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Inheritance, bequest, and devise: Property rights on the graveyard shift

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Abstract

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The purpose of this inquiry is to determine whether the powers to bequest and devise, as part of a group of property rights, are justifiable according to present-day American values. The first chapter is a summary of certain political-philosophical revisions of inheritance laws and their purposes since the recorded emergence of bequest and devise in medieval England. Reviewing this series of shifts throws into question whether any specific right to inheritance can be said to exist, suggesting it has merely been a useful convention throughout history. In chapter two, the discussion of bequest and devise as such is suspended temporarily in order to discuss the interaction of two contradictory and sometimes loosely-delineated sets of values in America. These value sets are discussed in relation to the philosophers John Locke and Robert Nozick on one side and John Stuart Mill on the other, aiming to maximize individual liberty and social utility respectively. Finally, the inquiry re-introduces bequest and devise within the philosophical framework developed in the second chapter. Bequest and devise are debated as rights potentially beneficial and potentially harmful. The alleged negative effects of these powers gain attention in Bruce Ackerman's and Anne Alstott's *Stakeholder Society* and in Mark Ascher's *Curtailing Inherited Wealth*. Both these works suggest major reductions to the powers of bequest and devise, along with other property rights, as justified by the needs and rights of society. The conclusions of the inquiry ultimately oppose these suggestions, citing the necessity to protect incentives for accumulating wealth, including, at least in small part, the rights to bequest and devise.

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Men sooner forget the death of their father than the loss of their patrimony.

–Nicolo Machiavelli, *The Prince*

Introduction: Inheritance and its critics

The power to determine how one's wealth is distributed after one's death is a part of American law inherited from the English. The laws surrounding devise (the power to allocate one's real property at death) and bequest (the same power as relates to moveable property) have evolved slowly throughout American history and are only rarely at the fore of any major debate. Most people think of them sometime during adult life, perhaps in contemplation of mortality. Some people consider inheritance laws in context of taxation. Some people detest the idea of "death taxes" on inheritance, but few people ever inherit enough to be bothered by them financially. In light of this infrequency, it is easy to see why estate taxes garner so little attention compared with income and payroll taxes, which people face regularly and with discomfort.

If inheritance is rarely in the limelight, it nonetheless has drastic influence on some peoples' lives. In certain cases, money passes to charities and other recipients, but heirs are largely descendants, direct or collateral, who receive considerable amounts of wealth without earning it. Within the legal discussion of inheritance, this pattern of inheritance draws criticism for its contribution to the inequality of opportunity between poor and wealthy Americans. Beyond, academia, though, there is a set of concerns emerging on the national scene which make a discussion of inheritance *qua* large wealth transfers extremely pertinent.

In the decades surrounding the turn of the twentieth century, inheritance was under scrutiny. The reason for the criticism was the mass of wealth accumulated in the upper class, along with the famous fortunes of the so-called "captains of industry." Compared with the massive concentration of wealth at the upper extremes of the social scale, there was no

comparable lifestyle possible for those in the lower strata, including for those working in the mines and factories, driving the progress of industry. The Progressive ideology of the era treated inheritance as another tool of the wealthy few, used to preserve dynasties like that attained by the Vanderbilt family.

Similar concerns have arisen in the present day. The Occupy Wall Street protests are in their sixth full month. If public sympathy for the movement appears to have cooled, many of the group's criticisms of "The One Percent" still draw supporters to their cause (Gross). Meanwhile, newspapers proclaim the dwindling of the American Middle Class, and politicians clamor to promise its rescue.

Unlike in the last century, inheritance law has nowhere taken the national spotlight. It seems to have well enough maintained its normal position, attracting only passing criticism. But disparity of wealth and of economic opportunity seem to be causes of concern, and inheritance merits inquiry and attention because of its tendency to influence this disparity. The influence it has also appears to be at the heart of the current academic concern over inheritance practices. The consistently reemerging objection among these critics to the practice of inheritance is how a system which allows large transfers of unearned wealth to benefit people can be justified in a liberal society. Is it not entirely and blatantly in conflict with the American value of equal opportunity? Would society not be better served if that wealth were put to some other purpose, perhaps redistribution, or perhaps elimination of the national debt? In any case, no small number of legal experts holds the current system of inheritance is unjust.

The conclusion ultimately reached in this inquiry will be quite different. It will not defend the current practice of inheritance in America as such, for there is nothing sacred about

America's current tax rates or the current policies for allocating the wealth of intestate decedents. It will, however, support the preservation of something like the current system of inheritance, or, more accurately, the current rights to bequest and devise. On a broader scale, the conclusions reached will be applicable to other property rights which tend to come under fire simultaneously with testation rights. In essence, what follows will be a justification of the value of private property – why it is essential to individual liberty and why it is essential to public ends.

An Historical Approach

Perhaps their long history in English and American law has helped make inheritance laws slow to change. For some people, this historical basis alone has been sufficient reason to continue something like the existing pattern, but this conclusion is not philosophical. A law's existence is not its own justification. Nonetheless, this inquiry begins with history, tracing the development of inheritance and testation, particularly through their conflicts.

This method serves several useful purposes. First and foremost, it provides some insight into what has historically concerned people about testation. By looking at the history of the practice in Western law, one is able to see the purposes for which it first emerged, as well as the primary purposes for which it was maintained. This approach throws into question the reasons why the practice is preserved today.

Second, by focusing on the points of transition, for instance, of increasing testamentary freedom or the abolition of entails, one can see the philosophical questions surrounding inheritance. There has not forever been someone insisting on an inherent right to pass on property at death, just as there is now no one insisting wealth should only pass to eldest sons. What implications can be drawn if the connection between inheritance and equal opportunity is a

new concern, not at all independent of time or place? It seems more intellectually appropriate, therefore, to approach problems of wealth distribution as problems of function, not of objective morality.

Third, the largest historical shift which will be explored is the gradual transition in American law from the acceptance of a right to inherit to the protection of a right to bequest and devise. The right of controlling wealth, and the power of influence attached to it, have changed hands to resemble more the property rights recognized in contemporary American society: not familial, but individual. This transition makes possible a view of bequest as a property right, rather than relying on argument for natural rights to inheritance. The conclusion will emerge in this discussion that as much as possible, it will be more useful to allow the system of inheritance to grow and adapt further with societal changes without casting it out in its entirety or making it unrecognizable.

Why not a Metaphysical Approach?

For people familiar with the history of philosophy, what follows will appear perhaps to be a utilitarian defense for libertarian ends, and in a sense it is, but it is intended to privilege both sets of values. It will seem strange to approach an issue of property rights without appeal to either natural rights or utility. Indeed, the libertarian and utilitarian philosophies as well as the positive and natural conceptions of law will in large part be the focus of the second chapter of the present inquiry. This focus, though, will be incidental. It will be employed only because certain of these philosophical terms are knit together with the values which seem to conflict in discussions of inheritance. In a discussion of a public versus a private right to control wealth after the death of its owner, the terms “libertarianism” and “utilitarianism” seem to embrace the

conflict between public and individual concerns. In any case, the inquiry to follow will not attempt to assume any rights held by the individual or by society as such. It will focus, rather, on analyzing and enabling important rights and values recognized in American law.

One of the primary faults of the sorts of metaphysical arguments sometimes made for or against private property rights is that they rarely win converts. In assuming ahead of time certain rights, these lines of metaphysical reasoning are prone to begging the question. For almost any account of rights developed in the modern tradition or afterward, one can only seem to get through the door of the argument by making certain unwarranted, if appealing, assumptions. If one is willing to grant A and B, then C and D are plainly true, but if A seems only half-true, or if there is no reason aside from opinion to accept B, then C or D will be unachievable. To completely undo Nozick's argument for a minimal state, one need only reject that the individual ability to determine meaning for one's life is really a good. If this unproven premise is rejected, what reason remains for protecting liberty? By attempting to work from an analysis of protected values from America's legal history, this discussion will hopefully avoid such vulnerability.

For this reason too, the current writers in the inheritance debate, as distinguished from the philosophers discussed in depth later, tend to avoid making broad assertions about rights on metaphysical grounds. They begin from socially-determined goals and values; the writers discussed in Chapter 3 all begin from the premise of a certain value: equality of opportunity. Their arguments and others like them tend to begin with two premises: 1) Economic equality of opportunity is an American value, and 2) it is not being supported sufficiently by current tax laws. In this style of argument, one at least begins from a starting point for which there is some means of testing accuracy. Most people will probably admit equality of opportunity in some

form is an American value, but if they are not sure, they can perhaps confirm or refute its status as such through a survey or historical analysis.

The flaw in this style, which will become apparent later, is that, when discussing equal opportunity, or liberty, or a multitude of other values and rights, people use the same terms to indicate different ideas. One person may say “equality of opportunity” and think of a positive right, imposing a duty on each American to ensure each individual is reasonably prepared to compete against any other. Another person may use the same term to refer to a negative right against unequal treatment by the state. At this juncture, the individual is left to choose between this judge’s or that legislator’s or some professor’s suggested definition.

With any luck, this inquiry will be able to take up the second style without falling into the trap of uncertain definitions. The goal of the inquiry will be to pave the way to compromise by first exploring what kinds of values American law tends to protect and further, then, exploring how these should be balanced for the future. The suggestion of compromise between competing values is not new to inheritance, though, and a certain kind of compromise which includes a system of inheritance much like the current one will be indicated by the final conclusions. This recommendation brings problems of its own, though.

As has already been said, inheritance laws have been slow to change. There are probably a number of causes contributing to this relative consistency. One can safely suppose, though, the practice has always been of greater benefit to rich people than to poor people, though a large part of this consistency may be due to the efforts of rich and influential people to preserve testamentary freedom and low inheritance taxes. The critical mind may, therefore, place the burden on the defender of inheritance to show he is not merely trying to avoid a regime change

or the just loss of property through taxation. The suggestions with which this inquiry will conclude are, for that reason, as flexible and moderate as possible without failing at their purpose. The argument which follows is also framed so as to protect the public as well as private ends Americans tend to pursue, to the greatest extent possible. With that qualification, the first step of this inquiry will be an overview of the historical developments which have brought inheritance, bequest, and devise to their present state.

Chapter 1: Prior debates and revisions

The purpose of this chapter is to provide both an historical and a philosophical context for the issues at hand. Rather than fully accounting for the history of inheritance laws and practices it will focus on key points in history when these laws have come into question. In these instances, in which people have debated practical and ethical issues of distributing the wealth of deceased persons, the discussion will focus also on the philosophical concerns, sometimes implicit and sometimes explicit, in these debates. Throughout the history of Western testation, governments have designed and redesigned policies depending on questions of legitimate authority, rights to inherit, and more recently in the U.S., the right to bequest. The discussion of these and other questions which follows is divided into chronological sections, beginning with the English legal system in which the American system finds its roots.

