

# A HEBREW REPUBLIC OF TAXATION? HENRY GEORGE'S SINGLE TAX, HEBRAIC LAW, AND UNEARNED INCOME

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## ABSTRACT

*Can millennia-old religious ideas offer insights into modern tax law? I explore this question through the hugely popular, yet largely forgotten, tax movement of political economist Henry George. Seeking to explain why poverty always seemed to increase along with progress, George proposed that, as societies advanced, land owners were able to capture an increasing share of unearned wealth. To remedy this, George proposed a "Single Tax" on the unearned income from land. George's tax movement gained popularity largely because it was founded on widely-held ideas originating in the Hebrew Bible. Yet, the religious foundation of George's tax movement has been largely unexplored. I trace key elements of George's theories to ideas and institutions originating in the Hebrew Bible. In Hebraic thought, because mankind did not create the earth, no person can claim full ownership of the land or its wealth. This principle was embodied in the Hebrew Bible's laws mandating an equal distribution of land and institutions to maintain this distribution over time. Centuries before George, medieval rabbis had already used these laws to derive a flexible, effective taxing power. Further demonstrating their durability and cross-cultural appeal, these Hebraic institutions would come to have a strong influence on European and American political thought through an intellectual tradition known as the "Hebrew Republic." Henry George's ideas can be seen as an unwitting revival of this tradition.*

*While the Single Tax itself was never implemented, George's movement illustrates popular and powerful ideas that can still be applied to modern tax law. As an example, I focus on the theological idea of unearned income, which was key to George's movement and to the Hebraic institutions. While distinctions between earned and unearned income are prevalent throughout the current tax code, they are confused and complex. A religious understanding of unearned income, based in the Hebraic concepts used by Henry George, potentially offers a more coherent rationale for distinguishing between earned and unearned income. I discuss how this might work in two specific areas of the tax code: the passive activity loss limitations and the special use valuation of family farms under Section 2032A.*

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## I. INTRODUCTION

While it may seem strange to found a popular tax movement on religious principles, and even more strange for an often-unaffiliated Christian to do so using principles from Judaism, Henry George did precisely that. In the latter part of the nineteenth century, George, a self-educated and hitherto mostly obscure figure, burst into international fame with his phenomenally popular book, *Progress and Poverty*.<sup>1</sup> The book was George’s attempt to explain the riddle of poverty always seeming to grow in tandem with economic progress. In other words, why were the world’s richest, most advanced cities also the world’s most unequal, with unimaginable wealth always existing alongside degrading poverty? For George, the answer was inextricably tied up in the land.<sup>2</sup> George proposed that as society advanced, landowners captured a disproportionate share of the gains, which they had done nothing to earn, leaving less and less for labor and capital.<sup>3</sup> In response, George proposed a tax on the “unearned increment” of land values, or the rental value of land apart from its improvements.<sup>4</sup> The tax became known as the “Single Tax,” as George proposed that it replace all other forms of taxation.<sup>5</sup>

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1. HENRY GEORGE, *PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH THE REMEDY* (1879).

2. JOHN L. THOMAS, *ALTERNATIVE AMERICA: HENRY GEORGE, EDWARD BELLAMY, HENRY DEMAREST LLOYD AND THE ADVERSARY TRADITION* 52 (1983). George had very particular definitions for the land, labor, and capital. See *infra* section II.

3. See *infra* Section II.

4. See GEORGE, *infra* note 204, at 48.

5. See *infra* Section II.

Before long, George's book swept the English-speaking world, becoming the most widely-read economic treatise of all time and, according to some estimates, the second best-selling English language book of all time, after only the Bible.<sup>6</sup> In the United Kingdom alone it sold more than 100,000 copies, was instrumental in creating a popular socialist movement, and led to the inclusion of a land value tax in David Lloyd George's famous "People's Budget."<sup>7</sup> Economist Richard T. Ely remarked, resentfully, that "tens of thousands of laborers have read *Progress and Poverty*, who have never before looked between the two covers of an economic book."<sup>8</sup> Even Karl Marx felt compelled to read and comment, unfavorably, on *Progress and Poverty*.<sup>9</sup> On extensive speaking tours, Henry George was "met with admiring crowds wherever he went," including the United Kingdom, Australia, and New Zealand.<sup>10</sup> After a petition urging him to do so gathered 34,000 signatures, George agreed to run for mayor of New York City as a third-party candidate.<sup>11</sup> Although he lost to the Democratic nominee, George shocked the political establishment with a remarkable second place finish, well ahead of the Republican candidate, Theodore Roosevelt.<sup>12</sup> Although he was similarly unsuccessful in a subsequent run for governor of New York and a second mayoral campaign, many Midwestern Progressives who believed in his ideas won office in local government, and he had fervent disciples in the United States Congress.<sup>13</sup> While his ideas would lead to limited forms of land taxation throughout the United States and the British Empire, efforts to enact a real Single Tax generally met with rejection and failure.<sup>14</sup>

How can we explain the puzzle that George could attract so much fervor and enthusiasm, yet utterly fail to enact his prized policy, the Single Tax? George's program contained two elements, linked but distinct. One part was religious and ethical, the other technical and economic. Campaigns to enact the Single Tax tended to rely on George's technical-economic arguments, but it was the ethical-religious aspect of George's message that was the real source of his appeal.<sup>15</sup>

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6. Fred Nicklason, *Henry George: Social Gospeller*, 22 AM. Q. 649, 654 (1970).

7. Alexandra Wagner Lough, *The Last Tax: Henry George and the Social Politics of Land Reform in the Gilded Age and Progressive Era* (August 2013) (unpublished Ph.D. dissertation, Brandeis University) (<https://hgarchives.org/thelasttax/>) at 87, 89. "The bill provoked the House of Lords to break a two century-old Parliamentary tradition and veto it." *Id.* at 90.

8. Ajay K. Mehrotra, "Render Unto Caesar...": *Religion/Ethics, Expertise, and the Historical Underpinnings of the Modern American Tax System*, 40 LOY. U. CHIC. L.J. 321, 362 (2008) (citing PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES* 120 (1979)).

9. THOMAS, *supra* note 2, at 181.

10. *Id.* at 322.

11. *Id.* at 225–27.

12. *Id.* at 225–27.

13. *Id.* at 356. For example, James G. Maguire of California and Rep. Johnson of Ohio passionately advocated George's theories in Congress, see 26 CONG. REC. app. at 331–32 (1894) (statement of Rep. Maguire), 26 CONG. REC. app. at 486–87 (1894) (Statement of Rep. Johnson). ARTHUR NICHOLS YOUNG, *THE SINGLE TAX MOVEMENT IN THE UNITED STATES* 142 (1916).

14. See THOMAS, *supra* note 2, at 147–51, 156–58, 163–256, 285–86, 312; Louis Wasserman, *The Essential Henry George*, 62 AM. J. OF ECON. & SOC., Nov. 2003, at 23, 25.

15. See *infra* Section III; see also *infra* Section VIII.

Followers were deeply moved by George's sincere allegiance to the working class, and his impassioned denunciations of poverty, monopoly, and unearned wealth.<sup>16</sup> Even more importantly, George brilliantly founded these denunciations on deeply-held religious ideas shared by most of the population.<sup>17</sup> Yet in campaigns to enact the Single Tax, and sometimes in the design of the Single Tax itself, these important religious foundations were overshadowed by less popular economic arguments.<sup>18</sup>

The importance of religion in George's program is evident in the fact that his most devoted followers were a diverse array of religious leaders and religiously-minded reformers. While religious leaders were generally reluctant to support specific economic and tax proposals, many enthusiastically supported George.<sup>19</sup> To his followers, George was "the prophet of San Francisco," a moral philosopher and evangelical leader much more than an economist.<sup>20</sup> His religious style, but also his religious substance, attracted the loyal support of Catholics, Protestants, Jews, and others.<sup>21</sup>

Prior work has already ably demonstrated that George is best understood as a religious figure,<sup>22</sup> but very little attention has been paid to the actual substance of these religious ideas and how they could still inform tax law and policy today. I argue that, remarkably, the religious substance of George's message was often distinctly Hebraic.<sup>23</sup> Indeed, George's first and most frequently repeated lecture was titled "Moses", and the heart of his message is best captured in God's injunction delivered through that Hebrew prophet: "The land shall not be sold forever: for the land is mine."<sup>24</sup>

To be clear, George was surely influenced by many philosophers, economists, reformers, and other sources outside of the Hebraic tradition. However, I focus on the Hebraic foundations of George's thought for two reasons. First, I believe that Hebraic ideas were probably more important than any other single source in inspiring George's thought. Second, the ability of Hebraic thought to serve as an alternative foundation for taxation and economic regulation has received very little attention, and this is the main contribution of my article. However, I emphatically

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16. See *infra* Section III; see also *infra* Section VIII.

17. See *infra* Section III; see also *infra* Section VIII.

18. See *infra* Section III; see also *infra* Section VIII.

19. Mehrotra, *supra* note 8, at 325, 361; see *infra* Section III.

20. See *infra* Section III.

21. See *infra* Section III.

22. For the case that George is best understood as a religious figure, see Bob Lawson-Peebles, *Henry George the Prophet*, 10 J. AM. STUD. 37 (1976) and Nicklason, *supra* note 6.

23. Throughout the paper, I use the terms "Hebraic", "Jewish" and "Hebrew" somewhat interchangeably. I use "Hebraic" most frequently, given that I mostly refer to thought and philosophy more or less directly stemming from the Hebrew Bible and not encompassing all of the rich, extensive rabbinic literature spanning a much greater time period and subject matter. The latter would probably more commonly be captured by the phrase "Jewish thought" or "Jewish law". "Hebrew" could probably most commonly be taken to refer to the Hebrew language. Therefore, I often opt for the term "Hebraic" while admitting the distinction is difficult and imperfect. I approach this topic not as an expert in any degree on Hebraic or Jewish thought and law, but as a tax scholar hoping to learn lessons from this rich tradition.

24. *Leviticus* 25:23. See also THOMAS, *supra* note 2, at 104.

do not wish to minimize the importance of related ideas in other faith traditions and from other thinkers; adequately addressing them is simply beyond the scope of this article.<sup>25</sup>

In George's philosophy, and that of Jewish thinkers for millennia, the earth logically belongs to God, who created it. His creation and placement of humanity, His children, upon the earth indicates His intent that it be used in an egalitarian fashion for their benefit.<sup>26</sup> George's followers often summarized these principles in the popular phrase "the fatherhood of God, and the brotherhood of man."<sup>27</sup> After the exodus of the Israelites from Egypt and their eventual conquest of the land of Canaan, these principles, as revealed through Moses, were implemented by his successor Joshua, who divided the land equally among the families of Israel.<sup>28</sup> It was further decreed that all debts be forgiven every seventh, or Sabbath, year, and that after every seventh such Sabbath year, the fiftieth year would be known as the year of Jubilee, wherein all land would revert to its original ownership.<sup>29</sup> These mechanisms were to ensure that the equal allocation of land was maintained over time, preventing both extreme concentration and extreme poverty. The Hebraic system struck an innovative balance between freedom and equality, allowing buying and selling, borrowing and lending, success and failure; but it also set boundaries on economic liberty that prevented excessive inequality.<sup>30</sup>

These institutions would prove remarkably influential in European and American political thought for many centuries, through an intellectual tradition known as "the Hebrew Republic."<sup>31</sup> For thinkers in the Hebrew Republic tradition, the original and best model of a free society was the commonwealth of the Hebrews, as recorded in the Bible and elaborated by rabbinic authorities.<sup>32</sup> The divine approval attached to this system, as well as its inherent virtues, were powerful tools for persuasion and motivation. Thus, the Hebrew Republic tradition significantly influenced political thought and practice across many centuries, in both Europe and America. As a consequence, both Thomas Jefferson and John Adams could agree that property must be relatively equally distributed as a necessary condition of a free republic.<sup>33</sup> Although by all appearances unwittingly, Henry

25. For influential applications of Christian theology to tax policy, see Susan Pace Hamill, *An Argument for Tax Reform Based on Judeo-Christian Ethics*, 54 ALA. L. REV. 1 (2002); see also Susan Pace Hamill, *An Evaluation of Federal Tax Policy Based on Judeo-Christian Ethics*, 25 VA. TAX REV. 671 (2006).

26. See *infra* Section IV. As one example of important related ideas in other faith traditions, Catholic Social Teaching has also developed an equivalent principle, known as the Universal Destination of Goods. See *The Ten Commandments*, in COMPENDIUM OF THE CATECHISM OF THE CATHOLIC CHURCH (Vatican: Libreria Editrice Vaticana 2012).

27. See, e.g., THOMAS, *supra* note 2, at 321; Nicklason, *supra* note 6, at 659.

28. Joshua 19:51.

29. *Id.*; Deuteronomy 15:1–3; Leviticus 25:1–13.

30. RABBI JONATHAN SACKS, *ESSAYS ON ETHICS: A WEEKLY READING OF THE JEWISH BIBLE 201-05* (First edition ed. 2016).

31. See ERIC NELSON, *THE HEBREW REPUBLIC: JEWISH SOURCES AND THE TRANSFORMATION OF EUROPEAN POLITICAL THOUGHT* (1st Harvard Pr. ed. 2011).

32. See *infra* Section VI.

33. ERIC NELSON, *THE GREEK TRADITION IN REPUBLICAN THOUGHT* 209 (2004).

George revived and adapted the Hebrew Republic tradition to great effect, showing its continued resonance in America.

