FEDERAL REGULATION OF INHERITANCE

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"You see it's like a portmanteau—there are two meanings packed up into one word."—*Through The Looking Glass.*

I

On May 5th, 1798, General Thaddeus Kosciusko placed a substantial fund in the hands of Thomas Jefferson, and made a will authorizing Jefferson to employ the fund in purchasing the liberty of Negroes and in "teaching them to be defenders of their liberty and country, and of the good order of society, and in whatsoever may make them happy and useful".[1] Kosciusko then departed to Europe where he watched with an expectant eye the conflicts between France and Austria, in the eager hope that these might afford an opportunity for the resurrection of his beloved Poland. On June 28th, 1806, Kosciusko, who was then living in Paris, executed a will by which he directed Jefferson to pay $3,704 out of his funds to the son of the United States Minister to France, who bore the engaging if uneuphonious name of Kosciusko Armstrong.[2]

The General died on October 15th, 1817, at a time when the elderly Jefferson was harassed by his own pecuniary difficulties and could hardly face with enthusiasm the ambitious undertaking so bequeathed to him. On January 5th, 1818, Jefferson wrote to William Wirt and explained the predicament which arose out of the creation of the fund. Where was the will of this non-resident alien to be probated?

> "The place of probate generally follows the residence of the testator. That was in a foreign country in the present case. Sometimes the bona notabilia. The evidences or representations of these (the certificates) are in my hands. The things represented (the money) in those of the United States. But where are the United States? Everywhere, I suppose, where they have government or property liable to demand on payment. That is to say, in every State of the Union, in this, for example, as well as any other, strengthened by the circumstances of the deposit of the will, the residence of the executor, and the place where the trust is to be executed." [3]

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1. Jefferson's interest in the subject of slavery had manifested itself in the deleted clause of the Declaration of Independence. He wrote often on the social and political problems involved. His own will liberated only five of his numerous slaves.

2. Armstrong v. Lear, 12 Wheat. 169 (U. S. 1827).

3. 10 WRITINGS OF THOMAS JEFFERSON (Ford ed. 1892) 96.

We learn later that Jefferson proceeded to have the will proved in the Virginia District Court, and that he renounced as executor. Before he could apply for the appointment of an administrator with the will annexed, he was notified of Armstrong's claim (which he deemed "well-founded") and of other claims against the fund in his hands. On June 27th, 1819, Jefferson wrote again to Wirt, suggesting that these various claimants sue in the Federal Court for the District of Columbia, interplead all interested parties, and have that court direct the distribution of the fund.[4]

Accordingly, Kosciusko Armstrong filed a bill on the chancery side of the Circuit Court for the District of Columbia, alleging the validity of the Paris will and praying for discovery of the funds in the hands of the administrator with the will annexed, whose name was Lear. Edward Livingston, Jefferson's great adversary in the *Batture* litigation, represented the complainant. Wirt, who represented the administrator with the will annexed, was now Attorney General of the United States. The litigation dragged on and was not decided until 1827, the year following Jefferson's death. Joseph Story, the Federalist in Republican clothing, delivered the unanimous opinion of the Court.

The litigation must have been embarrassing to the Supreme Court. A decision for either party could only evoke resentment without serving the compensatory end of enlarged Federal power. The Court was busy at that time laying the foundations for a century of commercial and capitalistic expansion. The sanctity of contracts, the magic of corporate charters, these were its prime concerns. No one could see any special advantage in fussing with the probate of wills. Moreover, a decision in favor of Armstrong would be interpreted as a gratuitous slap at the recently departed Republican hero.

In the *Marbury* case and in the *Batture* litigation, the Court had discovered how to extricate itself from such inconvenient positions. Sweet are the uses of limited jurisdiction. If a litigation proves to be a nettle, one should either grasp it firmly or let it scrupulously alone, and if there is no active market in nettles, the latter course will prevail. At least that is what Justice Story thought.

The bill was dismissed without prejudice because Armstrong's will had not been probated in the state court. "By the common law, the exclusive right to entertain jurisdiction over wills of personal estate, belongs to the ecclesiastical courts; and before any testamentary paper of personalty can be admitted in evidence, it must receive probate in those

4. *Id.* at 134.

courts." [5] The sole authority cited by the Justice was a dictum of Lord Kenyon in an action at law.[6] In such fashion the United States Supreme Court established the principle that, even where there is diversity of citizenship, the federal courts have no jurisdiction on the chancery side to probate a will or to administer an estate.

