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THE NATURE OF SUCCESSION

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“PROBABLY the oldest and most important phase of the long battle for human liberty”, observed Lecky writing in 1896, “is the struggle to maintain individual rights of property and bequest against the inordinate claims of the ruling power.”¹ If this is true (and history demonstrates its verity) it is startling to observe that respectable courts of law in the United States have promulgated a theory of Succession which, if taken literally, permits the State to exercise complete and arbitrary dominion over estates of decedents, even to the extent of their confiscation. The United States Supreme Court and the vast majority of state tribunals, on numerous occasions, have enunciated the doctrine that Succession is a *privilege* conferred by the State and that the power of the State with respect to it is unlimited.² Text-writers³ and other commentators⁴ have adopted the principle without question.

It is the purpose of this paper to examine the “privilege theory” of Succession in the light of principle and experience in order to discover, if possible, its genesis, its significance, and its soundness. It will be well to understand the meaning of *Privilege* and *Succession* as used in this discussion. For such an understanding it will not be necessary to indulge in any Hohfeldian analysis.⁵ The decisions make their meaning quite clear. Privilege is contrasted with right. If Succession were viewed as a right it would enjoy (conceivably) certain legal and constitutional protection *per se*. Viewed as a privilege, however, it has no such status and the power of the State over it is unlimited and arbitrary.⁶ This

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1. Lecky, *Democracy and Liberty* (1896), reprinted in part in RATIONAL BASIS OF LEGAL INSTITUTIONS (1923) 233.

2. For a collection of the cases see 127 Am. St. Rep. 1035 (1909). And see the recent case State, *ex rel.* Luslow v. Louisiana Oil & Refining Co., 176 So. 686 (La., 1937).

3. 4 COOLEY, TAXATION (4th ed. 1924) 3448.

4. McMurray, *Liberty of Testation and Some Modern Limitations Thereon*, reprinted in part in RATIONAL BASIS OF LEGAL INSTITUTIONS (1923) 452, 456.

5. See the discussion of Koucourek, “*Privilege*” and “*Immunity*” as used in the *Property Restatement*, (1939) 1 LOUISIANA L. REV. 255.

6. “It is only by virtue of the State that the heir is entitled to receive any of his ancestor’s estate . . . and the same authority which confers this privilege may attach to it the condition (tax) that a portion of the estate so received shall be contributed to the

follows from the usual significance of privilege when applied to concessions granted by the government.⁷ Succession is taken to connote the transmission of title to things from a person at the time of his death to a survivor or survivors.⁸ This transmission may have been directed by means of a testament, or it may have been regulated by statutes in force at the time of death. While the term as here used is intended to include both modes of disposition, the distinction just made (between testate and intestate succession) will be adverted to in other parts of this paper.

The striking thing about the promulgation of this doctrine (the "privilege theory" of Succession) is that the cases which have considered and applied it have devoted very little time or attention to the origin of justification of a principle so fraught with revolutionary possibilities.⁹ Aside from one or two of the earlier cases, the courts have been content to adopt the generalization found in previous cases and then proceed from that point. It is safe to observe that the influence of Blackstone has been considerable, if not entirely controlling.¹⁰ In fact, the early cases cite him in support of their major premise.¹¹ Blackstone is authority for the proposition that "all rules of succession to estates are creatures of the civil polity, and *juris positivi* merely".¹² Furthermore, the commentator makes an effort to rationalize his conclusion by observing that

"the instant a man ceases to be, he ceases to have any dominion, else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million ages after him; which would be highly absurd and inconvenient".¹³

State." *In re Wilmerding's Estate*, 117 Cal. 281, 49 Pac. 181 (1897). "An act of the Legislature abridging, modifying, or denying the right of inherison by heirs, other than forced heirs, could not be successfully assailed on the ground that it deprived such heirs of property (an expectancy) without due process of law. Until such a right, as is the case with most rights, devolves upon the beneficiary, the power of the Legislature relative thereto is practically supreme." *Luslow v. Refining Co.*, 176 So. 686 (1927).

7. See *Camden Fire Insurance Ass'n v. Haston*, 153 Tenn. 675, 284 S. W. 905 (1926) (foreign corporation authorized to do business).

8. See *Succession*, WORDS AND PHRASES (2d Series) 756; Revised Civil Code of Louisiana (1870), Art. 871.

9. "The unanimity with which it [the "privilege theory"] is stated is perhaps only equalled by the paucity of reasoning by which it is supported": Winslow, J., in *Nunne-macher v. State*, 129 Wis. 190, 108 N. W. 627 (1906).

10. See Pound, *Liberty of Contract*, reprinted in part in *RATIONAL BASIS OF LEGAL INSTITUTIONS* (1923) 124. At page 126, Pound discusses the influence of Blackstone on American law in general. See also McMurray, *op. cit. supra*, note 4, at 455.