Henry George successfully harnessed some of these Hebraic ideas, but he did not have the luxury of making a new property distribution from scratch, as did the Israelites. His solution, at least in theory, was to affect a more equal land distribution through taxation. Because God had created the land, any returns arising from the land itself could not properly belong to any individual, because the individual had not earned them. If a farmer acquired land, improved and cultivated it, then the income from his improvements and labor were his, untaxed. But the portion of income from the land itself, the “unearned” income attributable to the land’s fertility, access to water, or proximity to markets, would be subject to George’s Single Tax. In essence, all earned income was untaxed, while unearned income, as George defined it, was taxed at one hundred percent. There would no longer be any profit in passively renting land to others or in idly holding land in speculation of price increases. Because idle land ownership would be unprofitable, the price of land would fall, and it would be available to anyone who wished to use it productively.

The enduring ability of these Hebraic principles to undergird tax law is evident in the fact that, many centuries before Henry George, medieval rabbis had already derived a taxing power from the Hebraic distribution of the land. This taxing authority was known by the Hebrew legal maxim *hefker beit din hefker*, and it proved highly useful in accomplishing various governmental purposes.<sup>34</sup> Further, given its religious foundations, it was a taxing power with significant moral legitimacy. Henry George, although surely unaware of *hefker beit din hefker*, likewise saw God’s ownership of the land as the intellectual foundation of a taxing system that was morally legitimate as well as useful.

The fact that Henry George built a mass tax movement in the United States using ideas from the Hebrew Bible suggests that these ideas may still provide valuable insights for American tax law. As noted, George’s influence stemmed from his ethical-religious ideas, yet this often didn’t translate to his signature policy proposal, the Single Tax, and efforts to enact it. Thus, although the Single Tax itself may have failed, many of the ideas behind the broader movement still hold promise. By identifying some of the important animating principles from George’s teaching and Hebraic thought, we can profitably apply them to our current tax code.

One key example of such a principle is the theological conception of unearned income. A core idea articulated in George’s thought was that some income is unearned, because it flows directly from resources created by God, rather than individual effort.<sup>35</sup> Such income is therefore deserving of higher taxation. As a corollary, earned income should be taxed less. Fascinatingly, Congress has been inclined, almost from the inception of the income tax, to distinguish between

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34. See *infra* Section V.

35. See *infra* Section VIII.

earned and unearned income.<sup>36</sup> Yet the reasons for this are never clearly articulated, and when we look at the actual provisions attempting to make this distinction, we find a great deal of confusion and conflict.<sup>37</sup> As two examples of such provisions, I consider the passive activity loss limitations and the special use valuation for family farms under Section 2032A. Using these examples, I discuss how the Hebraic principles that inspired Henry George could provide an alternative paradigm for distinguishing between earned and unearned income, bring more coherence to these provisions of the tax law, and endow the tax code with greater moral legitimacy in the eyes of taxpayers.

The maladies that George identified, miserable poverty and dislocation existing alongside increasingly concentrated wealth, remain intractable, and growing, problems.<sup>38</sup> In this environment, an alternative paradigm is needed, offering both new ideas and the power to motivate people to support them. The powerful ideas from the Hebraic tradition that George advocated deserve closer examination as a way forward.

The remainder of the paper proceeds as follows. In Section II, I briefly describe George's principal ideas and the Single Tax. In Section III, I outline how George is best understood as a religious figure, and I describe the myriad religious leaders and groups that he attracted. Section IV describes the egalitarian laws and institutions concerning land ownership in the original Hebrew commonwealth, and the radical Jewish conception of property that flows from these laws. As an example of a functional taxing power derived from these Hebraic land laws, Section V then discusses the Rabbinic legal maxim *hefker beit din hefker*. Section VI examines the remarkable influence and durability of these Hebraic laws and principles through a survey of the "Hebrew Republic" intellectual tradition, and Section VII discusses Henry George's movement as an unwitting revival of this tradition, as well as reasons for his failure to enact his Single Tax. Section VIII applies key ideas from Georgism and Hebraic thought to the current tax code, showing how they can be used to derive a concept of unearned income; examines how this theological concept of unearned income might be applied to improve two areas of the tax code where the existing attempt to distinguish unearned income is sometimes complex and arbitrary, the passive activity loss limitations and Section 2032A special use valuation; and notes how George's example shows that religious sources can inspire tax laws in ways that are consistent with religious freedom and pluralism. Section IX concludes.

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36. For an excellent treatment of this topic, see generally Lester B. Snyder, *Taxation with an Attitude: Can We Rationalize the Distinction between "Earned" and "Unearned" Income*, 18 VA. TAX REV. 241 (1998).

37. *Id.*

38. See, e.g., Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States since 1913: Evidence from Capitalized Income Tax Data*, 131 Q. J. ECON. 519 (2016) (showing continual increase in U.S. wealth inequality since 1978); Anne Case & Angus Deaton, *Rising Morbidity and Mortality in Midlife Among White Non-Hispanic Americans in the 21st Century*, 112 PROC. NAT'L ACAD. SCI. 15078 (2015) (chronicling rise of "deaths of despair" and discussing possible economic causes).

## II. OVERVIEW OF HENRY GEORGE'S ECONOMIC IDEAS AND THE SINGLE TAX

In lengthy exposition beyond the scope of this paper, Henry George argued that the gains of advancing society are inevitably swallowed up by rents paid to landowners.<sup>39</sup> Consider two different agricultural societies. The first is a frontier society where fertile land is freely available. A settler can work the free land and earn, say, \$30 per year. If the free land were still available, but there was also superior land available for rent, that would yield \$50 per year with the same labor, and then a tenant should be willing to pay up to \$20 in rent to work the land, leaving him with the same \$30 he could get from the free land. Now suppose a second society where there is no freely available land, but all the land is owned by a relatively small number of people, so the vast majority must rent in order to work and survive. Since the alternative to paying rent is starvation, tenants will be willing to work for mere subsistence. The tenants can and do produce wealth well beyond a subsistence level, but all such wealth is captured by the landowners. Such is the monopolistic nature of land in developed societies, according to George, that the landowner captures income that they have not earned.

As society advanced, the problem was compounded, argued George. Consider two plots of land, identical in every respect, except one plot lies in the middle of nowhere, far from any civilization, and the other is in or near a growing settlement. Clearly, the second plot will fetch a higher price than the first, although by itself it is indistinguishable. The growth of society all around the plot of land greatly increases its value, for now the farmer may more easily transport his crops to market and spend more time productively farming because he may hire blacksmiths, millers, tailors, etc., instead of performing such services himself. As the settlement grows, he may be able to sell his land at a large gain to someone who will turn it into a retail store or factory. The advance of civilization around the second plot has given it a great increase in value that had nothing to do with the efforts of the landowner.<sup>40</sup> Again, the landowner is capturing considerable income which he has not earned. Further, the possibility of such unearned income will compound the problem. Speculators will buy up parcels outside the town in anticipation of future growth, further driving up land prices, pushing out would-be farmers and laborers, and creating economically harmful bubbles.

George elaborated on these ideas much further, arguing for example, that even technological progress that increased worker productivity would mainly benefit landowners, and explaining why solutions such as labor unions would not be effective.<sup>41</sup> However, I will leave the summary of George's ideas at this simple level, which is sufficient for the purposes of this paper. If we accept George's diagnosis of the problem, then his solution logically follows. If landowners capture all of the unearned gains of a developing economy, reaping value that has been created by the community, then the response is to tax that unearned value and use

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39. HENRY GEORGE, *PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH, THE REMEDY*, 153-224 (1912).

40. *Id.* at 233-40.

41. *Id.* at 242-60, 297-325.

it for community purposes. This will provide adequate revenues to meet society's needs, according to George, while also keeping land prices low, making land available for all who desire to work.

Consider an example used by a prominent George supporter, the Reverend Herbert S. Bigelow.<sup>42</sup> Imagine three brothers who discover and settle a valley which they desire to share equally. The valley is such that it is only practical to work the land in three distinct parcels of unequal quality. The exact same labor will produce ten bushels from the first parcel, twenty from the second, and forty from the third. Therefore, the owners of the second and third parcels will reap unearned windfalls relative to the first. However, these fair-minded brothers consider that ten bushels is really the result of each's labor—their earned income—so they consider ten bushels to be their wages. The extra ten bushels from the second parcel and the extra thirty from the third are the unearned product of nature, and this becomes the basis of taxation. The Single Tax will impose a levy of ten bushels on the second brother, and thirty bushels on the third, with the first brother paying no tax at all.<sup>43</sup>

Two further clarifying points are in order. First, George defines "land" broadly to encompass every resource provided by nature, and not capable of production by labor.<sup>44</sup> This includes the soil, but also things such as mineral deposits, access to natural harbors and rivers, and fishing grounds. Second, after taxing away the rents attributable to these God-given resources, George would exempt everything else from taxation and enforce strict property rights.<sup>45</sup>

For many, this brief outline of George's doctrine will fail to explain how George could have attracted so many passionate followers or what made him stand out from so many other economists and reformers. This is because George's main appeal arose from his religious message, rather than his purely economic arguments. Because this religious aspect was much more prominent in his public speeches, which are less frequently studied than his most famous—yet more technical and academic—work, *Progress and Poverty*, the religious nature of George's message is underappreciated.<sup>46</sup>

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42. HERBERT S. BIGELOW, THE RELIGION OF HENRY GEORGE II: ECONOMIC EMANCIPATION THROUGH CHRISTIAN ETHICS, reprinted in 3 THE TWENTIETH CENTURY MAGAZINE 498, 499 (B.O. Flower & Charles Zueblin eds., 1911).

43. *Id.*

44. GEORGE, *supra* note 39, at 30–90, 153–218.

45. GEORGE, *supra* note 39, at 30–90, 153–218.

46. Lawson-Peebles, *supra* note 22, at 50; see also Nicklason, *supra* note 6. Just as George has a particular definition of "land," he also uniquely defines "rent," "labor," "wages," "capital," and "interest." Rent is the return earned directly from land. Labor includes all human effort and wages are the return from labor, minus capital. Capital is the fruits of labor which, rather than being consumed or stored for future consumption, have been preserved and dedicated to increasing the productivity of future labor. Lastly, interest is the returns to capital. Anything that is not labor or capital is land, just as anything that is not wages or interest is rent. GEORGE, *supra* note 39, at 30–90, 153–218.

## III. THE PROPHET OF SAN FRANCISCO

Bob Lawson-Peebles has persuasively shown that Henry George is best understood as a religious figure, that “it was his religious role, rather than the Single Tax, which . . . made disciples,” and “his religious influence was powerful enough to succeed where his economic message failed.”<sup>47</sup> Alternatively, as economic historian George Raymond Geiger concluded: “George must be appreciated not just as the ‘single taxer,’ but as a moral and social philosopher who has attempted to secure an inseparable union of economics and ethics.”<sup>48</sup> Like the prophets of the Hebrew Bible, George was an ethical messenger who condemned the corrupt system of the day. It was therefore fitting that, when the Duke of Argyll contemptuously labeled him “The Prophet of San Francisco,” George and his followers completely missed the pejorative intent and embraced the title.<sup>49</sup>

Also like the Hebrew prophets, Henry George found his mission through what he deemed a divine call. As a young man visiting New York City on business, George was profoundly affected by the heart-wrenching poverty he encountered.<sup>50</sup> “Once, in daylight, and in a city street, there came to me a thought, a vision, a call – give it what name you please,” recalled George, years later, “But every nerve quivered. And there and then I made a vow.”<sup>51</sup> On the streets of New York, said George,

I saw and recognized for the first time the shocking contrast between monstrous wealth and debasing want. And here I made a vow from which I have never faltered, to seek out, and remedy, if I could, the cause that condemned little children to lead such a life as you know them to lead in the squalid districts.<sup>52</sup>

George had found his calling, but it took many more years, and another revelatory experience, to find the answer he sought: the solution to the riddle of increasing poverty amid progress. Returning to San Francisco, George had opportunity to observe first-hand the rapid growth of the city from a frontier settlement to a thriving metropolis.<sup>53</sup> Eventually, his long pondering crystallized into a moment of transcendent clarity.<sup>54</sup> Riding his horse far out in the hills near Oakland, where rumors of a new railroad had prompted heavy speculation in real estate, George asked a passing teamster what land was worth there.<sup>55</sup> The teamster pointed far into the distance and said there was a man that way who would sell land

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47. Lawson-Peebles, *supra* note 22, at 37, 50.

48. Lough, *supra* note 7, at 190 (quoting GEORGE RAYMOND GEIGER, *THE PHILOSOPHY OF HENRY GEORGE* 13 (1933)).

49. Lawson-Peebles, *supra* note 22, at 41.

50. HENRY GEORGE, JR., *THE LIFE OF HENRY GEORGE: FIRST AND SECOND PERIODS* 193 (1904).

51. *Id.*

52. *Id.* at 192.

53. *Id.* at 210.

54. *Id.*

55. *Id.*

for the exorbitant sum of a thousand dollars per acre.<sup>56</sup> In that moment, said George, “Like a flash it came upon me that there was the reason of advancing poverty with advancing wealth. With the growth of population, land grows in value, and the men who work it must pay more for the privilege.”<sup>57</sup> Later, George described the event as “one of those experiences that make those who have them feel thereafter that they can appreciate what mystics and poets have called the ‘ecstatic vision.’”<sup>58</sup>

These founding experiences never left George and shaped the rest of his life. His sense of divine mission is evident in his account of finishing *Progress and Poverty*:

And when I finished the last page, in the dead of night, when I was entirely alone, I flung myself on my knees and wept like a child. The rest was in the Master’s hands. That is a feeling that has never left me; that is constantly with me. And it has led me up and up. It has made me a better and purer man. It has been my religion, strong and deep though vague.<sup>59</sup>

Consistent with the transcendent origins of his ideas, Henry George adopted a religious, proselytizing style, referring to his work as “missionary work” and a “New Crusade.”<sup>60</sup> George delivered more than 500 speeches in the United States alone, while also embarking on extensive speaking tours in the United Kingdom, Ireland, and Australia.<sup>61</sup> In all that time, George “never omitted the theological grounding of his ideas. Indeed, religion played an increasingly prominent part of his thinking” and his speeches had titles like “Thou Shalt Not Steal” and “Thy Kingdom Come.”<sup>62</sup> George declared that “my republic is ... a republic of God, a Christian republic” and his goal was “to bring on earth the Kingdom of God.”<sup>63</sup> Indeed, his critics complained that “the dominant note in all his writing is the religious note.”<sup>64</sup> Perhaps most tellingly, his first and most frequently repeated lecture was simply entitled “Moses,” and George’s followers, as well as George himself, saw the “Prophet of San Francisco” as a modern version of that ancient figure.<sup>65</sup>

With so much religion in his style and message, George naturally attracted many religious followers. In a time when church leaders were reluctant to support specific tax reforms, their enthusiastic support for George and his Single Tax was

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56. GEORGE, JR., *supra* note 50 at 210.

