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A HISTORY OF THE WISCONSIN INHERITANCE TAX

JACK STARK*

I. INTRODUCTION

Wisconsin's inheritance tax, which was repealed in 1987, never generated a large portion of the state's revenue; however, the potential and actual inheritance tax liabilities of some wealthy and influential persons created contention and political significance. Moreover, the nature of the tax—it was a tax on the transfer of property upon death—and certain attributes of the tax readily provoked ideological arguments. In fact, the inception of the tax, some of its modifications, and its discontinuation reflect important changes in Wisconsin's political climate. Furthermore, the tax was frequently litigated. Many of the cases involved only marginally important issues, but some of them forced, or allowed, judges to deal with a few of the weighty issues that confronted legislators. For these reasons, the importance of the inheritance tax in Wisconsin's political and legal history greatly outweighs the tax's fiscal significance.

II. THE INCEPTION OF AN EXACTION

At first, Wisconsin had a few rudimentary death taxes and facsimiles thereof. In 1868, the Wisconsin Legislature enacted the state's first exaction, activated by the transfer of property upon death. The exaction was imposed upon estates, and thus was not an inheritance tax, if it was a tax at all. It was a source of funding for courts and was imposed on persons in all counties who used the courts, so it can plausibly be classified as a user fee. Although the law was the beginning of what would later develop into a codified inheritance tax, it lasted only four years, and the legislature repealed it in 1872. Five years later, in 1877, the legislature enacted a law that was similar to the repealed law,

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except that it explicitly applied in only Milwaukee County. That law imposed an exaction, according to a graduated scale, on estates and the property of wards that guardians administered. The law appeared in that form in the 1878 Revised Statutes.

In 1889, the legislature repealed the death tax law of 1887 and created a different exaction. At first glance, this law was more general than the 1887 law because it applied to any counties that had a population of more than 150,000; however, in application, the law was just as narrow because at that time, only Milwaukee County had that many residents. The 1889 law imposed an exaction of 0.5% on the first $500,000 of each estate or ward’s property that a guardian administered, and an additional 0.1% on the value above $500,000. Estates and the property of wards were exempt if they were worth less than $3000. The exaction was to be paid to the county treasurer and was intended to fund “the expense of administration and guardianship.” That exaction is called a “sum” or an “amount” and is said to be “in lieu of fees,” which apparently referred to usual court fees, such as filing fees. The low rate, the recipient of the revenue, and the mandated use of the revenue suggest that the exaction might more accurately be called a fee. Conversely, the absence of an upper limit makes the exaction seem like a tax. That is, the cost of administration almost certainly did not continue to increase as the size of an estate increased, and the exaction therefore produced general revenue above and beyond compensation for court fees. For example, whereas the 1868 law imposed a charge of $75 on all estates of $10,000 or more, the 1889 law imposed a considerably higher charge against very large estates. Thus, the 1889 law not only funded the administration of estates but also redistributed income.

Other noticeable differences between prior laws and the 1889 law introduced an element of ideology into the history of Wisconsin death taxes. That additional function raised the issue of the propriety of using

3. Act of Mar. 6, 1877, ch. 98, § 4, 1877 Wis. Laws 190, 191.
4. 1878 Revised Statutes.
6. Id.
7. Id.
8. Id.
9. Id.
10. Id.
death taxes, or exactions that resembled them, to limit the amount of property that a decedent could transfer. The debate about whether this country should have an aristocracy of birth, which the absence of death taxes facilitates, or an aristocracy of talent, which the presence of death taxes facilitates, had once again arisen.

A. Constitutional Challenges to the "Exaction": Fee or Tax?

While the earlier laws had gone unchallenged in court—most likely a result of their low upper limits—the 1889 law did not escape adjudicative scrutiny and was quickly challenged in 1890. The estate in the case was appraised at $631,949.08 and owed $2631.95 in taxes; under the 1868 law it would have owed only $75. The crucial issue in the case was whether the exaction was a fee or a tax. The court held that it was the latter, and as a result, subjected it to three constitutional provisions.

One of those provisions required that "the rule of taxation shall be uniform." Another section of the constitution prohibited the enactment of special or private laws for the assessment of taxes, and a third section stated that only general laws that applied uniformly throughout the state could be enacted. Thus, only general laws that applied uniformly throughout the state could be enacted for the assessment of taxes.

The court held that because the tax law was limited in operation to Milwaukee County, it was a special law that did not operate uniformly throughout the state and was therefore unconstitutional. However, a later court held that the section of the constitution dealing with uniformity of taxes did not apply to death taxes. Although a dissenting judge in Sanderson argued that the exaction was a fee, the majority's position that it was a tax makes sense, and its conclusion that the act creating the tax was a special law—that is, one with a limited application—is also convincing. Because the case turned on the

13. State ex rel. Sanderson v. Mann, 76 Wis. 469, 45 N.W. 526 (1890).
15. Id. at 474–75, 45 N.W. at 528.
16. Id. at 475–77, 45 N.W. at 528–29.
17. Id. at 476, 45 N.W. at 529 (citing Wis. Const. art VIII, § 1).
19. Id. § 32.
20. Sanderson, 76 Wis. at 480, 45 N.W. at 530.
22. Sanderson, 76 Wis. at 480, 45 N.W. at 482.
uniformity of the rule, the court had to decide only peripheral issues, not difficult and politically charged issues.

B. Policy Issues Influencing the Inheritance Tax

Some of the major public policy issues related to the inheritance tax emerged soon after Sanderson. The occasion was the 1898 report of the Wisconsin State Tax Commission ("Commission"), a state agency that then consisted of the governor, the secretary of state, and three nonelected officials. One of the Commission's duties was to advise the legislature on tax policy. At that time, the property tax was not only the major source of revenue for local units of government, but it was also an important state tax. The Commission noted that property tax assessors failed to find a good deal of personal property, especially intangible personal property. That fact induced the Commission to write:

We recommend an inheritance tax as a partial substitute [for the property tax] which, as a tax burden, would rest, without shifting, upon intangible property not reached under present methods more than upon any other property. It would thus supplement the present system in the very feature wherein it is most inefficient.