11. *United States v. Perkins*, 163 U. S. 625 (1896); *State v. Hamlin*, 86 Mo. 495, 30 Atl. 76 (1894); *State v. Alston*, 94 Tenn. 674, 30 S. W. 750 (1895).

12. 2 BL. COMM. c. 14.

13. See *id.*, at c. 1.

This line of reasoning undoubtedly led the author to deny that Succession was a part of Natural Law, even though he predicated the right of property in general on Natural Law.¹⁴ Thus we have another example of the individualistic preconceptions which brooded over the seventeenth and eighteenth century exponents of Natural Law.¹⁵ There has been some attempt to determine what influences controlled Blackstone's philosophy as revealed in the Commentaries. While this is an undertaking full of difficulty,¹⁶ a distinguished writer and teacher of law has observed that with respect to testamentary dispositions Blackstone followed Pufendorf rather than Grotius.¹⁷ Conceding this to be a fact, it is evident that the same influence did not obtain with respect to intestate succession since Pufendorf clearly predicated the latter on the Natural Law.¹⁸

The cases contribute very little light on the matter since, as was observed before, they are content with a simple statement of the "privilege theory".¹⁹ The Maine court, in the case of *State v. Hamlin*,²⁰ did make some attempt to examine the proposition, but satisfied itself with a restatement of Blackstone's observation that "property ceases at death". It is interesting to note that the court in the *Hamlin* case went

14. See *id.*, at c. 14.

15. POUND, INTERPRETATIONS OF LEGAL HISTORY (1923) 15; LAW AND MORALS (1924) 33.

16. See Miltner, *A Philosophy of Law* (1939) 14 NOTRE DAME LAWYER 147.

17. McMURRAY, *op. cit. supra* note 4, at 454, 455.

18. 4 PUFENDORF, DE JURE NATURAE ET GENTIUM (Kennett's translation, c. 11). "According to the disposal of the Law of Nature, without any particular express Act of the former Lord, the Properties of Things are said to pass in Succession to Intestates. For Property having been at first embued with such Force and Power, as that by virtue of it, a man was enabled not only to do what he pleased with his Goods during his own life, but likewise effectually to transfer them upon others after his Death; it did not seem probable that if a person was found to have made no settlement of his Goods whilst he lived, he was therefore willing that they should after his Death become as it were derelict, and lie free to any that would take possession of them. In this Case then, Natural Reason suggested That men ought to follow the presumed will of the Deceased, or such a disposal as he might most probably be supposed to have designed. Now in doubtful matters everyone is supposed to have designed that, which is most agreeable both to his natural inclination, and to the Engagements of his duty."

It is evident from this quotation from Pufendorf that he considered Succession part and parcel of the Natural Law and not a creature of the civil polity, as Blackstone had declared. Thus Dean McMurray seems to be in error when he asserts: (See McMurray, *op. cit. supra*, note 4, at 455.) "And the distinction made in the first chapter of the second book of Blackstone between the right of property arising from occupancy, designated as a natural right, and the *right of succession*, defined as a mere creature of the positive law, is doubtless borrowed from Pufendorf . . ."

19. See note 2, *supra*.

20. See note 11, *supra*.

to the extreme of stating that there is no provision in the state constitution *giving* control or right to dispose or to inherit, and from this inferred that the power of the legislature in the premises (taking the power as confessed) was unlimited and might well be arbitrarily exercised. On its face, this conclusion embodies a unique theory of constitutional interpretation. This recitation points to the conclusion that the various courts in the United States have been little disposed to explore the principle and have leaned heavily upon the analysis made by Blackstone. This fact alone would justify further investigation as is here proposed.

The significance of the "privilege theory" of Succession is far-reaching. Followed to its logical conclusion, the first striking effect is that there is no legal nor constitutional limitation on the power of the legislature over the estates of decedents.²¹ This means that if a particular legislature so elected, it could cause all estates to escheat. Such a revolutionary doctrine must be (or ought to be) startling to American jurists since under its *aegis* a socialistic régime could be created in the United States under constitutional auspices in one generation.²² The next effect of this doctrine is that no estate in things could be greater than a life estate if the legislature so decreed. This conclusion is inescapable. If Succession were denied and title taken in the State at death it follows that, so far as any individual's interest in his estate is concerned, it could not be measured by a period longer than his life. Finally, the espousal of this principle establishes the State as the source and creator of fundamental rights, not the regulator and protector of them.²³

Before entering upon a criticism of the "privilege theory", we must dispose of certain preliminary matters. First of all, it must be observed that there has never been a case (at least in the United States) wherein a court was called upon to consider the extreme application of the "privilege theory", that is to say, consideration of a statute which provided that at the death of a person his estate would escheat to the State, or to some individual or group or institution arbitrarily selected. Thus we may say that the cases heretofore decided have not the binding force of *res adjudicata* on the question of whether or not Succession is a privilege. Furthermore, it is not the contention of this paper that disavowal of

21. *In re Wilmerding's Estate*, 117 Cal. 281, 49 Pac. 181 (1897); *State v. Alston*, 94 Tenn. 674, 30 S. W. 750 (1895).

