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Escheat of Indian Land as a Fifth Amendment Taking in *Hodel v. Irving*: A New Approach to Inheritance?

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CASE COMMENT

Escheat of Indian Land as a Fifth Amendment Taking in *Hodel v. Irving*: A New Approach to Inheritance?

I. INTRODUCTION

What is property? This seemingly simple question has no answer universally accepted by courts and commentators. Most attempted definitions, however, describe property with its accompanying rights, which are guaranteed and protected by the government.[1] The fifth amendment of the United States Constitution, in relevant part, provides that no person may be deprived of property without due process of law, and that the state may not take private property without just

1. United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945). Construing the term "property" as it is used in the fifth amendment, the Supreme Court stated:

> It is conceivable that [the term "property"] was used [in the "just compensation" clause] in its vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. On the other hand, it may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. In point of fact, the construction given the phrase has been the latter.

Id.; *accord* First Charter Land Corp. v. Fitzgerald, 643 F.2d 1011, 1014-15 (4th Cir. 1981) ("In contemporary jurisprudence, 'property' refers to both the actual physical object and the various incorporeal ownership rights in the *res*, such as the rights to possess, to enjoy the income from, to alienate, or to recover ownership from one who has improperly obtained title to the *res*.").

compensation.[2] There may be instances, however, in which one's interest in specific property is so small as to raise a question whether any accompanying property rights exist at all. In these cases, the issue arises whether the fifth amendment proscribes the taking of such property without just compensation. The United States Supreme Court addressed this issue in the context of fractionated[3] Indian lands in *Hodel v. Irving*.[4]

The fractionation of Indian land resulted from federal land policies that controlled reservation territory dating back to the late 1800s.[5] Under the General Allotment Act,[6] individual tribe members received tracts of tribal land, called allotments, with a restriction against alienation.[7] When an owner died without a will, as most Indians did,[8] the land was divided among the heirs according to state intestate succession rules.[9] Courts allowed partition of the land only if all the heirs agreed.[10] Often heirs could not be located, some heirs were not informed that they owned a land interest, or some landowners would not agree to sell due to fear that the allotment would be sold to a non-Indian.[11] As a result of these problems, ownership of the allotments became progressively fragmented with each succeeding generation.[12]

In 1983, Congress passed the Indian Land Consolidation Act[13] to consolidate these overly fractionated Indian land allotments.[14] Sec-

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2. U.S. CONST. amend. V (No person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.").

3. Indian land allotments, held in trust for individual Indians by the United States government, often could not be alienated or partitioned. Hodel v. Irving, 481 U.S. 704, 707 (1987). Over time, the parcels of land became splintered into undivided fractionated interests, with some parcels having hundreds of joint owners. *Id.* at 707-09, 712-13; *see infra* notes 5-11 & 21-34 and accompanying text.

4. 481 U.S. 704 (1987).

5. H.R. REP. NO. 908, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 4415, 4419-20.

6. 25 U.S.C. §§ 331-332 (1982).

7. *Id.*

8. H.R. REP. NO. 908, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 4415, 4420.

9. F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 230 (1986).

10. H.R. REP. NO. 908, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 4415, 4420.

11. *Id.*

12. *Id.*

13. Indian Land Consolidation Act, Pub. L. No. 97-459, §§ 201-211, 96 Stat. 2519 (1983) (codified as amended at 25 U.S.C. § 2206 (Supp. IV 1986)).

14. H.R. REP. NO. 908, 97th Cong., 2d Sess., *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 4415-25.

tion 207 of the Act provided for small allotment interests to escheat[15] to the tribe upon the death of the owner.[16] After the Act became effective, representatives of heirs or devisees of tribe members who died owning escheatable interests sued, claiming that Section 207 resulted in a taking of property without just compensation in violation of the fifth amendment.[17] The Supreme Court held that Section 207 resulted in a fifth amendment taking.[18]

This Case Comment examines the effect of *Irving* on inheritance,[19] escheat,[20] and freedom of testation.[21] Section II reviews the Court's reasoning in *Irving* through a historical perspective. Section III examines whether the *Irving* Court's holding must be limited in its application to Indian land, or whether it may have a broader scope. Section IV then analyzes the effect of the *Irving* decision on escheat. In addition, Section V explains the decision's effect on inheritance, including freedom of testation. Finally, Section VI concludes that the majority's opinion in *Irving* is anomalous to the accepted notion of inheritance as purely a creature of statute with no constitutional basis. Thus, the *Irving* case lends credence to the historically weak argument that inheritance is constitutionally protected.

II. ESCHEAT OF INDIAN LAND IN *HODEL V. IRVING*

A. *Historical Perspective*

The fractionation of individually owned Indian trust[22] or restricted land[23] represents one of the outstanding problems in Indian

15. In American law, escheat is a reversion of property to the state in the absence of any individual competent to inherit. United States v. Board of Comm'r of Pub. Schools, 432 F. Supp. 629, 630 (D. Md. 1977).

16. Indian Land Consolidation Act, Pub. L. No. 97-459, §§ 201-211, 96 Stat. 2519 (1983) (codified as amended at 25 U.S.C. § 2206 (Supp. IV 1986)).

17. Hodel v. Irving, 481 U.S. 704, 709-10 (1987).

18. *Id.* at 717.

19. The nature of inheritance has been clarified in the following manner:

> Inheritance arguably involves two related aspects of liberty and property. First, there is the individual's interest in being able to transmit property at death either by the law of intestacy or by designating what happens to his property after he dies, the latter being known as 'freedom of testation.' The second and reciprocal liberty/property aspect is the corresponding interest of potential heirs in receiving property from the dead.

Kornstein, *Inheritance: A Constitutional Right?*, 36 RUTGERS L. REV. 741, 749 (1984).

20. *See supra* note 15.

21. *See supra* note 19.

22. Many treaties which allotted land to Indian individuals or families provided that the land be held in trust by the government.

23. In some cases Indians acquired title under a restriction against alienation without the consent of the President. Treaty of October 23, 1826, United States-Miami Tribe of Indians, 7

law.[24] When the federal government originally negotiated treaties with the Indians, it granted land to the tribe as a whole.[25] Toward the end of the nineteenth century, Congress enacted a series of land Acts which divided the communal reservations of Indian tribes into individual allotments for Indians, with surplus land available for white purchase.[26] These Allotment Acts provided that the government would hold title to the allotments in trust for twenty-five years.[27] In addition, under these Acts, certain Indians received allotments with a restriction against alienation.[28]

Although the law has authorized Indians to devise their interests in trust or restricted property from an early date,[29] as a practical matter, a great deal of such land passed to Indian heirs through intestate succession.[30] As a result, the heirs owned the allotment in undivided interests—the heirs owned all of the tract together, rather than each person owning a specific part.[31] Because courts only allowed partition of restricted Indian land if all the heirs agreed, Indian landowners were unable to sell their land interests.[32] Upon each landowner's

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Stat. 300; Treaty of October 2, 1818, United States-Delaware nation of Indians, 7 Stat. 188; Treaty of October 2, 1818, United States-Potawatamie nation of Indians, 7 Stat. 185.

24. *See generally* Langone, *The Heirship Problem and Its Effect on the Indian, the Tribe, and Effective Utilization*, 2 TOWARD ECON. DEV. FOR NATIVE AM. COMMUNITIES 519, 541-48 (1969) (a statistical account of the Indian heirship problem); Comment, *Too Little Land, Too Many Heirs—The Indian Heirship Land Problem*, 46 WASH. L. REV. 709 (1971) (surveys the Indian land problem and examines congressional intent in resolving the issue).

