TAXATION, *supra* note 121, at 1.

126. HUANG & CHO, *supra* note 123, at 2.

127. The GRAT loophole alone is estimated to have allowed upwards of $100 billion to go untaxed, because of property owners closing their assets in such trusts. *Id.* at 3; *see also* Wendy C. Gerzog, *Toward a Reality-Based Estate Tax*, 57 B.C. L. REV. 1037, 1052 (2016).

128. "Unlike the terminable interest exception for a qualifying income interest coupled with a general power of appointment, the QTIP exception allows the predeceasing spouse to receive the benefits of a marital deduction without ceding control or ownership of the transferred property to the surviving spouse. The fiction of the QTIP as a marital transfer is intrinsically abusive. It also results in a significant current revenue loss." Gerzog, *supra* note 127, at 1056.

129. *See id.* at 1058.

B. Estate Tax Policy and Republicanism

1. The Purpose and Effects of the Estate Tax

The precise effect of the estate tax is a subject not entirely settled, and still hotly debated among economists and scholars. One consistent criticism of the estate tax is that it reduces the amount of savings in a given market, which has the additive effect of reducing growth.[130] Because a major incentive to save is the desire for gathered money and property to be passed on to one's children, an increase in estate taxes—or indeed the existence of such a tax at all—could potentially "increase the price of providing for one's heirs relative to the price of providing for oneself."[131] Whether this will actually reduce the amount of saving remains unclear: the estate tax's impact depends "upon the testator's elasticity of demand for bequests.".[132] Nevertheless, Wagner states that the most likely consequence will be a lower savings rate, and thus a slower rate of economic growth and progress than would be otherwise.[133]

The usefulness of the estate tax as a revenue-raising instrument also remains controversial. As previously mentioned, the United States estate tax was originally implemented almost purely as a means of bringing in new tax revenue under pressing circumstances, whether during the cash-starved early years of the republic or its most grave hour in the Civil War.[134] In each case, the estate tax was also set aside once the urgent need for additional revenue had run its course, and normalcy could return.[135] But even after the progressive estate tax was enacted on a more permanent basis in the United States, Britain, and other nations, it never served as a major source of revenue for any of those countries, and its already small role declined further as income, consumption, and social security taxes increasingly usurped its place.[136] Though the estate tax might still bring in some revenue, these more modern methods of taxation have largely proven to have greater efficacy and efficiency in bringing in revenue for their respective countries than the estate tax had previously been.[137] Thus, rather than arguing in favor of the estate tax as a means of bringing in more funds, this Note will instead focus on an argument that has seen more favor with scholars: using the estate tax to reduce the concentration of

130. *See* RICHARD E. WAGNER, INHERITANCE AND THE STATE: TAX PRINCIPLES FOR A FREE AND PROSPEROUS COMMONWEALTH 16 (1977).

131. *Id.*

132. *Id.* at 17.

133. *Id.* at 19.

134. *See* Duff, *supra* note 120, at 895.

135. *See id.*

136. *See id.*

137. In the United States, for example, the estate tax never commanded a greater percentage of total tax revenues than a mere 4.6% in 1941, declined to an even lower two percent in the 1970s, and continued to fall to a projected 0.6% in 2015. In the United Kingdom, revenues acquired by the estate tax reached a peak of 16.1% prior to 1915, but sharply declined after, declining to a scant 0.8% since 1982. This decline in the revenue-raising potential of the estate tax has been echoed in other OECD countries as well. *Id.* at 896–97.

wealth, and to promote equality of opportunity.[138]

There is reason to believe that the absence of the estate tax would worsen the problems of inequality in the United States. In an analysis of the consequences of an estate tax repeal, researcher Lisa Keister found that preserving the more progressive estate tax of the mid-1970s, with a top rate of seventy-seven percent and substantially lower exemptions, would have significantly reduced the income inequality later resulting from the stock market booms of the 1990s.[139] Comparing the concentration of wealth in these varying models, the preservation of the progressive estate tax would have lowered the share of wealth owned by the top one percent of economic earners by four percent in 1983, and by eight percent in 1998.[140] By contrast, the middle class would have swelled to own a ten-percent *larger* share of the total wealth in America.[141]

2. *The Estate Tax and the Republican Tradition*

Even if we accept that the estate tax would accomplish the goals of combating excessive wealth accumulation, a larger question remains: can the estate tax be justified on republican grounds? While it is true that major figures in the formation of republicanism as a theory believed that the ideal distribution of property was one of numerous small, independent owners, that does not necessarily mean that republicanism can support *re*distribution, or that they would find such affirmative measures advisable.[142] Considering the importance of private property in the minds of republican thinkers in the United States, could a redistributive method like the estate tax, aimed at combating the accumulation of wealth, be supported by republicanism itself? Despite these doubts, there is reason to believe that it can, from the testimony of these republican thinkers themselves.