22. See Albertsworth, *Capital Insecurity under the Constitution*, (1939) 27 GEORGETOWN L. J. 261, for an illuminating discussion of the meagre constitutional protection actually available to Capital in the United States.

23. For a criticism of this principle see de Laveleye, *Primitive Property* (1878), reprinted in part in RATIONAL BASIS OF LEGAL INSTITUTIONS (1923) 175. See also Leo XIII, *Encyclical, Immortale Dei* (1885); 15 BROWNSON, WORKS (1885) 4.

the "privilege theory" goes the length of denying any and all element of control and administration of decedent's estates by the State, even (conceivably) to the extent of entire expropriation in certain cases.²⁴ Rather, this criticism is aimed at the *theory* upon which the courts proceed in those cases wherein the privilege doctrine is enunciated. It is readily conceded that no one can claim the absolute power and control over his estate, whether during his life or after his death, unaffected by the superior right and power of the State to impose reasonable limitations in the public interest.²⁵ We will attempt to show, however, that the exercise of such control can be justified on grounds much less arbitrary and revolutionary than those upon which the "privilege theory" stands. We may observe further that, conceding for the nonce the statutory origin of testamentary disposition,²⁶ such concession in no way militates against the vigor of our opposition to the "privilege theory". And for obvious reasons. As will be pointed out later on, when we treat of historical considerations, freedom of testation is to a certain extent a restriction upon Succession. Thus, Succession historically was so universally recognized (and especially under the common law tradition) that it required legislative intervention (Statutes of Wills) to unfetter the ancestor.²⁷ Furthermore, freedom of testation is in essence merely a matter of administration. The grant of this privilege by the legislature in no manner goes to the nature of Succession since the only difference between freedom of testation, restricted testation, and a régime of intestate succession is that under the first it is presumed that a testator will provide for his dependents,²⁸ whereas under the second and third he has

24. Since the *raison d'être* of Succession traditionally has been the conceded priority of the decedent's dependents (as against the State) it follows that if there were no such legitimate objects of the decedent's bounty but rather "laughing heirs" [see (1935) 20 IOWA L. REV. 203], the State, in the interest of the common good, could justly go to the limit of causing such estates to escheat, providing that it was done in a fair and impartial manner. Furthermore, to preserve order and to avoid controversy, the State should administer estates of decedents, and laws of a regulatory nature enacted pursuant to this function of the State are unquestionably valid.

25. The cases are full of examples of the legitimate imposition of restraints upon ownership of property. The literature on these cases is likewise prodigious. See Ribble, *The Due Process Clause as a Limitation on Municipal Discretion in Zoning Legislation*, (1930) 16 VIRGINIA L. REV. 689. For a collection of the writings on this subject see 2 SELECT ESSAYS ON CONSTITUTIONAL LAW (1938) cc. 3-5. See also *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627 (1906); *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 512 (1894). Thus Blackstone's extreme individualism is the result of logical deductions hardly required. Rightly considered, it was unnecessary for him to suppose that acknowledgement of the right of *post obit* disposition demanded that the decedent be left unfettered in this matter *ad infinitum*.

26. WALSH, *HISTORY OF ANGLO-AMERICAN LAW* (2d ed. 1932) 291.

27. 2 TIFFANY, *REAL PROPERTY* (1920) 1806 & 1915.

28. Sidgwick, *Elements of Politics* (1891), reprinted in part in *RATIONAL BASIS OF LEGAL INSTITUTIONS* (1923) 447.

no choice to disinherit.²⁹ In no sense does it bring into focus a supposed dominant power of the State to permit or not to permit Succession.

An exhaustive examination of the authorities reveals no period in civilized history (with the exception of Russia—an innovation) wherein the State has denied Succession categorically. The verdict of history is that Succession has been a universally recognized phenomenon.³⁰ As a matter of fact some of the cases³¹ which have espoused the "privilege theory" have taken occasion to review the long history of Succession, to show that levies (or taxes) have been uniformly imposed on estates of decedents. (We repeat however that the power of the State to impose a tax in succession matters does not of itself demand the invocation of the "privilege theory".) From the time that the idea of ownership crystallized into definite form there has been a recognition of Succession.³² Even the most ancient systems of law acknowledge certain priorities in favor of the immediate family of a deceased member.³³ The Law of the Twelve Tables³⁴ and the enactments of Justinian³⁵ recognized and provided for Succession. As a matter of fact, testation to a limited degree has been recognized in the Roman Law from a very early period,³⁶ and this influence eventually had its effect on the Germanic law³⁷ and the

29. See Vernier and Hurlbut, *Descent and Succession under the Community Property System*, (1935) 20 IOWA L. REV. 232. Even in those jurisdictions which provide the legitimate (the part assured to the heir), there are circumstances which permit disinheriton. Typical grounds are set out in the Revised Civil Code of Louisiana (1870), Art. 996.