England, 1100s-1300s

In feudal England, inheritance began as a matter of custom, valued among late Anglo-Saxons for the stability it provided in transactions. Plans for the fate of property after the death of a landowner were frequently made public deliberately (Mumby, 2011). While trends existed, rules of testation varied from one feudal shire to another. Before roughly 1100, many men would appoint executors of sorts to oversee the distribution of their property after death. Most feudal lords made wills for both material and religious reasons, and a peasant could often produce a will for a fee. Generally, a man's estate and title, if any, would pass to his eldest son, if he had one, and his personal property would be divided equally among his children. (Murphy, 1959)

In the first half of the 13th century, the jurisdiction under which probate fell became a matter of debate. Probate had historically taken place in ecclesiastical courts. The church

oversaw collection by legatees and all charitable bequests in wills. Anyone who died intestate (without a written will) was assumed to have died without being confessed, and his property therefore passed to the church. (Murphy, 1985) In the 1520s, several acts of parliament reduced ecclesiastical jurisdiction, and in 1533, the Act of Restraint of Appeals passed, officially separating England, as well as her courts, from Rome and the Catholic Church.

From a practical standpoint, the debate over the right to administer probate was one of money. Either the church or the state stood to gain. Prior to the late 1520s, the Catholic church was able to maintain authority over the practices, with some deterioration of their authority. Under the Church of England, ecclesiastical courts thrived, occupied in large part with the work of inheritance:

...the instance side of their business, especially in the higher courts, was much more important than the office side. Litigation, in other words, was more important than prosecution. This is true in relation both to the numerical incidence of cases and to the profits that the courts and their officials derived from the system...It is abundantly clear, moreover, that the instance side was dominated by tithes, testamentary and defamation litigation. (Outhwaite 64)

Wealth transfers *mortis causa* were still under the jurisdiction of the church, but the church, of course, was now under the jurisdiction of the monarch.

The issue of jurisdiction was a philosophical as well as practical concern, though. Prior to the Act of Appeals, England lacked a sole source of authority. The influence of the Roman Catholic Church, in addition to obstructing the separation of King Henry VIII from Catherine of Aragon, was contrary to the emergent positivism which would evolve into Blackstone's attributing all property in England ultimately to the crown. Bequest and devise were part of a bundle of powers reserved to the crown, and apparent to the twenty-first century reader will be

the absence from parliamentary concerns of any of the “rights” language which currently surrounds inheritance and court action. The key point of this contrast is the supremacy of concern for the powers of the state. In asking after the proper jurisdiction under which inheritance should fall, the English preserved assumptions which have continued even into the American legal system: (1) bequest, devise, and intestacy should be matters of law under some managerial supervision, and (2) it is proper that the property owner or his agent (executor) should participate in the disposal of wealth after the death of said owner. This period of history is unique among those discussed in this chapter because it contains no suggestion for major change to the practice of inheritance, merely to its administrators.

England and the American Colonies, Before 1800

The 15th century saw an increase in the freedom of testation, and primogeniture became the standard choice among testators. Debates about primogeniture continued throughout the sixteenth century and addressed the potential right of children to inherit. The purported benefit of primogeniture was a predictably stable and therefore secure upper class. The debate over primogeniture introduced a much more serious discussion of inheritance as a right of the heir. Writing in the 1530s, Thomas Starkey began arguing against the practice because of the extreme disadvantage younger sons faced. In 1604, primogeniture had permeated the class system, and Sir Edwin Sandys spoke in favor of the Virginia Company’s enterprise as an opportunity for the advancement of younger sons; meanwhile, New Jersey was pushing to institute a system of primogeniture, hoping to prevent excessive division of its lands. (Thirsk 246)

As Beckert (76) notes, the American colonies were better suited to devises among multiple children because land was relatively plentiful. Primogeniture nonetheless took hold in Virginia.

Massachusetts did not institute primogeniture, instead opting for a partible inheritance system with a double portion for the oldest son. After the American Revolution, primogeniture would lose popularity in many states, particularly because of its association with English aristocracy (Murphy, 1959). Thomas Jefferson's opinions of primogeniture were also influential in the practice's decline. Beckert quotes a letter Jefferson sent to James Madison in 1785:

I am conscious that an equal division of property is impracticable. But the consequences of this enormous inequality producing so much misery to the bulk of mankind, legislators cannot invent too many devices for subdividing property, only taking care to let their subdivisions go hand in hand with the natural affections of the human mind. The descent of every kind therefore to all children, or to all brothers and sisters, or to other relations in equal degree is a political measure, and a practical one. (Quoted at 73)

At stake philosophically, and not commonly held in Jefferson's time, were notions of inheritance as alterable purely on the basis of the will of the state and without appeal to natural rights.

While inheritance today rarely has deterministic influence on life outcomes for heirs, Jefferson and others who opposed primogeniture and criticized its economic consequences were citing apparently real effects, utterly deleterious to the prospects of younger sons. Primogeniture in England preserved the interests of the crown and parliament in having a stable upper class and, therefore, a power structure slow to change. It further ensured the continuation of amassed power and wealth within a bloodline. Thomas Jefferson was one of the earliest ardent critics of large inheritances in America. He linked the accumulation of wealth with the accumulation of power and linked the accumulation of unearned wealth with the accumulation of power in the hands of the few. He separated the right to inherit from natural rights to property and advocated for strong controls on the practice; these suggestions did not all become law, but they would influence later debates (Beckert 175-176).

Entail in the U.S., 1800s

Entail was one of the first elements of English inheritance law abandoned by the colonies. Entails gave testators a means of preserving land within their bloodlines by denying heirs the right to sell or otherwise alienate property, a prohibition which could extend through multiple generations (as opposed to fee-tails, which allow heirs full rights to alienate property). This practice was abandoned with apparently little fanfare in most states, but the question of perpetuities was largely settled when New York legislation outlawed them in 1828. The rationale most commonly offered for this abandonment was the burden such provisions placed on economies encumbering the free sale of land with heavy restrictions. This is an early instance of how Americans weighed the rights of individuals against the interests of the public. England held onto the practice in some form until 1925 (Simes 44).

The abolition of entails seems *prima fascia* a reduction in freedom of testation. With new regulations, testators were much more limited in the ability to control their wealth *post mortem*. The intended effect of the new doctrine, though, was not a reduction of rights, but a more complete transfer of rights from one owner to the next. The shift from a system which did allow entails to one which did not was justified practically, and the importance of the practical concerns should not be overlooked. This reformation alone adapted the practice of inheritance to a form tolerable to an industrializing economy. In addition, this shift has real philosophical implications.

First, it continues the same notion Thomas Jefferson embraced when he insisted the world, “belongs in usufruct to the living (Quoted in Beckert 13).” This statement implies the living may do with the property available to them as they wish, at least in that they are justified in

disregarding the wishes of the dead as convenience requires. The new law did not fully enact this conclusion, though, for it left untouched the right of the testator to decide who would receive his property immediately upon his death. Perhaps most importantly, because a testator no longer had the right to deny the sale of his property by his heirs, an heir was now sole owner of the inherited property.

Informing the debates and opinions of this period were the writings of such liberal philosophers as John Locke and John Stuart Mill. For Lockeans, there were natural rights implicit in humanity, among which were property rights and the right to inherit. Locke was no staunch advocate of any certain kind of inheritance practices. He saw inheritance as falling among those rights one could give up in favor of participation in the state. Those favoring Mill made no allowance for a natural right to inheritance; rather, inheritance was at the mercy and pleasure of the state.

This positivist philosophy of law became enshrined in the American legal tradition fairly early. In his essay *Inheritance in American Legal Thought*, Ronald Chester traces the origin of this tradition in legal opinions to the 1858 Virginia case of *Eyre v. Jacob*. Chester quotes from the majority opinion:

The right to take property by devise or descent is the creature of the law and secured and protected by its authority. The legislature might if it saw proper, restrict succession to a decedent's estate...or it may tomorrow, if it pleases, absolutely repeal the statute of wills and that of descents and distribution and declare that upon the death of a party, his property shall be applied to payment of his debts and the residue appropriated to public uses. (Miller and McNamee 29)

As Chester notes, this opinion is visible throughout much of U. S. legal history.

French Revolution (1780s-1800)

While this discussion has so far focused on (and will soon return to) the origins and present state of inheritance in America, a brief glimpse at the treatment of inheritance during the French Revolution will prove helpful. The French Revolution is unique in the Western tradition as a point at which the right of testamentary freedom was rejected specifically because of its tendencies to distribute wealth unequally and to create economic and social classes akin to aristocracies. It is pertinent here because, while similar objections to inheritance have arisen in American history, no colony or state has at any time been without relative freedom of testation as became the case during the French Revolution.

The well-remembered mantra of the French revolutionaries, *Liberte, Egalite, Fraternite*, enshrined the stated values of the revolution and the goals of the Constitution of 1789. Certain proponents of these values, most notably Honorè-Gabriel Riquetti Mirabeau, Maximilian Robespierre, and Antoine Christophe Merlin de Thionville, believed the existing practices of inheritance were contrary to what was perhaps the most heavily emphasized of the three ideals: equality. Arguing in support of an inheritance-reform bill, Merlin told the National Assembly in 1790:

Established on the principle of the equality of all citizens, this government is a free government, and the consent of such a government to aristocratic rights of primogeniture or to the rights of male offspring thus stands in contradiction to this spirit and undermines all fundamental principles. (Quoted in Beckert 24)

The major concern over inheritance was practical as well as philosophical. Beckert describes two varied forms of inheritance law in different French regions prior to the Revolution, both

imposing limits on testamentary freedom to encourage equality among heirs (24-25). In practice, though, testators frequently circumvented these rules.

The real trends of bequest and devise seemed to follow the widespread preference to continue wealth largely undivided through a bloodline. While primogeniture was somewhat mitigated in statute, it was far more common as a *de facto* practice, one which understandably connoted aristocracy. The debate over inheritance became prominent in 1791. Beckert notes: “The substantive analysis of the arguments put forth in the debate shows that opponents of testamentary freedom staked their position more strongly on the value of equality, the deliberate alteration of existing family structures, and society’s moral values (42).” On the other side of the debate were arguments for “preserving existing family values (42).” Evidencing its continued support for the Revolutionary conception of equality, the National Assembly tightened restrictions to testamentary freedom to ensure the division of large fortunes.