The only way that we can go forward at this point is by going backward. That is to say, by considering some of the history of English probate jurisdiction, and how it came to repose in ecclesiastical hands. The mists of our ignorance on the question lift only in the thirteenth century when we find the King's Courts according to clerics virtually complete control over probate and administration. Holdsworth suspects that the mailed fist of the bishops who participated in the drafting of Magna Carta may have had something to do with this practice. During the sixteenth and seventeenth centuries the Ecclesiastical Courts were constantly cribbed and restricted from both the law and the chancery sides, and their jurisdiction in practice was never very efficacious beyond the mere grant of probate or issuance of letters of administration.[7]

In the eighteenth century this "lame jurisdiction" [8] was held to be exclusively ecclesiastical and to include any proceedings to set aside a probate for fraud.[9] But the same House of Lords which laid down this rule, held almost simultaneously that because of the inadequacy of ecclesiastical procedure, the Chancellor had power to make any decree suitable to safeguard the estate pending the contest.[10] Such was the law as to personal property at the time that Story wrote, and if he failed to cite the leading precedents, he was at least accurate in digesting their purport.

All of this procedure had generated during an era when the owner had no testamentary power over his real estate. The Statute of Wills dates only from Henry VIII. Devises of real estate were thereafter cognizable at law, and were usually established in an action of ejectment on the issue *devisavit vel non*.[11] The clerics never invaded this field, probably because by the time devises were legalized, Englishmen were no longer interested in saving their souls by the devotion of their

5. Armstrong v. Lear, 12 Wheat. 169, 175 (U. S. 1827).

6. King v. Inhabitants of Netherseal, 4 T. R. 258, 100 Eng. Rep. R. 1006 (K. B. 1791) (involving the settlement of a pauper family).

7. 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922) 625 *et seq.*; 3 *id.* at 583, 594; 5 *id.* at 300, 316, 320.

8. Matthews v. Newby, 1 Vern. 133, 23 Eng. Rep. R. 368 (Ch. 1682).

9. Kerrich v. Bransby, 7 Bro. P. C. 437, 3 Eng. Rep. R. 284 (H. L. 1727); *see* Bennet v. Vade, 2 Atk. 324, 26 Eng. Rep. R. 597 (Ch. 1742); Webb v. Clavender, 2 Atk. 424, 26 Eng. Rep. R. 656 (Ch. 1742).

10. Andrews v. Powys, 2 Bro. P. C. 504, 1 Eng. Rep. R. 1094 (H. L. 1723).

11. Kerrich v. Bransby, 7 Bro. P. C. 437, 3 Eng. Rep. R. 284 (H. L. 1727); 7 HOLDSWORTH, *op. cit. supra* note 6, at 362.

goods to spiritual uses, and of course statutes of mortmain had already appeared to discourage any undue preoccupation with the beyond.

This was the complex picture which Story had before him at the time of *Armstrong v. Lear*. If the matter had been one which the Federalists then considered important, jurisdiction could have been taken upon any of a number of plausible grounds. First of all, we had no Ecclesiastical Courts in America, and so far as the federal system was involved, the chancery side of the court was the logical successor of its clerical ancestors.[12] Secondly, the Chancellor in England had often invaded the ecclesiastical field, usually employed a species of canon law, and in fact was himself quite frequently a member of the cloth. Until Thomas More, all of the Chancellors were clerics, and that circumstance permanently molded equity jurisprudence. Finally, since devises of real estate were concededly within the jurisdiction of the common law courts, Story might just as well have let the personalty follow the realty into the federal courts as let the realty follow the personalty outside. But as has been said, there were strong considerations of convenience and Story probably saw no use in fighting the Battle of Blenheim over a matter irrelevant to the business and commercial structure of the country. Or at least he thought it irrelevant.

Litigants are not easily chased away. The decision in *Armstrong v. Lear* served only as the archetype of a long series of similar controversies which have cropped up in the federal courts ever since. Apparently citizens of states other than that of the decedent have a way of thinking that the Federal Constitution means to confer jurisdiction on the federal courts in controversies between citizens of different states.[13] If the Constitution seems rarely to mean what it says, that is, I suppose, because the glosses are so elaborate and artificial that the simple language of the original is lost to view.[14] We are reminded of those religious sects in which the meaning of the Bible is obtained from an ecclesiastical hierarchy or from the study of an accumulated law code. No one but amateurs or infidels will dare to look at the original text, and that is why only amateurs and infidels ever learn how very lucid, how very beautiful, that text is. Which is bad for the business of those whose duty it is to interpret the interpretations.