30. NOYES, *THE INSTITUTION OF PROPERTY* (1936) 100. *Primitive and Ancient Legal Institutions*, EVOLUTION OF LAW SERIES (1915) 542; Huebner, *History of Germanic Private Law*, CONTINENTAL LEGAL HISTORY SERIES (1918) 694 *et seq.*; *Sources of Ancient and Primitive Law*, EVOLUTION OF LAW SERIES (1915) 106; BUCKLAND, *THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW* (1931) 201 *et seq.*

31. *State v. Alston*, 94 Tenn. 674, 30 S. W. 750 (1895); see *Magoun v. Bank*, 170 U. S. 283, 287 (1897).

32. See note 30, *supra*. 4 KENT. COMM. 344 (12 ed. 1873).

33. 1 WIGMORE, *PANORAMA OF THE WORLD'S LEGAL SYSTEMS* (1928) 35. Here will be found an interesting account of the litigation between Nubnofret and Khay under ancient Egyptian procedure wherein the latter claimed the right to till the lands of Nishi, her (grand)father.

34. 1 *THE CIVIL LAW* (S. P. Scott's translation, 1932) 67; *THE LAW OF THE TWELVE TABLES*, V, 2: "Where a father dies intestate, without leaving any proper heir, his nearest agnate, or, if there is none, the next of kin among his family shall be his heir." See BUCKLAND, *loc. cit. supra*, note 30. "Our knowledge of the law of succession in intestacy begins with the XII Tables, and what they say is not easily interpreted. The primary right of succession of *sui heredes* is not stated but simply assumed, in the proposition that, failing *sui*, the property goes to the nearest agnates, and failing these, to the gentiles." *The Rules of Ulpian* are to the same effect. Cf. *THE CIVIL LAW* (S. P. Scott's translation, 1932) 251.

35. 2 *THE CIVIL LAW*, *op. cit. supra*, note 34, at 87.

36. See 16 *id.* at 69 *et seq.*

37. HUEBNER, *op. cit. supra*, note 30, at 750.

English common law.³⁸ Obviously, this is not the place to consider at any length the respective merits of restricted and unrestricted testation. In English law, the earliest records disclose a recognition of the fact of Succession in favor of the heirs of the deceased.³⁹ French law not only recognized the fact of Succession, but traditionally has imposed restrictions upon the ancestor in favor of certain of his dependents, thus expressly recognizing their prior and immediate claim to a part of the ancestor's estate.⁴⁰ The conclusion to be drawn from this universal recognition of the fact of Succession is self-evident. It is difficult to justify this institution as a creature of the State when the phenomenon was extant and practiced at a time when any notion of statehood was vague at best. It would seem more consistent to conclude that a practice so universally accepted and so universally acquiesced in at all times, in ancient as well as modern systems of law, is something more substantial than a mere privilege conferred by the State. It is an institution which springs from the very nature of man and the obligation which flows from the family relation. Therefore, it should not be supposed that simply because modern systems of government *recognize* Succession that they have given birth to it. To recognize the existence of a phenomenon, already *in esse* at the time the recognizing agency comes into being, is not to create the phenomenon.⁴¹ Herein is an example of a fallacious and unsound interpretation of our American constitutions. Those who contend for the "privilege theory" of Succession needs must conclude that our constitutions (especially those of the states) *create* rights rather than recognize or enforce those already existing.⁴² This interpretation mars the line of cleavage between the privilege and the right theory of Succession. Those who contend for the former trace the origin of the fact of Succession to an act of the state Legislature. If the Legislature had remained silent, forsooth, there could be no Succession.⁴³ To state the proposition is to answer it. A further answer to the proposition will be found, however, in the descent statutes which have been uniformly enacted in recognition of the priority of those closely related to and

38. 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW (1895) 312; see Cairns, *The Explanatory Process in the Field of Inheritance* (1935) 20 IOWA L. REV. 266, 279.

39. 2 HOLDSWORTH, HISTORY OF ENGLISH LAW (1927) 91.

40. CODE NAPOLEON (1804) Art. 913, 914. AMOS AND WALTON, INTRODUCTION TO FRENCH LAW (1935) 325.

41. 1 BAKER, THE FUNDAMENTAL LAW (1916) 12.

42. The creative power of the state is denied however, only as to fundamental rights, that is to say, the minimum of capacities demandable as the necessary *sine qua non* of respectable human existence. Obviously other prerogatives, such as to incorporate, to vote, or to engage in a public calling are of such a positive nature that well may they be said to come into being at the instance of the State, and not otherwise.