In letters sent to his fellow American statesmen and contacts elsewhere, Thomas Jefferson showed a remarkable sympathy towards the idea of a method meant to prevent estates from being inherited intact.[143] Discussing the rights of both preceding and succeeding generations over modern society in a letter to James Madison, Jefferson laid out a stark philosophy as to the rights of the deceased over the way property is distributed:

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138. "In contrast to these small percentages, the OECD reports that 'income profits and capital gains taxes' generally accounted for between 25% and 60% of total tax revenues in OECD countries in 2012, representing 46.9% of all U.S. taxes, [and] 35.6% of U.K. taxes. . . ." *Id.* at 897–98.

139. WILLIAM H. GATES, SR. & CHUCK COLLINS, WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES 24 (2002).

140. *Id.*

141. *Id.* at 25.

142. *See* ALEXANDER, *supra* note 6, at 33–34.

143. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), *in* 1 THE REPUBLIC OF LETTERS: THE CORRESPONDENCE BETWEEN JEFFERSON AND MADISON, 1776–1826 631, 631–32 (James Morton Smith ed., 1995).

> I set out on this ground, which I suppose to be self-evident, *"that the earth belongs in usufruct to the living"*: that the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be his when himself ceases to be, and reverts to the society. . . . Then no man can, by *natural right,* oblige the lands he occupied, or the persons who succeed him in that occupation, to the paiment [sic] of debts contracted by him. For if he could, he might, during his own life, eat up the usufruct of the lands for several generations to come, and then the lands would belong to the dead, and not to the living, which would be the reverse of our principle.[144]

In general, Jefferson shows a skepticism that the qualities of property or property ownership should remain the same from one generation to the next.[145] He applies this principle to a number of potential scenarios, including the continuation of debts from one's ancestor, or even in the validity of laws passed down from a prior age to the modern one.[146] It is this same logic that causes him to be skeptical of the use of the fee tail in property ownership, or of the feudal privileges placed on lands, all of which were issues he would go on to scribe into the law.[147] In general, Jefferson viewed this attitude towards generational property as being one in stark contrast to the older tradition of "English precedent," and viewed the deference of the United States to these conceptions of property—allow passage of ownership without change from ancestor to descendent—as a habit "which fetters us with all the political heresies of a nation equally remarkable for it's early excitement from some errors, and long slumbering under others."[148]

Though Jefferson was a prominent supporter of ideas resembling the estate tax, he was by no means the only figure in republicanism to do so. Other Founding Fathers, such as John Adams, spoke at length on the value of property distributions as a means of promoting virtue. Writing to a contemporary, Adams cited the examples of Harrington to demonstrate how a balance of property ownership in society was necessary to preserve republican government:

> The only possible way, then, of preserving the balance of power on the side of equal liberty and public virtue, is to make the acquisition of land easy to every member of society; to make a division of the land into small quantities, so that the multitude may be possessed of landed estates. If the multitude is possessed of the balance of real estate, the multitude will have the balance of power, and in that case the multitude will take care of the liberty, virtue, and interest of the multitude, in all acts of government.[149]

This principle of power following property is one that Adams believed preexisted any American attempt at rebellion, having been fostered in the

144. *Id.* at 632.
145. *See id.*
146. *See id.* at 634–35.
147. *See id.* at 635.
148. *Id.* at 635–36.
149. Letter from John Adams to James Sullivan (May 26, 1776), *in* IX THE WORKS OF JOHN ADAMS 376–77 (Charles Francis Adams ed., Little, Brown & Co., 1854).

continent from the earliest days of colonization.[150] He believed this was a standard that any nation had to be exceedingly cautious in deviating from, particularly at a time in which the ability to vote was still tied to property ownership.[151] Though that particular suffrage element of American democracy might be gone in the present day, it nevertheless stands that Adams shared many of Jefferson's views on the vital nature of property ownership in creating a productive and conscious citizenry able to maintain the republic and its ideals.[152]