France revisited inheritance legislation under the Jacobins in 1793. In this instance, testamentary freedom was entirely abolished, and the distribution of wealth to heirs was equalized by mandate. The ultimate issue in the series of inheritance debates from 1791-1793 was a clash of ideologies. Those who favored the policies of the *ancien régime* tended to make arguments for liberty, often based in natural legal theory and the philosophies of Locke and Pufendorf. On this account, the French government had no legitimate claim to complete control of private wealth and no right to interfere with the function of the family as it related to inheritance. In contrast, Rousseau’s philosophy influenced the more popular view of private wealth existing subject to the good pleasure of society and secondary to social equality.

Extended Debate, 1880s-1920s

The French Revolution changed the very nature of the French government. While the prolonged Progressive movement in the U.S. from the 1880's to 1920's was nowhere near as consequential by comparison, it introduced arguments to U.S. politics which persist today. The inheritance debate during this period can be broadly captured in the ideological clash between renowned financier John Pierpont Morgan and U.S. president Theodore Roosevelt. On one hand, Morgan epitomized the striving of business to establish extreme wealth and even monopoly through the establishment of trusts. Roosevelt summarized the emerging criticism of such business moguls as Morgan and the Vanderbilt family:

The man of great wealth owes a peculiar obligation to the State, because he derives special advantages from the mere existence of government. Not only should he recognize this obligation in the way he leads his daily life and in the way he earns and spends his money, but it should also be recognized by the way in which he pays for the protection the State gives him. (Quoted in Beckert 176)

Perhaps what Roosevelt saw was a sort of proportional reasoning, such that those who benefitted the most from society's existence should do the most to sustain it, a pattern of reasoning which survives today. Morgan took to the opposite extreme: "Men owning property should do what they like with it...I owe the public nothing." Cornelius Vanderbilt, originator of the Vanderbilt fortune, spoke, if such is possible, more plainly; Lewis Corey quotes an account of a statement he made: "'Law?' exclaimed 'Commodore' Cornelius Vanderbilt, the manipulator of railroads. 'What do I care for law? Hain't I got the power?' (Corey 363)"

If Roosevelt was an ideological polar opposite to the likes of Morgan and Vanderbilt, Andrew Carnegie fell somewhere in the middle. Carnegie, whom Morgan once congratulated for being "the richest man in the world," also earned wide renown as a philanthropist. On the

surface, he seems more in accord with Roosevelt's ideology, for he denounces the wealthy person's right to hold wealth unconditionally. According to Beckert, "Carnegie saw the owner as merely the trustee of the wealth, and society as the moral owner," advocating a "quasi-public form of private property" (Beckert 177). It is important to note, though, Carnegie saw the responsibility to respond to this view of wealth as incumbent on the individual.

For Carnegie, great wealth should not necessarily be taxed more heavily, but should rather be freely given by the owner in philanthropic interests. This obligation could only be fulfilled during the individual's lifetime, so bequests after death were of little special significance; Carnegie famously said, "The man who dies thus rich dies disgraced" (Quoted in Beckert 177). This pattern of disposing of wealth emphasizes the will of the individual in his philanthropic ventures and is therefore not strictly social. Later proponents of inheritance taxes would partially rely on Carnegie's arguments for support, but his practical suggestions would never be as popular as his criticisms of those who use and bequeath wealth without consideration for society.

Whether by intention or coincidence, the opinion of the Supreme Court in the 1900 case of *Knowlton v. Moore* was generally in keeping with the publicly accepted view of inheritance at the time. "The right to take property by devise or descent is the creature of the law, and not a natural right" (Quoted in Miller and McNamee 29). The debate which would emerge in the coming decade would test the extent to which private property was an inviolable right or whether it was at the pleasure of society, and *Knowlton* was thus a modest part of the road to the Progressive Era. Its ruling, though, went to the heart of the question of the extent to which certain traditional rights could be removed.

Chester gives some further insight into the debate over inheritance rights at the time. He mentions a bill before the Illinois legislature to cap inheritance which had been rejected in 1887, only to be a topic of discussion for the Chicago Bar Association in 1915. In 1919, the Mississippi State Tax Commission supported a bill to do the same, citing instances “where profits are so enormous, they cease to be profits simply, but they are nothing other than a tax. The citizenship, that has paid them, is more entitled to the benefits than the heirs at law” (Quoted in Miller and McNamee 31). Ultimately, though, neither of these bills passed their state congresses. Philosophically, it is unclear whether the decisions to reject these bills were driven by some idea of natural rights, including inheritance, whether the decision was pure politics, or what other factors were at play. It is clear, though, the sentiment in support of inheritance reform was never strong enough nor widespread enough to propel the bills into law.

Hodel v. Irving (1987)

In the 1987 case of *Hodel, Secretary of the Interior v. Irving Et. Al.*, the U.S. Supreme Court recognized for the first time a Constitutionally-protected right to bequest and devise. The case arose from a dispute over legislation designed to consolidate Suix lands. Land previously allotted to individual tribal members had become divided through sale and inheritance, leaving the tribal territories fractured. Section 207 of the Indian Land Consolidation Act provided for the complete escheat (government assumption of property at the death of its owner) of the previously Suix-held lands back to the Suix tribe upon the deaths of the current owners, with certain other, minor allowances. Most importantly, though, there was no provision for compensating those who lost property claims as a result of the legislation.

The case was heard at the peak of the “Conservative Revolution,” and after a period beginning in 1972 wherein the only changes to inheritance taxes had been reduction. The last major Supreme Court inheritance case had been *Irving Trust Co. v. Day* (1942), wherein the Supreme Court found, as precedent generally held, there was no legal reason inheritance could not be abolished. Now in 1987, the Supreme Court reached a literally unprecedented decision when it found Section 207 of the Indian Land Consolidation Act unconstitutional because it denied individuals the right to devise or bequest real property.

While complete escheat was found unconstitutional in this case, it had previously been viewed more favorably. Writing the majority opinion in the 1896 case of *Hamilton v. Brown*, Justice Gray affirmed Texas escheat legislation. The plaintiffs in the case claimed to be heirs of a deceased Texas man whose property had passed to the State of Texas after no heirs were found during a ten year period following his death. Their claim against Texas rested partly on an accusation Texas had violated the Fifth Amendment “Takings Clause.” The Supreme Court found no such violation, holding, as Texas’ escheat laws did not interfere with the property owner’s original contract to possess his holdings, they could be, and had been, carried out according to due process. (Sentell 101)

Outside of legal precedent, the political context of the case should also be noted. While inheritance was not at the time a political issue of the utmost attention, it had been an issue in the 1970s. During his 1972 presidential campaign, Senator George McGovern suggested an extreme tax on inheritance, confiscatory in effect, and the idea was soundly rejected. In the decade following, Congress would first eliminate the federal tax on transfers of wealth to spouses *mortis causa* and would later increase the exemption on inheritance transfers generally to allow ten times the 1972 exempt amount to pass tax-free through bequest and devise. These changes were

followed in 1980 by the election of Ronald Reagan. As others have noted, conservative influence was heavy during the period *Hodel* was decided, and Reagan was able to change the makeup of the Supreme Court. It is unclear, though, how, if at all, those facts should change the reading of the *Hodel* decision lawyers give in determining the case's influence as precedent.

The Supreme Court addressed questions of escheat on several other occasions and repeatedly upheld judgments in favor of escheat statutes. These decisions do not seem to protect any sort of Constitutional right to bequest. As will be discussed later, Mark Ascher makes an argument based in historical evidence for a purely positive view of American law in his 1990 article, *Curtailing Inherited Wealth*. He cites *Magoun v. Illinois Trust and Sav. Bank* (1898) and *Irving Trust Co. v. Day* (1942), both of which embrace the authority of the states and the federal government to change inheritance laws as it sees fit. The Court's opinion in *Magoun* states, "The right to take property by descent or devise is a creature of the law, and not a natural right..." While this quotation does suggest a positivist view, it does not quite cover the issue in *Hodel*, which addressed the right to *give* property by descent or devise, not *take*.

In light of this fact, the Supreme Court found in favor of the individual tribal members seeking rights to devise and bequest. Writing for the majority, Justice O'Connor states,

...the character of the Government regulation here is extraordinary since it amounts to virtually the abrogation of the right to pass on property to one's heirs, which right has been part of the Anglo-American legal system since feudal times. [It] effectively abolishes both descent and devise of the property interest even when the passing of the property to the heir might result in consolidation of property -- as, for instance, when the heir already owns another undivided interest in the property -- which is the governmental purpose sought to be advanced. (*Hodel v. Irving* {1987})

This was the first case in which the Supreme Court recognized devise and bequest as rights. The decision includes language allowing for inheritance taxation, acknowledging devise and bequest may be “regulated” but not abrogated.

This ruling suggests the Constitution protects some form of right to devise and/or bequest. The distinction between a right to devise and bequest versus a right to inherit is crucial. By rejecting primogeniture, the U.S. states came close to recognizing a right of younger brothers to inherit, and all states somehow recognize the rights of widows to inherit. The rights to devise and bequest, though, are arguably at the base of every body of testamentary statute.

The Supreme Court’s handling of escheat in *Hodel* was clearly unique. Ascher suggests it is merely a function of the political shift toward conservatism, not an accurately-reasoned decision. Ascher and Chester both note the complex nature of the case’s implications. On the surface, the majority opinion written by Justice O’Connor seems to suggest descent and devise are protected under the 5th Amendment, such that, while they may be regulated, they may not be completely abolished, as through complete escheat. Ascher suggests the opinion may only make this requirement for devise, but Chester criticizes the opinion further.

Chester focuses on one portion of the decision in which an argument by the federal government is rejected. The government’s argument is based on the option provided in the Act for would-be testators to use certain non-will instruments to transfer their properties during life. The Court found these options, though, did not make up for the revocation of the right to devise:

Although Justice O’Connor did note that the Act allowed owners ‘to effectively control disposition upon death through complex *inter vivos* transactions such as the revocable trust,’ this was not, ‘given the nature of the property,’ an ‘adequate substitute’ for the right to pass property by descent and devise. This right was completely

abolished by the Act, and, given the tiny interests at stake, will substitutes were unfeasible alternatives. (*Hodel v. Irving* {1987})

The important implication of this distinction is that the decision may not, per se, recognize a right to make a will. The decision seems to imply a set of other legal instruments could provide the same power. Any such instruments, though, only provide substitutes for the function of the will. The rights to devise and bequest are essential, and the instrument is of secondary importance to the right.