43. *State v. Hamlin*, 86 Me. 495, 30 Atl. 76 (1894).

dependent upon the deceased.⁴⁴ Can these statutes be said to *create* the right to succeed? A more convincing interpretation would be to claim that these statutes recognize a right already *in esse*—a right which traces its genesis to the very nature of the family relation.⁴⁵

The sociological implications of the "privilege theory" present further weighty objections to its soundness. There is observable in contemporary writings a tendency to manifest some impatience with such transcendental nonsense as "property rights" and other magic "solving words" of traditional jurisprudence.⁴⁶ The plea is for a functional approach to legal problems with a view to seeing how a particular rule or decision works⁴⁷ without resort to *a priori* speculation based upon metaphysical conceptions.⁴⁸ It is as a concession to those who find impatience in the statement that Succession is a property right that we propose to demonstrate the unsoundness of the "privilege theory" by observing it in action. If it is functionally undesirable and unworkable, it should command the opposition of the functionalists. Fortunately (or unfortunately), we do not want for an example in history, and very recent history, wherein the "privilege theory"—or what amounted to the same thing—was invoked. By decree of April 27th, 1918, Russia abolished inheritance.⁴⁹ Five years later however the civil code re-introduced inheritance.⁵⁰ The reason for the restoration of Succession was the discovery that the people were circumventing the law so flagrantly that it was considered more expedient to allow Succession and impose a tax on it than to attempt confiscation.⁵¹ While this is the only example which relates to Succession as such, the history of legal institutions supplies numerous examples of attempts to foist arbitrary and unreasonable restrictions

44. See, for example, ILL. REV. STAT. (Smith-Hurd, 1935) c. 49.

45. Pius XI, *Encyclical, Quadragesimo Anno* (1931).

46. Cohen, *Transcendental Nonsense and the Functional Approach*, (1935) 35 COL. L. REV. 809, 820. But see Kennedy, *Functional Nonsense and the Transcendental Approach*, (1936) 5 FORDHAM L. REV. 272 (a reply to Cohen's article), and *More Functional Nonsense*, (1937) 6 FORDHAM L. REV. 75.

47. Cohen, *op. cit. supra*, note 46, at 821 *et seq.*

48. See FRANK, *LAW AND THE MODERN MIND* (1935) 243; Llewellyn, *A Realistic Jurisprudence—The Next Step*, (1930) 30 COL. L. REV. 431, 453 and *Some Realism about Realism*, (1931) 44 HARV. L. REV. 1222.

49. Holman, *The Law of Succession in Soviet Jurisprudence, A Survey*, (1936) 21 IOWA L. REV. 487.

50. *Ibid.*

51. *Ibid.* And see Editorial in the *New York Times*, Feb. 7, 1939, p. 18, col. 2, entitled *Motives under Communism* quoting this press dispatch from Harold Denny, Moscow correspondent: "Soviet industrial leaders are finding that people work here from the same motives that they work in the capitalist system. Some work for pride of accomplishment, or for the benefit of their fellowmen. Some work to get the highest possible financial reward. Some work because if they do not they will starve".

upon people, and arbitrarily to impair or deny what were conceived to be fundamental property rights with no more success than that which accompanied the Soviet experiment. The practice of Common Recoveries in English land law was invented to avoid the Statute de Donis.⁵² In a recent interesting article,⁵³ there is discussed an example of restrictive legislation and the means employed to evade its provisions. It should be evident then, even to a Realist, that Succession viewed as a privilege is unworkable and therefore untenable.

Having paid our respects to the functional approach, perhaps we may be permitted one or two observations of an *a priori* nature, while on the subject of sociological considerations, which point to the same conclusion as the Soviet experience in denying Succession. Any inquiry into the nature of human society has led to the universal conclusion that it centers around the family institution.⁵⁴ The family as a social entity antedated the State.⁵⁵ An examination of the nature of the family relation reveals certain basic and self-evident propositions. A primary obligation imposed by the nature of the institution is that the parents should look after and provide for the offspring.⁵⁶ Reason dictates that in the first instance this duty should fall to those who brought the offspring into being. In all ages civilized societies have recognized this as one of the motivating factors of industry and progress.⁵⁷ The obligation imposed upon parents to provide for the well-being of their offspring creates a corresponding right upon the part of the off-spring to have this care and attention, at least until such time as the child becomes self-sufficient. This seems self-evident and has all of civilized history and human experience to support it. It follows from this that the worldly goods that the parents have acquired should be devoted, in the first instance, to the care and welfare of the family. Reason dictates that a parent who squanders his possessions in frivolous pastime, with resulting privation on the part of his children, is derelict in a primary duty imposed upon him as a parent. It is apparent in such a situation that a dependent child ought to be able to assert his claim to support against the parent. Here, again, every civilized system of law recognizes the reasonableness of this claim and provides for its enforcement. Having established the priority of the dependent off-spring with respect to the worldly goods

52. 1 TIFFANY, REAL PROPERTY (1920) 70.