57. *Id.*

58. THOMAS, *supra* note 2, at 52.

59. Lough, *supra* note 7, at 191.

60. Lawson-Peebles, *supra* note 22, at 40.

61. Nicklason, *supra* note 6, at 653.

62. Nicklason, *supra* note 6, at 653–54.

63. Lawson-Peebles, *supra* note 22, at 42–43.

64. *Id.* at 43.

65. *See, e.g.*, Nicklason, *supra* note 6, at 653 (“‘Moses’ contained George’s own image of his personal mission in life.”); GEORGE JR., *supra* note 51, at 193, 283 (George’s son explicitly likens him to Moses).

remarkable.<sup>66</sup> When George ran for mayor of New York City, he had the support of more than forty Catholic priests and more than sixty Protestant leaders.<sup>67</sup> Clergymen around the country preached sermons on George's ideas, declaring, "[w]e have found a politics that is a religion."<sup>68</sup> To promote George's ideas in New York City, a group of local Catholic, Presbyterian, Protestant Episcopal, Methodist, and Baptist ministers formed the "Single Tax Brotherhood of Religious Teachers."<sup>69</sup> Beyond Catholic and mainline Protestant adherents, George attracted significant support from Shakers, Swedenborgians, and Jews.<sup>70</sup> George's first "Moses" lecture, delivered at the Young Men's Hebrew Association of San Francisco, deeply moved Rabbi Dr. Elkan Cohen of the Temple Emanuel, who asked the lecture's organizer, "Where did you find that man?"<sup>71</sup> The United Hebrew Congregation even formed a "Henry George Club" to support "our second Moses."<sup>72</sup>

Easily George's most important supporter, religious or otherwise, was Father Edward McGlynn, pastor of New York City's largest Roman Catholic Church, St. Stephen's.<sup>73</sup> McGlynn saw George as "a man sent from God," and his prominent public advocacy for George aroused opposition within the Catholic hierarchy.<sup>74</sup> This resulted in McGlynn's excommunication and likely helped prompt Pope Leo XIII to issue the landmark encyclical *Rerum Novarum*.<sup>75</sup> McGlynn was later reinstated, and Georgism was held to be consistent with Catholic doctrine, all-in-all a remarkable course of events.<sup>76</sup>

Other influential religious figures to support George included Reverend Frederick A. Wiggin of Boston's Unity Church,<sup>77</sup> Anglican priest Stewart Duckland Headlam of London,<sup>78</sup> Congregational minister and later U.S. Congressman Herbert S. Bigelow,<sup>79</sup> Shaker leader Elder Frederick W. Evans,<sup>80</sup> and Hugh O. Pentecost, who lost his pulpit as a result of his support and went on to make the Unity Congregation in New York the "religious home" of Georgists.<sup>81</sup> Father McGlynn and others, with George's support, founded the Anti-Poverty Society (APS), a non-denominational yet distinctly religious group dedicated to spreading George's ideas, attracting

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66. Mehrotra, *supra* note 8, at 325, 361.

67. Nicklason, *supra* note 6, at 656–57.

68. *Id.* at 658–59.

69. *Id.* at 660–61.

70. *Id.*

71. GEORGE JR., *supra* note 51, at 297.

72. Nicklason, *supra* note 6, at 656–57.

73. *Id.* at 649–50.

74. *Id.* at 650.

75. *Id.* at 650, 663.

76. *Id.* at 664.

77. *Id.* at 650 (Wiggin's support).

78. LOUGH, *supra* note 7, at 185, 210, 216 (Headlam's support).

79. BIGELOW, *supra* note 42; Nicklason, *supra* note 6, at 649 (Bigelow's support).

80. John E. Murray, *Henry George and the Shakers: Evolution of Communal Attitudes Towards Land Ownership*, 55 AM. J. OF ECON. & SOC. 245, 251–53 (1996) (Evans' support).

81. Nicklason, *supra* note 6, at 662 (Pentecost's support). Pentecost later lost his enthusiasm for George and attacked him from the left. *Id.*

laymen and clergy across the country.<sup>82</sup> An APS meeting was scarcely distinguishable from a church service, being complete with hymns and sermons.<sup>83</sup>

Henry George, then, displayed an ability to attract dedicated support from an incredible range of religious groups. Why? Certainly, his evangelical style was an important factor. George had a “rhapsodical and unchastened style, strongly suggestive of the pulpit,” and Mary Gladstone observed in George “a divine spark” that “often carried one away.”<sup>84</sup> Yet, beyond his style, there must have been something in his substance that drew religious followers, for they became ardent advocates of his policies themselves, capable of carrying forward the program for some time after George’s death. What was it in George’s message that could make Rabbi Michael Aaronsohn declare that “the writings of Henry George were the scriptures of truth?”<sup>85</sup>

#### IV. THE HEBRAIC LAND LAWS AND THE RADICAL JEWISH CONCEPTION OF PROPERTY

Remarkably, in a nation still overwhelmingly Christian, the religious substance that Henry George so effectively preached owed much more to Judaism than to Christianity, that is much more to the Old Testament, or Hebrew Bible, than to the New Testament. George’s entire program was based on the Jewish conception of property as embodied in the land laws of the Hebrew Bible. Americans had long had a special appreciation for the Old Testament, seeing themselves as new Israelites fleeing the bondage of Great Britain’s Egypt.<sup>86</sup> But Henry George took the analogy further. Yes, he drew on the general themes of deliverance from bondage, but he also found in the biblical account specific laws about property and economics that he viewed as keys to solving societal problems. In the words of his son, Henry George believed that Moses “pointed the way for the new exodus—the exodus of the people of this modern age out of the bondage of poverty, and laid down a code for the observation of . . . a commonwealth.”<sup>87</sup> For George, the most important aspect of this code was the way that it treated land ownership:

Moses saw that the real cause of the enslavement of the masses of Egypt was, what has everywhere produced enslavement, the possession by a class of the land upon which and from which the whole people must live. . . . And with the foresight of the philosophic statesman . . . he sought, in ways suited to his times and conditions, to guard against this error. Everywhere in the Mosaic institutions is the

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82. THOMAS, *supra* note 2, at 229; Nicklason, *supra* note 6, at 658.

83. Nicklason, *supra* note 6, at 659.

84. THOMAS, *supra* note 2, at 196, 200.

85. MICHAEL AARONSOHN, RED POTTAGE 118 (1956). The declaration is made through Aaronsohn’s autobiographical alter-ego, Rabbi Milton Stern. *Id.*

86. See, e.g., MICHAEL WALZER, EXODUS AND REVOLUTION (1985); ERAN SHALEV, AMERICAN ZION: THE OLD TESTAMENT AS A POLITICAL TEXT FROM THE REVOLUTION TO THE CIVIL WAR (2013).

87. GEORGE JR., *supra* note 50, at 297.

land treated as the gift of the Creator to His common creatures, which no one had the right to monopolize . . . [Moses] not only provided for the fair division of the land among the people, . . . but by the institution of the jubilee he provided for a redistribution of the land every fifty years, and made monopoly impossible.<sup>88</sup>

George concluded that Moses had identified the causes of poverty three thousand years earlier, along with institutions that would abolish it.

As George indicated, Moses dictated a peculiar property system, as revealed by God, that the Israelites were to implement upon entering and conquering the promised land. First, the land was to be divided equally among all the tribes and families of Israel.<sup>89</sup> Next, Moses provided mechanisms designed to maintain this egalitarian distribution in perpetuity. Every seventh, or Sabbath, year, all debts were to be forgiven.<sup>90</sup> While clearly having a number of economic ramifications, rabbis understood this debt forgiveness as designed to maintain the land distribution by preventing the loss of land pledged as collateral.<sup>91</sup> More importantly, after the seventh such Sabbath year came the year of Jubilee, when, among other mandates, all land was to be returned to its original owners or their descendants.<sup>92</sup> In practice therefore, any sale of land was in reality a lease that could endure for no more than 50 years. If followed, the law would prevent any individual from forever accumulating more land, and it simultaneously prevented any family from becoming permanently destitute.

Was it just, though, to take property from someone who had fairly acquired it? How could it be just, for example, to take land from a frugal farmer who had purchased it from his improvident neighbor? The answer was that property was not taken away from anyone, for it had never belonged to them. In the Hebrew system, only God was capable of owning land in fee simple. As God told Moses: "The land shall not be sold forever: for the land is mine."<sup>93</sup>

From this simple premise flows a radical system of property having profound implications for the entire economic system.<sup>94</sup> Indeed, God's creation, and thus ownership, of the earth is the foundation of much of Jewish law. This is well-illustrated by the answer that the famous Rabbi and commentator on Jewish law, Rashi, gave to the puzzle of why, if the Torah is a body of law, it begins with an

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88. HENRY GEORGE, MOSES, in AN ANTHOLOGY OF HENRY GEORGE'S THOUGHT: VOLUME I OF THE HENRY GEORGE CENTENNIAL TRILOGY 22 (Kenneth C. Wenzer ed., 1997) [hereinafter GEORGE, MOSES].

89. *Joshua* 19:51.

90. *Deuteronomy* 15:1–3.

91. NELSON, *supra* note 31, at 66.

92. *Leviticus* 25:8–13. The Jubilee year involved other equalizing measures as well, such as the liberation of all slaves.

93. *Leviticus* 25:23.

94. See NELSON, *supra* note 31, at 65 (listing various sources discussing the many legal implications flowing from the Jewish understanding of property).

account of the earth's creation, instead of simply starting with the law itself.<sup>95</sup> Rashi answered:

Because of the thought expressed in the text (Psalm 111:6) 'He declared to his people the strength of his works (i.e. He gave an account of the work of creation) in order that he might give them the heritage of the nations.' For should the peoples of the world say to Israel, 'You are robbers, because you took by force the lands of the seven nations of Canaan,' Israel may reply to them, 'All the earth belongs to the Holy One, blessed by He; He created it and gave it to whom he pleased.'<sup>96</sup>

Because they view God as the only One who truly holds all property rights in land, Jews have a distinctive idea of justice and the obligation to care for the poor. Whereas in most Western thought, obligations of justice are separate from voluntaristic acts of charity, for Jews they are inseparable. Both ideas are embodied in the Hebrew term *tzedakah*. According to Rabbi Lord Jonathan Sacks:

*Tzedakah* means both [justice and charity]. It arises from Judaism's theological insistence on the difference between possession and ownership. Ultimately, all things are owned by God, creator of the world . . . . In Judaism, because we are not owners of our property but guardians on God's behalf, we are bound by the conditions of trusteeship, one of which is that we share part of what we have with others in need. What would be regarded as charity in other legal systems is, in Judaism, a strict requirement of the law and can, if necessary, be enforced by the courts.<sup>97</sup>

This understanding of property was fully embodied in the Mosaic distribution of land and the institutions that maintained it. The result was a society in stark contrast to Egypt. In Egypt, Pharaoh had come to own all land, and consequently the Israelites were slaves to Pharaoh. But in the promised land, God declared that the Israelites were to be "my servants" and "they may not give themselves over into servitude."<sup>98</sup> Historian Eric Nelson has aptly summarized this philosophy: "One needs one's own patrimony in order not to be a slave, and since the Israelites must

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95. NELSON, *supra* note 31, at 63–64. Torah is not easy to define and can have a broad meaning that includes all of traditional Jewish law and teaching, in both written and oral forms. In its narrowest sense, though, Torah refers to the five books of Moses, which constitute the first five books of the Old Testament in most Bibles. See, e.g., *Torah*, JUDAISM 101, <http://www.jewfaq.org/torah.htm> (last visited Jan. 24, 2021).

96. NELSON, *supra* note 31, at 64–65 (quoting RASHI, *HAMISHAH HUMSHE TORAH 'IM KOL HA-HAFROT: THE RASHI CHUMASH* (Shraga Silverstein ed & tran., 1997).

97. JONATHAN SACKS, *TO HEAL A FRACTURED WORLD: THE ETHICS OF RESPONSIBILITY* 32 (2007).

98. *Leviticus* 25:42; see NELSON, *supra* note 31, at 66.

be servants of God alone, every Israelite must have land. The various biblical land laws are best understood as reflections of this fundamental commitment.”<sup>99</sup>

This fundamental commitment would serve as the foundation for Henry George’s ideas as well. But long before Henry George’s time, Medieval rabbis had already used the Jewish understanding of land ownership as a foundation for taxation and regulation.