Of philosophical concern in this case are the insights of the 1970s philosophers Ronald Dworkin and Robert Nozick. According to Dworkin's standards, the *Hodel* Court's break with legal precedent could become extremely problematic and may make the entire decision faulty. Dworkin's theory of law includes a "web" of legal precedent, wherein each case decided forms a point on the web with certain weight, affecting and affected by other decisions. A decision which fails to give due consideration to legal precedent, then, does not allow the web to remain balanced. In more practical terms, it creates confusion and uncertainty for future cases. Chester notes jurists writing at the time of *Hodel* who were concerned about this sort of confounding, but he says it seems never to have occurred. Likely, no major problems have arisen, despite the so-called "radical" break with a tradition of recognizing the authority of legislators to deny rights to testation, mainly because of the broad wording of the decision (Miller and McNamee 36). Because the decision itself could be interpreted as a strong protection of certain rights to devise and descent or as a rather narrow protection of a right to some means of leaving property, even if during life, the decision's potency could conceivably be emphasized, exaggerated, or reasoned away.

Conclusion

It is important to note calls for change to inheritance laws rarely arise as independent concerns. The decline of primogeniture in England and the American colonies may be one of the rare instances in which they did. The changes in inheritance laws which emerged in medieval England and in the French Revolution, though, were largely incidental to changing conceptions of the state and wealth. Furthermore, in the U. S. during the twentieth century, objections to the practice of inheritance tended to arise at times when the disparity in wealth between rich and poor reached extreme points, only to be abandoned when some unrelated policy changed that disparity. This is not all an historical inquiry can reveal about inheritance, though.

It seems difficult to say anything about inheritance that unites every moment of history mentioned above. In fact, inheritance bore different meanings at different times, as shown, and thus the questions, objections, and defenses for it varied considerably. In medieval England, inheritance was a matter of social and political stability, and ideas of social justice between the rich and the poor were heard nowhere; in the U.S. between 1880 and 1940, the arguments for and against inheritance changed from social justice concerns to economic concerns. What is now demanded is a solution for twenty-first Century America.

When addressing the topic of inheritance and its influence on wealth patterns, then, it is essential to make a statement pertinent to the day at hand. At the end of this chapter, the key message should be to abandon all hope of finding out what inheritance law should be in all instances. Today's level of testamentary freedom would not have satisfied medieval England, nor fit its understanding of wealth. Just the same, it will be essential to examine in the following pages what sort of approach will best serve modern America. Even when inheritance laws were by all accounts at the whim of the states and the federal government, no state in the Union was ever without a greater degree of testamentary freedom than existed in revolutionary France, and

it is reasonable to look carefully at any suggestions for similar measures. The following chapters will provide examples to support this claim and will ultimately show there is good reason why *Hodel v. Irving* should have been decided as it was, even if the most politically conservative reading of the majority opinion is taken.

Chapter 2: A confluence of concerns

The current academic debate over inheritance is largely a question of the individual's relation to society, and in order to understand how inheritance ought to be treated in contemporary America, it will have to be approached as such. There will be little discussion of inheritance in this chapter, for the purpose of the chapter is to come closer to the philosophical foundations of the political debate. American legal philosophy and legal opinions draw from a widely varied field of precedent, opinion, and philosophy. Legal arguments and judicial opinions have cited thinkers as varied as St. Thomas of Aquinas and William Blackstone, and the intended purposes as well as the experienced effects of adopting disparate viewpoints often conflict. As such, visions of the status of the individual citizen also sometimes conflict. American legal history has at times been divided between those who believe some rights are natural to humans and those think them strictly positive in origin. Lawyers and philosophers have frequently approached inheritance as part of this debate. Does the individual, or the state, or the individual-as-allowed-by-the-state have the right to decide what happens to the wealth held by the individual at death? While the purpose of this debate, the establishment or refutation of legitimate authority, is useful in theory and practice, the terms of the debate cause needless confusion.

The question in the debate is essentially, "Are rights natural to the human, or are they given by governments?" In a monarchy, this question reaches to the heart of political theory by potentially limiting the just power of the monarch. In the context of the American republican democracy, though, it presents a false contest. If one asserts a natural theory of rights, the positivist will be quick to quote Bentham, calling the idea of natural rights, "nonsense upon stilts." After all, what proof or evidence could be found for a natural right to anything? Should

one assert rights are given by governments, though, natural law theorists will ask how governments obtain the power to give rights. This is the point where American democracy becomes incompatible with the question, for, since the Declaration of Independence was written, the answer to this question for Americans has been something like, “from the consent of the governed.” In other words, if the government in question is a government “of the people,” it is impossibly circular to claim the people obtain their rights from that government.

Perhaps addressing the proper limits of the state through a different conflict within American political philosophy will be more useful for discussing inheritance. At its base, this conflict is between libertarian and utilitarian philosophies. Ultimately, it asks what rights an individual has when compared to a majority and further, whether all of an individual’s rights are negative (i.e.: requiring inaction by others), or if some individual rights imply duties for other people. This discussion is entirely within liberal philosophy, so it takes for granted that individuals are both autonomous from and equal to one another, but the precise meaning of each of these terms is debatable. The contest is similar in part to the discussion of inheritance as a natural versus a positive right, in that it assumes, between the state and the citizen, one party (sometimes to the exclusion of the other) has the right to decide what happens to the citizen’s property at the citizen’s death. It is different, though, in that it assumes some rights are essential to the individual, regardless of their origin, and focuses primarily on which rights, if any, are subject to the will of a majority.

The questions to be evaluated, then, include first, what each of these philosophies entails; second, whether U.S. law can best be characterized as utilitarian or libertarian; and ultimately, how the concerns of these separate philosophies affect law and policy in the U.S. The following discussion of libertarianism will depend most heavily on John Stuart Mill’s *On Liberty*, and the

subsequent discussion of libertarianism will follow the development of that tradition from the second of John Locke's *Two Treatises on Government* to Robert Nozick's *Anarchy, State, and Utopia*. These traditions should reveal the functions certain policies and decisions have served in the evolving understanding of rights in America.

Utilitarianism

Mill's utilitarianism emphasizes the greatest utility (happiness, pleasure, satisfaction) of the greatest possible number as the highest good in any circumstance. This chief value distinguishes utilitarianism and establishes the most important standard according to which the utilitarian tradition gauges goodness. Among the other values in Mill's utilitarianism is the right of the individual to decide issues pertinent or predominantly pertinent to him, as long as no other person is harmed, but these are derivative values based on the principle of utility. In other words, rights of the individual such as free speech and freedom of the press bring about the greatest utility for the greatest number because rarely would anyone desire a society wherein he or she was not guaranteed such rights. As Mill maintains in *On Liberty*, even in the face of the rightful liberties of the individual, utility is still the "ultimate appeal" on ethical issues (Mill 25). This authority emerges because people feel a strong desire to increase the happiness of others. Given this structure, it will be instructive to evaluate the nature of liberty Mill attaches to utilitarianism, but doing so will not provide a final set of utilitarian rights, for a strictly utilitarian state could change its collective mind on these issues.

As stated above, Mill regards the individual as having a right to decide issues which exclusively concern him, or which concern him in a much more significant way than they concern the rest of humanity. Mill insists these freedoms are of far greater concern to the

individual exercising them than to any other person. Rights like the freedom of speech, for instance, concern the individual far, far more than they affect others. Thus, he criticizes the Americans of his day for persecuting Mormons, for one's religion concerns him much more than anyone else (Mill 177).

Mill's allowance for individual rights is indicative of a more moderate form of utilitarianism than is sometimes discussed. Mill would leave open the possibility that people have rights against others, regardless of broader utility. Strict utilitarianism would not. In his essay *Utilitarianism*, Mill describes the supremacy of utility in ethical concerns, corroborated by his statement in *On Liberty* that utility is the ultimate determining factor for ethical matters. As Mill says,

In many cases, an individual, in pursuing a legitimate object, necessarily and therefore legitimately causes pain or loss to others, or intercepts a good which they had a reasonable hope of obtaining. Such oppositions of interest between individuals often arise from bad social institutions, but are unavoidable while those institutions last; and some would be unavoidable under any institutions. (61)

This perspective yields some insight into Mill's view of the proper role of the state.

There is a set of states Mill sees as useless for his purposes; his reference to "those backward states of society in which the race itself may be considered as in its nonage," which he says "we may leave out of consideration," implies he attributes a relatively greater maturity and validity to his state and others like it (Mill 10). In any event, Mill does not describe precisely what a state should look like, but the "Applications" chapter of *On Liberty* is largely a series of discussions of specific restrictions the state might or might not be justified in imposing. He apparently sees no need to specify major departures from the structure of England at the time.

The liberties the state may restrict include any in the public sphere. Mill does not see restrictive measures as good, as he asserts, “all restraint, *qua* restraint, is an evil,” and “leaving people to themselves is always better, *caeteris paribus*, than controlling them, but,” he continues, “that they may be legitimately controlled for these ends [i.e.: the ends of free trade, including sanitation, safety, fraud], is in principle undeniable (Mill 116).” Mill holds similarly for social constraints on crime and other matters of public weal.

Libertarianism

Robert Nozick captures a defining difference between utilitarianism and libertarianism when he describes the role of individual liberties in utilitarianism as goals to be achieved rather than as rules to be violated under no circumstances (28). The libertarianism he describes has been built largely on Lockean foundations. In his *Two Treatises on Government* Locke attempts to describe the proper relation between the individual and the state, given a conception of the individual as having natural rights preceding the state. The state, further, draws its legitimate authority from the consent of the citizenry:

The constitution of the legislature is the first and fundamental act of society, whereby provision is made for the continuation of their union, under the direction of persons, and bonds of laws, made by persons authorized thereunto, by the consent and appointment of the people, without which no one man, or number of men, amongst them, can have authority of making laws that shall be binding to the rest. When any one, or more, shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority... (372)

The most basic rights in Locke’s estimation are life, liberty, and property. In general, libertarians hold the right of a state to act contrary to these rights is dependent on the individual’s consent to waive them.

This requirement, though, does not take the same form for all libertarian theorists, and many allow for circumstances in which the state can act contrary to these rights with only the implied or presumed consent of the individual. In order to capture the strictest form of libertarianism while still acknowledging the more moderate forms which will prove more relevant to the case of the United States, it will prove useful to divide this descriptive passage between what Richard Arneson calls “hard” and “soft” libertarianism (262). The former refers to the strain of libertarianism which does not yield any of the rights supposedly natural to the individual and recognizes in the individual the maximum possible amount of liberty accepted as tolerable in a state, including often the right to alienate his or her rights.