The Commission realized that it was much easier to discover, and thus to tax, intangible property during the probate process, when it was subject to an inventory, than during the owner's lifetime. The Commission recognized that it was impractical to tax credits (the rights of lenders to collect loan payments) and saw the inheritance tax as a possible solution. For example, a person who was still making payments on a home was taxed on the entire value of the home, although part of that value reflected the lender's right to loan payments, which was secured by a mortgage that, upon default, ultimately allowed the lender to seize the home. The administrative burdens of identifying

23. WISCONSIN STATE TAX COMMISSION, REPORT OF THE WISCONSIN STATE TAX COMMISSION (1898) [hereinafter COMMISSION REPORT 1898].
25. Id. § 3.
26. COMMISSION REPORT 1898, supra note 23, at 120.
27. Id. at 121.
28. Id.
29. Id. at 160.
the lender and allocating the value of the home between the owner and
the lender, as well as the likelihood that lenders would pass on the tax to
consumers in the form of higher interest rates, made taxing that credit
impractical and unwise. As a result, the Commission recommended
that the state stop taxing credits and suggested instead that an
inheritance tax would help solve the problem. The Commission’s
stated motive was to make the state’s tax system more equitable, not to
disadvantage wealthy persons by redistributing income. Although the
value of intangible property that wealthy persons owned far exceeded
the value of other persons’ intangible property, there is no reason to
doubt the Commission’s sincerity.

III. IMPLEMENTING THE INHERITANCE TAX: A SERIES OF TRIALS

The Commission’s advocacy of an inheritance tax apparently
convinced the legislature, which promptly enacted a law that imposed a
tax on the transfer of property at death. That tax was levied on only
personal property, which suggests that the legislature accepted the
Commission’s rationale for the tax. The law was inartfully drafted; it did
not clearly identify the person who was required to pay the tax. The
tax was imposed on the transfer, not on the receipt of property.
However, because the tax is called an inheritance tax in the bill’s title, the
tax was probably intended to be imposed on the transferee. The
first $10,000 of the value of property transferred was exempt, and the
remainder was taxed at 5%, except that if the transfer was to a father,
mother, husband, wife, child, brother, sister, wife or widow of a son,
husband of a daughter, or adopted child, the rate was 1%. The flat rate
also indicates that the legislature’s motive was not to impose a greater
tax burden on wealthy persons.

30. Id.
31. Id. at 161.
32. See id. at 161–63.
33. Act of May 12, 1899, ch. 355, 1899 Wis. Laws 668.
34. Id. § 1, 1899 Wis. Laws 668.
35. Id. § 3, 1899 Wis. Laws 668.
36. Id. § 3, 1899 Wis. Laws 668, 670.
38. Id. § 1, 1899 Wis. Laws 668–69.
39. Id. § 2, 1899 Wis. Laws 669.
A. Political Influence on the Inheritance Tax

Between the issuance of the first and second reports, the world of Wisconsin politics had changed, which was reflected in the make-up of a new Tax Commission. At the time that it issued its second report, the Commission no longer had any elected officials as members, and two of the three nonelected officials who were on the Commission in 1898 had been replaced. In 1901, Robert M. La Follette, Sr., was elected as Wisconsin's governor, a major political event. In the wake of the election, La Follette, the first in a series of three Progressive governors, appointed Nels Haugen, one of his closest allies at the time, to the Tax Commission. It is widely believed that a major motive of the Progressives was to fiscally punish the wealthy. For example, two historians have attributed the Progressives' establishment of the income tax a few years later to that motive. However, careful analysis of the legislative history of the Income Tax Act, of the voting on that measure, and of the Act's results indicate that the legislature's primary motive was to make Wisconsin's system of taxation more equitable. Indeed, one of the motives of the Income Tax Act's advocates was the same as a major motive for establishing the inheritance tax: to compensate for the difficulty of subjecting intangible personal property to the property tax.

Despite the primarily Progressive attitudes of its members, the Tax Commission carried on a quiet battle of making the administration of tax more equitable. The Progressives' motives for taxation are illustrated by the fact that the Commission's 1901 report is heavy on technical analysis and light on political rhetoric. For example, in its 1898 report, the Commission based its assertions on impressions that most intangible personal property escaped taxation. In contrast, in its

40. WISCONSIN STATE TAX COMMISSION, FIRST BIENNIAL REPORT OF THE WISCONSIN STATE TAX COMMISSION TO THE LEGISLATURE (1901) [hereinafter COMMISSION REPORT 1901].
41. Like many of La Follette's allies, he eventually fell out of favor with his chief.
42. See DAVID P. THELEN, THE NEW CITIZENSHIP (1972); W. Elliott Brownlee Jr., Income Taxation and the Political Economy of Wisconsin, 1890–1930, WIS. MAG. HIST., Summer 1976, at 299.
44. Id.
45. COMMISSION REPORT 1901, supra note 40.
46. COMMISSION REPORT 1898, supra note 23, at 120.
1901 report, rather than expound on its political theories, the Progressive-heavy Commission made its case for imposing an inheritance tax in part by announcing the results of a comparison of assessment records and probate records in seven counties. The latter records were far more likely to be accurate because inventories of estates were complete or virtually complete and because expert appraisers determined the value of property in estates. The Commission found that the taxable personal property of decedents whose estates had been probated had been assessed at only 14% of their actual value, as determined by appraisals for probate purposes. Inaccuracy and omissions in assessments were even more pronounced with regard to intangible personal property, of which only 5.5% had been assessed. Thus, the Commission provided ample evidence for its conclusions regarding taxation and seemed justified in pressuring local officials to improve the process.