#### V. WHAT THE COURT DECLARES OWNERLESS: THE RABBINIC EXAMPLE

When he crafted his Single Tax, Henry George was unknowingly following in the footsteps of Jewish legal thinkers. Centuries before, Medieval rabbis had created a right of expropriative taxation based on the Jewish conception of property and the Mosaic land system. It was, as Talmudic scholar Ephraim Urbach said, an “example of a religious motivation underlying the establishment of a legal institution.”<sup>100</sup> This taxing power served as the *de facto* foundation of much of medieval Jewish government.<sup>101</sup> This Jewish experience demonstrated, albeit in a limited context, that their conception of property could serve as the basis of a functioning tax that was flexible, useful, and morally legitimate. This taxing power is known by the Hebrew legal maxim *hefker beit din hefker*, or “what the court declares ownerless is ownerless.”<sup>102</sup> As would be the case with George’s Single Tax, because no one could really own the land but God, a validly constituted authority could expropriate the fruits of that land to accomplish authorized purposes.

Medieval Rabbis administering communities among Gentile nations needed to establish a basis within Jewish law for their authority. The direct source of their authority was the Talmud’s grant that “[t]he townspeople are at liberty to fix weights and measures, prices and wages, and to fix penalties for the infringement of their rules.”<sup>103</sup> Thus, a community could perform basic functions oriented towards the public good. But from where did the Talmud derive these powers? From the maxim *hefker beit din hefker*. By consent the people could form a court, or *beit din*, but to be effective the court needed a way to enforce its rulings.<sup>104</sup> The

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99. NELSON, *supra* note 31, at 66.

100. EFRAIM ELIMELECH URBACH, *Halakha and Religion*, in COLLECTED WRITINGS IN JEWISH STUDIES 13 (Robert Brody & Moshe D. Herr eds. 1999).

101. *Id.* at 18; Martin P. Golding, *The Juridical Basis of Communal Associations in Mediaeval Rabbinic Legal Thought*, 28 JEWISH SOC. STUD., Apr. 1996, at 68.

102. JOSEPH I. LIFSHITZ, *RABBI MEIR OF ROTHENBURG AND THE FOUNDATION OF JEWISH POLITICAL THOUGHT* 55 (2015).

103. Babylonian Talmud, Bava Batra 8b. The Talmud is an originally oral tradition essentially explaining what the written Torah means and how to apply its laws. Orthodox Jews believe an “Oral Torah” was delivered by God to Moses along with the written Torah. The Oral Torah was eventually committed to writing, and additional rabbinic commentaries were later added, together making the Talmud. There are two versions of the Talmud, the Jerusalem Talmud and the more comprehensive and common Babylonian Talmud. See, e.g., *Oral Torah: The Talmud*, JUDAISM 101, <http://www.jewfaq.org/torah.htm#Talmud> (last visited Jan. 25, 2021).

104. Golding, *supra* note 101, at 67, 70 (town populace can form a court by consent).

power that they used was the ability to expropriate property. Technically, the court did so by declaring the property to be “ownerless” or *hefqer*.<sup>105</sup>

The first recorded example of *hefqer beit din hefqer* occurs in the context of enforcing a prohibition against sowing diverse kinds of seeds. At first, the remedy had been to root out the seeds and cast them at the guilty farmer’s feet, but as the problem grew, the courts employed the more efficient solution of simply declaring the entire field ownerless.<sup>106</sup> The usefulness of this legal device made it a widely used tool, “a peg on which to hang many strings.”<sup>107</sup> Another example shows the ingenious flexibility with which rabbinic jurists employed this power. Although the Pentateuch and subsequent interpretation merely required two male witnesses at a wedding, medieval communities were able to require ten witnesses. If less than ten witnesses were present, the court would simply confiscate the coin (*keseif*) that the groom must have for the ceremony, through the power of *hefqer beit din hefqer*, invalidating the wedding.<sup>108</sup> Centuries later, Henry George would also embrace the flexible power of expropriation to overcome difficult obstacles.

But where did the Jewish court obtain its power to expropriate property in the first place? First, they pointed to the biblical precedent of Ezra, who decreed that the property of Jews who had married non-Israelite women would be forfeited if they did not report at the temple within three days.<sup>109</sup> But this was merely an example of the exercise of the power. Its deeper source was traced to the original distribution of the land.<sup>110</sup> As God had instructed through Moses, after conquering the promised land, Moses’s successor Joshua, the chief priest Eleazar, and the tribal elders divided the land evenly among all the tribes and families.<sup>111</sup> Just as God gave the priests and elders authority to distribute the land in the first place, the heads of families were thereafter held to have authority to distribute property within their families, and from this came the authority to expropriate property as well, just as Ezra had demonstrated.<sup>112</sup> Commentators stressed, though, that the expropriating power was not unlimited or arbitrary, but was only valid for actions that served the common good.<sup>113</sup>

The older history of *hefqer beit din hefqer* is somewhat obscure, but further illustrates how the practice was rooted in the Jewish conception of God as the owner of the earth, and was still consistent with a general respect for property rights. *Hefqer* likely has a connection to the related practice of *heqdesh*, whereby someone disclaimed ownership of one or more pieces of property and dedicated

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105. *Id.* at 70–71; LIFSHITZ, *supra* note 102, at 55–57.

106. URBACH, *supra* note 100, at 18–19.

107. *Id.* at 18.

108. Golding, *supra* note 101, at 72. Note that this mechanism could expand, but not diminish, what was required in the Torah, e.g., they could not have required less than two witnesses. *Id.*

109. *Ezra* 10:8.

110. LIFSHITZ, *supra* note, 102 at 56, 62.

111. See *Joshua* 13–19.

112. *Id.*

113. LIFSHITZ, *supra* note 102 at 80, 199–200.

them to God or to his sanctuary.<sup>114</sup> Urbach explains that such acts were motivated by “a wish to restore to the Lord what actually belongs to Him. In other words, the man who dedicates the object is conscious of the fact that he is only a guardian of the goods in his possession.”<sup>115</sup> Because *heqdes* only involved the relinquishment of certain possessions, but not all of one’s possessions, Urbach points out that this practice—and by implication the related practice of *hefqa*—maintained a respect for property rights in general, not endorsing any sort of “fundamental negation of private property.”<sup>116</sup> Likewise, Henry George ardently promoted strict property rights in everything but land, with land value expropriation permitted only because God was the sole owner of land.<sup>117</sup>

*Hefqa beit din hefqa* therefore stands as a practical example of an effective tax based on the Hebraic conception of land ownership. Clearly, the example occurs within a limited setting, and among a community who explicitly accepted all of the theological commitments upon which it was based. Yet this itself is a key insight. A tax that is founded on deeply held beliefs of the polity will be much more easily accepted as legitimate. Outside of a strict Jewish community, a tax exactly like *hefqa beit din hefqa* will not work. However, the basic theological foundation—God as the owner of the land who intends that it be equitably shared—is widely shared outside of Judaism.<sup>118</sup> As one example, the Catholic doctrine of the universal destination of goods is quite similar.<sup>119</sup> Thus, a taxing system inspired on some level by the Hebraic conception of land ownership commends itself as worthy of further study. Henry George’s tremendous popularity and influence in the United States suggests he tapped into at least some broad, widely shared religious ideas that can usefully inform tax law and policy. By tracing the Hebraic ideas that proved durable and influential over many centuries, eventually arriving in the United States and influencing its founding, we can discover ideas still likely to be salient and persuasive for an American audience.

## VI. THE HEBREW REPUBLIC

In addition to unwittingly echoing the work of medieval rabbis, George seemingly unknowingly built on the legacy of another intellectual tradition remarkably influential across centuries and cultures. For hundreds of years a distinguished line of political thinkers—including Carlo Sigonio, Peter Cunaeus, Hugo Grotius, and James Harrington—used the Mosaic institutions as a model for the ideal republic.<sup>120</sup> To these figures, the laws handed down by God himself naturally served as the best guide for constructing a republic.<sup>121</sup> To better understand these biblical laws, they turned to the writings of the rabbis, especially

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114. Urbach, *supra* note 100, at 16.

115. *Id.*

116. *Id.* at 18.

117. See GEORGE, *supra* note 39, at 30–90, 153–218.

118. See *The Ten Commandments*, *supra* note 26.

119. See *id.*

120. NELSON, *supra* note 31, at 70–83.

121. *Id.* at 74–75, 78–79.

Maimonides, as the most authoritative sources.<sup>122</sup> This intellectual tradition came to be identified with the name “The Hebrew Republic.”<sup>123</sup>

Memorialized as it was in the world’s most widely read book, the Bible, the Hebraic property system could play a significant role in European thought. In the sixteenth and seventeenth centuries, European republican thinkers began to look to the Hebrew Bible as a political narrative, and the revival of the study of the Hebrew language at the same time made available a rich rabbinic literature as a complementary source.<sup>124</sup> Thus, for example, God’s displeasure when the Israelites demanded a king in I Samuel 8 could be used to argue against monarchy.<sup>125</sup> Yet in this process, republican thinkers also encountered the egalitarian Hebraic land laws, sparking a radical transformation in thinking about property distribution.

This “most dramatic possible break with the earlier tradition of republican thought” is perhaps best encapsulated in the debate over how to interpret the attempted Roman reform known as “the agrarian law.”<sup>126</sup> In the late Roman Republic, the agrarian law was an attempt by Tiberius and Caius Gracchus to take public lands away from the powerful families that had acquired control over them and to redistribute them among the more common people.<sup>127</sup> The orthodox view in Medieval and Renaissance Europe was that the agrarian law was a disaster and a violation of property rights.<sup>128</sup> Further, conventional wisdom held that the agrarian law’s attempt at redistribution had fomented envy, disorder, and rebellion directly contributing to the fall of the Republic.<sup>129</sup> Up until the seventeenth century, this strict property rights conception was thoroughly dominant.<sup>130</sup>

However, in the seventeenth century the study of Hebrew sources shattered this consensus. While he was preceded by many important scholars of Hebrew, the first thinker to apply the Hebraic land laws to contemporary debates about land redistribution was Dutch scholar Peter Cunaeus.<sup>131</sup> In his famous work, *The Hebrew Republic*, Cunaeus made a crucial linguistic move. When discussing the biblical law governing land, he called it “the agrarian law,” thereby equating it with the Roman

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122. *Id.* at 70, 72-73, 75, 79-80.

123. *Id.* at 16.

124. Historian Eric Nelson has documented this phenomenon in two masterful books, and my brief summary of the Hebrew Republic tradition relies heavily upon his work. See NELSON, *supra* note 31; NELSON, *supra* note 33. In understanding the laws and institutions of the Hebrew Commonwealth, Cunaeus and others found rabbinical writings to be an indispensable source. Maimonides, in particular, was relied upon and praised by Cunaeus. NELSON, *supra* note 31, at 64, 71, 75. James Harrington would also draw upon “the whole stream of Jewish writers and Talmudists (who should have had some knowledge in their own commonwealth).” *Id.* at 80 (quoting JAMES HARRINGTON, *THE POLITICAL WORKS OF JAMES HARRINGTON* 573 (J.G.A. Pocock ed., 1978)).

125. NELSON, *supra* note 31, at 35-46, 50-53.

126. *Id.* at 58-59.

127. *Id.* at 59-63.

128. *Id.*

129. *Id.* at 58-59.

130. *Id.* at 64.

131. NELSON, *supra* note 31, at 64.

reforms.<sup>132</sup> This constituted a major reversal in contemporary thought.<sup>133</sup> While the Roman agrarian law was heretofore universally reviled, Cunaeus now gave it the most unimpeachable endorsement: divine authority.<sup>134</sup> As Cunaeus argued, the Hebrew government was “the most holy, and the most exemplary in the whole World. The Rise and Advance whereof, it well becomes you perfectly to understand, because it had not any mortall man for its Author and Founder, but the immortall God.”<sup>135</sup> As Nelson states, more than any prior figure, “[f]or Cunaeus, Israel is the ultimate constitutional model.”<sup>136</sup> If the system authored by God limited and redistributed property in land, then to do so must be just.

For Cunaeus, the most important and foundational feature of the Hebrew Republic was its land laws. The Hebraic land system had the dual virtues of first, ensuring that everyone was provided with the means for living; and second, creating peace and order because there was no mad scramble over resources.<sup>137</sup> Even better, Moses did not simply provide for this virtuous distribution at the beginning of the Republic, but also gave institutions to maintain it—the Jubilee system of periodic land restoration and debt forgiveness.<sup>138</sup> Said Cunaeus, “Moses, as it became a wise Man, not only to order things at present, but for the future ages, too, brought in a certain Law providing that the wealth of some might not tend to the oppression of the rest.”<sup>139</sup> Cunaeus recognized that, in language that Henry George would precisely echo centuries later, “[i]t is not unusuall with rich men to thrust the poor out of his inheritance, and deprive him of necessaries, whilst they enlarge their own estate superfluously.”<sup>140</sup>

While Cunaeus can be credited as the most important originator of the Hebrew Republic tradition, a few decades later an English thinker and writer, James Harrington, became the most influential figure in disseminating these ideas widely among an English-speaking audience. For Harrington, the distribution of property was absolutely essential to the form of government, for the balance of power would always follow the balance of property.<sup>141</sup> When property was widely distributed, power would be so as well, and tyranny or oligarchy would be impossible. Conversely, if property were highly concentrated, power would be so as well, making a true republic impossible.<sup>142</sup> Therefore, in God’s ideal republic, Israel, the law created and maintained an equal distribution of land.<sup>143</sup>

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132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 75 (quoting CUNAEUS, DE REPUBLICA HEBRAEORUM LIBRI III 5 (1617)).

136. *Id.*

137. NELSON, *supra* note 31, at 75.

138. *Id.* at 76.

139. *Id.* (quoting CUNAEUS, De Annis Climacteribus et Eorum vi in RERUMPUBLICARUM ET CIVITATUM CONVERSIONE, Lecture given at Leiden University (1638), in ORATIONES, ARGUMENTI VARI, 1643, at 51–53).

140. *Id.* at 77 (quoting CUNAEUS, *supra* note 135, at 61).

141. *Id.* at 78–79.

142. *Cf. id.* at 78–83.