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12. On the origins of American Equity Practice, *see* Sprague v. Ticonic National Bank, 307 U. S. 161, 164 (1939).

13. U. S. CONST. Art. III, § 2 refers to "all cases, in Law and Equity" but, as to jurisdiction predicated upon diversity of citizenship, to "Controversies". A neat argument can be drawn from this difference in language. Concededly not all constitutional questions are answered explicitly in the text.

14. ". . . in Utopia every man is a cunning lawyer. For . . . they have very few laws; and the plainer and grosser that any interpretation is, that they allow as most just." THOMAS MORE, UTOPIA, in 36 HARVARD CLASSICS (1910) 213; *cf.* Justice Frankfurter in Graves v. New York, 306 U. S. 466, 491 (1939).

The reports are full of litigations involving the issues of *Armstrong v. Lear,* although for about the last seventy years little reference has been made to Story's decision. The holdings on the subject are not consistent with one another, and simply cannot be reconciled.[15] There is always the question of degree, that is, how far will the federal court go into the territory of administration.

Probably the deepest incursion was made by the pugnacious Court which sat just after the Civil War. In *Payne v. Hook* [16] the Supreme Court compelled an accounting by the administrator and a distribution of the assets. In conformity with its neat volteface in the *Legal Tender Cases,*[17] the Court beat a retreat some six years later.[18] Subsequent cases tend to show how skillful the Court can be in permitting just that degree of chancery jurisdiction which will thoroughly interfere with the proceedings in the state courts without effectively securing to the complainant the rights which he seeks.

The present law is that if the proceeding is "incidental to probate", jurisdiction will not attach, but if the suit is independent and relates to the interests of the heirs, devisees or legatees, the federal court can and will undertake to act. We find progressively less discussion of the function of the bishop and his surrogate and an increasing insistence that matters of probate and administration are concerns of local law and should be left to the local probate courts.[19] This implies the novel proposition that where diversity of citizenship and the jurisdictional amount are involved, a federal question is additionally required. I do not for one moment believe that the decisions mean to invite any such revolutionary inference, for they do not. They simply say that probate is of strictly local concern because it sounds good to say that. Where a denial of relief is based upon archaic historical distinctions, courts are bound to cover the holes with any planking that offers itself. If the planking is thin, at least the hole no longer gapes.

What is most significant about this jurisprudence, is the impression that it has created in the general mind. The judges honestly believe

15. Tarver v. Tarver, 9 Pet. 174 (U. S. 1835); Gaines v. Chew, 2 How. 619 (U. S. 1844); Fouvergne v. New Orleans, 18 How. 470 (U. S. 1855); Payne v. Hook, 7 Wall. 425 (U. S. 1868); Yonley v. Lavender, 21 Wall. 276 (U. S. 1874); Case of Broderick's Will, 21 Wall. 503 (U. S. 1874); Ellis v. Davis, 109 U. S. 485 (1883); Byers v. McAuley, 149 U. S. 608 (1893); Farrel v. O'Brien, 199 U. S. 89 (1905); Waterman v. Canal-Louisiana Bank Co., 215 U. S. 33 (1909); McClellan v. Carland, 217 U. S. 268 (1909); Sutton v. English, 246 U. S. 199 (1918); also innumerable cases in the lower federal courts, of which Atwood v. Rhode Island Hospital, 34 F. (2d) 18 (C. C. A. 1st, 1929) is an interesting specimen.

16. 7 Wall. 425 (U. S. 1868), cited with approval in Sprague v. Ticonic National Bank, 307 U. S. 161, 164 (1939).

17. 12 Wall. 457 (U. S. 1872).

18. Yonley v. Lavender, 21 Wall. 276 (U. S. 1874).

19. *Armstrong v. Lear* slips out of sight about the time of the Case of Broderick's Will, 21 Wall. 503 (U. S. 1874). Farrell v. O'Brien, 199 U. S. 89 (1905), and Sutton v. English, 246 U. S. 199 (1918) exemplify the reference to local law.

that inheritance is a purely local phenomenon. They have been taught that the federal courts are not the place for the distribution of estates and that, except in most unusual cases, the division of large aggregations of capital cannot affect the national economy. *Armstrong v. Lear* has, perhaps by political accident, set the stage for this deep and tacit assumption. Inheritance's purely local significance has become an axiom, factitiously illustrated and confirmed by the refusal of the federal court to take jurisdiction.[20] The impression so graven is particularly deep because in these matters the federal substantive law so closely follows the adjective. Where the federal courts decline to operate, who will doubt that there is no national interest?