The Commission gingerly approached the issues of public policy that were related to its findings on the escape of personal property from taxation. On “the taxation of moneys, and credits, especially bank deposits and real estate mortgages,” it opined:

[T]he consideration of these questions opens up a field of discussion so wide that we can no more than allude to the topic at this time; and until it can be given full and exhaustive consideration it is perhaps best that no attempt be made to reach or state definite conclusions. The Commission, however, did anticipate that in the near future there would be agreement “that so much revenue as ought to accrue to the public under a wise policy from such forms of property shall be secured by indirect methods more nearly approximating equality between individual citizens. The taxation of inheritances of personal property is a step in that direction.” Thus, the Progressives’ policies on the taxation of intangible personal property were again based on concerns about equity, not on desires to redistribute income.

47. COMMISSION REPORT 1901, supra note 40, at 128–31.
48. Id. at 129–30.
49. Id. at 131.
50. Id. at 142.
51. Id. at 143.
Although the Commission supported the 1899 inheritance tax law, that law had a short life. Like the 1889 inheritance tax law, the 1899 law was held unconstitutional. The Wisconsin Supreme Court, in Black v. State, wrote that it considered unimportant the question of whether the tax violated the state constitution's Uniformity Clause, despite the plaintiff's argument to the contrary. Instead, the court examined the tax in the context of the state constitution's version of the federal Equal Protection Clause. The court held that the tax violated the Equal Protection Clause because transfers of property of equal value to the same class of legatees would result in tax liability for some legatees if the entire estate's value exceeded the amount of the exemption, while other legatees could escape tax liability simply because the entire estate's value from which their transfer came was equal to or less than the exemption. Like the statute that was at issue in Sanderson, the statute that was at issue in Black was clearly unconstitutional due to some of its details; therefore, as in Sanderson, the Wisconsin Supreme Court could decide easily the case while avoiding the important public policy issues that lurked beneath the tax's surface.

1. An Inherent Right to Inherit?

In Black, the first instance of a political argument—as opposed to advocacy supporting taxation regardless of whom it helped or hurt—appeared. The writer of the majority opinion, Justice Winslow, noted in passing that if the right to transfer property at death was not inherent, those transfers could be taxed at 100%, and the right would thereby be nullified. In a concurring opinion, Justice Marshall wrote that he wished that the majority opinion had not passed so lightly over the issue. The right to inherit, Marshall wrote, is inherent and is subject to only a few limitations, including nondiscriminatory taxation. Marshall, who was not known for lassitude, then proceeded, at
considerable length, to defend property rights.\footnote{Id. at 223–33, 89 N.W. at 529–32 (Marshall, J., concurring).}

2. Changes in the Political View of the Court

Justice Marshall did not state the motive for his digression, but the timing of it is revealing. Shortly before the opinion was issued, Robert M. La Follette was elected to his first term as governor of Wisconsin. La Follette’s rhetorically powerful attacks on special interests were well known, and they suggested to many people that property rights, especially those asserted by the wealthy, were not as secure as they had been before his inauguration. Marshall was a conservative jurist.\footnote{See generally, \textit{1 ROUJET D. MARSHALL, AUTOBIOGRAPHY OF ROUJET D. MARSHALL} (Gilson G. Glasier ed., 1923).} In fact, before he began his long tenure on the Wisconsin Supreme Court, he had been counsel for major lumber interests.\footnote{Id. at 272–344.} In his concurrence, he appears to be announcing, in veiled terms, that he would defend property interests against attacks that he expected La Follette and his allies to mount on them. However, if that was the case, Marshall’s apprehension was ill-founded. As we have seen, the Progressives’ tax policy was based on a respect for equity, not on a desire to confiscate wealth.

Regardless of the accuracy of Marshall’s perceptions about the Progressives, the relationship between the court and the loci of power in the state government had changed. At this point, it is important to clarify this new relationship, because soon after the court decided \textit{Black}, it decided a case in which it had to squarely face the question of whether an inheritance tax law that was not obviously flawed, as were the ones at issue in \textit{Sanderson} and \textit{Black}, was constitutional.

The Progressive era in Wisconsin lasted from 1901 to 1915.\footnote{Robert M. La Follette’s son Philip was governor for three nonconsecutive terms in the 1930s, and his tenure was an attenuated second Progressive era.} In 1901, the Wisconsin Supreme Court had five members. Due to a constitutional amendment, its membership was increased to six in 1905 and to the present seven in 1908.\footnote{1877 Senate Joint Resolution 2, ch. 48, Laws of 1877.} From 1901 to 1915, the Progressive governors appointed only two justices: Bashford, who served for less than one year, and Vinje, who was not appointed until 1910. During that period, the only other obvious Progressive was Justice Siebecker (who was in fact Robert M. La Follette’s brother-in-law). Marshall and Winslow, two conservatives, served for the entire Progressive era. Thus,
the court was certainly not well disposed toward the Progressives. Despite the court’s composition, it upheld most of the major Progressive legislation that was challenged. For example, the court upheld the Progressives’ innovative legislation on workers’ compensation, the income tax, the Civil Service Commission, workplace safety and the Industrial Commission, and the direct primary. Two exceptions were challenges to acts on water conservation and regulation. The only other major exception is a case in which the court, with Justice Marshall writing the majority opinion, invalidated a forestry program on the grounds that the constitutional amendment that made it possible was procedurally defective. After so holding, Marshall went on at great length to invalidate the program on as many other grounds as he could imagine, some of them being quite fanciful.

C. The Reaffirmation of Policy: An "Equitable" Inheritance Tax

Despite two legal setbacks, advocacy for instituting an inheritance tax did not cease. In its 1903 report, the Commission again urged the enactment of such a tax. That report makes clear that the Commission’s primary motive for its recommendation was to make Wisconsin’s tax system more equitable:

The old order of things in taxation must inevitably change and yield to the new to keep pace with the rapid social and industrial advances in order to produce equality and justice by the taxation of every individual according to his ability to pay, whether measured by property, earnings or other standards.