143. NELSON, *supra* note 31, at 78–83.

Harrington expounded his ideas through a fictional utopian republic, Oceana, in his most important work, *The Commonwealth of Oceana*.<sup>144</sup> Like Cunaeus, Harrington relied on the implied divine approval for the Hebrew system, which he used as the model for his Oceana.<sup>145</sup> Also like Cunaeus, Harrington equated the Hebrew land laws with the Roman agrarian law.<sup>146</sup> “This kind of law fixing the balance in lands is called agrarian,” wrote Harrington, “and was first introduced by God himself, who divided the land of Canaan unto his people by lots, and is of such virtue that, whenever it hath held, that government hath not altered, except by consent. . . . God, in ordaining this balance, intended popular government.”<sup>147</sup>

Harrington’s key argument was that a lasting republic required two things: widely distributed land ownership, and institutions to maintain that distribution over time.<sup>148</sup> Clearly, this thesis arose directly from a study of the Hebrew example. But to enact such a system in Harrington’s England would require a forcible redistribution, since land could not simply be distributed *de novo* as with the Israelites. This was a serious problem for Harrington, because redistribution would violate the dominant Roman conception of justice and property rights.<sup>149</sup> Obviously, one way for Harrington to address this problem was to point out that God himself had authored the Hebrew system.<sup>150</sup> But for Harrington, the Hebrew example seems to have illustrated the proper end—widely distributed land—rather than the means for achieving it, for he did not rely on the Bible to answer concerns about coerced redistribution by the state and instead turned to another source, the Greeks.<sup>151</sup>

In contrast to Roman thinkers, Greek historians such as Plutarch and Appian saw the Roman agrarian law as a just reform and the best chance of saving the declining republic.<sup>152</sup> In fact, Plato had started an influential tradition holding that justice not only sanctioned a wide distribution—including *re*-distribution—of property, it *required* it.<sup>153</sup> According to this theory of justice, a just society is a society ruled according to reason, equivalent to rule by the most virtuous men.<sup>154</sup> If property ownership is concentrated, the richest men inevitably wield power, making rule by reason impossible. Under a wide distribution of property, though, where no one was distinguished by their wealth, the Greeks held that citizens would have to select their leaders based on virtue, resulting in rule by the best men

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144. *Id.* at 79.

145. *Id.*

146. *Id.* at 80.

147. *Id.* (quoting HARRINGTON, *supra* note 124, at 462–63).

148. *Id.* at 83.

149. NELSON, *supra* note 31, at 83.

150. *Id.* at 79.

151. *Id.* at 85–86; NELSON, *supra* note 33, at 115–24.

152. See NELSON, *supra* note 33, at 59. For space, I have greatly generalized and condensed the account of the Greek tradition, leaving out for example, many of the important figures such as Erasmus, Machiavelli, and Thomas More.

153. *Id.* at 118–20.

154. *Id.*

according to reason.<sup>155</sup> Aristotle, like Plato, agreed that “political authority should rest with those who most contribute to the good life (i.e. the virtuous), rather than the wealthy, and only a temperate distribution of property secures this end.”<sup>156</sup>

Harrington precisely adopted this Greek theory of justice, citing both Plato and Aristotle, to advocate his ideas.<sup>157</sup> While Harrington used this reasoning to sanction using state power to redistribute property, he only specifically advocated fairly restrained means—primarily restrictions on inheritances, gifts, and dowries—that would gradually disperse property over time.<sup>158</sup>

Harrington’s ideas proved enormously influential on both sides of the Atlantic and became entrenched in republican thought. “Writers from Montesquieu to Rousseau, and from Jefferson to Tocqueville, would regard it as axiomatic that republics ought to legislate limits on private ownership in order to realize a particular vision of civic life.”<sup>159</sup> In America, this view was pervasive, often through the direct influence of Harrington, whose *The Commonwealth of Oceana* was widely circulated and cited throughout the American colonies.<sup>160</sup> James Madison and Thomas Jefferson are both known to have read Harrington’s great work, and Jefferson’s copy is still preserved in the Library of Congress.<sup>161</sup> Of all his accomplishments, Jefferson repeatedly insisted that his proudest was his bill in Virginia to abolish entails and prevent accumulation of property, a very Harringtonian reform.<sup>162</sup> He also successfully proposed a bill to end the practice of primogeniture.<sup>163</sup> Jefferson stated that his goal was to “prevent the accumulation and perpetuation of wealth in select families” and remove “the feudal and unnatural distinctions which made one member of every family rich, and all the rest poor, substituting equal partition, the best of all Agrarian laws.”<sup>164</sup> Thus, Jefferson firmly established himself in the pro-agrarian Greek tradition that Harrington had melded with the ideas of the Hebrew Republic.

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155. *Id.* at 15.

156. *Id.* Aristotle adds that it is far better to enact a just distribution of property from the outset of the state than to try to correct the distribution later. *Id.* at 111–12.

157. *Id.* at 16–17 (“Harrington . . . would later insist that Plato’s *Laws* and Aristotle’s *Politics* were of one mind in endorsing agrarian laws.”).

158. NELSON, *supra* note 33, at 115.

159. NELSON, *supra* note 31, at 85–86. Montesquieu, like Harrington, created a fictional utopian society, the Troglodytes, based on an equal division of property maintained through inheritance mechanisms. NELSON, *supra* note 33, at 159.

160. NELSON, *supra* note 33, at 194, 214–17 (Montesquieu’s influence); see also H.F. RUSSELL SMITH, HARRINGTON AND HIS OCEANA: A STUDY OF A 17TH CENTURY UTOPIA AND ITS INFLUENCE IN AMERICA 195–96 (1914) (cataloging references to Harrington by many revolutionary Americans); *id.* at 155–84 (describing Harrington’s extensive influence on colonial constitutions); *id.* at 200 (describing the extensive Harringtonian views of Noah Webster).

161. Dennis F. Thompson, *The Education of a Founding Father: The Reading List for John Witherspoon’s Course in Political Theory, as Taken by James Madison*, 4 POL. THEORY 523, 527 (1976); SMITH, *supra* note 160, at 200 n.2.

162. NELSON, *supra* note 33, at 201.

163. *Id.*

164. *Id.* at 203 (quoting THOMAS JEFFERSON, WRITINGS 44 (Merrill D. Peterson, 1984)).

Jefferson's friend but political opponent John Adams also read and adopted Harrington's ideas, demonstrating that these views were shared across both major political parties.<sup>165</sup> Adams wrote,

Harrington has shown that power always follows property . . . I believe we may advance one step farther, and affirm that the balance of power in a society, accompanies the balance of property in land. 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 land into small quantities, so that the multitude may be possessed of landed estates.<sup>166</sup>

While Harrington was successful at implanting his ideas in the young American republic, the role of the Hebraic sources was largely lost in the process. By mixing the Hebrew Republic tradition with the Greek tradition, Harrington convinced many that the redistribution of land was a just and necessary endeavor, but the Greek element crowded out the original Hebraic sources. To be sure, here and there the thread reemerges, and the underlying principles are embedded in the American consciousness. Jefferson, for example, stated in a letter to Madison that "[t]he earth is given as a common stock for man to labor and live on[.]" echoing Locke's assertion that "God gave the World to Men in Common."<sup>167</sup> Both statements are quite consistent with the Jewish understanding of property. In his 1797 tract *Agrarian Justice*, Thomas Paine, closely foreshadowing Henry George, called for a tax on the unimproved value of land because God created the earth as "the common property of the human race."<sup>168</sup> Less prominent revolutionaries such as Boston's Perez Forbes praised "the wisdom of GOD in the appointment of a jubilee, as an essential article in the Jewish policy. This . . . was the great palladium of liberty to that people. A similar institution perhaps may be the only method in which liberty can be perpetuated among selfish, degenerate beings . . ."<sup>169</sup>

However, in most places where we find advocates of egalitarian land ownership, the themes of the Greek and not the Hebrew tradition are dominant.

165. Adams listed Harrington as one of the most influential and widely-read writers in America, and he himself owned two copies of *Oceana*. SMITH, *supra* note 160, at 191–94. Both copies are still housed in the Boston Public Library. Adams specifically cited Harrington in an important 1776 letter that helped shape many early state constitutions, and Harrington's influence is clear in the Massachusetts constitution that Adams largely drafted. *Id.* It was even proposed, unsuccessfully, to change the name of the Commonwealth of Massachusetts to *Oceana*. *Id.*

166. NELSON, *supra* note 33, at 209 (quoting 9 JOHN ADAMS, WORKS 376 (Charles Francis Adams ed., 1854)).

167. *Id.* at 204–05 (quoting JEFFERSON, *supra* note 164, at 841); *id.* at 205–06 n.30; JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 59 (C.B. Macpherson ed., 1980).

168. THOMAS PAINE, AGRARIAN JUSTICE 12 (Wildside Press ed., 2010). However, Paine never refers to any of the Mosaic institutions. Despite many similarities between George's work and Paine's *Agrarian Justice*, to my knowledge, George never cited or referenced any of Paine's work.

169. NELSON, *supra* note 31, at 87 (quoting PEREZ FORBES, AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA: 1760-1805 1002 (Charles S. Hyneman & Donald S. Lutz eds., 1983)).

Jefferson, for example, advocated reforms to prevent land accumulation not on the grounds that God approved such principles in the Bible, but on the Greek theory that only equal property holdings could produce a “natural aristocracy” where the best men ruled according to reason.<sup>170</sup> As Nelson concludes:

[F]or most, the Biblical warrant for agrarian laws disappeared from view, leaving only the Platonizing rationale that Harrington had developed alongside it. Redistribution in the eighteenth and nineteenth centuries would find a home in republican political theory (and in its socialist variant), not because it had been authorized by the divine landlord of the earth, but because it was thought to secure the rule of a naturally superior elite.<sup>171</sup>

The Hebrew Republic tradition arguably achieved its greatest success in the United States, a republic founded upon a citizenry of relatively equal landowners.<sup>172</sup> Yet paradoxically, the Hebraic sources that argued for such an arrangement were largely forgotten.<sup>173</sup> While the Greek tradition was an ingenious and successful addition by Harrington, it lacked the persuasive and motivating power of the biblical sources. Replacing the aristocracy of wealth with another elite, the natural aristocracy of reason, was sure to lack popular appeal. Plato saw some people as gold, some as silver, and some as iron and brass,<sup>174</sup> but the Hebrew Republic offered a society where *every* member “shall sit . . . under his vine and under his fig tree; and none shall make them afraid . . .”<sup>175</sup> By Henry George’s time, industrialization and urbanization were undoing the egalitarian property distribution of the founding, and the Greek tradition alone seemed insufficient to mount a response. George would launch a major popular movement by resurrecting the power of the Hebraic sources, showing that these ideas still held great appeal for the American populace.

#### VII. HENRY GEORGE AS HEIR TO THE HEBREW REPUBLIC TRADITION.

As noted, when George was invited to give his first public lecture, at the Young Men’s Hebrew Association of San Francisco in 1878, he titled the address “Moses.”<sup>176</sup> The lecture, which he would repeat again and again, made clear how

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170. NELSON, *supra* note 33, at 194.

171. *Id.* at 87.

172. *See, e.g., id.* at 231 (“By the turn of the century, as James Kent reported in his 1840 Commentaries on American Law, laws repealing primogeniture and guaranteeing the equal division of estates among lineal descendants had been adopted in almost every state in the Union.”).

173. NELSON, *supra* note 31, at 87.

174. PLATO, REPUBLIC 415 (Paul Shorey trans., Harvard University Press 1969), <https://www.perseus.tufts.edu/hopper/text?doc=Plat.+Rep.+3.415&fromdoc=Perseus%3Atext%3A1999.01.0168>.

175. *Micah* 4:4. This biblical image was a favorite theme of Henry George. *See, e.g.,* GEORGE, *supra* note 88, at 18.

176. GEORGE, JR., *supra* note 51, at 297.

much inspiration he drew from the example of the Jews.<sup>177</sup> As we have seen, George believed Moses “pointed the way for the new exodus—the exodus of the people of this modern age out of the bondage of poverty, and laid down a code for the observation . . . of a commonwealth.”<sup>178</sup> For George, the God of the Hebrews provided a welcome contrast to the Christian teachings of his day.<sup>179</sup> The Jewish God was

not a God whose domain is confined to the far-off beginning or the vague future, who is over and above and beyond men, but a God who in his inexorable laws is here and now; a God of the living as well as of the dead; a God of the market place as well as of the temple.<sup>180</sup>

More specifically, God’s revelations to Moses taught concrete and timeless principles about the land. “Everywhere in the Mosaic institutions,” said George, “is the land treated as the gift of the Creator to His common creatures which no one has the right to monopolize.”<sup>181</sup> The institutions of the Mosaic law were

not directed to securing the strong in heaping up wealth so much as to preventing the weak from being crowded to the wall. At every point it interposes its barriers to the selfish greed that, if left unchecked, will surely differentiate men into landlord and serf, capitalist and workman, millionaire and tramp, ruler and ruled.<sup>182</sup>

Before he ever devised his particular solution, the Single Tax, George defined the problem in Hebraic religious terms, giving power to his ideas and attracting enthusiastic followers. Even if the Single Tax were proved entirely unworkable, and even if all George’s technical economic arguments collapsed, land monopoly would still be an evil because it was a clear violation of the Hebrew Bible’s land laws. George asked:

Have we made the earth that we should determine the rights of those who after us shall tenant in their turn? The Almighty, who created the earth for man and man for the earth, has entailed it upon all the generations of the children of men by a decree . . . which no human action can bar and no prescription determine.<sup>183</sup>

George made clear that the deepest foundations of his program came from the Hebrew Bible. Moses, more than any other figure, provided the ideas and the

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177. THOMAS, *supra* note 2, at 104; Nicklason, *supra* note 6, at 653.