53. Nabors, *The Shortcomings of the Louisiana Trust Estates Act*, (1939) 13 TULANE L. REV. 178.

54. WESTERMARCK, THE HISTORY OF HUMAN MARRIAGE (5th ed. 1922) 24. NOYES: *op. cit. supra*, note 30, at 36. Here the author discusses *familia*.

55. LEO XIII, *Encyclical, Rerum Novarum* (1891).

56. WESTERMARCK: *loc. cit. supra*, note 54.

57. *Ibid.*

of the parent, based as it is on the primary duty of the parent to support its off-spring, can it be said that the death of the parent leaving dependent children destroys this claim? Rather, is it not more reasonable to conclude that this claim or right (to support) still obtains in favor of the surviving dependent child and ought to be enforced against the estate of the deceased parent?⁵⁸ And can it, in reason, be argued that the State is prior to the dependent progeny in its claim to this estate?⁵⁹ Yet those who contend for the "privilege theory" of Succession must answer that the State does enjoy a priority if it wishes to assert it. It is patent then that sociological considerations lead to a repudiation of the "privilege theory" of Succession.

The political significance of the "privilege theory" commands attention. Obviously a complete inquiry would entail exhaustive consideration of the origin and nature of the State,⁶⁰ since it is patent that those who contend for the "privilege theory" of Succession must (if they are logical) contend likewise for a totalitarian state, i.e., the State is the source of all authority and of all rights.⁶¹ It would follow from this that the State would be the ultimate arbiter of right and wrong (or is there no difference?) and that what it decrees is right willy nilly. It may grant or withhold at its pleasure, limited only, in a few remaining spots on the globe, by the fundamental law—the constitutions. The evil of such a political philosophy is too manifest in contemporary life to require indictment here. Nevertheless, the proponents of the "privilege theory" go the length of contending that even the fundamental law imposes no restraints upon the State in succession matters.⁶² This is Austin's idea.⁶³ Stated another way this political theory of the State announces

"The simple plan
That they should take who have the power,
And they should keep who can."⁶⁴

58. Is not this proposition the very basis of the "forced heirship" and restricted testation doctrine?

59. 2 KENT COMM. *326: "It [succession] is in accordance with the sympathies and reason of all mankind, that the children of the owner of the property which he acquired and improved by his skill and industry, and by their association and labor, should have a better title to it at his death than the passing stranger. . . . This better title of the children has been recognized in every age and nation. . . ." And see Christian's criticism of Blackstone's conception of Succession (as a creature of the *juris positivi*). 2 BL. COMM. (Christian's ed. 1800) 9, n. 2.

60. The literature ranges from ARISTOTLE, POLITICS TO HITLER, MEIN KAMPF!

61. SALMOND, JURISPRUDENCE (8th ed. 1930) 238.

62. State v. Hamlin, 86 Me. 495, 30 Atl. 76 (1894); *In re Wilmerding's Estate*, 117 Cal. 781, 49 Pac. 181 (1897).

63. AUSTIN: JURISPRUDENCE, (1874) 233.

64. WORDSWORTH, ROB ROY'S GRAVE.

Before taking up the constitutional aspects of the question, we must dispose of some preliminary matters. It must be noted that all of the cases which have had occasion to enunciate the "privilege theory" of Succession were dealing with matters of taxation. Secondly, there was no need to invoke such a controversial and untenable theory in order to justify the same conclusion as that found in the cases.⁶⁵ Finally, it must be remembered that an extreme application of the "privilege theory", that is to say, a statute denying Succession, has never been before courts in the United States. The exact reasoning of the typical case is as follows: ". . . it is only by virtue of the statute that the heir is entitled to receive any of his ancestor's estate."⁶⁶ What the State can deny *in toto* it can limit in part. Therefore, since this tax is merely a limitation upon the *quantum* received, it is clearly within the power of the State to exact it, the Constitution notwithstanding.⁶⁷

To justify state control of and taxation of the estate of decedents on grounds less controversial than the "privilege theory", the following reasoning might be and has been employed.⁶⁸ From the very nature of government (whatever theory of its origin may be proposed), it follows that a tribute can be exacted lawfully from all whom the government serves and who receive its protection.⁶⁹ No serious argument can be opposed to this proposition. It is also self-evident that this tribute can be imposed on all lawful objects and upon the benefits which the government secures to its citizens or subjects. One of these benefits is the

65. See opinion of Marshall, J., in *Nunnemacher v. State*, *supra*, note 25; *Gelsthorpe v. Furnell*, 20 Mont. 299, 51 Pac. 267 (1897). In this case Hunt, J. observed *inter alia*: ". . . protection is guaranteed by the state, not alone to the property of the decedent and to those who are justly entitled thereto, but also to the right to receive the property, by affording to those enjoying that right means to determine its extent, and enforce the same when determined, to the end that it shall accrue absolutely to them, freed from the control of an administrator or an executor. As a correlative proposition, the state has the power to demand of those upon whom it confers the right, and to whom it affords this measure of protection, a tax, to help sustain its protection. . . ."