Hard Libertarianism

The “hard” libertarian, as Arneson states, holds fast to four tenets of Lockean libertarianism:

1. Each person has a moral right to do whatever she chooses with whatever she legitimately owns unless her actions would harm nonconsenting others in certain ways that violate their rights.
2. Each person has the right not to be harmed by others, whether by physical assault, interference with her liberty by coercion or force, physical damage to her person or property, extortion, theft or fraud, breach of contract, libel, or threat of any of these things
3. Each adult person legitimately owns herself.
4. All of these moral rights are forfeitable by misconduct, transferable from their holder to another by mutual consent, and waivable by voluntary consent of their holder. (Arneson 256)

Arneson adds in a footnote that not all Lockean libertarians will agree that these rights are transferrable (258). For the hard libertarian, none of these rights is violable. Under no circumstance could a state be justified in forcing a law abiding citizen to give up that citizen’s property without the citizen’s consent. Imminent domain laws are thus patently unjust, for once an individual has obtained property through just means (i.e. consensual transfer from the former

owner or an initial acquisition of previously un-owned property), the state cannot force her to yield it, even with what it deems fair compensation. This interpretation of natural rights allows for potentially draconian outcomes, even the right of the individual with abundant supplies of food to knowingly and intentionally allow the starvation of a neighbor, with no violation of justice.

In *Anarchy, State, and Utopia*, Robert Nozick lays out the minimal possible attributes of a state. He begins with a partial return to one of the most ridiculed aspects of Locke's *Two Treatises*: the "State of Nature." Locke famously asserts, "Thus in the beginning all the world was America... (228-229)" The world was full of unexplored, unclaimed property, and "...of those things which nature hath provided in common, every one had a right...to as much as he could use, and property in all that he could effect with his labour...to alter from the state nature had put it in, was his (209)." Essentially, man had rights to property before he ever established the state and before society was anything like it is today. Emerging evidence since Locke's time has shot this image through with so much doubt it is anything but tenable; yet, Nozick begins too in a state of nature.

Nozick entertains no concern with the historical validity of the state of nature. He employs the state of nature strictly as a contrast with traditional theory:

The fundamental question of political philosophy, one that precedes questions about how the state should be organized, is whether there should be any state at all. Why not have anarchy? Since anarchist theory, if tenable, undercuts the whole subject of *political* philosophy, it is appropriate to begin political philosophy with an examination of its major theoretical alternative. (4)

He thus begins by examining how government might begin with individuals seeking protection for their lives, property, and the ability to pursue their desires (12, 25). The state emerges and

exists wholly to enhance the potential for the individual to exercise liberty while infringing on his rights as little as possible. The minimal powers of the state include a monopoly on force, which the state may use to punish misbehavior and enforce contracts, only on behalf of those who pay to receive these benefits (25-26). Nozick suggests a tax to fund vouchers for any who cannot pay for the state's services. He justifies this redistributive tax because it is not redistributive in its intent (27). It is instituted because, if the protection of the state were not ensured to all within the state, the state's monopoly on the use of force would also be incomplete. Nozick maintains any state of greater or lesser authority is unjust.

Nozick attempts to account for why the liberty of the individual ought to be maximized, though formally he does not prove his answer. He contextualizes this question in a discussion of utilitarianism and concludes that the liberty of the individual ought to be protected, even if doing so diminishes the utility of others. For instance, Nozick offers the example of a mob whose passions have been inflamed by the commission of a crime (29). The mob is causing widespread death and destruction. Would it not be better to punish one person unjustly if doing so would quell the mob? Nozick answers in the negative, basing his answer on the value of the individual's power to determine the meaning of his or her life (50-51). The individual alone should be able to determine this meaning; it is thus generally unjust to interfere with this power. The hard libertarian follows this charge to the letter, but the soft libertarian is willing to mitigate it somewhat.

Soft Libertarianism

In Nozick's depiction of utilitarianism, the rights of the individual may serve as goals to be achieved through policy (28). For the libertarian, though, they form rules which policy can in

no way violate; Nozick calls them “side constraints (30).” They precede and restrict policy, rather than serving as its objectives. For the soft libertarian, the rights of the individual will generally serve as side constraints. But individuals may at times be required to sacrifice beyond the requirements of the minimal state if doing so in small amounts will greatly increase the ability of some other person to exercise his rights. For example, Arneson offers a scenario in which A is being pursued by the murderous criminal B. “A can elude B and save his own life by jumping onto the alcove where C is standing. B, a heavy-set aggressor, will not be able to follow. C could move to the rear of the alcove to give A room to land safely.” Perhaps C has a moral duty to accommodate by moving from the un-owned land he is currently using, which land A urgently needs as a platform to land on for his life’s sake. If C does not make this accommodating move, and if A jumps to this spot, killing C, A is not violating any of C’s rights. (Arneson 272-273). If this conclusion is accurate, it would seem to suggest a state, upon encountering this situation, would be just in imposing a legal requirement forcing C to move. Arneson further describes the scenario of an unattended, privately owned orchard. If A and B are starving and happen upon the orchard, perhaps they have a right to take some of the fruit, which will otherwise rot.

While Nozick writes before Arneson’s division of hard from soft libertarianism, his *Anarchy, State, and Utopia* begins the discussion Arneson has taken up. It is through the concept of self ownership that soft libertarianism approaches the potential for duties beyond the minimal state. The self ownership thesis allows that the individual has exclusive ownership of her person and has a right to make use of this ownership. Therefore, one person does not have an unlimited right to enjoy his property if some marginal sacrifice thereof is necessary for someone else’s right of self ownership to be exercised.

Utilitarianism and Libertarianism in the United States

It should now be possible to take up the question: “Is the U.S. more utilitarian or more libertarian?” In this description of the United States, both strict utilitarianism and hard libertarianism can be ruled out immediately. The United States is not strictly utilitarian because some privileges are denied majorities in order to protect individuals, such as the requirement that speech must remain free. One could assert these rights are still utilitarian at their bases because they are protected by laws, or in the case of free speech, a constitution, any of which could be altered by the representatives of the people. This argument only applies to the technical structure of the federal government; a utilitarian account does not explain either the intent behind the laws or the policy implications of the laws, both of which are best described as libertarian. This description fits because the purpose of these rules is so often described in terms of protecting the minority from the will of the majority.

The United States is also not strictly libertarian, for the majority of the day-to-day functions, as well as its year-to-year functions, are utilitarian. This point requires some justification. While, the U.S. has a republican, not a purely democratic, form of government, this form of government is structured around following public preference and the utility of the majority.

Because the most important difference between libertarianism and utilitarianism in practice is the powers each allows the state, it will be best to examine the extent to which each philosophy allows these powers. Most interesting are the points of conflict between the two philosophies and how the U.S. tends to decide these conflicts. While libertarianism emphasizes certain rights of the individual, specifically life, liberty, and property, as enumerated by Locke,

moderate strains of utilitarianism also protect these rights (259). As such, instances of the state respecting these rights will not be counted as evidence of a libertarian state. Only those points where the rights of the individual conflict sharply with the utility of a majority and these rights are overridden for the benefit of that majority will be counted as evidence of a utilitarian state. One should not, then, accept as evidence a law preventing someone from building on her neighbor's land as a libertarian law, for utilitarianism generally accommodates such rules. If a law could be found, though, which prevented a government from assuming land held by an individual to create, say, faster access to a hospital, it would be counted as evidence of a libertarian state. In these examples and the following chapter, the ideas of libertarianism and utilitarianism will be discussed in terms of U.S. law and policy.

What follows will be a short discussion of three instances which point to utilitarian practice, to the exclusion of libertarian practice in the United States. Each instance is an example of utilitarian values in practice to the exclusion of libertarian values. First, the institution of Franklin Roosevelt's New Deal during the Great Depression is overtly utilitarian and distinctly non-libertarian. It represents utilitarian values because it was intentionally redistributive and because it was admittedly instituted to improve the state of affairs of a large number of people while imposing some tax burden on others. Finally, it is clearly a counter-libertarian measure because it involves state action to do more than protect negative rights, defend from violence, or enforce contracts.

The second point worth highlighting is the body (bodies) of laws covering eminent domain, including specifically the "Takings Clause" of the Fifth Amendment. On their surface, these laws appear to serve libertarian ends, for they require compensation to the individual. Their primary purpose satisfies utilitarian ends, though, not libertarian, for they allow the state to

revoke otherwise legitimate property rights. The counter-libertarian nature of these laws is clear. One could reject this assessment and suggest the requirement for fair compensation brings these laws into conformity with libertarianism. The use of force by the state to create the transaction without the consent of the property owner plainly disregards property owner's otherwise legitimate rights to ownership, intentionally redistributing property, often for purposes other than the protection of the natural rights of others.

The third issue to consider among utilitarian measures is the creation of the Federal Reserve Bank. This is not a discussion of the financial and economic impacts of the central bank. Most important here is the early debate surrounding the creation of the bank, for it nearly fits the pattern of the next three events to be discussed. On the federalist account of the argument, the creation of such a bank is constitutional because the "Necessary and Proper Clause" can be construed to allow it. The creation of a bank, though, is in no way consistent with the libertarian idea of the minimal state. Despite eventual loss in this situation for those holding libertarian concerns, it exemplifies a pattern in American law wherein some utilitarian goal is first advanced, then a libertarian concern is raised in response. In the instance of the Federal Reserve, the libertarian concern for limiting the role of the state was overridden.

Certain instances exist, though, in which libertarian concerns are legally affirmed. One instance worthy of citation is the creation of the Bill of Rights. With this addition to the constitution, the U.S. government was limited in its ability to restrict citizens. These restrictions leave the U.S. government still far beyond Nozick's minimal state, but they protect a set of rights which often conflict with the utility of majorities. As stated above, the mere recognition of these rights is not by nature libertarian; rather, it is the similarity these rights bare to Nozickian side constraints rather than to objectives which makes the Bill of Rights libertarian and counter-

utilitarian. The First Amendment does not set the freedom of religion, for instance, as something to be striven for; rather, it is delineated as untouchable except in certain, carefully-reasoned instances.

Another example worthy of consideration is the case of *Cohen v. California* (1971). In this famous case, the plaintiff, a young man who strongly opposed the draft associated with the Vietnam War, was arrested for disturbing the peace. More specifically, he had allegedly disturbed the peace by wearing a jacket which read, "Fuck the draft." This expression was found by the Supreme Court to be protected by the First Amendment. This and other interpretations of Constitutional rights sometimes lead to an effective increase of rights in a tightening of Nozickian side constraints.