25. Comment, *supra* note 24, at 719.

26. General Allotment Act, 25 U.S.C. §§ 331-332 (1982). *See generally* F. COHEN, *supra* note 9, at 206-236 (1986).

27. General Allotment Act, 25 U.S.C. §§ 331-332.

28. The policy behind this restriction was to protect the Indian until he could assume the role of a responsible landowner who knows how to till his own land and is aware of its value on the market. Comment, *supra* note 24, at 720.

29. *See* Act of February 14, 1913, 37 Stat. 678, 25 U.S.C. § 373; Act of June 25, 1910, 36 Stat. 855, 856. As the former provision appears in the United States Code, anyone who is at least twenty-one-years old and who has an interest in trust or restricted property may devise his interest by a will, which is subject to the approval of the Secretary of the Interior. 25 U.S.C. § 373. If the will is not approved, the allotment passes according to the law of the situs state. F. COHEN, *supra* note 9, at 232.

30. Comment, *supra* note 24, at 721-24. Property passes through intestate succession when the property owner dies without leaving a valid and operative will. Estate of Baird, 135 Cal. App. 2d 333, 287 P.2d 365 (1955); *In re* Cameron, 47 A.D. 120, 62 N.Y.S. 187 (1900), *aff'd*, 166 N.Y. 1120 (1901). When an Indian owning an allotment dies without having made a will, the Secretary of the Interior determines the heirs to the allotment in accordance with state intestacy laws. F. COHEN, *supra* note 9, at 230. Before the General Allotment Act, 25 U.S.C. §§ 331-332, however, heirs were determined in accordance with tribal custom. F. COHEN, *supra* note 9, at 230. The result of this shift was further fractionation of the land because state intestacy law split the allotments among more heirs. *Id.*

31. H.R. REP. NO. 908, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 4415, 4420.

32. *See supra* notes 10-11 and accompanying text.

death, his interest was often divided among his heirs according to state intestacy laws, as most Indians failed to make wills.[33] Ownership thus continued to fragment with each succeeding generation.

The federal government's allotment policies resulted in progressive fractionation of ownership of the land, until most of the allotments were held by so many owners that the property could not be put to effective use.[34] The Indians were forced into the role of absentee landlords, leasing their allotted lands rather than farming it themselves and living upon the always diminishing rental income.[35] The return to each heir was minimal,[36] and as a result, all Indians who owned these small land interests became disinterested in managing the land.[37] The resulting administrative headache was thrust upon the government, forcing the Indian Service to act as an overworked real-estate agent on behalf of the living allottees and the numerous heirs of deceased allottees.[38]

In 1983, Congress attempted to ameliorate, over time, the problem of extreme fractionation of Indian lands by enacting the Indian Land Consolidation Act.[39] Congress passed this statute to facilitate consolidation of tribal lands,[40] to reduce the number of small frac-

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33. *See supra* notes 8-9 and accompanying text.

34. *Id.*

35. Hodel v. Irving, 481 U.S. 704, 707 (1987).

36. Comment, *supra* note 24, at 711-13 ("For example, one young Sioux who received a check for 7 cents as his share of a lease fee found that it would cost him 10 cents to cash the check."). *Id.*; *see Hearings on S. 1392 Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior and Insular Affairs*, 87th Cong., 1st Sess. 60 (1961).

37. Comment, *supra* note 24, at 712.

38. To illustrate the administrative disaster caused by the allotment of Indian lands, the Supreme Court in *Irving* discussed Tract 1305 of the Sisseton-Wahpeton Lake Traverse reservation, *Irving*, 481 U.S. at 713, dubbed "one of the most fractionated parcels of land in the world." Lawson, *Heirship: The Indian Amoeba, reprinted in Hearing on S. 2480 and S. 2663 before the Senate Select Committee on Indian Affairs*, 98th Cong., 2d Sess. 85 (1984). The Supreme Court in *Irving* stated:

> Tract 1305 is forty acres and produces $1,080 in income annually. It is valued at $8000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,849,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming the 439 owners could agree) for its estimated $8000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.

Irving, 481 U.S. at 713.

39. Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2519 (1983) (codifed as amended at 25 U.S.C. § 2206 (Supp. IV 1986)).

40. H.R. REP. NO. 908, 97th Cong., 2d Sess. 5, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 4415-25.

tional interests in individually allotted lands,[41] and to keep trust or restricted lands in Indian ownership by allowing tribes to adopt certain laws restricting inheritance of Indian lands to Indians.[42] Section 207 of the Act provided that very small, individually owned land interests shall escheat to the tribe upon the death of the owner, rather than pass through intestacy or devise to the landowner's heirs:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descedent [sic][43] by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.[44]

This provision became the most controversial of the Consolidation Act.[45] The conflict between individual Indian property rights and the overall welfare of the tribe eventually led to the Supreme Court case of *Hodel v. Irving*.[46]

B. *Escheat as a Fifth Amendment Taking*

In *Hodel v. Irving*,[47] designated heirs and devisees of three deceased members of the Oglala Sioux Tribe challenged the constitutionality of Section 207, contending that the escheat provision authorized a seizure of their property without providing just compensation.[48] The three appellees, Mary Irving, Patrick Pumpkin Seed, and Eileen Bissonette, represented four decedents who owned forty-one fractional interests subject to Section 207 escheat.[49] Although the Irving estate lost two interests with a mere combined value of approximately $100, Bissonette's decedent lost twenty-six escheatable interests with a total value of approximately $2,700, and the Pumpkin Seed estate lost thirteen escheatable interests, valued at approximately

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41. *Id.*

42. *Id.*

43. The Senate Report accompanying the Act of October 30, 1984, 98 Stat. 2519, described how this obvious error made its way into the original text: "[T]he bill actually voted on by the House and Senate was garbled in the printing. It was this garbled version of Title II that was signed by the President." S. REP. No. 632, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5470, 5471. The 1984 Act substituted the word "descend" for "descendent."

44. Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2519 (1983) (codified as amended at 25 U.S.C. § 2206 (Supp. IV 1986)).

45. S. REP. No. 632, 98th Cong., 2d Sess. 2, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5470, 5471.

46. 481 U.S. 704 (1987).

47. *Id.*

48. *Id.* at 709-10.

49. *Id.*

$1,816.[50] The United States District Court for the District of South Dakota upheld the statute, reasoning that Congress had plenary authority to abolish the power of testamentary disposition of Indian property,[51] and that the heirs and devisees had only an expectancy of heirship and not a vested property right entitled to constitutional protection.[52]

The United States Court of Appeals for the Eighth Circuit agreed with the district court's latter reasoning; nevertheless, the Eighth Circuit determined that the heirs and devisees could assert the third-party rights of their decedents.[53] The court held that Section 207 violated the fifth amendment because it did not provide for compensation to the estates of the decedents for the land it declared to escheat.[54]

The Supreme Court affirmed, holding that the escheat provision of the Consolidation Act, which provided for small undivided property interests that were unproductive during the year preceding the owner's death to escheat to the tribe, constituted a taking of the decedents' property without just compensation.[55] Justice O'Connor, writing for the majority, agreed with the government that the consolidation of Indian land is an important governmental purpose.[56] She nevertheless dismissed the government's arguments that the property interests affected by Section 207 are negligible[57] and that the tribe, rather than the United States government, is the beneficiary of the escheat.[58] The Court noted that even though the income generated by the land in question is de minimus, the value of the land may not be.[59] The Court concluded that the economic impact of Section 207 upon the appellees could be considered substantial, as this property[60] would have passed to them or to those they represent, but for Section 207.[61]

Pursuant to the escheat provision at issue, small property inter-

50. *Id.* at 710.