66. *In re Wilmerding's Estate*, 117 Cal. 281, 49 Pac. 181 (1897).

67. The decision in the Wilmerding case proceeds on the theory that, since Succession is a privilege, taxes levied on estates of decedents are not subject to the same constitutional inhibitions that attach to the taxing power generally. It is evident that Holmes, J. was of the same opinion. Dissenting in *Chanler v. Kelsey*, 205 U. S. 466 (1907), the late Justice stated: "I always have believed that a state inheritance tax was an exercise of the power of regulating the devolution of a property by inheritance or will upon the death of the owner—a power which belongs to the states; and I have been fortified in my belief by the utterances of this court from the time of Chief Justice Taney to the present day. For that reason the power is more *unlimited* [italics mine] than the power of a state to tax transfers generally."

68. *Minot v. Winthrop*, 162 Mass. 113, 38 N. E. 812 (1894); *Nunnemacher v. State*, 129 Wis. 190, 108 N. W. 627 (1906).

69. 2 COOLEY'S CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 986.

assurance which a citizen has,⁷⁰ and which his dependents should be able to rely upon, that his estate will be administered in a fair and orderly manner; that it will *not* be confiscated or alienated to the detriment of his dependents. This is, in fact, a prime duty of government. But, in return for it, the government is clearly entitled to claim some compensation to defray the cost of administration and to finance legitimate governmental functions. Consequently, the imposition of a fee or tax upon the transmission of estates of decedents is a legitimate exercise of the taxing power.⁷¹ This justification of the imposition of a succession tax is a far cry from the *pseudo*-justification found in the privilege doctrine. And what is more, it avoids the untenable inferences which flow therefrom.

One more matter deserves mention before examining the constitutional status of the "privilege theory". Some of the cases, especially the cases involving federal estate taxes, have been at pains to observe that it was the *transmission* of the estate which was the object of taxation and not the *corpus* itself.⁷² It is important to note that whether it is the corpus, or the transmission, or the receipt that is the object of the tax, the invocation of the "privilege theory" (*in extenso*) renders the inquiry immaterial so far as its effect on the estate of the ancestor is concerned. As was observed heretofore, it is at most a life estate. This point is important.

It is submitted that the extreme application of the "privilege theory" of Succession would constitute a denial of due process of law as guaranteed in the Fifth and Fourteenth Amendments, respectively, of the United States Constitution. It is not necessary to trace herein the pattern which results from putting together the numerous adjudications of "due process". This torturous undertaking has been the object of numerous well-considered writings.⁷³ It will suffice here to utilize the summaries which have been made and apply them to the problem at hand. What is "due process" of law is an elusive concept. Professor Cushman in his splendid article⁷⁴ has pointed out that the very indefiniteness and

70. See Bentham, *Theory of Legislation* (1871), reprinted in part in *RATIONAL BASIS OF LEGAL INSTITUTIONS* (1923) 413. And the opinion of Hunt, J. in *Gelsthorpe v. Furnell*, 20 Mont. 299, 51 Pac. 267 (1897).

71. 1 COOLEY, *TAXATION* 149.

72. *Knowlton v. Moore*, 178 U. S. 41 (1899). See *State v. Ferris*, 53 Ohio 314, 41 N. E. 579 (1895), for a clear statement of the distinction between taxing the right to transmit and the right or privilege of receiving.

73. See the excellent collection of articles in 2 *SELECTED ESSAYS ON CONSTITUTIONAL LAW* (1938), particularly those found in chapter 1.

74. *The Social and Economic Interpretation of the Fourteenth Amendment*, 2 *id.*, at 60, 61.