178. GEORGE, JR., *supra* note 51, at 297.

179. *Id.*

180. GEORGE, *supra* note 88, at 19.

181. *Id.* at 22.

182. *Id.* at 18–19.

183. GEORGE, *supra* note 39, at 200.

example for George, for Moses combined “in highest expression the qualities of politician, patriot, philosopher, and statesman.”<sup>184</sup> For George, Moses’s most important achievements were in political economy. His greatness was “not in the deliverance from Egypt, [but] in the constructive statesmanship that laid the foundations of the Hebrew commonwealth.”<sup>185</sup> “[T]he great concern of Moses,” concluded George, “was with the duty that lay plainly before him; the effort to lay the foundations of a social state in which deep poverty and degrading want should be unknown.”<sup>186</sup> Moses’s greatest genius, according to George, was in the creation of new institutions, for “institutions make men.”<sup>187</sup> And what were the institutions that Moses gave to his commonwealth? The Hebraic land laws, culminating in the Jubilee year.<sup>188</sup> Of the Hebrew Republic, George said: “With the blast of the jubilee trumpets the slave goes free, the debt that cannot be paid is cancelled, and a redivision of the land secures again to the poorest his fair share in the bounty of the common Creator.”<sup>189</sup>

George’s most ardent followers made clear that they were motivated by his program’s biblical foundation. In a series of essays advocating George’s policies, Reverend Bigelow adopts Isaiah’s condemnation of Israelites who had amassed land in violation of the Mosaic laws: “Woe unto them that join house to house, that lay field to field, till there be no room, and ye be made to dwell alone in the midst of the land!”<sup>190</sup> Stewart Headlam, a reform-minded Anglican priest, Christian socialist, and fierce advocate for Georgism, published a monthly periodical, *The Church Reformer*, that often used the Bible to support its land reform proposals centered on the Single Tax.<sup>191</sup> Frederick Verinder, co-editor of the *Reformer*, authored many works designed to illustrate Georgism’s basis in the Hebrew Bible.<sup>192</sup> “The general principles upon which Hebrew Land Laws were based are absolutely fatal to the idea of private property in Land,” wrote Verinder, for “[t]he Hebrew did not own land. It was not ‘his own’ to do as he like with; ‘the land shall not be sold out and out’; it was only his to use, subject to the equal rights of every other Hebrew.”<sup>193</sup> For Father McGlynn, too, God’s land laws were the key to ending poverty.<sup>194</sup> “To abolish poverty, we want the earth,” he declared, “[because] all

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184. GEORGE, *supra* note 88, at 16.

185. GEORGE, MOSES, *supra* note 88, at 17.

186. *Id.* at 21.

187. *Id.* at 17.

188. *See id.* at 19.

189. *Id.*

190. HERBERT S. BIGELOW, THE RELIGION OF HENRY GEORGE IV: MONOPOLY IN LAND A NATIONAL PERIL, *reprinted in* 4 TWENTIETH CENTURY MAG. 137 (Benjamin O. Flower ed., 1911) (quoting *Isaiah* 5:8).

191. Lough, *supra* note 7, at 211.

192. *Id.*

193. *Id.* at 211–12 (quoting FREDERICK VERINDER, MY NEIGHBOUR’S LANDMARK: SHORT STUDIES IN BIBLE AND LAND LAWS 16, 57 (Memorial ed., Land and Liberty Press 1950) (1913)).

194. Reverend Dr. Edward McGlynn, Religion vs. Robbery, Address before the New York Anti-Poverty Society 1, 4 (June 5, 1887) (transcript available at <https://hgarchives.files.wordpress.com/2016/04/religion-vs-robbery-the-standard-june-5-1887.pdf>).

men, being equally by nature brethren of one family because children of one Father, should have joint, equal ownership in usufruct of all these bounties.”<sup>195</sup>

George not only revived certain ideas of the Hebrew Republic, but he also went farther than Harrington by adopting a fully Hebraic understanding of property. While Harrington used the Hebrew example to argue that equal distribution of land was desirable, he did not use it to show that state action to achieve equal distribution was just.<sup>196</sup> George, however, used the Hebraic understanding of property to support both points: the desirability of equal land distribution, and the justice of a coerced redistribution.<sup>197</sup> In the understanding of George, strikingly similar to that of Hebraic law, land redistribution was just because it was not a redistribution of ownership at all. The land could only ever belong to God who created it for his creatures in common.<sup>198</sup> Harrington tried to shift from a Roman idea of property and justice toward an alternative Greek understanding, but George’s thought can be viewed as a reconciliation of both through a fully Hebraic conception. Roman justice could be satisfied because no property rights were violated, and Greek justice would be satisfied because an egalitarian property distribution would enable rule by the best men.

George’s indictment of the modern economy resonated with many struggling to come to terms with the miseries of industrialization.<sup>199</sup> But George was not content to simply diagnose the disease; he wanted to cure it as well.<sup>200</sup> Obviously, it was impractical to use state power directly to redistribute land, and unlike Moses or even the American founders, he was no longer dealing with a purely agrarian economy. George believed that the principles behind the Mosaic institutions held the key to ending poverty, but first he would have to adapt them to an industrial economy radically changed by technological progress.<sup>201</sup> He needed to devise a mechanism to create and maintain an egalitarian land distribution without the luxury of creating the distribution from scratch. George recognized that “Moses had to work, as all great constructive statesmen have to work, with the tools that came to his hand, and upon materials as he found them.”<sup>202</sup> George would have to do the same.

The tool that came to George’s hand was the Single Tax. This solution flowed directly from George’s understanding of the problem. If landowners could get wealthy through no merit or labor of their own, by extracting unearned wealth through rents, then the community needed to tax those unearned rents. “What I, therefore, propose . . . is—to appropriate rent by taxation . . . [t]o abolish all taxation save that upon land values.”<sup>203</sup> A tax on this “unearned increment” of land

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195. *Id.*

196. See *supra* Section VI.

197. GEORGE, MOSES, *supra* note 88, at 18–19, 22. George, *supra* note 39, at 200.

198. GEORGE, MOSES, *supra* note 88, at 22.

199. See *supra* Section I.

200. See *supra* Section II.

201. See GEORGE, MOSES, *supra* note 88, at 18–19, 22; George, *supra* note 39, at 200.

202. GEORGE, MOSES, *supra* note 88, at 22.

203. GEORGE, *supra* note 39, at 237–38.

values would make any idle ownership of land immediately unprofitable because the landlord's rent would be taxed away, as would the speculator's gain.<sup>204</sup> Land prices should therefore fall, making land affordable for anyone seeking to use it productively.<sup>205</sup> Economic forces, rather than priests and elders, would evenly divide the land.

While elegant in principle, in terms of actual implementation, the Single Tax was largely a failure. Watered-down versions of George's land tax were implemented in several cities in Pennsylvania, extensively in Australia and New Zealand, and in small enclaves throughout the United States and Canada.<sup>206</sup> The practice of many states and localities, including Idaho, to separately assess land and improvements is arguably a result of the Single Tax movement.<sup>207</sup> Overall, though, electoral campaigns to enact something like a Single Tax were generally rejected quite resoundingly.<sup>208</sup> A true Single Tax was only attempted in a small number of enclaves and colonies founded by dedicated Georgists, the two most famous and longest-lasting being those in Fairhope, Alabama, and Arden, Delaware.<sup>209</sup>

Several factors may have contributed to the failure of the Single Tax. First, George faced consistent opposition from academic economists who were eager to establish their discipline as the domain of professional, scientific experts, and they were accordingly hostile to George because of his amateur status and his embrace of religion.<sup>210</sup> Second, the Single Tax involved daunting technical difficulties in calculating the tax base, and there was considerable uncertainty inherent in such a radical change in tax law. Even in the Single Tax colonies, specifically comprised of George's most committed followers, the measurement and collection of the tax proved difficult and contentious, and they settled for something less than a true Single Tax on the full rental value of land.<sup>211</sup> Many voters who rejected Single Tax proposals seem to have been concerned about practical disruptions, such as potential waves of foreclosures for landowners suddenly faced with higher tax bills.<sup>212</sup> Crucially, and as further discussed below, this was a key departure of George from the Hebraic ideals. While the Biblical system promised profound security through the Jubilee institutions that prevented the permanent loss of one's land, a true Single Tax would effectively confiscate land from anyone not willing to use it

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204. HENRY GEORGE, *THE CONDITION OF LABOR: AN OPEN LETTER TO POPE LEO XIII* 48 (1891).

205. Conversely, the tax would also force a modest family operating a farm on inherited land near a booming urban area to either sell the land or convert it to a more remunerative use. This was a dark side to the Single Tax. It lacked the Mosaic system's security of an assured, fixed piece of land near one's own family and tribe. See *infra* Section VIII.C.

206. Wasserman, *supra* note 14, at 25.

207. YOUNG, *supra* note 13, at 240–41.

208. YOUNG, *supra* note 13, at 147–51, 156–58, 169–82, 184–96, 202–07.

209. Lough, *supra* note 7, at 282–326; Christopher W. England, *Land and Liberty: Henry George, the Single Tax Movement, and the Origins of 20th Century Liberalism* 141–42 (Aug. 25, 2015) (unpublished Ph.D. dissertation, Georgetown University), <https://repository.library.georgetown.edu/handle/10822/1029879>.

210. Mehrotra, *supra* note 8, at 325, 363–64; THOMAS, *supra* note 2, at 324–25.

211. Lough, *supra* note 7, at 282–326.

212. See, e.g., YOUNG, *supra* note 13, at 188–89, 194.

in a manner that maximized profit because they would not be able to afford to pay the tax.

Third, although he was the Single Tax movement's biggest asset, Henry George could also be a large liability in practical, political terms. Remarkably, in the limited areas where implementation happened at all, George opposed it, even refusing to support his dedicated disciples in the Single Tax colonies.<sup>213</sup> He was extremely inflexible and dogmatic, insisting that the Single Tax would work only if fully implemented everywhere at once.<sup>214</sup> His inflexibility also made him a poor politician. For example, working class voters who supported him in his first mayoral campaign eventually lost patience and moved on, exasperated by his unwillingness to consider any issues outside the Single Tax.<sup>215</sup> When invited to speak at the Chicago convention of the Labor-Populist Party in 1894, where he would have the opportunity to support two candidates who were solid Single Taxers, he instead alienated the party by delivering a lengthy denunciation of its platform, which he believed did not sufficiently emphasize the Single Tax.<sup>216</sup>

A final factor is especially relevant to our inquiry here. While religious ideas were fundamental in building George's movement, they seem to have been largely absent from electoral campaigns aimed at enacting a Single Tax.<sup>217</sup> For example, many campaigns had been essentially anti-landlord campaigns, or campaigns against land ownership itself, while later campaigns focused on the idea that the tax would create business incentives leading to general prosperity.<sup>218</sup> Campaigns also appealed to voters' self-interest, creating schedules showing how much less most voters would pay under the Single Tax, or some variant of it.<sup>219</sup>

Certainly, beyond the aversion of professional economists to religious ideas, we cannot find evidence that the failure of the Single Tax was attributable to the religious ideas at the heart of George's thought. By all accounts, the religious aspect worked incredibly well, motivating many thousands to support George for many years. However, it appears that the broad religious ideas that so many found so appealing somehow didn't translate to George's specific policy proposal, the Single Tax, and the campaigns to enact it. Indeed, reading the speeches and writings of George's strongest supporters, one is struck by how much their devotion is rooted in George's religious diagnosis of the problem, the violation of God's laws concerning the distribution of property and earnings, rather than in George's economic solution, the Single Tax.

Therefore, the religious ideas that inspired Henry George, those Hebraic legal principles that were so influential across the centuries in the Hebrew Republic

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213. England, *supra* note 209, at 141; Lough, *supra* note 7, at 283.

214. England, *supra* note 209, at 141; Lough, *supra* note 7, at 283. It is quite possible that George was correct. The point is that this made enactment quite difficult.

215. THOMAS, *supra* note 2, at 228.

216. THOMAS, *supra* note 2, at 320.

217. See, e.g., YOUNG, *supra* note 13, at 145–229, 230–50 (chronicling many Single Tax campaigns in the United States and discussing their tactics).

218. YOUNG, *supra* note 13, at 205.

219. YOUNG, *supra* note 13, at 207.

tradition, that supported a working tax system through *hefquer beit din hefquer*, could still hold great promise in the realm of tax law. The task is to identify the important principles present in George's ethical-religious message, though perhaps absent from the Single Tax itself, and to begin to apply them to modern issues. Clearly, these principles have application to many areas of law. For example, George used Hebraic ideas to articulate a powerful anti-monopoly message, and this could be very useful in antitrust law. However, in the limited space here, I will focus on tax law and specifically how Georgism and Hebraic thought can offer an alternative conception of unearned income.

#### VIII. UNEARNED INCOME

Perhaps the key principle at the heart of George's thought and of the Hebraic institutions is the idea that some income is "unearned" and should therefore be treated differently. This idea resonated not only with George's followers but with many others as well. I will focus on this theme as an example of how religious thought from the Hebraic tradition can inform tax law, explaining otherwise puzzling aspects of our tax code and offering more coherence and legitimacy to the law. Presently, our tax law seeks to differentiate between earned and unearned income, and this is partly the result of a religious and moral impulse. However, the tax law actually puts this into practice without any reference to the underlying religious motivation, resulting in considerable confusion.

First, I will briefly review the importance of unearned income in George's thought and in Hebraic law, as well as its importance to George's followers and many others. Then, I will discuss how the desire to truly distinguish between earned and unearned income was present from the very beginning of the tax code but how in practice we have come to distinguish only between labor and capital income, although we label it as earned and unearned income. This has mostly generated arbitrary complexity. As two representative examples, I will discuss the passive activity loss limitations and the special use valuation for inherited family farms. I will present George's religious, Hebraic understanding of unearned income as a potential way to clear up confusion and arbitrariness in these provisions.