51. *Id.*

52. *Id.*

53. Irving v. Clark, 758 F.2d 1260, 1267-68 (8th Cir. 1985), *aff'd*, 481 U.S. 704 (1987).

54. *Id.* at 1268-69.

55. *Irving*, 481 U.S. 704 at 709, 716-17.

56. *Id.* at 718.

57. *Id.* at 714-15.

58. *Id.* at 715-16.

59. *Id.* at 714.

60. Only the remainder interests are actually lost because appellees' decedents retained full life estates and the power to convey their interests *inter vivos*. The value of these remainder interests depends upon the age of the interest holder at death. *Id.* at 715.

61. *Id.* at 716-17 n.2.

ests pass to the tribe rather than to the government,[62] unlike traditional escheat in which the property escheats to the state upon the failure of heirs to inherit a decedent's property.[63] The majority, however, did not give this distinction much weight.[64] To the extent that the owners of escheatable interests maintain a nexus with the tribe and that the consolidation of tribal lands benefits the tribe members, the majority admitted that there is an "average reciprocity of advantage,"[65] and that "the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands."[66] Therefore, the majority recognized the legitimacy of the legislative goals.

Justice O'Connor, however, stressed the "extraordinary"[67] character of the escheat provision at issue, which completely abolishes descent and devise, even when the governmental purpose sought to be advanced, consolidation of Indian lands, would result from the further descent of the property.[68] The majority held this to be a fifth amendment taking, determining that the escheat provision "goes too far"[69] because it is overinclusive.[70] Before Congress amended Section 207,[71] the statute did not contain any exceptions to prevent the escheat of fractional interests when the passing of property to the

62. Indian Land Consolidation Act, Pub. L. No. 97-459, § 207, 96 Stat. 2519 (1983) (codified as amended at 25 U.S.C. § 2206 (Supp. IV 1986)).

63. *See supra* note 15.

64. *Irving*, 481 U.S. at 715.

65. *Id.* (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

66. *Id.* at 716.

67. *Id.*

68. *Id.* at 716-18. For example, if the heir already owned another undivided interest in the property, his inheritance would result in consolidation of these interests.

69. *Irving*, 481 U.S. at 718 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

70. *See infra* notes 150-54 and accompanying text. Justice Stevens, in his concurrence, responded to Justice O'Connor's reasoning by stating that the majority adopted "an overbreadth analysis that has heretofore been restricted to the First Amendment area." *Irving*, 481 U.S. at 724. He argued that saying Section 207 "goes too far" may apply to some decedents, but it does not apply to the appellees in this case because, if the appellees and other potential heirs inherited the interests at issue, the fractionation of these interests would be increased. *Id.* Stevens went on to cite *United States v. Raines*, 362 U.S. 17, 21 (1969), for the proposition that "one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *Irving*, 481 U.S at 725 (quoting *Raines*, 362 U.S. at 21).

71. The Eighth Circuit declared that both the original escheat provision of the Consolidation Act and its amended version, 25 U.S.C. § 2206 (Supp. IV 1986), unconstitutionally took property without just compensation. Irving v. Clark, 758 F.2d 1260, 1261 (8th Cir. 1985), *aff'd*, 481 U.S. 704 (1987). The Supreme Court, however, stated that the amended version was not at issue because none of the property that escheated in the case did so pursuant to the amended version of the statute. *Irving*, 481 U.S. at 710 n.1.

heirs might result in consolidation of the property.[72] The result, Justice O'Connor concluded, is that "the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest—to one's heirs."[73]

C. *Escheat as a Due Process Violation*

Justice Stevens, in a concurring opinion, concluded that the escheat provision was unconstitutional, not because it resulted in a taking of property without just compensation, but because it violated the due process clause of the fifth amendment.[74] Justice Stevens based his opinion on the premise that Indians who owned fractional land interests and were afforded ample notice of the escheat provision could avoid escheat by voluntarily conveying their interests to a landowner who would have a large enough interest to avoid Section 207 entirely.[75] Accordingly, he stated the issue as "whether Section 207 represents a lawful exercise of the sovereign's prerogative to condition the retention of fee simple or other ownership interests upon the performance of a modest statutory duty within a reasonable period of time."[76]

Justice Stevens then reviewed the legislative history behind Section 207. In 1982, the Senate passed a bill that authorized the Devils Lake Sioux Tribe of South Dakota to adopt a land consolidation program, subject to the approval of the Secretary of the Interior.[77] The bill provided that the Tribe would compensate individual owners for any fractional land interest it might acquire.[78] There was no escheat provision.[79] The House of Representatives added Section 207 to the Senate bill upon the bill's consideration by the House Committee on Indian Affairs.[80] The Senate accepted the House addition without any hearings or discussion of the escheat provision.[81] Interestingly, the Consolidation Act specifically provided that fractional interests acquired by a tribe pursuant to an approved program must be

72. *See supra* note 68 and accompanying text.

73. *Irving*, 481 U.S. at 716.

74. *Id.* at 730-31 (Stevens, J., concurring); *see* U.S. CONST. amend. V.

75. *Irving*, 481 U.S. at 719 (Stevens, J., concurring).

76. *Id.*

77. S. 503, 97th Cong., 2d Sess. (1982).

78. *Id.*

79. *Id.*

80. H.R. REP. NO. 908, 97th Cong., 2d Sess. 5, 9, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 4415, 4419.

81. 128 CONG. REC. S15,568-70 (daily ed. Dec. 19, 1982).

purchased for a fair price;[82] however, Section 207 had no comparable provision. Congress also omitted from the Consolidation Act a grace period, which gave owners of fractional interests an opportunity to avoid the impact of the statute by consolidating their interests with those of other owners of similar interests.[83]

Departing from Justice O'Connor's takings analysis, Justice Stevens determined that the due process clause of the fifth amendment requires Congress to afford reasonable notice and opportunity for compliance to Indians affected by Section 207.[84] Justice Stevens declared the majority's takings analysis to be inappropriate because Section 207's escheat provision differs from conventional escheat in two important ways.[85] Escheat at common law provided for determining ownership of property if there were no heirs capable of inheriting.[86] Section 207, on the other hand, constitutes a forced escheat provision, in which claimants who would otherwise inherit lose their rights. There is yet another kind of escheat, which governs ownership of abandoned property. Legislation authorizing the escheat of unclaimed property typically provides, as a condition precedent to escheat, an appropriate lapse of time and requires adequate notice to ascertain that the property has indeed been abandoned.[87] Likewise, legislation governing the escheat of property of decedents who die intestate and without heirs also provides for notice and an opportunity for interested parties to assert their claims.[88] Justice Stevens pointed out that a state may treat real property as having been abandoned if the owner fails to take certain affirmative steps to protect his interest.[89] These preconditions, however, are only reasonable if they afford sufficient notice to the property owners and a reasonable opportunity to comply.[90] Section 207 did not provide for such a "grace

82. *See* Indian Land Consolidation Act, Pub. L. No. 97-459, §§ 204-06, 96 Stat. 2517, 2519 (1983).

83. *Id.*

84. *Irving*, 481 U.S. at 730-34 (Stevens, J., concurring).

85. *Id.* at 727 (Stevens, J., concurring).

86. *See generally* Note, *Origins and Development of Modern Escheat*, 61 COLUM. L. REV. 1319 (1961) (an in-depth look at the history of escheat).

87. *See, e.g.*, ILL. REV. STAT., ch. 141, para. 102, 112 (1986) (property held by banking or financial organizations); N.Y. ABAND. PROP. LAW §§ 300-302 (McKinney 1944 and Supp. 1988) (property held by banking organizations).

88. *See, e.g.*, CAL. CIV. PROC. CODE §§ 1420, 1423 (West 1982); TEX. PROP. CODE ANN. §§ 71.101-.106 (Vernon 1984 and Supp. 1989).