The changes that the report referred to included the decrease in the relative importance of the economy’s agricultural sector. The property

68. State ex rel. Buell v. Frear, 146 Wis. 291, 131 N.W. 832 (1911).
70. State ex rel. Van Alstine v. Frear, 142 Wis. 320, 125 N.W. 961 (1910).
71. State ex rel. Jones v. Froehlich, 115 Wis. 32, 91 N.W. 115 (1902); Water Power Cases, 148 Wis. 124, 134 N.W. 330 (1912).
72. State ex rel. Owen v. Donald, 160 Wis. 21, 151 N.W. 331 (1915).
73. See id.
74. WISCONSIN STATE TAX COMMISSION, SECOND BIENNIAL REPORT OF THE WISCONSIN STATE TAX COMMISSION TO THE GOVERNOR AND LEGISLATURE (1903).
75. Id. at 50.
tax could be much more fairly administered in a primarily agricultural economy than it could in a mixed economy, which was developing in Wisconsin. In the former kind of economy, property was clearly visible; in the latter kind of economy, much of the property was intangible and thus anything but clearly visible.

The Commission also considered several arguments in favor of, and several opposed to, inheritance taxes. It rejected the argument that the tax should be instituted in order to redistribute wealth, which again indicates that the Progressives’ tax policy was not based on a desire to confiscate wealth from those who had a large measure of it. Although the Commission acknowledged that the most popular justification for the tax was that it reached property that, due to ineffective administration, the property tax had not reached, it pointed out that persons who inherited property—not persons who had avoided taxes on it—paid the inheritance tax. In addition, the Commission rejected the argument that imposition of an inheritance tax would drive capital from the state. That argument was the major one used decades later by persons who advocated discontinuing the tax. Rather, the Commission was persuaded that it was rational to impose the tax because it attached to property that the taxpayer acquired without effort. The Commission also included in its report a copy of a legislative bill it had prepared that would establish an inheritance tax. In his State of the State address, Governor La Follette remarked:

[T]he tax inheritance [sic] bill to be prepared and submitted by the commission doubtless will meet every objection raised by the supreme court in Black v. State. The wisdom of this legislation is no longer open to question, and the bill will, I cannot doubt, receive prompt and favorable consideration at your hands.

76. Id. at 59–65.
77. Id. at 60.
78. Id. at 61.
79. Id. at 63.
80. Id. at 61–63.
81. Id. at 71–76.
82. 113 Wis. 205, 89 N.W. 522 (1902).
D. A "Progressive Rate" Inheritance Tax System

La Follette's prediction was accurate; by the end of March 1903, the legislature had enacted an inheritance tax law, and La Follette had signed it.\(^84\) That law taxed the transfer of both real property and personal property.\(^85\) It had an intricate system of rates that varied both with the closeness of the transferee's relation to the transferor and with the amount of property transferred.\(^86\) As was true of the 1899 tax, the law did not clearly identify the payer of the tax, but the tax was labeled an inheritance tax, so the transferee apparently was required to pay it. The exemptions were stated in terms of the value of property transferred to each recipient, not in terms of the overall estate's value.\(^87\) That change from the previous inheritance tax act was a response to \textit{Black}. The 1903 act also established a sophisticated administrative structure.\(^88\) Legally, conceptually, and administratively, the 1903 act was considerably stronger than earlier Wisconsin inheritance tax laws.

1. Constitutional Attacks: Natural Rights, Uniformity, and Equal Protection

The technical improvements added in the 1903 inheritance tax law allowed the act to survive a legal challenge.\(^89\) The plaintiff in that case presented three arguments against the law, the first of which was that the transfer of property at death was a natural right.\(^90\) On that point, the plaintiff probably took a clue from Justice Marshall's concurring opinion in \textit{Black}. The court, with Justice Winslow writing the majority opinion as he had in \textit{Black}, assented to that argument.\(^91\) Justice Winslow acknowledged that on the issue of natural rights, the great weight of opinion favored the other side, but he framed an argument based on a Lockean conception of the establishment of civil societies: "The people, in full possession of liberty and property, come together and create a government to protect themselves, their liberty, and their property. The government which they create becomes their agent; the officers their

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\(^{84}\) Act of Mar. 31, 1903, ch. 44, 1903 Wis. Laws 65.
\(^{85}\) \textit{Id.} § 1, 1903 Wis. Laws 65.
\(^{86}\) \textit{Id.} §§ 2, 3, 1903 Wis. Laws 65, 66–68.
\(^{87}\) \textit{Id.} § 4, 1903 Wis. Laws 65, 68–69.
\(^{88}\) \textit{JOURNAL, supra} note 83.
\(^{89}\) Nunnemacher \textit{v. State}, 129 Wis. 190, 108 N.W. 627 (1906).
\(^{90}\) \textit{Id.} at 197–98, 108 N.W. at 628.
\(^{91}\) \textit{Id.} at 198–204, 108 N.W. at 628–30.
servants." That, of course, is not a legal argument, nor is Winslow's argument based on the reference to "pursuit of happiness" in the Declaration of Independence. Winslow revealed the probable actual motive for his decision by making a third nonlegal argument:

[T]his idea of the acquisition and undisturbed possession of private property has been the controlling idea of the race, the supposed goal of earthly happiness. From this idea has sprung every industry, to preserve it governments have been formed, and its development has been coincident with the development of civilization.

Winslow, as Marshall had in his concurring opinion in Black, appeared to have been warning the Progressives that the court would negate overly zealous attacks on private property, on the wealthy. Winslow, although a conservative, was more flexible and less dogmatic than Marshall.

