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

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CASE COMMENT

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I. INTRODUCTION ................................................................. 739
II. ESCHEAT OF INDIAN LAND IN *HODEL v. IRVING* .......... 741
   A. Historical Perspective .................................................. 741
   B. Escheat as a Fifth Amendment Taking ............................... 744
   C. Escheat as a Due Process Violation ................................. 747
III. SPECIFIC ISSUES ARISING FROM INDIAN PROPERTY RIGHTS .... 749
IV. TRADITIONAL ESCHEAT AFTER IRVING ................................. 753
   A. Escheat Under the Uniform Probate Code .......................... 753
   B. Escheat of Abandoned Property ..................................... 755
V. IRVING'S EFFECT ON INHERITANCE ..................................... 756
   A. Inheritance Before Irving ............................................ 756
   B. Inheritance After Irving: Has It Changed? ....................... 758
   C. Limitations on Freedom of Testation Not a Fifth Amendment Taking .... 760
VI. CONCLUSION ................................................................. 763

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.”).
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 Indian lands in *Hodel v. Irving*.

The fractionation of Indian land resulted from federal land policies that controlled reservation territory dating back to the late 1800s. Under the General Allotment Act, individual tribe members received tracts of tribal land, called allotments, with a restriction against alienation. When an owner died without a will, as most Indians did, the land was divided among the heirs according to state intestate succession rules. Courts allowed partition of the land only if all the heirs agreed. 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. As a result of these problems, ownership of the allotments became progressively fragmented with each succeeding generation.

In 1983, Congress passed the Indian Land Consolidation Act to consolidate these overly fractionated Indian land allotments. 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.


7. *Id.*


11. *Id.*

12. *Id.*


tion 207 of the Act provided for small allotment interests to escheat\(^\text{15}\) to the tribe upon the death of the owner.\(^\text{16}\) 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.\(^\text{17}\) The Supreme Court held that Section 207 resulted in a fifth amendment taking.\(^\text{18}\)

This Case Comment examines the effect of *Irving* on inheritance,\(^\text{19}\) escheat,\(^\text{20}\) and freedom of testation.\(^\text{21}\) 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\(^\text{22}\) or restricted land\(^\text{23}\) 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).


\(^{18}\) *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.


\(^{20}\) 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
When the federal government originally negotiated treaties with the Indians, it granted land to the tribe as a whole. 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. These Allotment Acts provided that the government would hold title to the allotments in trust for twenty-five years. In addition, under these Acts, certain Indians received allotments with a restriction against alienation.

Although the law has authorized Indians to devise their interests in trust or restricted property from an early date, as a practical matter, a great deal of such land passed to Indian heirs through intestate succession. 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. Because courts only allowed partition of restricted Indian land if all the heirs agreed, Indian landowners were unable to sell their land interests. Upon each landowner's...
death, his interest was often divided among his heirs according to state intestacy laws, as most Indians failed to make wills. Ownerships 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. 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. The return to each heir was minimal, and as a result, all Indians who owned these small land interests became disinterested in managing the land. 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.

In 1983, Congress attempted to ameliorate, over time, the problem of extreme fractionation of Indian lands by enacting the Indian Land Consolidation Act. Congress passed this statute to facilitate consolidation of tribal lands, to reduce the number of small frac-
tional interests in individually allotted lands, and to keep trust or restricted lands in Indian ownership by allowing tribes to adopt certain laws restricting inheritance of Indian lands to Indians. 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 descend 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.

This provision became the most controversial of the Consolidation Act. 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.

B. Escheat as a Fifth Amendment Taking

In Hodel v. Irving, 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. 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. 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

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."
47. Id.
48. Id. at 709-10.
49. Id.
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, and that the heirs and devisees had only an expectancy of heirship and not a vested property right entitled to constitutional protection.

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. 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.

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. Justice O'Connor, writing for the majority, agreed with the government that the consolidation of Indian land is an important governmental purpose. She nevertheless dismissed the government's arguments that the property interests affected by Section 207 are negligible and that the tribe, rather than the United States government, is the beneficiary of the escheat. 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. The Court concluded that the economic impact of Section 207 upon the appellees could be considered substantial, as this property would have passed to them or to those they represent, but for Section 207.