Finally, the case of *Miranda v. Arizona* (1965) is also an example of libertarian values in action. This is another famous case. The matter at issue here was the possibility of a duty of officers to ensure arrestees were aware of their Constitutional rights. In this instance, the Supreme Court interpreted the 5th Amendment such that citizens obtained additional protection of their right to liberty (i.e.: the right to a certain interpretation of due process). The counter-utilitarian element of this decision is apparent because the apprehension of suspected criminals is not a matter of concern merely to the suspect; communities tend to want suspected criminals arrested, tried, and punished if guilty. Often, the punishment of a suspected criminal simply makes people feel better, but the ability of communities to extract utility at the expense of the individual is in check.

As demonstrated, one can find evidence for policies and judicial decisions on both utilitarian and libertarian grounds. Perhaps it will be helpful, then, to consider the contexts in

which these actions occur. American laws generally emerge on more a utilitarian than libertarian basis. When a new law is advocated, it is generally on the grounds of better meeting public utility or of providing for some positive right through state channels. Libertarian concerns, on the other hand, usually arise secondarily or perhaps in response to utilitarian concerns. Such was the case in the measures discussed above. In each of these examples, some protection of individual rights is apparent. What is plainly absent, though, is an example of protection of property from any tax. During the period leading up to the ratification of the 16th Amendment, there were challenges to income taxes on Constitutional grounds, but the passage of the amendment caused those objections to dissipate. With the *Hodel* case, though, there is very clear protection from a complete tax on, or escheat of, property transferred through bequest or devise. The potentially most significant aspect of this decision is the implication of a Constitutional right, at least sometimes, to have taxes limited. This is one more example of libertarian values prevailing over utilitarian values, and it is the most important such example for this discussion because it touches on the protection of property rights from certain taxes.

The U.S. maintains below its utilitarian functioning something like the side constraints Nozick describes. These constraints do not always act during the formation of statutes, but they are often invoked or discovered once laws are passed or enacted. In answer to the question posed near the beginning of this essay, then, the United States is more utilitarian than libertarian, for its daily function is utilitarian. The system of rights contained in U.S. law, though, is libertarian in nature. It is libertarian and not utilitarian because, once some right is violated and the violation is recognized as such (as by a federal court or the Supreme Court), the resulting conclusion is that the violation must cease, not that it should ideally cease. In this sense, the rights of a U.S. citizen are libertarian side constraints, not utilitarian objectives, and any right which can be shown

among these side constraints becomes a negative right against the state. The question to be taken up in the next chapter is: should such side constraints apply to inheritance and property.

Chapter 3: The merits of bequest and devise

Why an Historical Approach?

The first chapter of this discussion traced briefly the history of inheritance practices and important shifts therein. This developmental history demonstrates the evolution of the conflict over inheritance. It shows how the standard, or standards, by which inheritance practices are judged differ according to people, place, and time. The tension between private property and public welfare did not always surround inheritance, and it is because of circumstance, not necessity, that it is now prevalent. The issue of inheritance in recent years has seemed to center heavily around wealth distribution, often with criticism of the *Hodel* decision, which apparently relies on an opposing interest in private property.

This relativistic approach is not intended to portray any stage of debate as merely a passing fad. These are each questions of very real importance in a certain context and to a certain generation. As such, just as the English crown in the 16th century had to accept a gradual diminution of papal influence, and the decline of primogeniture did not immediately yield equal inheritance for younger sons, today's debate can likely only culminate in a compromise of values with neither side triumphant, at least not immediately. If reason could judge cleanly between the competing values, perhaps one set could be called philosophically superior, but as will become clear, interlocutors on both sides appeal ultimately to their own conceptions of American values, making objective judgment difficult. These concerned parties, then, can better expect resolution by compromise than by triumph, much as has been the rule throughout America's history. The concluding chapter of this inquiry, then, will attempt to set the best possible rules according to which this compromise should be negotiated. What follows will be an exploration of two prominent and enduring suggested solutions to the current inheritance debate, which are best

characterized as “utilitarian” according to the dichotomy developed in the preceding chapter. Each proposal is an attempt at redistribution, and each targets inheritance practices as contrary to this goal. In both cases, in addition to inheritance rights, both plans encourage extensive erosion of wider property rights. This erosion is cause for serious concern.

The Utilitarian Perspective

If the *Hodel* decision represents a choice for libertarian values over utilitarian, several notable theorists have accepted the mantle of representing more utilitarian values. While only two will receive mention here, several others have contributed to the discussion. Of those legal experts who have taken up the issue of inheritance, though, the accounts most inclusive of philosophical concerns seem to come from Professor Mark Ascher’s 1990 article, “Curtailing Inherited Wealth” and from a book co-authored by Professors Bruce Ackerman and Anne Alstott, *The Stakeholder Society*. Each of these two works is included here for a different set of reasons. Ascher’s work is beneficial because it provides a relatively moderate criticism of inheritance practices with a proposal which affects only the upper echelons of society. He proposes this policy shift partly in order to increase equality for poorer Americans, but he also proposes measures which he claims would benefit all Americans by reducing the national debt. On the other hand, Ackerman and Alstott are valuable for their more extreme suggestion. They approach inheritance not as an isolated problem, but as an exacerbating factor for a much broader problem of inequality. They present a drastic example of what might result if American values shifted dramatically away from libertarian values and toward utilitarian values. While only Ascher’s article refers directly to the *Hodel* decision, Ackerman and Alstott express a clear opinion on the question of inheritance, and the points of conflict between their view and that expressed in the *Hodel* decision are easily identified.

In *The Stakeholder Society*, Ackerman and Alstott propose adding an economic aspect to U.S. citizenship. This is the broadest way to phrase their proposal. More specifically, they propose levying a two-percent wealth tax (with a potential sunset date), a nearly total estate tax, a heavy gift tax, and a potential privilege tax paid annually for life by the adult children of wealthy parents, among others as necessary, as redistributive measures to ensure each citizen receives his or her rightful share of the nation's wealth. This "stake" of the national wealth is determined by the amount necessary to fund a reasonable opportunity for a young adult to succeed financially. The amount must be enough to provide significant opportunity. For instance, it might provide start-up funds for a small business, fund most or all of a college education, or perhaps make for a sizeable down-payment on a home. In the authors' words,

The stake should be big enough to provide each citizen with a cushion against market shocks and to enable her to take a long-term perspective as she determines the most sensible way of investing in herself, her family, her career, and her community.
(58)

In 1999, they estimate this amount at \$80,000. This money would be channeled through a "stakeholding fund" to be claimed by individuals. The suggestions and other political and philosophical changes Ackerman and Alstott suggest do relate to inheritance, but inheritance laws are not a major concern for them. For this reason, including their work in a discussion primarily focused on inheritance may seem counterintuitive; on the contrary, their work is significant in the present inquiry because it shows an example of the sort of social shift into which major changes to inheritance policy might fit. Of particular importance, it also shows a certain kind of reasoning in the present day which could lead to the erosion of multiple property rights.

Ackerman and Alstott criticize present-day America for its “neo-conservative” view of wealth redistribution as charity, given by the “haves” to meet only the bare necessities of the “have-nots.” “In a stakeholding society, stakes are a matter of right, not a handout (9).”

They frame their proposal, therefore, as a change to citizenship itself rather than merely to the social safety net. Every citizen is part of a social, political, and economic structure within which some acquire wealth, and just as each is entitled to a vote in the political sphere of the society, each is entitled to part of the wealth accumulated through the economic sphere. According to Ackerman and Alstott, “All Americans have a fundamental right to a fair share of the nation’s resources as they accept the full responsibilities of adult life (57).” Essential to this assertion is its depiction of wealth as primarily national, divided secondarily among private citizens. In this sense, the proposal of stakeholding is entirely counter to libertarianism.

In another sense, as the authors point out, the plan has a libertarian element. The individual is free to use his or her stake of the nation’s wealth to meet any goal allowed by law:

We agree with our libertarian friends that each citizen, after paying her taxes and fulfilling her other obligations, should generally be free to spend her money as she sees fit. It is up to her, and not the community, to determine the meaning of her life and the proper use of her resources. (85)

Because of this allowance, Ackerman and Alstott see their plan somewhere between libertarianism and utilitarianism; they intend to meliorate for the potentially totalitarian control of utilitarianism and the potentially vast inequality in a libertarian state. As such, the authors would reject a “utilitarian” characterization, perhaps with good reason, because they do aim to protect individual rights to self-determination in a certain scope. After an individual has met his or her social obligations, any private wealth is completely at the individual’s discretion to use.

On what grounds is their proposal utilitarian, then? It is not, to use the authors' words, "hard-headed utilitarianism;" that is, it does not seek government according to a strict calculus of the greatest happiness, regardless of how this result is achieved. As they phrase it,

...utilitarianism, at its core, does not take individualism seriously enough. Each citizen's standing in society should not depend on whether he contributes to others' happiness. We are not just cogs in a collective happiness machine. We are different people, each with rights of self-determination. (23)

Ultimately, Ackerman and Alstott reject the libertarian/utilitarian dichotomy as outside current philosophical debate: "With few exceptions, libertarians struggle against utilitarians as if they were the only guys in town. But there are other serious options, and in the past generation, liberal political philosophy has sought to rework the basic terms of debate (21)." They see their book as part of this reworking. Despite this distinction, their plan is called "utilitarian" here because its distinguishing traits draw out and emphasize those American values which are distinctly utilitarian, particularly the desire to increase the potential happiness of a large number of people, even at the expense of others. Ackerman and Alstott state the libertarian aims of their plan – allowing people to use private wealth to "determine the meaning[s] of [their lives]," but Americans spending private wealth as they see fit is business as usual. The unique aspect of Ackerman and Alstott's plan is the concept of an economic stake in wealth as a component of citizenship and the drastic redistributive implications thereof.