##### A. Unearned Income in Georgism and in Hebraic Thought

The central premise of George's entire program was that, because God had created the earth, any income directly attributable to the land, broadly defined, was not earned by any individual. Even worse, a landowner could capture not only the unearned wealth flowing from the land itself but from someone else's labor applied to the land. George believed that "the strong and unscrupulous who desired to live off the labor of others, have been prompt to see," that they could do so through land ownership.<sup>220</sup> "When the possession of land means the gain of unearned wealth," said George, "the strong and unscrupulous will secure it."<sup>221</sup>

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220. HENRY GEORGE, SOCIAL PROBLEMS 150 (1883).

221. GEORGE, *supra* note 204, at 48.

Therefore, George believed that the entire tax burden should fall on this unearned wealth: “when, as we propose, economic rent, the ‘unearned increment of wealth,’ is taken by the state for the use of the community, then land will pass into the hands of users and remain there . . . .”<sup>222</sup>

This view that no person can rightly claim the wealth generated by the earth, because the earth was not built or created by any mortal individual, is of course central to Hebraic thought and Jewish law. Again, in the words of Rabbi Lord Jonathan Sacks:

[u]ltimately, all things are owned by God, creator of the world . . . . In Judaism, because we are not owners of our property but guardians on God’s behalf, we are bound by the conditions of trusteeship, one of which is that we share part of what we have with others in need.<sup>223</sup>

Or consider a more radical view in the words of Zionist Rabbi Yeshaya Shapiro: “[a]nyone who yearns to fulfill in his soul the requirement of ‘You shall be holy,’ and ‘You shall do that which is straight and good,’ must live exclusively through the work of his own hands and in no circumstances off the labor of another.”<sup>224</sup> But this theological view of unearned income is by no means limited to Judaism. Consider, for example, the Catholic doctrine of the Universal Destination of Goods, which teaches that “[i]n the beginning God entrusted the earth and its resources to the common stewardship of mankind . . . . The goods of creation are destined for the whole human race . . . . The *right to private property*, acquired or received in a just way, does not do away with the original gift of the earth to the whole of mankind.”<sup>225</sup> Likewise, the ideal distribution of property in the theology of the Church of Jesus Christ of Latter-day Saints derives from the teaching that “I, the Lord, . . . built the earth, my very handiwork; and all things therein are mine.”<sup>226</sup>

#### B. Broad Support for Distinguishing Earned and Unearned Income

The religiously derived concept that some income is unearned, because it is divinely created, was a theme that deeply resonated with George’s followers. They constantly referred to the “unearned increment” of land values as the proper tax base.<sup>227</sup> The premise was simple: it is wrong to take from someone, through taxation or otherwise, what they have honestly acquired with their labor and effort;

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222. *Id.*

223. SACKS, *supra* note 97, at 32.

224. David Wolkenfeld, *Sacred Rebellion: Socialism and Messianic Religious Zionism*, 4 MILIN HAVIVIN [BELOVED WORDS] 19, 29 (2008), <https://library.yctora.org/files/2016/09/Sacred-Rebellion-Socialism-and-Messianic-Religious-Zionism.pdf>.

225. See *The Ten Commandments*, *supra* note 26.

226. THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, *THE DOCTRINE AND COVENANTS OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS* 207 (2013).

227. See, e.g., Edward McGlynn, *Father McGlynn on the Land Question*, HENRY GEORGE LIBRARY, <https://bibliotek1.dk/english/the-land-question/father-mcglynn-on-the-land-question> (last visited Mar. 26, 2021); 26 CONG. REC. 1655 (1894) (statement of Rep. Johnson).

conversely, it is right to tax what someone has acquired from land or resources that properly belong to the whole community, from the labor of others, or from other special advantages. As prominent Georgist and U.S. Congressman Tom L. Johnson argued in the House of Representatives:

The true principle is to tax men . . . not in proportion to what they may have honestly earned or saved, but in proportion to the special advantages which they are suffered to enjoy. There is an enormous difference, a difference in kind, between what a man gets by his own exertions without any advantage over his fellows, and what a man gets by reason of special advantages accorded him over his fellows . . . I believe he ought to pay taxes on what he takes belonging properly to the whole people—that *unearned* increment of land value which springs, not from individual exertion, but from the common growth. I believe that which is rightfully private property, that which individual exertion adds to the sum of wealth, should be held sacred, should not be subject to taxation[.]<sup>228</sup>

Accordingly, Georgists generally opposed the income tax:

They oppose it on the ground that it taxes ‘earned’ and ‘unearned’ incomes alike . . . because it is based upon the ability rather than the benefit theory of taxation—as ‘taking from the individual in proportion to what he has, irrespective of how he gets it, not in proportion to what service he receives from government or what privilege he may enjoy’.<sup>229</sup>

We can see that George’s followers saw land as a form of monopoly, and they also saw all monopolies, including those resulting from special privileges granted by the state, as generating unearned income that should be taxed.

Given that the theological underpinnings of this idea of unearned income are shared in both Judaism and Christianity, it is not surprising to find that the desire to treat unearned income differently is widespread in Western society. As early as the Civil War, future president James Garfield opposed an income tax unless a laborer, “with nothing in the world except his hands,” was taxed less than those living off of “unproductive wealth.”<sup>230</sup> In England there had long been a movement throughout the 19th and early 20th centuries to differentiate between earned and unearned income, although only a small reduction in the tax on earned income was achieved.<sup>231</sup> Proponents of differentiating earned and unearned income in the U.S. Congress picked up the arguments from England, with Senator Coe Crawford citing a report to Parliament by David Lloyd George:

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228. 26 CONG. REC. 1652, 1655 (1894) (emphasis added).

229. YOUNG, *supra* note 13, at 144.

230. RANDOLPH E. PAUL, TAXATION IN THE UNITED STATES 14–15, 28 (1954).

231. SVEN STEINMO, TAXATION & DEMOCRACY: SWEDISH, BRITISH, AND AMERICAN APPROACHES TO FINANCING THE MODERN STATE 55 (Reprint ed. 1993).

Comparing two individuals, one 'who derives, we will say, £1,000 a year from a perfectly safe investment in the funds perhaps accumulated and left him by his father, and, on the other hand, a man making the same nominal sum by personal labor in the pursuit of some arduous and perhaps precarious profession, or some form of business,' to say that these two people are, from the point of view of the state, to be taxed in the same way is, to my mind, flying in the face of justice and common sense.<sup>232</sup>

Populist Senator James Kyle believed that "[t]he rich are often the children of fortune, living on the fruits of others' labor, and it is right economically and morally that they should bear the larger share of the public expense."<sup>233</sup> Representative T.J. Hudson of Kansas similarly thought that "no man by his own industry and exertion can honestly earn [a very high income for many years], and the rule is in nearly all cases . . . that their incomes come to them without exertion on their part or through some unfair and vicious system."<sup>234</sup>

The desire to differentiate earned and unearned income was bipartisan and broad and often stemmed from the same moral beliefs. Even wealthy capitalist Andrew Mellon supported a preference in favor of earned income, and when a provision favoring earned income was eventually passed with his help, the Republican newspaper, *The New York World*, applauded it.<sup>235</sup> Andrew Carnegie supported an onerous inheritance tax for the wealthy on the grounds that individual great wealth could only occur through the appropriation of value produced by society and because heirs had not earned their inherited wealth with their own efforts.<sup>236</sup> Republican Representative William Bourke Cockran of New York attacked the 1894 income tax for its failure to treat earned income preferentially.<sup>237</sup> The tax was immoral because it might tax a man who "in the sweat of his brow . . . rises early and toils far into the night, . . . who by the active employment of his energies in productive enterprises increases the aggregate wealth of the country, who by unceasing labor and rigorous self-denial realizes a profit . . . by industry and frugality," but at the same time the tax might exempt the income of "the idle man who derives his profits and his income from the sweat of another man's brow."<sup>238</sup>

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232. Snyder, *supra* note 36, at 249 n.19 (quoting 50 CONG. REC. 3837 (1913)).

233. 26 CONG. REC. 6684–85 (1894) (statement of Sen. Kyle).

234. 26 CONG. REC. appendix 57 (1894) (statement of Rep. Hudson).

235. Ajay K. Mehrotra & Julia C. Ott, *The Curious Beginnings of the Capital Gains Tax Preference*, 84 *FORDHAM L. REV.* 2517, 2528 (2016); LOUIS EISENSTEIN, *THE IDEOLOGIES OF TAXATION* 48 (1st ed. 1961); PAUL, *supra* note 230, at 65, 136. It should be noted that this provision mainly benefitted wealthy professionals, given the high exemption level at the time, making Mellon's support perhaps less than purely altruistic. Mehrotra & Ott, *supra* at 2528.

236. PAUL, *supra* note 230, at 65.

237. 26 CONG. REC. app. 464 (1894) (statement of Rep. Cockran).

238. *Id.* Cockran is specifically criticizing the \$4,000 exemption level of the 1894 income tax. *Id.* The idle man with \$4,000 or less of income would not be taxed, while the honest laborer with \$10,000 or \$20,000 would. *Id.*

### C. The Unearned Income Distinction in the U.S. Tax Code

With such broad support, it is not surprising that provisions quickly appeared in the tax code to distinguish between earned and unearned income. Members of Congress argued for an earned income distinction every time an income tax was proposed, including when the current income tax was enacted in 1913.<sup>239</sup> They succeeded in 1924, enacting a lower tax rate on earned income.<sup>240</sup> Interestingly, the 1924 provision did not directly attempt to define earned income but instead assumed the first \$10,000 of income above the exemption level was earned.<sup>241</sup> Thus, Congress effectively endorsed the above-quoted view by Congressman T.J. Hudson that income above a certain level must be unearned.<sup>242</sup>

While this preference intended for earned income appeared quickly, a preference for capital gain income had appeared even faster. In 1921, while the top rate for ordinary income was 65 percent, Congress enacted a 12.5% rate for capital gain income, and some form of capital gain preference has been present in the tax law since that time.<sup>243</sup> The most important argument deployed in favor of the capital gains preference appears to have been the lock-in effect, the idea that high capital gains rates were causing taxpayers to hold on to their assets and avoid transactions.<sup>244</sup> While this preference is for capital gain income, such income, along with other income from property and investments, has come to be generally identified as “unearned” or “passive.”<sup>245</sup>

Thus, we see the tax code almost immediately distinguishing labor income from capital or property income, yet frequently applying the labels of earned and unearned income. It is, perhaps, not surprising to see the earned vs. unearned income distinction subsumed in the labor versus property income distinction, for this was the dichotomy created by the Supreme Court in its seminal case striking down the income tax, *Pollock v. Farmers' Loan & Trust*, and later even further embedded into the tax law by Justice Holmes in *Lucas v. Earl*.<sup>246</sup>

However, to call all income from property and investment “unearned” is inconsistent with the thought of Henry George, who distinguished true unearned income from both labor and capital income.<sup>247</sup> For George and his followers, and likely for most voters, unearned income should be defined much more literally. They meant it to be income that bore no connection to the taxpayer's effort. For example, an absentee landlord's rent, a monopolist's economic profit, and the extra

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239. See, e.g., PAUL, *supra* note 230, at 14–15, 28 (Civil War era income tax); 26 CONG. REC. 6684–85 (daily ed. June 23, 1894) (statement of Sen. Kyle); 26 CONG. REC. 6684–85 (daily ed. June 23, 1894) app. 57 (statement of Rep. Hudson) (1894 income tax); 50 CONG. REC. 3837 (daily ed. August 28, 1914) (statement of Sen. Crawford) (1913 income tax).

240. Snyder, *supra* note 36, at 249; Mehrotra & Ott, *supra* note 235, at 2528.

241. Mehrotra & Ott, *supra* note 235, at 2528–29.

242. See *supra* note 239 and accompanying text.

243. *Id.* at 2518.

244. *Id.* at 2525–27.

245. Snyder, *supra* note 36, at 243, 244.

246. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895); *Lucas v. Earl*, 281 U.S. 111 (1930).

247. GEORGE, *supra* note 39, at 30–90, 153–224.

profits of an establishment granted exclusive rights to sell liquor within a jurisdiction would all be true unearned income. Accordingly, George equated unearned income with the idea of economic rent from classical economics.<sup>248</sup> Another obvious break from George's thought and religious tradition is the fact that unearned income, however imperfectly defined, is often given a tax *preference*, rather than bearing more of the tax burden.<sup>249</sup>

Therefore, what started as a desire to distinguish truly unearned income, for reasons grounded in morality and religion, quickly became a distinction, and often a very imperfect distinction, between labor income and investment income, justified, if at all, through a muddle of economic arguments.<sup>250</sup> Professor Lester Snyder has documented the complexity and confusion that this distinction has generated in the tax law, as well its increasingly poor fit for an evolving economy.<sup>251</sup> As Snyder states:

Many taxpayers (business and individual) earn their incomes from a combination of invested capital and work effort, such as in computer software, auto body shops, and natural resource activity . . . . As it becomes more difficult to categorize a business as service or capital intensive, it logically follows that tagging income derived from these activities as "earned" (services) or "unearned" (capital) is also an artificial exercise.<sup>252</sup>

Snyder notes how the same complexity and arbitrariness apply to the similar distinction between passive and active income and losses, which is once again in reality an attempted distinction between labor and investment income.<sup>253</sup>

Two examples from the current tax code, one from the income tax and one from the estate tax, show how the conventional passive/active or unearned/earned distinction creates arbitrary results, complexity, and litigation. Applying the conception of unearned income derived from Georgism and Hebraic thought to these examples can point the way to a more effective distinction. If this conception of unearned income is also more in accord with the real moral reasons why we desire to distinguish unearned income in the first place, then it will also grant more moral legitimacy to the tax code.