89. *See* Texaco, Inc. v. Short, 454 U.S. 516, 529 (1982) ("[A]s a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse.").

90. United States v. Locke, 471 U.S. 84, 106 n.15 (1985). The claimants' loss of their mining rights was held not to be a fifth amendment taking because their failure to file a timely

period;" therefore, Justice Stevens concluded that Congress failed to afford the Indians due process of law as required by the fifth amendment.[91]

III. SPECIFIC ISSUES ARISING FROM INDIAN PROPERTY RIGHTS

Long before Congress enacted the Consolidation Act, there seemed to exist a "curious psychological block in the minds of federal officials" concerning the Indian heirship problem in general.[92] The "psychological block" consisted of "an over-compensative concern with the property rights of individual Indians in heirship lands conjoined with a complete aphasia concerning the practical effects on Indian welfare of the existence of such lands."[93] Through the Consolidation Act, Congress attempted to resolve this conflict in favor of the overall welfare of the tribe. The Supreme Court, on the other hand, reacted to pressure by the claimants in *Irving* to protect the rights of the individual Indian property owners. The psychological block thus evolved into a standoff between the Legislature and the judiciary.

No matter how one analyzes *Hodel v. Irving*, the unique constitutional nature of Indian property and property rights must be kept in the forefront. From the early nineteenth century, there have been two lines of eminent domain cases concerning Indian property interests decided by the Supreme Court, which seem to be in historical conflict.[94] The first line, exemplified by *Lone Wolf v. Hitchcock*,[95] recog-

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claim under the Federal Land Policy and Management Act caused their property rights to be extinguished. *Id.* The Supreme Court stated:

> Common-law principles do not, however, entitle an individual to retain his property until the common law would recognize it as abandoned. Legislatures can enact substantive rules of law that treat property as forfeited under conditions that the common law would not consider sufficient to indicate abandonment. As long as proper notice of these rules exist, and the burdens they impose are not wholly disproportionate to the burdens other individuals face in a highly regulated society that some people are being forced "alone to bear public burdens which, in all fairness and justice, must be borne by the public as a whole," the burden imposed is a reasonable restriction on the property right.

Locke, 471 U.S. at 106 n.15 (1984) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)) (citations omitted). The Supreme Court then determined that the filing requirement was a reasonable restriction on the continued retention of mining claims. *Id.*

91. *Irving*, 481 U.S. at 730-34 (Stevens, J., concurring).

92. Gilbert & Taylor, *Indian Land Questions*, 8 ARIZ. L. REV. 102, 116 (1967).

93. *Id.* Although the "over-compensative concern" probably stems from the fact that many of these Indian tribes originally occupied and roamed over territory now embraced within the United States, the Indians do not have a greater property interest in their lands as a result. After the discovery of North America, England claimed sovereignty over the lands, but recognized the possessory right of the Indians over the lands that they occupied. United States v. Wright, 53 F.2d 300, 302 (4th Cir. 1931), *cert. denied*, 285 U.S. 539 (1932). The Indians' aboriginal claim to lands thus was not fee simple.

94. *See infra* notes 95-98 and accompanying text.

nizes "that Congress possesse[s] a paramount power over the property of the Indians, by reason of its exercise of guardianship over their interests, and that such authority might be implied, even though opposed to the strict letter of a treaty with the Indians."[96] The second line, exemplified by *Shoshone Tribe v. United States*,[97] concedes Congress' paramount power over Indian property, but nonetheless holds that "[t]he power does not extend so far as to enable the Government 'to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation.' "[98]

In 1968, in *Fort Berthold Reservation v. United States*,[99] the United States Court of Claims distinguished between cases in which one or the other principle is applicable:

> It is obvious that Congress cannot simultaneously (1) act as trustee for the benefit of the Indians, exercising its plenary powers over the Indians and their property, as it thinks is in their best interests, and (2) exercise its sovereign power of eminent domain, taking the Indians' property within the meaning of the Fifth Amendment to the Constitution. In any given situation in which Congress has acted with regard to the Indian people, it must have acted either in one capacity or the other. Congress can own two hats, but it cannot wear them both at the same time.[100]

The court articulated a test to reconcile these two lines of decisions, holding that when "Congress makes a good faith effort to give the Indians the full value of the land and thus merely transmutes the property from land to money, there is no taking."[101]

In enacting the escheat provision at issue in *Irving*, Congress,

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95. 187 U.S. 553 (1903); *see also* Chippewa Indians of Minnesota v. United States, 301 U.S. 358 (1937); Tiger v. Western Inv. Co., 221 U.S. 286, 310 (1911); Cherokee Nation v. Hitchcock, 187 U.S. 294, 306 (1902); Chippewa Indians of Minnesota v. United States, 88 Ct. Cl. 1 (1938), *supplemental opinion*, 88 Ct. Cl. 43, 47, *aff'd*, 307 U.S. 1 (1939).

96. Lone Wolf v. Hitchcock, 187 U.S. 553, 565 (1903). If a taking of treaty-protected property is alleged, it must be recognized that "tribal lands are subject to Congress' power to control and manage the tribe's affairs. But this power to control and manage [is] not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it [is] subject to limitations inhering in . . . a guardianship and to pertinent constitutional restrictions." United States v. Sioux Nation of Indians, 448 U.S. 371, 415 (1980) (quoting United States v. Creek Nation, 295 U.S. 103, 109-10 (1935)).

97. 299 U.S. 476 (1937); *see also* United States v. Klamath and Moadoc Tribes, 304 U.S. 119 (1938); Uintah & White River Bands of Ute Indians v. United States, 152 F. Supp. 953 (1957).

98. *Shoshone Tribe*, 299 U.S. at 497 (quoting United States v. Creek Nation, 295 U.S. 103, 110 (1935)).

99. 390 F.2d 686 (1968).

100. *Id.* at 691.

101. *Id.*

instead of exercising its power of eminent domain, acted under its plenary powers over the Indians and their property. Section 207 does not provide for eminent domain; rather, it provides for escheat. The difference is that the United States did not take the property for a public purpose or provide just compensation to the decedents' estates. Instead, the property reverted to the tribe as a result of a legislative determination that there were no heirs competent to inherit these small interests.[102]

To the extent that property rights already vested in individual Indians, however, the property in question in *Irving* can no longer be regarded as part of tribal lands. In *Choate v. Trapp*, the Supreme Court recognized this difference, stating that "there is a broad distinction between tribal property and private property, and between the power to abrogate a statute and the authority to destroy rights acquired under such law."[103] In *Choate*, the issue was whether a tax exemption provided for in the Act of June 28, 1898 (the Atoka Agreement)[104] constituted a right that could be abrogated by congressional legislation passed after the land had been allotted.[105] The Atoka Agreement also contained a temporal restriction on each Indian's right to alienate the land allotted to him.[106] Subsequent to the closing of tribal citizenship rolls, Congress passed the Act of May 27, 1908,[107] which removed the restriction on alienation and provided that, from that time on, the land should be subject to taxation.[108]

The Supreme Court held that, upon the allotment of land to the plaintiff Indian, the Atoka Agreement vested certain enforceable rights in the Indians who were on the citizenship rolls, including the right to have their land exempt from taxation.[109] In discussing Congress' right to remove the restriction on alienation, but its lack of power to deprive the Indians of the tax exemption on the same land, the Court stated:

> The right to remove the restriction [on alienation] was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant. That right fully vested in the Indians and was binding upon

102. Irving v. Clark, 758 F.2d 1260, 1264 (8th Cir. 1985), *aff'd*, 481 U.S. 704 (1987).
103. Choate v. Trapp, 224 U.S. 665, 671 (1912).
104. Ch. 517, 30 Stat. 495 (1898).
105. *Choate*, 224 U.S. at 671.
106. *Id.* at 669.
107. Ch. 199, 35 Stat. 312 (1908).
108. *Id.*
109. *Choate*, 224 U.S. 665.