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

50. Id. at 710.
51. Id.
52. Id.
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, unlike traditional escheat in which the property escheats to the state upon the failure of heirs to inherit a decedent’s property. The majority, however, did not give this distinction much weight. 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,” and that “the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands.” Therefore, the majority recognized the legitimacy of the legislative goals.

Justice O’Connor, however, stressed the “extraordinary” 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. The majority held this to be a fifth amendment taking, determining that the escheat provision “goes too far” because it is overinclusive. Before Congress amended Section 207, the statute did not contain any exceptions to prevent the escheat of fractional interests when the passing of property to the

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. 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."

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. 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. 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."

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. The bill provided that the Tribe would compensate individual owners for any fractional land interest it might acquire. There was no escheat provision. The House of Representatives added Section 207 to the Senate bill upon the bill's consideration by the House Committee on Indian Affairs. The Senate accepted the House addition without any hearings or discussion of the escheat provision. Interestingly, the Consolidation Act specifically provided that fractional interests acquired by a tribe pursuant to an approved program must be

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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.  
78. Id.  
79. Id.  
purchased for a fair price; 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.

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. 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. Escheat at common law provided for determining ownership of property if there were no heirs capable of inheriting. 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. 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. 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. These preconditions, however, are only reasonable if they afford sufficient notice to the property owners and a reasonable opportunity to comply.

83. Id.
84. Irving, 481 U.S. at 730-34 (Stevens, J., concurring).
85. Id. at 727 (Stevens, J., concurring).
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).
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-
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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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)).


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 distinc-
tion 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 Agree-
ment)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 Con-
gress’ 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 pursu-
ance 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 prop-
erty right, which Congress undoubtedly had the power to grant.
That right fully vested in the Indians and was binding upon

104. Ch. 517, 30 Stat. 495 (1898).
105. Choate, 224 U.S. at 671.
106. Id. at 669.
108. Id.
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. 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, 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 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, 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. 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.
to be used effectively, Congress took action and limited the right to inheritance for minor property interests. 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

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119. T. ATKINSON, supra note 118, at 74-76. In the United States, personal as well as real property may escheat. Id.
120. Id.
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. 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. 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 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. Second, the owner may convey his ownership interest to relatives or co-owners and reserve a life estate. 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. 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”\textsuperscript{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 \textit{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 \textit{inter vivos} transactions, but dismissed these avoidance techniques as “not an adequate substitute for the rights taken.”\textsuperscript{129}

\section*{B. Escheat of Abandoned Property}

The escheat provision at issue in \textit{Irving} may also be analogized to the escheat of abandoned property.\textsuperscript{130} Generally, abandonment is presumed when the person in custody of the property cannot locate the property owner.\textsuperscript{131} The policy behind most abandoned property statutes is to prevent the deterioration of unused property through abandonment.\textsuperscript{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 \textit{Texaco v. Short},\textsuperscript{133} the Supreme Court held that the escheat of abandoned property was not a fifth amendment taking.\textsuperscript{134} In \textit{Texaco}, the owners of lapsed mineral interests challenged

\begin{itemize}
  \item \textsuperscript{128} Id. at 717.
  \item \textsuperscript{129} Id. at 716.
  \item \textsuperscript{131} Note, supra note 86, at 1330.
  \item \textsuperscript{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. \textit{ABAND. PROP. LAW} § 102 (McKinney Supp. 1988); \textit{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. \textit{Barker v. Leggett}, 102 F. Supp. 642 (W.D. Mo. 1951).
  \item \textsuperscript{133} 454 U.S. 516 (1982).
  \item \textsuperscript{134} Id.
the constitutionality of an Indiana statute,\textsuperscript{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.\textsuperscript{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.\textsuperscript{137}

The difference in result between \textit{Texaco} and \textit{Irving} strengthens the due process argument made by Justice Stevens in his concurrence in \textit{Irving}.\textsuperscript{138} Justice Stevens would most likely argue that the major difference between the statutes in question in \textit{Irving} and \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{141}

V. \textit{Irving}'s Effect on Inheritance

A. Inheritance Before Irving

At first blush, the Supreme Court’s holding in \textit{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.\textsuperscript{142} Traditionally, inheritance has been viewed as a privilege rather than


\textsuperscript{136} \textit{Texaco}, 454 U.S. at 518-19.