First, consider the complex rules limiting the availability of losses from "passive activities," commonly understood as a response to a wave of aggressive tax shelter activity whereby high-income individuals lowered their tax bills using

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248. See, e.g., *id.* at 48.

249. See, e.g., I.R.C. § 1(h), 1(j)(5) (providing for taxation of long-term capital gains and qualified dividends at preferential rates).

250. For a good summary of historical economic arguments in favor of an earned income preference, see Snyder, *supra* note 36, at 253–54. For a good summary of historical economic arguments in favor of a capital gains preference, see Mehrotra & Ott, *supra* note 235, at 2525–27.

251. Snyder, *supra* note 36, *passim*.

252. *Id.* at 244–46.

253. *Id.* at 244.

artificial losses. Imagine a partnership with one active, materially-participating general partner and one passive limited partner who does not materially participate, both with a 50% interest in the partnership's income and deductions.<sup>254</sup> Suppose each has ordinary income from outside activities and no other income.<sup>255</sup> In the current year, the partnership generates no income and a \$100,000 loss from depreciation on an office building, while in reality the building has substantially increased in market value during the year.<sup>256</sup> The active partner will be able to use the \$50,000 loss to offset his ordinary income, while the loss is currently unavailable for the passive partner.<sup>257</sup> One could argue that this is consistent with the traditional understanding of a preference for labor income or for the taxpayer who put forth more individual effort. However, we can quickly see this is not strictly true. For suppose instead that the partnership had \$100,000 of income. Now both partners could benefit from the depreciation deduction, although the limited partner still has put forth no individual effort. Thus, the passive loss rules take on an arbitrary character.

Meanwhile, the real moral issue causing us to object to the deduction of the depreciation losses is that they are completely artificial and therefore represent an *unearned* benefit. The building has increased, not declined, in value, and therefore neither partner has suffered any real loss. By allowing a depreciation deduction on appreciating real estate, Congress has bestowed an unearned privilege on real estate owners. The passive loss rules simply arbitrarily make the privilege less valuable for passive participants under certain circumstances. More broadly, we could say that the dynamics described by Henry George, the increase in the value of real estate due to developments all around it, have bestowed unearned income on the real estate owner. Yet, the legislature has effectively applied a negative tax rate to this unearned income by artificially turning it into a deduction.

A theological conception of unearned income would deny such benefits. A true moral understanding of unearned income consistent with Georgism and Hebraic law would distinguish between real and artificial losses, or earned and unearned losses, rather than active and passive losses. This idea could be expanded so that a loss is limited or income is taxed more heavily if either results from special privileges created by the legislature or arising in some other way. For example, consider the § 230 liability protection afforded to certain internet publishers.<sup>258</sup> The moral-religious conception of unearned income would seek to tax the additional income resulting from this privilege.

A second example where an understanding of unearned income informed by Georgism and Hebraic law can illuminate a confused area of the tax law is § 2032A.<sup>259</sup> This provision was enacted in 1976 to prevent families from being forced

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254. This example is adapted from Michael A. Oberst, *The Passive Activity Provisions—A Tax Policy Bloop*, 40 U. FLA. L. REV. 641 (1988).

255. *Id.*

256. *Id.*

257. See I.R.C. § 469 (2018) and regulations thereunder.

258. 47 U.S.C. § 230 (2018).

259. 26 U.S.C. § 2032A (2018).

to sell their inherited farms in order to pay the estate tax.<sup>260</sup> Farmland was traditionally valued for estate tax purposes based on its “highest and best use,” but growing urban development was creating such high valuations that heirs simply could not earn enough to pay the estate tax by farming, forcing them to sell the land.<sup>261</sup> Section 2032A addresses this situation by allowing an alternate “use valuation” when the farm is put to a “qualified use” by a “qualified heir.”<sup>262</sup> The alternate use valuation is based on the value generated by the land when used for farming, rather than the full fair market value under its highest and best use.<sup>263</sup> In the prototypical case, if a deceased farmer’s sons or daughters actively operate the farm after his death, they qualify for a substantially lower estate tax valuation than if they sold the farm or passively leased it to a third party in exchange for cash payments.

Clearly, section 2032A is driven by concerns of fairness that are broadly shared by most people, just as most people would agree that high-income taxpayers should not be able to shelter their income using artificial losses. This laudable provision may have saved many family farms, yet it is complex and its implementation often creates arbitrary results. For example, an heir who leases the land to be farmed in exchange for a fixed cash payment will not qualify for the special use valuation, while an heir who leases using a crop share arrangement, whereby they receive a negotiated portion of each year’s production, will qualify.<sup>264</sup> Or, consider a factual situation from an IRS Private Letter Ruling.<sup>265</sup> For the sixteen years prior to the decedent’s death, a farm was operated by her half-brother and his sons under a cash lease arrangement.<sup>266</sup> This was considered a qualified *pre-death* use.<sup>267</sup> However, when the decedent’s heirs, her children, wanted to continue the arrangement with her half-brother after her death, the IRS determined that this was not a qualified *post-death* use, because the heirs themselves would not have an “equity interest.”<sup>268</sup>

Henry George’s thought, and the Hebraic institutions that inspired him, can point the way out of such arbitrary complexity. Note that § 2032A was enacted in the face of significant increases in the fair market values of farmland, not due to any activities or efforts of the farmers, but because of development and population growth all around them.<sup>269</sup> This is precisely the dynamic at the heart of George’s

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260. Stephen F. Matthews & Randall Stock, *Section 2032A: Use Valuation of Farmland for Estate Tax Purposes*, 14 IDAHO L. REV. 341, 341 (1978).

261. Ryan D. Downs, *A Proposal to Amend Section 2032A to Reduce Restrictions on Cash Leasing of Farm Property*, 73 NEB. L. REV. 342, 344–45 (1994).

262. *Id.* at 345–47; 26 U.S.C. § 2032A.

263. 26 U.S.C. § 2032(a) (2018); Matthews & Stock, *supra* note 260, at 344.

264. Downs, *supra* note 261, at 349–50.

265. I.R.S. Priv. Ltr. Rul. 83-07-110 (Nov. 18, 1982).

266. *Id.*

267. *Id.*

268. *Id.* For further discussion of this Letter Ruling and related IRS guidance, see Downs, *supra* note 261, at 352–56.

269. Matthews & Stock, *supra* note 260, at 341.

thought. What has occurred is that the farmer and the farmer's heirs have enjoyed a substantial increase in unearned wealth. But they will only realize this unearned wealth if they convert the farm to a different use, such as urban development. Our moral objection is not to taxing this wealth *per se* but to taxing it before it has been realized or forcing the heirs to realize it through sale when they would prefer to continue farming.

The fact that our real moral concern lies with unearned wealth is apparent in the use of the term "windfall" in the House Report accompanying the enactment of § 2032A, explaining why heirs must continue to actively farm the land in order to qualify for the lower special use valuation:

[I]t would be a windfall to the beneficiaries of an estate to allow real property used for farming or closely related business purposes to be valued for estate tax purposes at its farm or business value unless the beneficiaries continue to use the property for farm or business purposes, at least for a reasonable period of time after the decedent's death.<sup>270</sup>

Congress recognized that by converting the land away from agricultural use to its more profitable use while still avoiding estate tax, the heirs would be enjoying a windfall that they had not directly earned.

Once we realize that the issue is unearned wealth, we can create a simpler rule based on a realization requirement. If the farm continues to be operated as a farm, by the heirs or any lessee, then they have not realized the unearned wealth created by development surrounding the farm, and they should not be taxed on that unearned wealth. If, however, the heirs realize the unearned wealth by, say, selling the land to a developer, then it may fairly be taxed. Complex and litigious distinctions between labor and capital, active and passive, material and non-material participation are no longer necessary.

Section 2032A is also useful for highlighting an important area where George's thought diverged from its Hebraic roots. A faithful application of George's principles could be even harsher than the estate tax, taxing the farmland, separate from its improvements, according to its highest and best use, not at the death of the original farmer, but as soon as the higher value was created.<sup>271</sup> If the Single Tax forced the sale of the farm, or its conversion to another use, George would likely see this as the proper result.<sup>272</sup> In contrast, the land laws of the Hebrew Bible prioritized continuity and security, periodically returning the land to its original owners or their descendants.<sup>273</sup> The Hebraic institutions placed these values above economic efficiency.<sup>274</sup> Indeed, much of George's popularity and influence came from his

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270. H.R. REP. No. 94-1380, pt. 4, at 22 (1976).

271. *See supra* Section II.

272. *See supra* Section II.

273. There are instances where the family is not always prioritized. *See Bava Batra 154b-155a; Leviticus 25:8-13.*

274. *See supra* Section IV.

adoption of values and ideals from the Hebrew Bible, and his divergence from those values in this context could partly explain some of the Single Tax's unpopularity. For example, when a constitutional amendment that would move the state towards a Single Tax was proposed in Missouri, it aroused ardent opposition from farmers, who viewed it as "intended to take their land away from them."<sup>275</sup> The amendment was defeated with more than 85% of voters opposing it.<sup>276</sup> This highlights the importance of hewing closely to the deep moral principles that animate voters and how an understanding of religious sources can help us to do so.

This application of religiously informed ideas about unearned income to the modern tax code is obviously cursory and incomplete. The intent is to make an initial demonstration of the potential in looking outside of conventional economics and social science to inform tax policy. Such use of religious thought as a source for policy and law is extremely underappreciated and recommends itself for further study.

#### D. Compatibility with Religious Freedom

Henry George's experience showed that religious thought can provide useful insights for tax law without requiring anyone to accept a religion's underlying commitments or to alter their own beliefs. George was notable for the sheer range of religious followers he attracted, as well as non-religious followers.<sup>277</sup> George's supporters were Catholic, Protestant, Jewish, Evangelical, and from myriad other denominations and persuasions,<sup>278</sup> all while George himself, although baptized a Methodist and married to a Catholic, never maintained a strict affiliation with any group.<sup>279</sup> Most remarkably, George built a movement on distinctly Jewish theology that gained prominence in overwhelmingly Christian countries.<sup>280</sup>

Thus, George's example demonstrates that law and policy can draw inspiration from particular religious ideas, while maintaining a universal appeal and respecting freedom of religion and conscience. The Hebraic land laws, for instance, are consistent with a robust pluralism, including for secular and even atheist groups. For, "according to both Genesis *and* geology," the land came before people and will outlast them, and therefore monopoly in land can be condemned on a religious basis, while also comporting with the philosophy of the most secular environmentalist.<sup>281</sup> The religious aspect is foundational and essential, but it can coexist with the deep commitments of secular citizens as well.<sup>282</sup>

George's movement also fostered other unique and unlikely coalitions. When George ran for mayor of New York City, his "campaign was noted for its

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275. YOUNG, *supra* note 13, at 191–94.

276. *Id.*

277. *See supra* Section III.

278. *See supra* Section III.

279. GEORGE, JR., *supra* note 50, at 103–05.

280. *Id.*

281. Wasserman, *supra* note 14, at 23 (emphasis added).

282. *Id.*

unprecedented co-operation between labour leaders and radical churchmen, so often at odds in the past.”<sup>283</sup> George also seemed to have unique appeal for middle class voters, quite remarkable for a radical reformer.<sup>284</sup> Such an ability to forge new coalitions and cut across traditional lines is sorely needed in today’s polarized environment.

## IX. CONCLUSION

Religious ideas and institutions from Hebraic thought have proven themselves to be enduring and useful across many centuries, places, and cultures, and they are often more salient and meaningful for voters than technocratic ideas. Through the Hebrew Republic intellectual tradition, the ideas have proved able to influence political thought and institutions in many different settings. Through the legal maxim *hefker beit din hefker*, they have proved able to serve as a foundation for tax laws. Through the popular tax movement of Henry George, they have proved able to resonate with modern taxpayers. An initial exploration of applying these principles to the modern tax code, in the context of distinguishing unearned income, shows great potential.

The ability to generate new ideas capable of appealing across party lines is critical today, for the problems of inequality amid progress that Henry George identified seem more present than ever. While the century plus since George’s death has brought reductions in absolute poverty in many parts of the world, it has by no means eradicated it, and technological progress continues to produce increasingly concentrated gains.<sup>285</sup> George’s concern of “the strong heaping up wealth” to the point of “the weak . . . being crowded to the wall” could have been uttered today.<sup>286</sup> He could as easily say today, as in 1878:

And yet for all this wonderful increase in knowledge, for all this enormous gain of productive power, where is the country in the civilized world in which today there is not want and suffering—where the masses are not condemned to toil that gives no leisure, and all classes are not pursued by a greed of gain that makes life an ignoble struggle to get and to keep? Three thousand years of advance, and still the moan goes up: “They have made our lives bitter with hard bondage, in mortar and in brick, and in all manner of service!”<sup>287</sup>

Perhaps due to his failure to implement the Single Tax, George is largely forgotten today, but that is a mistake. George’s instinct to look to Hebraic thought,

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283. Lawson-Peebles, *supra* note 22, at 42.

284. Mehrotra, *supra* note 8, at 365.

285. See Saez & Zucman, *supra* note 38; *Income Inequality in the United States*, INEQUALITY.ORG, <https://inequality.org/facts/income-inequality/> (last visited Apr. 12, 2021) (presenting various measures indicating growing income inequality).

286. GEORGE, MOSES, *supra* note 88, at 18.

287. *Id.* at 21 (paraphrasing *Exodus* 1:14).

to revive the Hebrew Republic as an inspiration for modern reforms, as a solution to the problem of poverty and inequality, retains its promise. These ideas have been powerful and persuasive across many centuries, from medieval Europe to gilded age America, and it is worth testing their continued vitality today.