Both Adams and Jefferson believed that a certain dynamism in property ownership could work wonders in supplying the land necessary for the republic to flourish.[153] That dynamism could not be conjured out of thin air, without any changes to the way the government approached property—instead, it had to be cultivated using reforms and legislations that attacked the foundations of aristocracy in property.[154] Because both men believed that excess privilege and luxury could ruin a republic by sapping at necessary virtues, they wanted this dynamic style of property that resisted being hoarded by the few, choosing land liberty over stability, one that could withstand the pressures of the privileged.[155]

In this instance, that liberty of land meant demolishing styles of ownership and inheritance that would stop a common citizen from acquiring the small parcel of land necessary for his self-sufficiency and security, the one that would tie him to his community and give him the platform he needed to take part in the political process.[156] Thus, to both Adams and Jefferson, "Liberating the land . . . meant liberating the individual."[157] Considering this attitude, a measure taken to discourage the accumulation of excess land and wealth in the form of a tax upon death and inheritance would find fertile ground in this 'liberation' theory of land ownership and distribution.

Thomas Paine also wrote on the ideas of land reform in pamphlets concerning "Agrarian Justice," and supported the notion that cultivated land—having originally existed in common for the entire human race—must be compensated for when certain individuals garner so much of it that others are forced to do without.[158]

> It is a position not to be controverted, that the earth, in its natural uncultivated state, was, and ever would have continued to be, the *common property of the human race*. In that state every man would have been born to property. He would have been a joint life-proprietor with rest in the property of the soil, and in all its natural productions, vegetable and animal.[159]

150. *See id.*
151. *See id.*
152. *See* ALEXANDER, *supra* note 6, at 37.
153. *See id.*
154. *See id.*
155. *See id.*
156. *See id.*
157. *Id.*
158. *See* THOMAS PAINE, AGRARIAN JUSTICE 6 (London, 1797).
159. *Id.*

Despite this being the natural state of affairs, Paine states that "the landed monopoly" has perverted the value of cultivation by dispossessing others of the ability to own land or property of their own, thus creating a large population of individuals beset by "poverty and wretchedness that did not exist before" the system of land ownership and improvement began.[160] To combat this, Paine advocated for a "ground rent": that there would be a common fund, paid for by both the aforementioned "landed monopoly" and the citizenry at large, the purpose of which was to indemnify and compensate for the loss of land that these dispossessed members of society now faced.[161]

This proposal, radical in its day, shows that the republican philosophy of the day was open to strategies far bolder than the estate tax in the hopes of achieving balance in property ownership and wealth distribution. While few references by these past voices specifically authorize an estate tax for the purposes of combating wealth inequality, they nevertheless make clear not only that goal's importance, but also acceptable methods not dissimilar to it. The Framers and their contemporaries believed for a certainty that the lifeblood of republicanism lay with a dynamic order of property ownership that did not allow for aristocratic control, and that the best means of ensuring this was by attacking key structures in the inheritance system.[162] The estate tax, while not an exact analogue, is nevertheless similar enough that it can fall under this broad umbrella of acceptable distributive methods.

Conclusion

As the estate tax comes under increasing pressure from all sides, it is important that we determine just how rooted in American ideals such a measure truly is. On the one hand, it is true that Lockean theories of private property remain a stalwart influence on the nation, one which may be used to argue against the estate tax.[163] On the other hand, however, the equally venerable theory of republicanism—one adopted and developed by the Framers themselves—can justify its continuation. Applying the principles of republicanism to this specific context, one can see how closely its tenets align with the goals of the estate tax, acting as a method of preventing aristocratic wealth accumulation and defending against gross inequalities that can harm a republic.[164] Based upon the stated interests of a republican government in encouraging virtue amongst its citizens, the estate tax can be used to foster the small, independent land-owners that men like Jefferson sought.[165] Though it is true that republicanism has some reluctance to redistribute existing wealth, that need not stop it from

160. *Id.* at 7.
161. *Id.*
162. *See* Katz, *supra* note 68, at 11.
163. *See* Jennifer Bird-Pollan, *Death, Taxes, and Property (Rights): Nozick, Libertarianism, and the Estate Tax*, 66 MAINE L. REV. 2, 3 (2013).
164. *See* ALEXANDER, *supra* note 6, at 34.
165. *See id.*

justifying the use of an estate tax. Whether or not the estate tax survives is yet to be seen. When applying republicanism to it, however, one can see how closely one can follow the other.