> Oklahoma. There have been comparatively few cases which discuss the legislative power over private property held by the Indians. But those few all recognize that he is not excepted from the protection guaranteed by the Constitution. His private rights are secured and enforced to the same extent and in the same way as other residents or citizens of the United States. . . . His right of private property is not subject to impairment by legislative action, even while he is, as a member of a tribe, subject to the guardianship of the United States as to his political and personal status.[110]

Under this analysis, the private property rights of Indians should not be given more or less constitutional protection than the property rights of any United States citizen.

Applying the reasoning of *Choate* to *Irving*, it is unlikely that the latter case turned upon the particular facts that the property interests in question were owned by individual Indians. Although policymakers have recently had an overcompensatory concern with regard to the protection of Indians' rights,[111] an individual Indian's property interests are protected by the same provisions of the Constitution as are the property interests of any other property owner. The extremely serious problem of fractionation of Indian lands[112] apparently did not sway the Court from giving constitutional protection to the ability to transmit and receive property at death. Thus it appears that the *Irving* decision could be extended beyond the case's particular facts to other situations in which both descent and devise of a particular class of property are completely abolished, even if policy reasons in favor of such a taking are not present. Furthermore, by giving small fractionated property interests fifth amendment protection despite the government's argument that such interests are merely de minimus,[113] the Court appears to have emphasized the importance of private property rights, no matter how small. Seemingly negligible property interests are sufficient for purposes of the Constitution.

The *Irving* opinion, however, does not indicate clearly whether the majority's analysis would have been the same if the Indians' interests had been limited in the first instance. When the individual Indians received their allotments, no restrictions were placed upon the property's inheritability.[114] As time passed and the ownership interests became so fractionalized that tracts of land had too many owners

110. *Id.* at 673, 677.

111. *See supra* notes 92-93 and accompanying text.

112. *See supra* notes 5-12 & 22-35 and accompanying text.

113. *Irving*, 481 U.S. at 714.

114. H.R. REP. NO. 908, 97th Cong., 2d Sess. 10, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 4415, 4420.

to be used effectively, Congress took action and limited the right to inheritance for minor property interests.[115] Under the *Irving* Court's analysis, depriving the Indian landowners of the right to inheritance of these very small interests still constituted a taking of a valuable property right. It is not clear, however, whether Justice O'Connor premised her opinion on the theory that, since the Indians had originally received the land without any restrictions, their property interests had vested, and thus the subsequent limitation on their "bundle of rights"[116] constituted a taking.

IV. TRADITIONAL ESCHEAT AFTER *IRVING*

A. *Escheat Under the Uniform Probate Code*

An analogy can be drawn between Congress' implementation of the escheat provision at issue in *Irving* and a state legislature's adoption of the Uniform Probate Code.[117] Fundamental differences between the two escheat doctrines, however, prevent the Court's holding in *Irving* from applying to intestate escheat. At common law, property would escheat to the lord in the absence of any heir capable of claiming the lands of a decedent under a will.[118] Historically in the United States, an intestate's property would escheat to the state only in the absence of all blood relatives.[119] Every jurisdiction historically forbade escheat if there were legitimate nonalien blood relatives, regardless of how remote they were.[120]

Under the Uniform Probate Code, on the other hand, inheritance by collateral relatives is limited to grandparents and those descended

115. 25 U.S.C. § 2206 (Supp. IV 1986).

116. *Irving*, 481 U.S. at 716 (quoting Kaiser Aetna v. United States, 444 U.S 164, 176 (1979)).

117. The National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Probate Code in August of 1969. It has been adopted by sixteen states. ALASKA STAT. §§ 13.06.005-.36.100 (1988); ARIZ. REV. STAT. ANN. §§ 14-1101 to -7307 (1975); COLO. REV. STAT. §§ 15-10-101 to -17-101 (1987); FLA. STAT. §§ 731.005-735.302, 737.101-.512 (1987); HAWAII REV. STAT. §§ 560:1-101 to :8-102 (1985); IDAHO CODE §§ 15-1-101 to -7-307 (1979); KY. REV. STAT. ANN. §§ 386.650-.670 (Michie/Bobbs-Merrill 1984) (adopted only Article VII, Part I); ME. REV. STAT. ANN. tit. 18-A, §§ 1-101 to 8-401 (1981); MICH. STAT. ANN. §§ 27.5001 to .5993 (Callaghan 1980); MINN. STAT. ANN. §§ 524.1-101 to .8-103 (West 1975); MONT. CODE ANN. §§ 72-1-101 to -5-502 (1988); NEB. REV. STAT. §§ 30-2201 to -2902 (1985); N.M. STAT. ANN. §§ 45-1-101 to -7-401 (1978); N.D. CENT. CODE §§ 30.1-01-01 to -35-01 (1976); S.C. CODE ANN. §§ 62-1-100 to -7-602 (Law. Co-op. 1987); and UTAH CODE ANN. §§ 75-1-101 to -8-101 (1978).

118. T. ATKINSON, HANDBOOK OF THE LAW OF WILLS 42 (1937). *See generally* Note, *supra* note 86.

119. T. ATKINSON, *supra* note 118, at 74-76. In the United States, personal as well as real property may escheat. *Id.*

120. *Id.*

from grandparents.[121] When a state adopts the Uniform Probate Code, the effect is similar to the promulgation of Section 207 of the Indian Land Consolidation Act because remote heirs lose their right to inherit the decedent's property, a right which they would have retained if the jurisdiction followed the tradition of common law escheat.[122] Adopting the Uniform Probate Code, however, would not rise to the level of a fifth amendment taking because of the fundamental difference between the escheat provided for in the Uniform Probate Code and the escheat at issue in *Irving*. The Uniform Probate Code provides that, in the course of intestate succession, a decedent's property will descend to his heirs, but if the decedent has no grandparents or relatives who have descended from his grandparents, the decedent's estate escheats to the state.[123] Of course, this provision does not nullify the decedent's freedom of testation because he could avoid escheat by leaving a will.

In contrast, Section 207[124] is a forced escheat provision because it cannot be avoided by will. It effectively provides that no heirs are competent to inherit minor property interests, and that the property must, if overly fractionated, revert to the tribe. There are three ways in which an owner of escheatable property may avoid the effect of Section 207. First, the owner may purchase additional interests from co-owners and thereby increase his ownership interest to more than two percent of the tract.[125] Second, the owner may convey his ownership interest to relatives or co-owners and reserve a life estate.[126] Third, if feasible, the tract may be partitioned in such a way as to enlarge the owner's interest in a portion of the tract.[127] None of these avoidance techniques, however, involve the descent or devise of the property interest. Thus, although both types of escheat could be avoided by an affirmative action of the property owner, the Court's holding that "complete abolition of both the descent and devise of a

121. UNIFORM PROBATE CODE § 2-103 (1982).

122. *See* United States v. 198.73 Acres of Land, More or Less, In Loudoun County, Virginia, 800 F.2d 434 (1986) (In Virginia, land escheats to the state only as a last resort.); VA. CODE ANN. § 64.1-1 (1987) (providing for intestate inheritance by even the most remote descendants).

123. UNIFORM PROBATE CODE §§ 2-103, 2-105 (1982).

124. *See supra* notes 43-45 and accompanying text.

125. *Irving*, 481 U.S. at 723 n.6 (1987).