Despite Winslow's lecture on political theory, the court held that reasonable taxation did not impair substantially the natural right to transfer property. At that point, the inheritance tax was past the shoals and sailing smoothly. To counter the plaintiff's argument that the statement in the constitution that "[t]he rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe" meant that the state may levy only the property tax, Winslow cited debates on that section from the constitutional convention and cases in which other kinds of taxes were approved. On the plaintiff's third argument, the court held that the requirement of uniformity established by that constitutional provision, as well as the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and its Wisconsin equivalent, required adherence to only "the true principles of classification." According to Winslow,

92. Id. at 199, 108 N.W. at 629.
93. Id. at 201, 108 N.W. at 629.
95. Nunnenmacher, 129 Wis. at 203, 108 N.W. at 630.
96. Id. at 204, 108 N.W. at 630 (quoting Wis. Const. art. VIII, § 1).
97. See id. at 204–21, 108 N.W. at 630–37.
99. Nunnenmacher, 129 Wis. at 221, 108 N.W. at 637.
the progressive rate structure of the tax was a proper classification; the tax, therefore, was constitutional.\textsuperscript{100}

The concurring opinion and the two dissenting opinions in \textit{Nunnemacher} indicate the political coloring of the court.\textsuperscript{101} In his concurring opinion, Justice Marshall wrote ecstatically about the court's strong stand in favor of property rights, which he had expressed a yearning for in his concurring opinion in \textit{Black}. In a revealing passage, he wrote:

\begin{quote}
It should be cause for much gratification to all who appreciate the principles of constitutional liberty, now so signally vindicated, that, rising above the influence of mere precedent, the court has the courage to cut loose from a judicial error that has been almost universally proclaimed by the courts of this country for many years.\textsuperscript{102}
\end{quote}

Justice Dodge wrote in dissent that the progressive rate structure violated both the uniformity clause and the guarantee of equality in the state constitution.\textsuperscript{103} Justice Cassoday, who had written the opinion in \textit{Sanderson},\textsuperscript{104} wrote in dissent that the tax was upon property and was therefore required to be uniform but was not uniform because classification based on value (the progressive rate structure) was "purely arbitrary and highly destructive of the equal rights guaranteed by the constitution."\textsuperscript{105} Thus, a court composed of five conservatives and one progressive upheld a tax that redistributed wealth, although the motive for enacting it was something else.

2. Political Reaction

Justice Marshall probably hoped that the "judicial error" of denying an inherent right to transfer property had been permanently corrected. Reaction to the case, however, indicated otherwise. The author of an article in a legal encyclopedia wrote:

\begin{quote}
Not a single other authority can be found to support [the
\end{quote}

\textsuperscript{100} \textit{Id.} at 222–23, 108 N.W. at 637.
\textsuperscript{101} Only Justice Siebecker and Justice Kerwin, both of whom voted for the state's position, did not write an opinion.
\textsuperscript{102} \textit{Nunnemacher}, 129 Wis. at 224, 108 N.W. at 638 (Marshall, J., concurring).
\textsuperscript{103} \textit{Id.} at 228–33, 108 N.W. at 639–41 (Dodge, J., dissenting).
\textsuperscript{104} State \textit{ex rel.} Sanderson v. Mann, 76 Wis. 469, 45 N.W. 526 (1890).
\textsuperscript{105} \textit{Nunnemacher}, 129 Wis. at 234, 108 N.W. at 641 (Cassoday, J., dissenting).
inherent right doctrine], and it is opposed to the views of all historians of the law and of all economic writers. Indeed the entire body of the law of descent and distribution seems to have been built upon the opposite conclusion.106

Nor did the Progressives, either in Wisconsin or on the national scene, change their position because of Winslow's arguments for property rights. A few years after Nunnemacher was decided, Theodore Roosevelt referred to "swollen fortunes,"107 indicating that he did not include the right to unimpaired accumulation of wealth among valid property rights. In contrast, Richard Ely, a professor at the University of Wisconsin whose reputation as a Progressive is not particularly well founded, dodged the issue by stating that his research on related subjects was at the time too jejune for him to comment upon Roosevelt's colorful phrase.108

Given that an inheritance tax was enacted and declared constitutional, the Commission did not have to argue in its next report that such a tax should be enacted or present a draft of such a law.109 Rather, the Commission could indulge itself in some well deserved pride, quoting a commentator who wrote that ""[s]ubsequent to 1900 our interest centres [sic] chiefly in the Wisconsin tax of 1903, which far surpasses any earlier law in the scientific character of its provisions.""110 The Commission also reported that the tax generated roughly $103,000 during the first full fiscal year of its existence, and roughly $125,000 in the following six months.111

In addition, the Commission expressed its hope that the federal government would continue to impose an inheritance tax only in times of war, when additional tax sources were required, thereby leaving the majority of income derived from routine inheritance tax to the states.112 The report included a memorial to Congress from the Wisconsin Legislature that expressed agreement with the Commission and requested that Congress repeal the inheritance tax it had imposed to

107. 41 CONG. REC. 22, 28 (1906).
110. Id. (quoting Solomon Huebner, The Inheritance Tax in the American Commonwealths, 18 Q. J. ECON. 529, 542 (1904)).
111. Id.
112. Id.
help fund the Spanish-American War. This tension between the federal government and state governments over which should have access to the inheritance tax continued for some time.