vagueness of the adjudications respecting its meaning and application have had some wholesome results in that it has prevented "petrification" in our law. Professor Kales⁷⁵ likewise has adverted to the danger of too much precision of definition in that it would tend to crystalize into a rule of law binding upon succeeding issues. He describes the uncertainty in terms "the inarticulate major premise". Obviously the inarticulate major premise would spell out something like this: A statute which infringes "fundamental principles as they have been understood by the traditions of our people and our law"⁷⁶ is unconstitutional in that it is a denial of due process of law. The difficulty of application is at once apparent, and the court has been careful to refrain from any *a priori* statement of what it conceives to be fundamental principles or from offering a conclusive test to determine a violation of them. In proving the minor premise of the syllogism, *i.e.* that *this* statute infringes fundamental principles, there has been a different method employed since Brandeis' famous brief in *Muller v. Oregon*.⁷⁷ The technique is to refrain from any attempt to formulate a legal definition of "due process", and to provide the court with sufficient factual data to satisfy it that the statute involved does or does not infringe fundamental principles as a matter of fact. This requires a balancing of interests.⁷⁸ Such statutes do not stand or fall on the issue whether they interfere with private rights or not, but rather, granting the interference with private right, does the contemplated or demonstrable benefit flowing from the statute outweigh the obvious interference with private rights!⁷⁹ Applied to the instant case, it would be necessary to consider the relative worth of interfering with the citizen's control over his property, to the extent of reducing it to a life estate, as against the estimated or provable community benefit which may be reasonably expected to result. In support of the minor premise, and in order to show that the restriction of one's legal interest in things to a life estate is not outweighed by the general welfare, it is necessary only to summarize the findings of this paper and thus permit the conclusion that the "privilege theory" of Succession, applied in the extreme, would infringe fundamental principles as they have been understood by the

75. "Due Process", *The Inarticulate Major Premise and the Adamson Act*, *id.*, at 51.

76. The quoted part is taken from the dissenting opinion of Holmes, J., in *Lochner v. New York*, 198 U. S. 45 (1905).

77. 208 U. S. 412 (1907).

78. See Frankfurter, *Hours of Labor and Realism in Constitutional Law*, *op. cit. supra*, note 73, at 699, 711.

79. A fact too little recognized in this connection is that in reckoning this community benefit, the effect on the citizen whose rights are threatened must likewise be kept in view since he is, after all, a unit in the community. Thus his interests are in a sense the concern of both sides of the issue.

traditions of our people (and all civilized people) and our law (and all systems of law). Having done this, it is reasonable to suppose that the court would find that a statute, enacted pursuant to the "privilege theory" of Succession and which reduced one's interest (property rights) to a life estate *de lege*, constitutes a denial of due process. And if it would so find, then Succession is not a privilege, as the vast majority of the cases contend. Therefore, these courts ought to adopt a more tenable premise in support of the taxing power of the State in succession matters.⁸⁰

The burden of this paper has been to show that the "privilege theory" of Succession is historically indefensible, sociologically undesirable, politically dangerous, and constitutionally untenable. The procedure has been negative throughout. We have been content to adduce evidence, the effect of which is to deny the "privilege theory". A merit of this method is that it should offend no one's sensibilities nor provoke controversial discussion of a theoretical nature. To go further, however, and illucidate in a positive manner on the nature of Succession, would undoubtedly invite opposition of a kind that might cloud the vital and fundamental issue at stake. The writer rests secure in the theory of a Higher Law⁸¹ with all of its intendment; that certain fundamental rights and their complements are inherent in man and ought to be *recognized* by the State (and are not conferred by it); that man is a social creature or, as Aristotle has described him, a political animal,⁸² and, therefore, these inherent rights must yield on those points wherein their exercise constitutes a demonstrable interference with the general welfare; that Succession is part and parcel of an adequate conception of property (even conceived as a function!);⁸³ that Succession is promotive of both the individual and community well-being;⁸⁴ that its denial would be productive of the greatest mischief and chaos in society; that the power (which is conceded) of the state to *regulate* and tax Succession can be brought to rest upon other and more suitable grounds than the "privilege

80. It must be remembered that it is the *theory*, employed to justify the decisions in the cases which is in issue here and not the decisions themselves. As has been pointed out, the decisions can be justified as they stand, but on other grounds.

81. That is to say, the enactments of the positive law do not exhaust the concept of law, adequately conceived. See AQUINAS, *SUMMA THEOLOGICA*, Part II, First Part Q. 90, art. 1. ". . . for *lex* [law] is derived from *ligare* [to bind], because it binds one to act. Now the rule and measure of human acts is the reason, which is the first principle of human acts. . . ." (Dominican translation).

82. *Politics*, reprinted in part in HALL, *READINGS IN JURISPRUDENCE* (1938).

83. See RATIONAL BASIS OF LEGAL INSTITUTIONS (1923) 315 and 329.

84. "Man must have something that he may call his own, or he will burn and slay". This quotation from Schiller is found in de Laveleye, *Primitive Property* (1878), reprinted in part in RATIONAL BASIS OF LEGAL INSTITUTIONS (1923) 179.

theory"; that the "privilege theory" of Succession is inimical to the genius of American ideals,⁸⁵ uncongenial to its legal institutions, and unbecoming the dignity of Man!

85. See Hadley, *The Constitutional Position of the Property Owner*, 2 SELECTED ESSAYS ON CONSTITUTIONAL LAW (1938) 1.