



**OXFORD JOURNALS**  
OXFORD UNIVERSITY PRESS

---

The Constitutionality of the United States Inheritance Tax

Author(s): William H. Dunbar

Source: *The Quarterly Journal of Economics*, Feb., 1901, Vol. 15, No. 2 (Feb., 1901), pp. 292-298

Published by: Oxford University Press

Stable URL: <https://www.jstor.org/stable/1884899>

---

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



Oxford University Press is collaborating with JSTOR to digitize, preserve and extend access to *The Quarterly Journal of Economics*

JSTOR

## THE CONSTITUTIONALITY OF THE UNITED STATES INHERITANCE TAX.

By Act of June 13, 1898, the Congress of the United States imposed a tax on legacies and inheritances of personal property. This tax, laid as a part of the system of measures for additional revenue resorted to in consequence of the war with Spain, was in most respects a close copy of the similar tax imposed during the Civil War. The principal difference was in the new provision by which the rate varied according to the amount of property, and again according to the degree of relationship, if any, between the legatee or person inheriting and the deceased.

In the case of *Knowlton v. Moore*, and the cases argued with it, collectively called the *Inheritance Tax Cases* (to be reported), decided by the United States Supreme Court in May, 1900, the legality of the tax imposed by the Act of 1898 was assailed. The case arose in the Circuit Court of the United States for the Southern District of New York. It was an action brought by the executors of the will of one Eben Knowlton against the internal revenue collector, to recover the amount paid under protest by the executors in satisfaction of the tax assessed upon the personal property passing under the will. The constitutionality of the law was denied on three grounds:—

1. Because the subject-matter taxed was not included in the power conferred on Congress.

2. Because, if an indirect tax, it was not uniform.

3. Because, if a direct tax, it was not apportioned among the several States on the basis of population, as required by the Constitution.

The case also involved the construction of the provisions of the act fixing the rate, but this point need not here be considered. The Circuit Court decided against the plaintiffs on all the points raised, and the case was then taken to the Supreme Court by writ of error.

The Supreme Court had no difficulty in disposing of the

contention that Congress lacked power to levy any tax on the transmission of property upon the death of the owner. That contention rests upon the proposition that the transmission of property by will or by inheritance is a right created by legislation, and that the creation and regulation of the right is a matter within the exclusive jurisdiction of the several States, and that such a tax is, therefore, an interference with the powers of the several States. It is undeniably true that under the Constitution all power over the transmission of property after death rests with the States, but the conclusion sought to be drawn from this premise is essentially fallacious. Congress may not, indeed, in any way impose burdens on the exclusive powers of the States or the instrumentalities by which they are exercised ; but this does not imply that, because property or any other subject-matter of taxation is created by or is within the exclusive jurisdiction of the States, it is withdrawn from all possibility of taxation by the national government. The argument had been rejected long ago by the Supreme Court, when advanced in the *License Tax Cases* (5 Wall. 462) to defeat the power of Congress to require the payment of a license by persons engaged in certain trades. Such trades, like the inheritance of property, are to be regulated by the several States only ; but, while no act of Congress can legalize the carrying on of a trade illegal by State laws or provide for the inheritance of property, Congress may in the latter case, as in the former, resort to this subject of taxation. The power conferred upon Congress by the Constitution is, as to the subject-matter of taxation, plenary : the limitations are confined to the method of laying particular kinds of taxes and to the prohibition of any tax on exports.

These general considerations are decisive against the view that the national government cannot have recourse to a subject of taxation as ancient and as common as the various forms of death duties. Were further argument needed, the fact pointed out by the court that, within eight years after the adoption of the Constitution, Congress laid the first legacy tax, and at other periods subsequently resorted to similar measures, would afford a cogent reason for not denying the power.

The Constitution of the United States provides (Art. 1, Sect.

8) that "The Congress shall have power to lay and collect taxes, duties, imposts, and excises; . . . but all duties, imposts, and excises shall be uniform throughout the United States."

The Constitution also provides (Art. 1, Sect. 9) that "No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

The argument that the inheritance tax, if indirect, was not uniform throughout the United States, as required by the Constitution, was rightly rejected by the court. This argument was based on those provisions of the law exempting legacies of less than a certain amount, and establishing the double sliding scale already referred to, by which the rate increases with the size of the legacy or distributive share and with the remoteness or absence of relationship between the deceased and the legatee or heir. The ideas embodied in these provisions are common to a great part of the laws imposing death duties existing in the several States. In *Mayoun v. Illinois Trust and Savings Bank* (170 U. S. 293), decided in 1898, the Supreme Court had fully considered the argument that a progressive tax imposed by a State was so unequal and opposed to fundamental principles of justice as to be invalid, and to constitute a taking of property without due process of law. Agreeing with the great weight of authorities in the various States, the court had upheld such a law. This decision disposed of the argument that the tax should be declared void as an arbitrary and unjust exaction. As to the question of uniformity under the Constitution, the court simply reaffirmed its own previous decisions that the only uniformity required is geographical. The history of this provision in the Constitution lends no support to any other view, and, indeed, shows conclusively that the intention was to prevent inequality and discrimination between States, and not between individuals. Any tax which operates alike throughout the United States, without regard to where the subject-matter of taxation is found, is uniform, even though a much greater amount may be collected in one State than in another. As an indirect tax, therefore, the inheritance tax satisfied the only constitutional requirement.