The redistribution necessary for their plan is achieved with several special taxes. While proposing an initial wealth tax of only two percent, Ackerman and Alstott suggest a drastic tax on both lifetime gifts and bequests:

At present, donors can make large gifts to charity without paying any tax. All the charities need to do is to convince them to ignore the competing pleas of family members. Our revised tax system modifies this choice, whether made during life or exercised at

death. Family demands are capped at fifty thousand dollars. Thereafter, gifts or bequests to charities must compete with the stakeholder's moral responsibility to the next generation of citizens, and any charitable transfer must be matched dollar for dollar with a payment to the stakeholding fund...each taxpayer will have an annual exemption of two thousand dollars for gifts to charity and one thousand dollars for gifts to each child, and a lifetime exemption of fifty thousand dollars in either gifts or bequests. (91-92)

These taxes will help fund the stakeholding program. Ackerman and Alstott see them as a fulfillment of a kind of civil obligation derived from the possession of wealth. This is the essence of their "trusteeship principle," essentially a claim that the present citizenry is responsible to the future citizenry for providing a healthy stakeholding fund. To support the fulfillment of this obligation, the authors suggest a "trusteeship tax." Apparently, the tax is primarily justified by a requirement that people who accept eighty thousand dollar stakes repay the money with interest:

Each stakeholder should take her eighty thousand dollars under conditions of trusteeship. While the stake is her property during her lifetime, her control should not extend beyond the grave. If a stakeholder is successful and dies with millions in the bank, she should not be allowed to forget the eighty thousand dollars that helped give her a start. Instead, she must first repay it into the stakeholding fund, with interest, before she may give large bequests to her children or to charities...If someone finds the trusts too offensive, he can simply refuse to claim his stake. (82)

Because the concept of trusteeship is part of American citizenship, though, and because some people who claim stakes will be unable to repay them, the same principles of taxation apply to people who do refuse their stakes, and the taxes are progressive.

Herein lays perhaps the greatest threat of this and similar redistributive programs: that privately-held wealth will confer a decreasing number of special benefits, and people will therefore work less hard, save less, and invest less, to the detriment of the nation. People have warned of this danger before, and it is not always a real threat for a particular tax. There is little

reason to suspect, for instance, people's ambition will wane because of a large or even prohibitive tax on inherited wealth. Such a tax, in combination with a significant gift tax, however, would likely discourage people who pursue wealth with the intention of passing most of it on at some point. Added taxes on wealth, while also not too damaging to incentive if kept low, would exacerbate the problem. Lest this be taken for an argument against taxes generally, it is not; it is an argument why private wealth creation must remain attractive and useful for private ends, not only public, if either is to be accomplished.

Ackerman and Alstott are conscious of certain risks surrounding this possibility. The objections they anticipate are rather common and are based on the threat of businesses and wealthy people leaving the United States because of unfavorable business, banking, or tax policies. Perhaps, the objection goes, if taxes and policies become too inhospitable for wealth holders, these people will leave the country. Ackerman and Alstott respond: "...they should be barred from the country for life. If they wish to renounce America, let them do so. But they should really mean it (109)." At the very least, their suggestion of mandatory expatriation seems to miss the problem it is supposed to treat. To be sure, it is a problem that any American should want to leave the nation, but the heart of the objection is not the physical and legal expatriation of citizens; rather, it is the loss of the base of America's wealth. Ackerman and Alstott offer no remedy if this should happen. They apparently view this concern as philosophically irrelevant to their proposal, for they insist,

The case for stakeholding does not depend on whether you think that the superrich serve as an essential engine of innovation or as a corrupting force in democratic life. Stakeholding is built on a broader foundation: the imperative need to redeem the liberal promise, made to each citizen, of genuine freedom to shape his or her life. (93)

The practical relevance of the objection, though, makes it philosophically relevant. The redemption of the promise of freedom in the method they suggest is dependent on the continued ability of the nation to produce wealth.

It is essential to note, Ackerman and Alstott plainly deny being troubled by inequality of wealth as such. They object to the inequality of opportunity available to children born in different economic strata, but they are not bothered at all by poor conditions in a hypothetical future U.S. where each person has the economic ability to determine his or her own outcomes (Ackerman and Alstott 96). Their goal is equal opportunity in a free state. Mark Ascher's plan is considerably more conservative in its ambition, and it focuses much more heavily on justifying major changes to inheritance law. As such, it does not give a picture of a revolutionized society, but it introduces a set of philosophical problems surrounding inheritance and an in-depth proposal for how the practice could be orchestrated.

Ascher's *Curtailing Inherited Wealth* works from several of the major premises Ackerman and Alstott accept, but Ascher develops them further into the realm of inheritance. Ascher's summation of his proposal allows, "...all property owned at death, after payment of debts and administration expenses, should be sold and the proceeds paid to the United States government (2)." He provides six exemptions to this policy:

A marital exemption, potentially unlimited...Decedents would also be allowed to provide for dependent lineal descendants. The amount available to any given descendant would, however, depend on the descendant's age and would drop to zero at an age of presumed independence. A separate exemption would allow generous provision for disabled lineal descendants of any age. Inheritance by lineal ascendants (parents, grandparents, etc.) would be unlimited. A universal exemption would allow a moderate amount of property either to pass outside the exemptions or to augment amounts passing under them...Up to a fixed fraction of an estate could pass to charity. (2)

In his first step toward justifying this plan, Ascher takes up the controversy noted in the prior chapter between natural rights and positive law. This inquiry has challenged that dichotomy as the best way to approach the issue of inheritance in today's America and has arrived at a general distinction between utilitarian values and libertarian values as more useful. Viewed from this perspective, Ascher's argument falls squarely on the utilitarian side of the division, for while Ascher does consider natural rights as a basis for maintaining testamentary freedom, he dismisses it and, in the process, seems to dismiss the possibility of an individual right on any other basis. Part of the purpose of the present argument, though, is dealing with practical concerns which can enable or limit policy and arguably rights.

While these concerns have been and will continue to be discussed in the terminology of libertarianism and utilitarianism, it is important to recognize the distinction between utilitarianism and libertarianism as frameworks for values and the actual values which the terms are supposed to make coherent. These terms are not employed because phrases like "the greatest good for the greatest number" and "the minimal state" are commonly on the lips of most Americans; rather, the values embodied in Ackerman, Alstott, and Ascher's work seem to resemble very closely utilitarian values, and the values expressed in the *Hodel* decision likewise seem to resemble libertarian values. The purpose of using these terms is therefore to situate the issues of testation within a more manageable picture of the ongoing debate. With this established, the following discussion of Ascher's article should demonstrate exactly what is at stake in a discussion of testation rights: a vast store of wealth on one hand, and the power of certain individuals to control this wealth on the other.

The primary phenomenon Ascher refuses to tolerate is inheritance of significant wealth by healthy, adult children of wealthy parents (2). Such inheritance is unacceptable because it

exacerbates an already pernicious inequality of opportunity between the children of wealthy and poor children. “My proposal,” he writes, “views inheritance as something we should tolerate only when necessary (2).” The question he must resolve, then, is when it is necessary to tolerate inheritance. Considering the argument for a natural right to inherit, Ascher presents briefly Locke’s insistence on a natural right on the part of children to inherit from their parents. Ascher also notes the 1906 Wisconsin Supreme Court case of *Nunnemacher v. State*, wherein the Court found (a) inheritance was a right the state should protect, but (b) the state could regulate inheritance through taxation (while this question has a strong history, it is important to note the shift between a question of rights to inherit, as addressed then, versus the right to bequest freely as addressed in the current debate and the later sections of Ascher’s article) (Ascher 3).

Ascher traces the opposing positive conception of law from William Blackstone’s denial of a natural right to inherit and from an apparent multitude of legal cases, including the 1898 Supreme Court case of *Magoun v. Illinois Trust and Savings Bank*, supporting a state power to abolish inheritance rights. Following this exposition, Ascher offers several reasons why the positive conception prevailed in America. First among these reasons is:

Blackstone’s explanation of how inheritance developed makes intuitive sense. Any society that respects property rights during lifetime necessarily reallocates those rights at an owner’s death...Inheritance is merely the tool we currently use to reallocate the property rights of those no longer living. Other simple and enforceable rules for reallocating property at death might work equally well. (Ascher 4)

Aside from this appeal to “intuitive” reason, Ascher presents three reasons why a theory of inheritance as a natural right could not be made tenable. Ascher gives strikingly little explanation for the success of the positivist view (as opposed to the mere failure of the natural rights view). “Intuitive sense” also seems a poor refuge for an argument with which the author

acknowledges many Americans disagree. If his assertion were accurate, Ascher could get by with saying very little about natural rights because it would have no defenders. Likewise, Americans at the Revolution apparently found intuitive sense in conflict with strict positive law. As he has shown, though, the positivist view seems to describe a great deal of American law, except touching some very specific areas, most of which are given positive protection in the Constitution. In light of his evidence, it is tempting to grant that positivism does generally seem to make intuitive sense that, states have the authority to make laws, and the rights protected in a society are determined by its laws. This cannot be yielded yet, though. The problem which must be resolved, and which Ascher fails to resolve is that, after the long history of testation to which Justice O'Connor's *Hodel* opinion refers, the right to testamentary freedom also makes intuitive sense to a great many people, and the entire historical tradition traced in Chapter 1 shows multiple conceptions of law and rights have been only too clear to different people at different times. The power of positivism to describe the function of the state should not be mistaken for a philosophical legitimatization of that function. The lack of demonstrable evidence on either the utilitarian or libertarian side, combined with the desire to avoid gridlock in the courts and congress has resulted in the same sort of compromise as will be necessary in the present discussion of libertarianism and utilitarianism. Ascher's apparent goal in arguing against a natural right to inheritance through is to open the door for a novel and different method of allocating wealth after the death of its owner.

Ascher's second step is to separate inheritance from the concept of property:

...the essence of our notion of property lies in its usefulness to its current owner. Curtailing a parent's ability to leave property to healthy, adult children at death would have no effect on this aspect of property. A property owner could continue to use property for his or her benefit in any way he or she saw fit during life. (6)

He also makes a distinction between bequests and outright gifts. Aside from the obvious difference of the death of the giver in one case and not the other, Ascher describes a difference in attitude between the two acts of giving. Essentially, an outright gift requires the giver to sacrifice, while a bequest does not; therefore, an outright gift indicates a greater desire to give, and a bequest is simply “garbage can parental ‘giving (Ascher 6).” Bequests allow owners to give something away only when they can no longer use it. Clearly, though, this distinction assumes parents do not, at least in some cases, build up stores of wealth with the sole intention of leaving them as bequests.

Having created these distinctions, Ascher offers several arguments in support of his suggested plan. The first of these arguments gives an historical foundation for an argument similar to Ackerman and Alstott’s. Like them, Ascher claims society has a “stake in wealth.” In describing this interaction between society and the holder of wealth, Ascher cites Andrew Carnegie, as well as both Presidents Roosevelt, each speaking during one of the periods described in the first chapter of this discussion. Ascher reasons thusly:

Those who succeed in accumulating large sums would, no doubt, do quite well for themselves, even if stranded on a desert isle. But they have not been. Instead, they have been a part of society, where they have been allowed to attend public or privately endowed schools and then employ their gifts in dealing with rights, institutions, knowledge, and fashions created and maintained by society at large... Therefore, in spite of the great importance in our national life of the efforts and ingenuity of unusual individuals, the people in the mass have inevitably helped to make large fortunes possible. The inescapable conclusion is that society has a major stake in all accumulated wealth. Given that stake, society need not continue to allow decedents nearly unlimited control over the disposition of their property after death. (Ascher 8)

While Ascher offers several other reasons why inherited wealth ought to be curtailed, two of his reasons seem to stand out above the others. The first is “leveling the playing field (Ascher 9).”