3. A Second Round of Constitutional Attack: Natural Rights Revisited

Although *Nunnemacher* appeared to be a definitive ruling that the inheritance tax was constitutional, litigation on the subject followed in its wake. In a 1909 case, the plaintiff launched two assaults on the tax. The first was based on a drafting error. A literal reading of part of the 1903 law would have resulted in an unreasonable, and therefore unconstitutional, classification, but the court, with a little straining, managed an interpretation that saved the tax. The second assault was more clever and more dangerous. The plaintiff argued that if inheritance was a natural right, as the court had held in *Nunnemacher*, it was a property right; thus, the inheritance tax was a property tax, and it was nonuniform and therefore unconstitutional. That argument gave the court a plausible way to find the tax unconstitutional, but it declined the gambit. Justice Winslow, writing yet another majority opinion in an inheritance tax case, pointed out that a number of taxes were imposed on activities that were natural rights, without being unconstitutional. Justice Timlin, who had joined the court in 1907, demonstrated that his view of the inheritance tax resembled those expressed earlier by Justices Cassoday and Dodge. Justice Timlin wrote, in dissent, that despite the holding to the contrary in *Nunnemacher*, which he did not mention (although he did cite *Magna Carta*), the tax was required to be uniform but was not.

**E. Reducing the Impact of the Inheritance Tax:**

Judicial and Legislative Influence

As a result of the supreme court’s holding in *Nunnemacher* and *Beals*, the inheritance tax’s constitutionality was firmly established; therefore, its opponents turned their attention to weakening its effects. An example is a case involving the $4 million estate of Frederick Pabst,

113. *Id.*
115. *Id.* at 553–55, 121 N.W. at 348–49.
116. *Id.* at 555–56, 121 N.W. at 349.
117. *Id.*
118. *Id.* at 560–61, 121 N.W. at 350–51 (Timlin, J., dissenting).
the Milwaukee brewing tycoon.\textsuperscript{119} The Milwaukee Probate Court found that his heirs' tax liability was approximately $140,000.\textsuperscript{120} After proceedings in a circuit court, those heirs paid $113,414.86.\textsuperscript{121} The plaintiff argued that the tax was invalid for the following reasons:

\begin{quote}
[I]t attempts to impose a tax on transfers limited to vest on contingencies which may never happen or to persons not in being or ascertainable, in making the tax due and payable forthwith out of the property transferred, by compelling parties to pay such tax on defeasible estates which they may never own, and in contemplating the payment of penalties before any opportunity is afforded to pay the tax.\textsuperscript{122}
\end{quote}

Had the court accepted any of those arguments, artful drafting of wills would have made tax avoidance possible, but none of them swayed the court. Careful consideration of the tax's administrative structure made it easier for the court to reach that result.

A few decades later, the legislature, not the courts, began to attenuate the inheritance tax. By 1929, the zenith of the Wisconsin Progressives had passed.\textsuperscript{123} In that year, the legislature enacted a law that granted an exemption from the inheritance tax for nonresidents' personal property, except for intangible personal property that had a situs in Wisconsin, if the state of the decedent's residence granted a similar exemption.\textsuperscript{124} Passage had been difficult. Its opponents filibustered, and the senate refused to return the bill to the assembly, an action that was usually considered a courtesy.

At the bill signing, Governor Kohler, a conservative Republican, asserted that the act "promises to stimulate the investment of capital in Wisconsin, and thereby increase our sources of taxation."\textsuperscript{125} Kohler's statement indicates the reason for the furor in the legislature. The motive for the change was not to achieve equity but to benefit the wealthy: The exemption would apply to intangible property, such as

\begin{footnotes}
\item[119] State v. Pabst, 139 Wis. 561, 121 N.W. 351 (1909).
\item[120] \textit{Pabst Heirs Must Pay $140,000 Tax}, MILW. SENTINEL, June 13, 1908, at 1.
\item[121] \textit{Inheritance Tax Law Is Attacked}, MADISON DEMOCRAT, Dec. 3, 1908.
\item[122] \textit{Pabst}, 139 Wis. at 583–84, 121 N.W. at 357.
\item[123] The zenith was the 1911 legislature, which passed much of the innovative legislation for which the state is still known.
\item[124] Act of July 18, 1929, ch. 298, 1929 Wis. Laws 374.
\item[125] Harold M. Griffin, \textit{Sees Benefit to Business in Measure}, WIS. ST. J., July 17, 1929, at 1.
\end{footnotes}
stocks and bank accounts, which were held predominantly by the wealthy. The argument that a unit of government can increase tax revenue by decreasing tax revenue would become familiar fifty years later. The tide had turned. At its inception, the inheritance tax was considered to be an essential part of an equitable tax system. By 1929, opponents of the tax occasionally were able to argue successfully that it impeded economic growth, thereby convincing politicians to provide tax relief to the wealthy.

In 1939, during the governorship of Julius Heil, the legislature enacted three laws that further eroded the inheritance tax. One increased the exemption for decedents’ siblings;\textsuperscript{126} another allowed a deduction for federal death taxes paid;\textsuperscript{127} and a third allowed an exemption for certain life insurance proceeds.\textsuperscript{128} Even if none of those acts was specifically designed to help the rich, the rich would receive a disproportionate share of the benefits that the acts created. That effect was caused by the tax’s progressive rate structure, the exemption (which allowed beneficiaries of the property of persons who had modest fortunes to escape taxation), and the greater likelihood that rich persons would have life insurance policies that paid substantial proceeds. The acts’ fiscal effect was significant; it was estimated to be $3 million annually.\textsuperscript{129}

Ten years later, the lines between the advocates of equity and the advocates of tax benefits for the wealthy were firmly drawn. The occasion was a bill that was introduced in the 1949 session of the legislature that would have made it more difficult for a transfer of property to avoid both the gift tax and the inheritance tax.\textsuperscript{130} Harold Groves publicly supported the bill.\textsuperscript{131} Groves was a University of Wisconsin economist and a nationally recognized authority on public finance, specifically on tax policy. For years he provided information and advice to the state government, and during the 1931 session, he was a valuable Progressive representative to the state assembly.\textsuperscript{132} For many decades he had consistently and effectively advocated for tax equity.