126. *Id.*

127. *Id.* Shortly after the Consolidation Act went into effect, the Bureau of Indian Affairs of the Department of the Interior issued a memorandum to all area directors, instructing them that the statute had been enacted. *Id.* at 722. This memorandum then explained these three methods by which an owner of a fractionated interest could enlarge his interest to more than two percent, thereby avoiding the impact of Section 207. *Id.* at 723.

particular class of property may be a taking"[128] does not apply to intestate escheat.

In the final analysis, the analogy between the adoption of the Uniform Probate Code and the promulgation of Section 207 works in terms of the impact these provisions have on property owners who fail to take any steps to avoid escheat. The analogy, however, does not work in terms of determining whether there has been a taking because of the Court's emphasis on inheritance. The escheat provision in the Uniform Probate Code does not totally abrogate the descent and devise of a decedent's property, while Section 207 does. Therefore, the former does not result in a fifth amendment taking. This analysis reinforces the emphasis that the *Irving* Court placed on one's ability to transmit and receive property at death. Justice O'Connor conceded that the escheat provision could be avoided through *inter vivos* transactions, but dismissed these avoidance techniques as "not an adequate substitute for the rights taken."[129]

B. *Escheat of Abandoned Property*

The escheat provision at issue in *Irving* may also be analogized to the escheat of abandoned property.[130] Generally, abandonment is presumed when the person in custody of the property cannot locate the property owner.[131] The policy behind most abandoned property statutes is to prevent the deterioration of unused property through abandonment.[132] In this respect, the escheat of abandoned property serves a similar purpose to Section 207, which Congress enacted to consolidate fractionated Indian lands and thereby put the property to more efficient use.

Nonetheless, in *Texaco v. Short*,[133] the Supreme Court held that the escheat of abandoned property was not a fifth amendment taking.[134] In *Texaco*, the owners of lapsed mineral interests challenged

128. *Id.* at 717.

129. *Id.* at 716.

130. *See, e.g., In re* Estate of Russell, 387 So. 2d 487 (Fla. Dist. Ct. App. 1980) (taker under will could not be located). *See generally* Overton, *A Study of Constitutional Problems and Policy Decisions in Drafting an Escheat Statute for Tennessee*, 34 TENN. L. REV. 173 (1967).

131. Note, *supra* note 86, at 1330.

132. For example, the New York Abandoned Property Law declares that it is the policy of the state "while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state." N.Y. ABAND. PROP. LAW § 102 (McKinney Supp. 1988); *see also* Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944). The right of the state to abandoned property has been compared to a right of succession, under which the state takes when other rightful claimants cannot be found. Barker v. Leggett, 102 F. Supp. 642 (W.D. Mo. 1951).

133. 454 U.S. 516 (1982).

134. *Id.*

the constitutionality of an Indiana statute,[135] under which a mineral lease that was not used for twenty years automatically lapsed and reverted to the current surface owner, unless the mineral owner filed a statement of claim in the local county recorder's office.[136] The Supreme Court held that the mineral owner's failure to make any use of the property, rather than any state action, caused the lapse of his property right under the Mineral Lapse Act, and therefore there was no taking.[137]

The difference in result between *Texaco* and *Irving* strengthens the due process argument made by Justice Stevens in his concurrence in *Irving*.[138] Justice Stevens would most likely argue that the major difference between the statutes in question in *Irving* and *Texaco* is that the Indiana statute provided a two-year grace period to afford property owners adequate time to familiarize themselves with the terms of the statute and to take any action deemed appropriate to protect their property interests.[139] Section 207 provided no such luxury, and that failure sparked Stevens' concurrence, which argued that the escheat provision was unconstitutional because it deprived the decedents due process of law.[140] Even though both statutes provided for the lapse or escheat of private property upon failure of some affirmative action by the interest owner to avoid the impact of the statute, whether the provision affords the property owner sufficient notice and a reasonable opportunity to comply will determine whether or not the statute results in a taking.[141]

V. *IRVING*'S EFFECT ON INHERITANCE

A. *Inheritance Before* Irving

At first blush, the Supreme Court's holding in *Irving* seems to be the logical application of constitutional analysis to a provision which does indeed deprive one of the power to alienate his property at death. The historical treatment of inheritance by courts and commentators, however, renders the majority's takings analysis more attenuated.[142] Traditionally, inheritance has been viewed as a privilege rather than

135. Dormant Mineral Interests Act, IND. CODE ANN. §§ 32-5-11-1 to -8 (Burns 1980 & Supp. 1988) (commonly known as the Mineral Lapse Act).

136. *Texaco*, 454 U.S. at 518-19.

137. *Id.* at 530.

138. *See Irving*, 481 U.S. at 730-34 (Stevens, J., concurring).

139. *Texaco*, 454 U.S. at 518-19.

140. *Irving*, 481 U.S. at 730-34 (Stevens, J., concurring).

141. United States v. Locke, 471 U.S. 84, 106 n.15 (1985); *see supra* note 90.

142. *See supra* note 19.

as a constitutional right.[143] More recently, however, the characterization of inheritance as a "right" or a "privilege" has lost its significance, in accordance with the general decline of the right-privilege distinction in modern constitutional law.[144] The source of the ability to transmit and receive property at death, whether constitutional or statutory in nature, is much more important than the characterization of the power.[145] It is commonly accepted that the right of inheritance is purely a creature of statute.[146] Rules of inheritance, except as to rights already vested, may be freely changed and modified by the legislature. Once the property has passed into the hands of the heir after the ancestor's death, the heir's property interest becomes vested and cannot be taken away without due process of law.[147] Wisconsin enjoys the distinction of being the only state to have recognized anything approaching a legal right of inheritance.[148]

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143. Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 288 (1898); Mager v. Grima, 49 U.S. (8 How.) 490, 493 (1850). *See generally* Kornstein, *supra* note 19 (argument that inheritance could constitutionally be abolished).

144. Kornstein, *supra* note 19, at 749 n.46; *see* Board of Regents v. Roth, 408 U.S. 564, 571 (1972) ("[T]he Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges' that once seemed to govern the applicability of procedural due process rights."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) (Whether any procedural protections are due to a citizen following revocation of a governmental benefit does not depend on whether the governmental benefit is characterized as a "right" or a "privilege."); Graham v. Richardson, 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'). *See generally* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968).

145. Kornstein, *supra* note 19, at 750 n.46.

146. Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283 (1898); Wallace v. Meyers, 38 F. 184 (1889); Wilson v. Storthz, 117 Ark. 418, 175 S.W. 45 (1915); *In re* Kirby's Estate, 162 Cal. 91, 121 P. 370 (1912); Coral Gables First Nat'l Bank v. Hart, 155 Fla. 482, 20 So. 2d 647 (1945); Burgamy v. Holton, 165 Ga. 384, 141 S.E. 42 (1927); National Safe Deposit Co. v. Stead, 250 Ill. 584, 95 N.E. 973 (1911); Markover v. Krauss, 132 Ind. 294, 31 N.E. 1047 (1892); State v. Bazille, 97 Minn. 11, 106 N.W. 93 (1905); *In re* Luckey's Estate, 206 Neb. 53, 291 N.W.2d 235 (1980); *In re* White's Estate, 208 N.Y. 64, 101 N.E. 793 (1913); *In re* Inman, 101 Or. 182, 199 P. 615 (1921); *In re* Knowles' Estate, 295 Pa. 571, 145 A. 797 (1929); Gibson v. Rikard, 143 S.C. 402, 141 S.E. 726 (1928); Powers v. Morrison, 88 Tex. 133, 30 S.W. 851 (1895); Withrow v. Edwards, 181 Va. 344, 25 S.E.2d 343 (1943).