Here he points to the sometimes-referenced distinction between two kinds of factors of inequality: those over which humans have some form of control and those over which they do not. Ascher entertains this distinction as a potential objection to his plan. The supposed objection states, in short, the benefits children gain from their parents because of wealth and those they gain because of other factors are only artificially separable. It is therefore unwise to attempt to reduce one without reducing the other. Ascher responds: “I do believe our ‘human arrangements’ ought to be tailored, wherever possible, to maximize equality of opportunity (9).” Among these arrangements, Ascher plainly includes inheritance laws.

Ascher’s next argument defends his plan as a “painless” way to reduce the national debt. By “painless,” he appears to mean the tax does not deprive people of money they have earned (9). While this point has merit, it is a blatant overstatement to call the tax “painless.” The reader will recall the importance Ascher places on an increased gift tax within his plan. While a drastic reduction in the amount of inheritable wealth would not deprive anyone of earned wealth per se, no such gift tax would be necessary if it did not deprive decedents of an anticipated opportunity to give. In fact, if Ascher’s characterization of bequests as “garbage can” gifts were accurate, no change to the gift tax would be necessary. Clearly, though, both taxes would be painful to people who truly wanted to give gifts; Ascher realizes this fact, plans for it, and here disregards it.

Finally, Ascher defends his plan against several additional anticipated objections. One of the objections Ascher anticipates is based on a reduced “incentive to work” and is related to, though distinctly different from, the suggestions offered in the present discussion:

According to this line of reasoning, one works in large part for the opportunity to pass something to one's children at death. People, however, work for many other reasons. First are the power and prestige that work and accumulation provide. Money makes the world go round. We work primarily to earn it. Money allows us to feed, clothe, and house ourselves. It also provides us with luxuries

and amusement for our leisure. Money provides us with security. If we accumulate enough money, we can stop working... Even complete abolition of inheritance would have no effect on any of these truisms. Money would continue to make both the world go round and Americans go to work... Another of the most important reasons we work and accumulate is to "provide" for others, particularly our children... Many parents also want their children to receive the best education and medical care money can buy. And all parents want to provide their children with little "extras" that constitute neither support, education, nor medical care... Curtailing inheritance would have *no effect* on parents' ability to satisfy these desires. Undoubtedly it is important to ask how curtailing inheritance would affect incentives for work. But with so many other, more important incentives, it is hard to believe curtailing inheritance by healthy, adult children would have any measurable impact. (13)

There is probably a great deal of evidence for this analysis. Indubitably, there are numerous reasons why people work and save money. The major concern in the present inquiry is not that the practice of inheritance alone will be lost and that America will thereby become devoid of opportunity, promise, or incentive to work. The concern is that the loss of the rights to devise and bequest would erode incentive somewhat. Combined with a heavy, even prohibitive gift tax, the erosion would be far worse. Ultimately, if the wrong standard is adopted to measure policy and the justice thereof, and if no protections are in place to shelter private property rights, then the incentive to work, to innovate, and to pursue wealth will crumble.

Admittedly, it is not possible to know in advance at what point on the spectrum of possible levels of taxation this effect would take place, but if the benefits of wealth begin to fall away, it will become a serious threat, as Ackerman and Alstott in some sense anticipate. Their lack of restraint, and Ascher's, to a lesser degree, relies on an assumption reflected in their assertion, "Americans who begin life with greater opportunities cannot complain when their tax dollars go toward expanding the life-options of the less privileged (4)." Presumably, they intend this line to be read, "Americans who begin life with greater opportunities *should* not complain..."

In fact, these exact people can and do complain about just such taxes. For that matter, some of them go beyond complaining – they may vote differently, attend political rallies, or even seek expert advice to avoid them. Is there a point at which these people will no longer want to remain in the U.S. because they feel their property will not be protected from society? Perhaps there is. Is there a point at which people will no longer see the point in pursuing wealth beyond ordinary amounts? If this wealth will no longer achieve their ends, there is.

Divergent Values

Two points of theory common to both of these works stand out as central to their authors' disagreements with the *Hodel* decision. They are 1) a certain common understanding of "equality of opportunity" as an American value, and 2) a certain common understanding of the proper relation between society and wealth. These two points do not capture the entire disagreement between the authors on one hand and the *Hodel* court on the other, but they seem to explain most of it.

On the first point, both pieces emphasize equality of opportunity as an essential American value. For Ackerman and Alstott, that their plan, if implemented, would drastically increase the equality of opportunity in the United State is half the justification for accepting the understanding of rights which underlies their plan. Because each citizen is part of the society in which the wealth is created and because Americans believe in equality of opportunity (or claim to), a particular form of redistribution is fair. Ascher similarly pairs an increase in the equality of opportunity with a decrease in the national budget deficit to justify a vastly increased inheritance tax, which he implies should be higher, but must be controlled to appease the requirements of *Hodel*.

The definition used or implied in both cases for “equal opportunity” carries a questionable element which may not be essential to the term. Specifically, if “equality of opportunity” is taken to mean simply “equality before the law,” then the measure necessary to put this value into practice may be nothing like those Ackerman and Alstott or Ascher suggest. Accepting, as these writers do, a definition of “equal opportunity” which requires or seeks original fiscal equality for all people necessitates some measure at least as redistributive as those proposed by Ackerman, Alstott, and Ascher. Key to the discussion, though, is by what means either definition has been justified. While no justification for the definition of equal opportunity as “equality before the law” will here be given, no comprehensive justification is offered for the alternate view by any of the above-mentioned writers. While this critique of the understanding of equal opportunity will remain unsettled for purposes of this discussion, it is important to note that it truly is not settled. Either utilitarianism or libertarianism can give a logically complete defense of its view on this count. In that each assumes a different role for the state, each ultimately begs the question, but as each piece makes suggestions for a society wherein values are democratically determined, no merely presumed definition is acceptable as authoritative. This is one point on which compromise has been and will be necessary.

The second point of contention between these theories and the *Hodel* decision is the role wealth should play in society. Ackerman, Alstott, and Ascher all ascribe to what can best be called a utilitarian view of wealth – wealth is allocated first according as is necessary for achieving a certain status for each individual in society as opposed to the holder of wealth. Competition and merit are then allowed to determine allocation, but the test of ultimate acceptability for any system seems to be the outcome for the individual. The main problem with the current system for Ackerman and Alstott is the unequal footing from which people compete

for resources. On their standard, their proposed plan is acceptable because of the improvement it presents for the greatest number of society's members with some detriment to a few. The same reasoning validates Ascher's plan.

In the conflicting perspective visible in the *Hodel* decision, little insight can be found for the proper definition of equal opportunity. The decision does not address the issue, and it seems the question must remain open for now. It is possible to speak to the role of wealth from this perspective, though. Embodied in the Court's protection of the right to devise is a protection of property rights. As indicated at the conclusion of the last chapter, these rights were granted new protection in a certain area, namely bequest and devise. The implication of this protection is that there are certain restrictions on how far the state may reach into the realm of private property without violating the Constitution. By calling a certain level of state interference unjust, the Court has effectively imposed what Nozick refers to as "side constraints"—not new objectives, but limits on what the state may do. Someone so inclined could counter that this decision does not, in fact, make a libertarian argument per se. It does not appeal to some natural right, merely to legal history and to the Constitution, such that, if the Constitution were amended, there would be no issue of natural justice protecting "rights" to bequest or devise. The rights could be terminated. It seems more accurate to say, though, given the intent of cordoning off the individual from the state, present in the *Hodel* decision and the 5th Amendment, the Court's goals were libertarian, even if its metaphysical theories were not.

This point requires further clarification of the Court's decision. There is no out-and-out prohibition on state interference with a particular part of private property. The decision grants it will be necessary for the state to regulate bequest and devise, and as Ascher points out, the reading of the decision most friendly to his cause yields strict prohibition only against the

complete escheat of lands (abolition of the right to devise). There is benefit to be gained, nonetheless, by considering this act of protecting private property. Further, if the Court can find this kind of property right protected, might a nearly complete gift tax not merit equal prohibition? The reason the Hodel decision merits attention outside inheritance law is because it opens the gate for protection and recognition of a multitude of rights to property. It suggests there is a limit on what the U.S. government is entitled to assume and tightens the restraints around interference with these limits. It remains to be seen to what extent this opportunity for additional constraints will manifest.

Conclusion: Wealth and Potential

It is first appropriate to make plain: inheritance is not sacred. There is little evidence why, metaphysically, it merits special protection from the state, more-so than gifts of another kind. On some legally accepted accounts of political justice, including the utilitarian account, there is no reason why it should not be taxed to annihilation. It remains to be settled, though, whether this would be most expedient.

The addition of the element of wealth to a discussion of utilitarianism and libertarianism requires justification. It seems to be a non-philosophical move to resolve a comparison of philosophical goals by recourse to the production of wealth. Such a solution seems appropriate in a policy discussion, but it does not seem to resolve the conflict between libertarian and utilitarian values. The impossibility of this resolution is precisely the conclusion of this inquiry, though. Both libertarian and utilitarian values are essential to the current function of the United States. The element of wealth is introduced in that context as a philosophical necessity. In the present inquiry, it is important because it is tied-up with two important issues: 1) the legitimacy of

government and 2) the ability to achieve social and private goals. In the first place, the legitimate role of government determines the extent to which that government may justly control wealth acquired by its people. In the second place, adequate incentive to continue wealth creation is essential in any society.

At stake in the conflict between libertarian and utilitarian values is, on one hand, the utilitarian guarantee of equal opportunity and, on the other, the libertarian guarantee of the right to pursue one's own good. When the actual United States is introduced, though, in 2012, complete with its real people and real issues, the actual achievement of either set of ends depends on having a substantial amount of wealth somewhere in society. If any substantial opportunity is to be afforded or any private good to be achieved, the means and incentives which lead to wealth creation are essential. This conclusion is admittedly only the beginning of a complete discussion of property rights. More is left to be said than has already been said, but a certain direction has been determined. The U.S. will need more steps like the *Hodel* decision to solidify and protect its property rights, and while some redistribution will likely be appropriate, it should never risk devaluing the incentive to pursue wealth. Only with definite constraints protecting private property will this be achievable.

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