\textsuperscript{126} Act of Aug. 8, 1939, ch. 311, 1939 Wis. Laws 498.
\textsuperscript{127} Act of July 3, 1939, ch. 204, 1939 Wis. Laws 341.
\textsuperscript{128} Act of June 21, 1939, ch. 168, 1939 Wis. Laws 273.
\textsuperscript{129} Bill Proxmire, Groves Clashes With Big Business on Integration of Gift, Inheritance Taxes, CAP. TIMES, May 11, 1949.
\textsuperscript{130} 1949 A.B. 695 (Wis. 1949).
\textsuperscript{131} \textit{Id.}
\textsuperscript{132} See John O. Stark, Harold M. Groves and Wisconsin Taxes, WIS. MAG. HIST., Spring 1991, at 196–214 (discussing Grove’s contributions to society).
On the other side of that issue was R. O. Wipperman, a lobbyist for the Wisconsin Chamber of Commerce, who said, "the men who have known how to make lots of money are responsible for the greatness of the state of Wisconsin." Wipperman lifted the veil. Rather than arguing that reducing tax revenue would increase tax revenue to hide his true motivation, he bluntly stated his position.

F. Inheritance Tax and Transfers to Spouses

The next phase in the history of the Wisconsin inheritance tax involved the issue of taxing transfers to spouses. Oddly enough, the property rights of married women were an issue in the debates about drafting and ratifying the Wisconsin Constitution. The electors failed to ratify the constitution's first version, partly because it included a provision that allowed women to control their property and forbade seizure of their property for their husbands' debts. The version of the constitution that the electors ratified in 1848 contained nothing on the subject of married women's property rights. That issue lay more or less in abeyance for decades but appeared again in 1971. At that time, a transfer of joint property at death to the surviving joint tenant was deemed a transfer of one-half of the property. That is, only one-half of the value of the property was taxed. That rule applied to all joint tenancies, but the surviving tenants in the vast majority of instances were spouses, and far more husbands predeceased their wives than vice versa.

1. The Joint Tenant Exception: Requirement of Marital Contribution

In the 1971 session, the legislature rewrote the inheritance tax laws. Under the new version of the tax, the property that a surviving joint tenant acquired from the decedent for "full consideration in money or money's worth" was exempt from the inheritance tax. In other words, a surviving joint tenant who proved contribution to the marriage would receive a partial or full exemption. The criterion of providing money was clear cut, although occasionally difficulties with proof arose. In contrast, the criterion of money equivalents was vague and thus became fertile ground for litigation. Interpreted as narrowly as possible, that phrase meant only consideration in the form of an asset that was

133. Proxmire, supra note 129.
134. WIS. STAT. § 72.01(6) (1969).
readily liquidated. However, there were other types of consideration; most notably, personal services, which have monetary value, albeit of a form that makes it difficult to calculate. For example, a surviving wife who had worked alongside her husband in a family enterprise could argue that her contribution to the enterprise was substantial enough to qualify her for a complete exemption from the inheritance taxes that would otherwise be imposed on the transfer to her of the property that was held in joint tenancy. Resolving that issue would necessitate a careful analysis of a voluminous body of evidence.

2. Defining “Money’s Worth”

Upon enactment of that act, the meaning of “money’s worth” was indeterminate. Into that void stepped the Department of Revenue (“Department”). The Department set out to define “money’s worth” for purposes of the inheritance tax. That word appeared in the statutes as part of one of the two exemptions from the inheritance tax. That exemption applied to property if “the property or the consideration with which it was acquired, or any part of either, is shown to have originally belonged to the survivor and never to have been received or acquired by him from the decedent for less than adequate and full consideration in money or money’s worth.” The most difficult and significant part of the analysis dealt with instances in which the provision of personal services was alleged to be the “money’s worth” that triggered the exemption. The foregoing hypothetical of the surviving wife who had worked in a family enterprise alongside her husband was the instance that needed to be clarified.

The Department asserted:

Generally, personal services of a spouse alone will not constitute consideration in money’s worth. The way in which the spouses viewed their business relationship as demonstrated through their Wisconsin income tax returns will be controlling as to how the equity of the joint property will be viewed at death. The survivor must meet the burden of proving that either a partnership, a joint venture, valid leases, payment of salary or anything else sufficient under Wisconsin income tax law existed between the spouses.
In other words, for purposes of the exemption, the Department would recognize the contributions of a person to a marriage relationship, as those contributions applied to an enterprise, only if the relationship of husband to wife was not really marital but the relation of a lessor to a lessee or of an employer to an employee. The anomalous nature of that assertion, as one would expect, became apparent to others.

Not surprisingly, as a result of its anomalous nature, the rule was rapidly challenged in litigation. In *In re Estate of Kersten*, the bulk of the estate that was at issue was a farm and farm equipment. The Department had declared that there was no exemption, but the widow asserted that she was entitled to an exemption because she had contributed to the farming enterprise. Mrs. Kersten had run the household, helped with various jobs on the farm, kept the books, and operated the farm alone during two periods when her husband was ill. On the other hand, Mr. Kersten had reported all of the income from the farm as his for state and federal income tax purposes and for social security purposes. The Department advanced the same position that it had presented in its informational memorandum on proving joint tenancy. It also cited the two cases about proving the existence of a partnership for Wisconsin income tax purposes that it had cited in its memorandum.