147. Miami County Nat'l Bank v. Bancroft, 121 F.2d 921, 925 (10th Cir. 1941).

148. *See* Nunnemacher v. State, 129 Wis. 190, 197-98, 108 N.W. 627, 628 (1906) ("The right to take property by inheritance or by will is a natural right protected by the [Wisconsin] Constitution, which cannot be wholly taken away or substantially impaired by the Legislature."); *accord In re* Estate of Eisenberg, 90 Wis. 2d 620, 280 N.W.2d 359, *appeal dismissed,* 444 U.S. 976 (1979); *In re* Estate of Uihlein, 269 Wis. 170, 68 N.W. 2d 816 (1955); *In re* Ogg's Estate, 262 Wis. 181, 54 N.W.2d 175 (1952); *In re* Szperka's Will, 254 Wis. 153, 35 N.W. 2d 209 (1948). *Contra In re* Estate of Blumreich, 84 Wis. 2d 545, 267 N.W.2d 870, 874 (1978) ("[T]he law of descent and distribution is of legislative origin and subject to the control of the legislature."); *see* Kornstein, *supra* note 19, at 787 (survey of representative state law holding inheritance not to be a natural or inherent right).

B. *Inheritance After* Irving: *Has It Changed?*

Given this backdrop, the Supreme Court's decision in *Irving* breathes new life into the theory of inheritance as a constitutional right. Justice O'Connor phrased the Court's holding rather tentatively: "complete abolition of both the descent and devise of a particular class of property may be a taking."[149] The Court concluded that Section 207, which provides for small, undivided fractionated land interests to escheat to the tribe, "goes too far"[150] because there was no exception for circumstances in which inheritance of these small interests would result in consolidation of the land.[151]

Justice O'Connor's reasoning adds a new dimension to fifth amendment takings analysis. The Court applied an implicit overbreadth analysis to the escheat provision and held that there was a fifth amendment taking because the provision was overinclusive—that is, descent and devise of minor fractionated interests were abolished in all cases, even when inheritance would have resulted in consolidation of the property. In his concurrence, Justice Stevens noted that overbreadth analysis had previously been restricted to issues concerning first amendment freedom of expression.[152] In *Thornhill v. Alabama*,[153] the Supreme Court defined a statute as overbroad if, in addition to proscribing activities that may constitutionally be forbidden, it also sweeps within its coverage speech or conduct that is protected by first amendment freedom of speech or freedom of association guarantees.[154] The Court in *Irving* applied the same reasoning when it said that Section 207 "goes too far" by taking "the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of the property."[155] In stark contrast to the Court's treatment of inheritability in *Irving*, the Court had stated forty-five years earlier in *Irving Trust v. Day*:[156] "Rights of succession to the property of a deceased . . . are of statutory creation . . . . Nothing in the Federal Constitution forbids . . . limit[ing], condition[ing], or even abolish[ing]

149. *Irving*, 481 U.S. at 717.

150. *Id.* at 718 (quoting Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)).

151. *Id.*

152. *Id.* at 724 (Stevens, J., concurring).

153. 310 U.S. 88 (1940).

154. *Id.* In later cases, the Supreme Court significantly curtailed the use of overbreadth analysis in first amendment cases. *See* Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973) (requiring that the overbreadth be "substantial," compared with the legitimate applications of the statute).

155. *Irving*, 481 U.S. at 718.

156. 314 U.S. 556 (1942).

the power of testamentary disposition over property."[157]

Thus, the holding of *Irving* puts teeth into the argument that the right of inheritance has a constitutional rather than a purely statutory basis because the Court implicitly reasoned that the escheat provision swept too broadly into an area protected by the fifth amendment takings clause.[158] This holding departs from the judiciary's previous notion of inheritance as a privilege that could be constitutionally abolished by statute.[159]

The 1984 amendment[160] to the Consolidation Act represented a valiant effort by Congress to reconcile the opposing concerns of practicality and efficiency with individual property rights. Section 207, the escheat provision, was amended to (1) permit a devise of such interests to other owners of a fractionated interest in such land;[161] (2) to allow for a five-year "lookback" to determine whether the land has earned its owner less than $100 in any one of the five years before the decedent's death, in order to more fairly evaluate the land interest's true economic value;[162] (3) to allow for rebuttal of the statutory presumption that the land is without significant economic value;[163] and (4) to allow tribes to adopt a code of their own to provide for a disposition of such minor fractionated interests, provided such codes accomplish the purpose of this section—to prevent the further descent or fractionation of such interests.[164]

It is interesting to question whether the Supreme Court would have determined that there was a taking in *Irving* had the plaintiffs contested the constitutionality of the amended escheat provision. Conveniently, none of the property in question escheated under the amended version of the statute; therefore, the Court expressed no opinion on the constitutionality of Section 207 as amended. Furthermore, the Eighth Circuit held that both the original version of the escheat provision and the amended version were unconstitutional, but the Supreme Court deemed this finding to be dicta.[165]

Applying Justice O'Connor's reasoning to the amended version of Section 207 does not work because the amendment, among other changes, loosens the restrictive language of the provision to permit a

157. *Id.* at 562.

158. *Irving*, 481 U.S. at 716-18.

159. Federal courts and all state courts except Wisconsin's regarded inheritance as a statutory creation. *See supra* notes 142-48 and accompanying text.

160. Indian Land Consolidation Act, 25 U.S.C. § 2206 (Supp. IV 1986).

161. 25 U.S.C. § 2206(b).

162. *Id.* § 2206(a).

163. *Id.*

164. *Id.* § 2206(c).

165. *Irving*, 481 U.S. at 710 n.1.

devise of these minor fractionated interests to other owners of fractionated interests.[166] The argument that the provision extended to situations in which permitting the devise would result in the sought after result—consolidation of minor fractionated land interests—now fails. With its amendment, Section 207 is no longer overbroad. If the Court had held that there was a taking under the amended escheat provision, then it would be anomolous to retain the currently favored notion of inheritance as a statutory creation.[167]

C. *Limitations on Freedom of Testation Not a Fifth Amendment Taking*

There may be many conditions placed upon the ability to transfer property at death, in which to avoid the effect of a certain statute, a decedent must have acted. For example, omitted spouse rules[168] and pretermitted heir statutes[169] protect the families of decedents who failed to provide for them in their wills. Uniform Probate Code Section 2-301 provides:

> If a testator fails to provide by will for his surviving spouse who married the testator after the execution of the will, the omitted spouse shall receive the same share of the estate he would have received if the decedent left no will unless it appears from the will that the omission was intentional or the testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.[170]

Likewise, Uniform Probate Code Section 2-302[171] provides for children born or adopted after the execution of the will who were not

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166. 25 U.S.C. § 2206(b) (Supp. IV 1986).

167. *See supra* note 146 and accompanying text.

168. At common law, a man's preexisting will was deemed revoked after marriage and the birth of a child. J. GAUBATZ & I. BLOOM, ESTATES, TRUSTS AND TAXES: CASES AND MATERIALS ON THE WEALTH TRANSMISSION PROCESS 6-30 (1983). A woman's will, in contrast, was deemed revoked after marriage alone. *Id.* Subsequent will acts neglected to distinguish between the conditions for implied revocation of a married man's or woman's will, lumping both into the phrase "revocations by operation of law." *Id.* Courts soon began to imply the revocation of a man's preexisting will after marriage alone. *Id.*

169. The purpose of pretermitted heir statutes is to protect a child's right to take, unless the will clearly expresses an intentional omission. Crump's Estate v. Freeman, 614 P.2d 1096 (Okla. 1980). Every state except Lousiana allows a testator to disinherit his children as long as his will unambiguously demonstrates his intent. J. GAUBATZ & I. BLOOM, *supra* note 165, at 6-35; *see infra* notes 177-80 and accompanying text. *See generally* Laube, *The Right of a Testator to Pauperize his Helpless Dependents*, 13 CORNELL L.Q. 559 (1928).