\textsuperscript{137} \textit{Id.} at 530.

\textsuperscript{138} \textit{See Irving}, 481 U.S. at 730-34 (Stevens, J., concurring).

\textsuperscript{139} \textit{Texaco}, 454 U.S. at 518-19.

\textsuperscript{140} \textit{Irving}, 481 U.S. at 730-34 (Stevens, J., concurring).

\textsuperscript{141} United States v. Locke, 471 U.S. 84, 106 n.15 (1985); \textit{see supra} note 90.

\textsuperscript{142} \textit{See supra} note 19.
as a constitutional right. 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. 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. It is commonly accepted that the right of inheritance is purely a creature of statute. 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. Wisconsin enjoys the distinction of being the only state to have recognized anything approaching a legal right of inheritance.


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 Oggn'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." The Court concluded that Section 207, which provides for small, undivided fractionated land interests to escheat to the tribe, "goes too far" because there was no exception for circumstances in which inheritance of these small interests would result in consolidation of the land.

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. In Thornhill v. Alabama, 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. 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." 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: "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]
the power of testamentary disposition over property.'"\(^{157}\)

Thus, the holding of \textit{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 \textit{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.

\(^{158}\) \textit{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.


\(^{162}\) \textit{Id.} § 2206(a).

\(^{163}\) \textit{Id.}

\(^{164}\) \textit{Id.} § 2206(c).

\(^{165}\) \textit{Irving}, 481 U.S. at 710 n.1.
devise of these minor fractionated interests to other owners of fractionated interests. 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 anomalous to retain the currently favored notion of inheritance as a statutory creation.

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 and pretermitted heir statutes 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.

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

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 ambiguously 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.\textsuperscript{172} In order to avoid the effect of the Indiana statute at issue in \textit{Texaco v. Short}, the mineral owner had to take one of three steps to establish his continuing interest in the property.\textsuperscript{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.\textsuperscript{174} The escheat provision, however, was held to constitute a taking, unlike the other statutory provisions addressed above. The Supreme Court in \textit{Irving} stressed that the “complete abolition of both the descent and devise of a particular class of property” was unacceptable under the Constitution.\textsuperscript{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 \textit{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

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.

\textsc{Uniform Probate Code} § 2-302(a)-(b) (1982).

\textsuperscript{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.

\textsc{Uniform Probate Code} § 2-201 (1982).

\textsuperscript{173} A severed mineral interest would not terminate under the Mineral Lapse Act, \textit{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. \textit{Texaco v. Short}, 454 U.S. 516, 530 (1982).

\textsuperscript{174} See \textit{supra} notes 125-27 and accompanying text.

\textsuperscript{175} \textit{Irving}, 481 U.S. at 717.
Stevens' due process analysis 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. Under the Louisiana Constitution, the child’s right to inherit a fixed portion of his parent’s estate is vested. 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. Louisiana courts have even stated that “[t]here is no right more sacred than that of a forced heir to inherit his legitime.”

Apparently, Louisiana places a greater importance on a descendant’s right to receive property from the dead than an individual’s freedom of testation. 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. The Court in Irving concluded that Congress completely abolished descent and devise in the Consolidation Act. 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 Louisiana 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).


181. See supra note 19.


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 desig-
nate 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 lim-
ited, preconditioned, or abrogated. The opinion, however, strength-
en 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. Bor-
rowing 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 Sec-
tion 207.\(^ {187}\) The 1984 version of the escheat provision carves out
exceptions to prevent escheat if the statute's policies would be fur-
thered 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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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.