However, the court held that the statute at issue, being very similar to a federal estate tax provision, was best illuminated by a federal case addressing the federal provision. Indeed, the facts in *Otte* closely resembled those in *Kersten*. Both cases were brought by widows who had operated a farm in conjunction with their husbands. In *Otte*, the court held that those personal services determined the division of the transferred property. The *Kersten* court held the same and

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140. *In re Estate of Kersten*, 71 Wis. 2d 757, 239 N.W.2d 86 (1976).
141. Id.
142. Id. at 758, 239 N.W.2d at 87.
143. Id. at 759, 239 N.W.2d at 88.
144. Id.
145. See generally, DEPARTMENT OF REVENUE, supra note 137.
146. Id. (citing Stern v. Dep't of Revenue, 63 Wis. 2d 506, 217 N.W.2d 326 (1974); Skaar v. Dep't of Revenue, 61 Wis. 2d 93, 211 N.W.2d 642 (1973)).
149. *Kersten*, 71 Wis. 2d at 766, 239 N.W.2d at 91.
determined that some real estate that the husband had purchased before the marriage and some certificates of deposit were fully taxable. However, the widow's personal services were a sufficient contribution to justify exempting half of the remainder of the estate, as joint property, from the inheritance tax. The court's finding that personal services are full consideration in money's worth for the survivor's share of the jointly held property resulted in an exemption of 50% of the property's value. In such an instance there was no need to place a monetary value on the services. The result reached in that case is the same as the one that would have been reached by reading literally the applicable statute, were it not for its most recent revision, that is, half the value of jointly held property was exempt.

3. Improving the Disposition of Women Through Legislation

The decision in Kersten was clearly good news for women, particularly farm wives. However, during the next few years there was considerable pressure to put widows in an even better situation with respect to the inheritance tax. An example of such pressure was the introduction of and enthusiastic support for a bill proposing changes to the inheritance tax. The bill would have exempted 50% of the value of property held in a joint tenancy, a portion of the property that reflected the survivor's contribution, or $500,000. An early result of that pressure was legislation that exempted interspousal transfers from the gift tax, which was the companion to the inheritance tax.

A few years later, the efforts of women and their supporters to achieve more favorable inheritance tax treatment bore fruit. In 1981, an

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151. Kersten, 71 Wis. 2d at 764, 238 N.W.2d at 90.  
152. Id. at 760, 238 N.W.2d at 88. It is not clear from the opinion whether farm proceeds were used to pay for the certificates of deposit and part of the loan on the real estate. If they were, one could argue that in calculating the inheritance tax at least some of that property should have been treated the same as the rest of the estate was treated.  
153. Id. at 765, 239 N.W.2d at 91.  
154. Id. at 766, 239 N.W.2d at 91.  
155. Id.  
158. Id.  
160. That is, the gift tax existed to prevent escape from the inheritance tax by making inter vivos gifts.
act\textsuperscript{161} created a total exemption for property transferred from one spouse to the other.\textsuperscript{162} By that time, it was becoming clear that the efforts to liberalize the inheritance tax treatment of transfers between spouses, particularly to a surviving wife, were part of a larger movement to increase the property rights of women. The larger movement came to fruition in the legislative session after the one that granted a complete exemption for transfers to spouses. That culmination was the enactment of a marital property act,\textsuperscript{163} which created a means of holding property that was analogous to community property and recognized the contributions that wives made to marriage. Ironically, the first draft of the state constitution, which the electorate rejected, contained a far-sighted provision on married women's property rights.\textsuperscript{164}

IV. THE DEMISE OF THE WISCONSIN INHERITANCE TAX: DIMINISHING REVENUE

After enactment of the interspousal exemption, the amount of revenue that the inheritance tax provided to the state had been reduced dramatically. That reduction made it easier to argue that the tax was obsolete. In fact, the tax at the time applied to mainly large estates left by wealthy persons. The proponents of repeal focused on this attribute. The success of the proponents in obtaining an exemption for surviving spouses also encouraged those who sought a more radical result: the repeal of the tax.

One can get a feel for the argument by considering a disagreement that occurred in 1980, when the pressure to discontinue the tax was becoming significant. A University of Wisconsin professor and his colleague argued that a survey that the Wisconsin Center for Public Policy conducted provided convincing evidence that the inheritance tax ought to be repealed.\textsuperscript{165} Their principal point was that wealthy, elderly persons were moving out of Wisconsin to escape the inheritance tax.\textsuperscript{166} The elderly claimed that the state was losing revenues that they provided, and therefore, the state would be better off without the tax.\textsuperscript{167}

\textsuperscript{163} Act of Apr. 4, 1984, Ch. 186, 1983 Wis. Laws 1153.
\textsuperscript{164} For a discussion of this issue, see Alice E. Smith, The History of Wisconsin Volume 1: From Exploration to Statehood 660–61 (1973).
\textsuperscript{165} Jon G. Udell & William M. Babcock, Jr., Death Taxes in Wisconsin (1980).
\textsuperscript{166} Id. at 28.
\textsuperscript{167} Id. at 29.
Two employees of the legislature attempted to rebut that analysis. They pointed out that the persons surveyed had left the state before the most recent reform of the tax, that the recent reductions made Wisconsin's inheritance tax similar to other states in its fiscal effect on taxpayers, that many of the persons surveyed cited better climate as an important reason why they left the state, and that discontinuing the tax would cost the state a substantial amount of revenue. At that time, the legislature declined to repeal the inheritance tax.

A few years later, the advocates of repeal made another concerted effort. An analyst in a state agency published a report that concluded that Wisconsin's death taxes exacted a larger economic toll than those of many other states. Some newspapers also called for repeal. For example, one asserted that the inheritance tax contributed to the state's reputation as being antibusiness and drove retirees from the state. Finally, in the budget act for 1987-88, the legislature phased out the tax over a five-year period.

V. CONCLUSION

The inheritance tax, having been repealed, is of only historical interest. However, its historical interest is significant. In tracing the history of the tax, one sees its interaction with such important topics as the degree to which the wealthy should be relieved of taxes and the proper status of women's property rights. In fact, the inheritance tax is a reasonably good indicator of the political currents that existed at various times in Wisconsin's history. Thus, as the history of the Wisconsin inheritance tax indicates, tax law often is sensitive to political and cultural changes and is therefore a good guide to those changes.

169. See id.
170. TUN-MEI Y. CHANG, WISCONSIN'S ELDERLY OUTMIGRATION AND WISCONSIN DEATH TAXES (Wis. Dep't of Health & Soc. Serv. ed., 1987).