170. UNIFORM PROBATE CODE § 2-301(a) (1982).

171. Sections 203(a) and (b) of the Uniform Probate Code provide:

> (a) If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child receives a share in the estate

provided for in the testator's will. These provisions whittle away some of the testator's freedom of testation, but like the abandoned property statute and the escheat provision of the Indian Land Consolidation Act, the effect of these statutes may be avoided upon the performance of a statutory duty.[172] In order to avoid the effect of the Indiana statute at issue in *Texaco v. Short*, the mineral owner had to take one of three steps to establish his continuing interest in the property.[173] In order to prevent escheat of minor Indian land interests, an owner needed to consolidate his interests with those of other owners of similar interests.[174] The escheat provision, however, was held to constitute a taking, unlike the other statutory provisions addressed above. The Supreme Court in *Irving* stressed that the "complete abolition of both the descent and devise of a particular class of property" was unacceptable under the Constitution.[175] If Justice O'Connor did not premise her opinion on the notion of a constitutional basis for inheritance, then using Justice O'Connor's takings analysis to distinguish Section 207 from the statute in *Texaco* and from rules limiting the right of inheritance, such as the omitted spouse rules or pretermitted heir rules, is very difficult. One probably must resort to Justice

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equal in value to that which he would have received if the testator had died intestate unless:

(1) it appears from the will that the omission was intentional;

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfer or other evidence.

(b) If at the time of execution of the will the testator fails to provide in his will for a living child solely because he believes the child to be dead, the child receives a share in the estate equal in value to that which he would have received if the testator had died intestate.

UNIFORM PROBATE CODE § 2-302(a)-(b) (1982).

172. To avoid the impact of the omitted spouse or the pretermitted heir statutes, a testator must provide for his spouse and children in his will, and if he desires to disinherit a child, he must make his intention to do so unambiguous. Crump's Estate v. Freeman, 614 P.2d 1096, 1097 (Okla. 1980) (Intent to disinherit must be apparent from the four corners of the will in clear and convincing language.). The Uniform Probate Code makes it very difficult to disinherit a spouse because a spouse is provided with an elective share under Section 2-201. UNIFORM PROBATE CODE § 2-201 (1982).

173. A severed mineral interest would not terminate under the Mineral Lapse Act, *supra* note 135, if during a period of twenty years the owner engages in actual production or collects rents or royalties from another who does so, if he pays any taxes on the interest, or if he files a written statement of claim in the county recorder's office. Texaco v. Short, 454 U.S. 516, 530 (1982).

174. *See supra* notes 125-27 and accompanying text.

175. *Irving*, 481 U.S. at 717.

Stevens' due process analysis[176] to make sensible distinctions.

There are, however, statutes that limit inheritance and may not be avoided upon the performance of a statutory duty. In Louisiana, a parent may not disinherit a child except for causes of disinheritance enumerated in the Louisiana Civil Code, and then only expressly and by name.[177] Under the Louisiana Constitution, the child's right to inherit a fixed portion of his parent's estate is vested.[178] Although a child has no vested right in his parent's property prior to the parent's death, he has both a constitutional right as well as a statutory right to the forced portion.[179] Louisiana courts have even stated that "[t]here is no right more sacred than that of a forced heir to inherit his legitime."[180]

Apparently, Lousiana places a greater importance on a descendant's right to receive property from the dead than an individual's freedom of testation.[181] The effect of forced heir rules is to eliminate a portion of the property a decedent is free to bequeath to whomever he pleases, if he leaves descendants. This result can be distinguished from the effect of the escheat provision at issue in *Irving* because escheat is a reversion of property in the absence of an individual competent to inherit.[182] The Court in *Irving* concluded that Congress completely abolished descent and devise in the Consolidation Act.[183] Forced heir statutes, on the other hand, allow for property to pass by descent; only the testator's freedom of testation is affected. This distinction makes it more likely that the *Irving* Court granted constitu-

176. *Id.* at 730-34 (Stevens, J., concurring); *see supra* notes 84-91 and accompanying text.

177. *See* LA. CIV. CODE ANN. art. 1619-22, 1624 (West 1987). The causes that would be sufficient for a parent to disinherit a child are as follows: if the child has raised his or her hand to strike the parent; if the child has been guilty towards a parent of cruelty, a crime, or a grievous injury; if the child has attempted to kill the parent; if the child has accused the parent of any capital crime (except for high treason); if the child has refused sustenance to a parent when the child had the means to afford it; if the child has neglected to take care of an insane parent; if the child refused to pay ransom for a captive parent; if the child has coerced the parent to prevent the parent from making a will; if the child has refused to order release from prison of a parent when the child had the means to do so; and if the child has committed a felony for which the punishment provided by law could be life imprisonment or death. *Id.* at art. 1621-22.

178. The Lousiana Constitution provides, "No law shall abolish forced heirship. The determination of forced heirs, the amount of the forced portion, and the grounds for disinherison shall be provided by law." LA. CONST. art. 12, § 5.

179. Succession of Clivens, 426 So. 2d 585 (La. 1982).

180. Succession of Landry, 463 So. 2d 681, 684 (La. Ct. App. 1985); Succession of Guerre, 197 So. 2d 738, 743 (La. Ct. App. 1967), *writs denied*, 250 La. 928, 929, 933, 199 So. 2d 925, 926 (1967).

181. *See supra* note 19.

182. Irving v. Clark, 758 F.2d 1260, 1264 (8th Cir. 1985), *aff'd*, 481 U.S. 704 (1987); United States v. Board of Comm'r of Pub. Schools, 432 F. Supp. 629, 630 (D. Md. 1977).

183. *Irving*, 481 U.S. at 716-18.

tional protection to the individual's right to have his property pass to his heirs at death and the corresponding interest in the heirs to receive property from the dead, and not to the individual's freedom to designate who these heirs will be. Accordingly, Justice O'Connor's takings analysis does not extend to statutes limiting freedom of testation.

VI. CONCLUSION

The fact that the Supreme Court held that there was a fifth amendment taking in *Hodel v. Irving*[184] does not mean that there is a taking whenever one's ability to transmit and receive property is limited, preconditioned, or abrogated. The opinion, however, strengthens the historically weak argument that inheritance does have a constitutional basis.[185] Furthermore, Justice O'Connor's overbreadth analysis adds an additional step to traditional takings analysis. Borrowing a page from the first amendment free speech context, the majority emphasized the overinclusiveness of Section 207, in that the statute provided for escheat of all interests that were small enough to meet the statutory description, even if the descent of some of those interests might have resulted in property consolidation.[186]

The major question that remains unanswered is whether the Court would have found a taking under the amended version of Section 207.[187] The 1984 version of the escheat provision carves out exceptions to prevent escheat if the statute's policies would be furthered by descent.[188] The overbreadth analysis would no longer apply, and the Court would be forced to face the more difficult issue of whether to give fifth amendment protection to the right of inheritance.

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184. 481 U.S. 704 (1987).

185. *See supra* notes 143-48 and accompanying text.

186. The Court stated:

> [B]efore § 207 was enacted appellee's decedents had the power to pass on their property at death to those who already owned an interest in the subject property. This right too was abrogated by § 207; each of the appellees' decedents lost this stick in their bundles of property rights upon the enactment of § 207.

Irving, 481 U.S. at 716-17 n.2.

187. 25 U.S.C. § 2206 (Supp. IV 1986); *see supra* notes 160-64 and accompanying text.

188. 25 U.S.C. § 2206(b)-(c) (Supp. IV 1986).