The most interesting question presented by the case, at least for the economist, was whether the tax was to be deemed direct or indirect within the meaning of the Constitution. If direct, then clearly the law was unconstitutional, because the tax was not apportioned among the several States in proportion to population; and, as such apportionment would obviously be an impossibility, to declare the tax direct would in effect remove this subject of taxation from the power of the national government.

The question whether an inheritance tax is direct within the meaning of the Constitution was not a new one in the Supreme Court. Such a tax on the succession to real property, as well as on the inheritance of personal property, was imposed during the Civil War; and its constitutionality had then been assailed on this ground. In *Scholey v. Rew* (23 Wall. 331) the Supreme Court held that a tax levied under that law on the succession to certain real property in the State of New York was valid, on the ground that the law imposed an excise duty, and not a direct tax. That decision would probably not have been questioned at the present time, except for the belief that in the *Income Tax Cases* of 1895 (157 U. S. 429; 158 U. S. 601) the Supreme Court had changed its position on the question, and had at least thrown doubt on the decision in *Scholey v. Rew*.

The *Income Tax Cases* arose out of the law passed in 1894 assessing a tax on all incomes in excess of \$4,000, including alike incomes from real and from personal property. When the cases were first heard, the court, consisting of eight members, held that the law, in its application to income derived from real estate, was in effect a levy upon the property and a direct tax within the meaning of the Constitution, and therefore void because not apportioned among the several States. On the question whether, as applied to income derived from personal property, the law in like manner imposed a direct tax, the court was equally divided. Upon a rehearing before all the nine justices of the court the decision that a tax on income from real property was direct was reaffirmed, and the court held by a bare majority that the same was true as to income from personal property.

The principle laid down by the court in the *Income Tax Cases* did not require a decision that an inheritance tax was direct, nor did the reasoning of the court necessarily lead to such a result. It would not be useful to discuss here the much-mooted question of whether the conclusion reached by the court as to an income tax was sound or whether it was consistent with the previous decisions of the same tribunal. For the present purpose it is sufficient to point out that this conclusion was not decisive as to an inheritance tax.

As an economic question, it will not probably be disputed that the income tax decision was sound, and it may be that as an economic question an inheritance tax must equally be deemed direct; but it does not follow that the same reasoning which led the court to hold the one tax direct requires it to hold every tax direct which would be so deemed by economists.

In the *Income Tax Cases* the court proceeded in substance upon the ground that the words "direct tax" in the Constitution were not limited, as had been contended, to a land tax and a capitation tax, but were used in an ordinary sense to mark a distinction well understood and recognized when the Constitution was adopted, and that in this sense, as shown by the State systems of taxation then in force, all taxes on real or personal property and on the rents or income thereof were classed as direct.

The distinction between a tax upon the corpus of property and a tax upon the income derived from the same property is one of form rather than of substance. The incidence of the tax is in each case the same, and the effect as to those objects covered by the constitutional provision in question is the same. The Court took the view, as appears from the opinion delivered by Chief Justice Fuller, that this provision of the Constitution was designed to guard against "the exercise by the general government of the power of directly taxing persons and property within any State through a majority made up from the other States." It is plain that such power could be as effectively exercised by a tax on the income from property as by a tax on the property itself. Such an income tax, fraught with the danger against which the provision of the Constitution was directed, might well fall within the

constitutional prohibition and within the distinction recognized in State systems of taxation ; while other taxes scientifically classified as direct, but not within the intended purview of the constitutional provision, would for the purposes of interpreting that instrument not be deemed direct.

The question whether a particular tax is one the burden of which cannot be shifted by the person against whom it is levied is not decisive. An import duty upon articles designed for the owner's personal use satisfies that test. In construing the provision of the Constitution, the court was not bound to follow the classification of taxes by economists, however well founded in reason, except so far as such classification agreed with the sense in which the words appeared to have been used in the Constitution. To determine that sense, not only the purpose of the provision, but the circumstances existing at the time of its adoption, were matters of controlling importance.

An inheritance tax, while unquestionably direct, in the sense that the burden falls without recourse upon the person on whom it is assessed, has not been regarded by the courts as imposed on property. It is not, like a property tax, a levy by which a greater share of the burden of taxation may be deliberately thrown upon the citizens of certain States. The fact that a greater amount may in practice be collected in one State than in another is no more significant from the standpoint of the Constitution than the fact that, under internal revenue laws requiring licenses for certain occupations, more may be collected in one State than in another.

If it could be shown that an inheritance tax was from a legal point of view to be deemed imposed on the property passing by will or inheritance, it might be difficult to uphold a distinction between such a tax and an income tax, notwithstanding the practical difference in their operation as regards the purpose of the constitutional provision. But in the *Inheritance Tax Cases* the court was able to show that in the courts of the United States, in the courts of the several States, and in the usages of foreign countries, such taxes had always been deemed to be assessed not upon the property *eo nomine*, but on account of the event or occasion of death, and the transmission of property in consequence. If the view is once

adopted that the tax is not upon the property itself, the analogy of the income tax fails; and it becomes apparent that, while the incidence of the tax is direct, in that the burden cannot be shifted, it does not belong to the class of direct taxes against which the provision of the Constitution was aimed.

From an economic standpoint it may be that the distinction relied upon is unsatisfactory; but, in adopting that distinction, the Supreme Court cannot be deemed in any wise to have departed from its previous decisions, and the opinion of the court in the *Inheritance Tax Cases* makes it plain that no such departure was intended.

WILLIAM H. DUNBAR.