II

We cannot hope fully to expose the origins and genealogy of this conviction. It is possible, however, to point to certain specific economic factors which controlled men's thoughts at the inception of our Federal Government, and to show how those factors have been transformed in the last century and a half. Thus, though such an exposition may not yield the whole truth, it should sufficiently illumine at least part of the subject.

We are limited at the outset by the shortcomings of American statistical information. This country has been sufficiently sure of itself and sufficiently extrovert in its national psychology, to be little concerned with accurate measurements and precise figures. Social scientists tear what remains of their hair when they discover the dearth of

20. The analogy offered by the New York cases as to the jurisdiction of the State Supreme Court is worth noting in detail. The State Supreme Court enjoys general jurisdiction in both law and equity, the latter coterminous with that possessed by the Court of Chancery in England on July 4, 1776. N. Y. CIV. PRAC. LAW § 64. Generally speaking, the New York jurisprudence is to the effect that the proper forum for matters of strict probate is the Surrogate's Court. Cassidy v. Savage, 150 Misc. 127, 269 N. Y. Supp. 751 (1934); *see* Hard v. Ashley, 117 N. Y. 606, 612, 23 N. E. 177, 178 (1890); *cf.* St. John v. Putnam, 128 Misc. 714, 716, 220 N. Y. Supp. 141, 144 (1927). However, the Supreme Court will undertake to construe wills, to direct accountings, and to issue all decrees which may be necessary to supplement the limited power of the surrogate. Tonnele v. Wetmore, 195 N. Y. 436, 88 N. E. 1068 (1909); Bankers Surety Co. v. Meyer, 205 N. Y. 219, 98 N. E. 399 (1912). The jurisdiction of the Surrogate's Court has been extended from time to time by successive statutes, so that intervention of the Supreme Court has grown progressively less. In the Matter of Raymond v. Estate of Davis, 248 N. Y. 67, 161 N. E. 421 (1928). It is noteworthy, however, that by a set of statutes of longstanding, probate jurisdiction in a particular class of cases has always been confined to the Supreme Court and is still enjoyed by it. N. Y. DEC. EST. LAW § 200 *et seq.*; *see* Matter of Canfield, 165 Misc. 66, 68, 300 N. Y. Supp. 502, 505 (1937). The analogy between the state and federal rules must not, however, be pressed too far. If the state court of general jurisdiction declines to accept probate matters, an adequate remedy is always available in the state probate court, where procedure is probably best adapted to such purposes. If, however, the federal court declines to act in a matter involving diversity of citizenship, it denies to the non-resident complainant a substantial right guaranteed to him by the Constitution. If diversity of citizenship is a proper basis for federal jurisdiction in general, the rationale thereof would seem to apply to probate matters.

early statistical reports. But regrets do not furnish us with graphs.[21] We will have to accept these limitations and be content if our ultimate picture is as accurate as, say, a seventeenth century map of Africa, the kind of map where the seas are peopled with dolphins spouting water and the geographer has sketched "elephants for want of towns".

The thesis here is that the institution of inheritance has evolved with the transmutation of the American national economy, that that economy was at its inception basically agricultural and that it has become progressively industrial and capitalistic. The subject matter of inheritance was originally of such a nature as to warrant its consideration in terms of purely local interests. It has been metamorphosed along with the constituents of the national wealth and the national income. Thus inheritance, like a tree, was originally rooted in the soil. The tree has been severed from its roots, has been transformed by the inventive genius of industry into paper pulp, and the paper has been printed with the names of large corporations and banks, stocks and bonds passing fluidly from hand to hand.

During the Constitutional Convention apparently no consideration was given to the institution of inheritance. Representatives of the states were met for the purpose of establishing a national government and conferring upon it power over those matters which could not be adequately handled at home. The wealth in the respective states consisted primarily of large plantations, crops and slaves.[22] Even the slaves were deemed to be attached to the soil, and were thought of as real property.[23] The law of inheritance was primarily one of descent in intestacy or devise by will. Wealth was anchored to the situs of the real estate.[24]

Thus the assumption that the Federal Government had no power to regulate this institution, was so complete that it remained tacit. One

21. The principal sources of which I have availed myself are the following: WEALTH, PUBLIC DEBT, AND TAXATION, DEP'T OF COMMERCE, BUREAU OF CENSUS (1922) vol. 1; 83 CONG. REC. (APPENDIX) 3086 (1938); DOANE, THE MEASUREMENT OF AMERICAN WEALTH (1933); NATIONAL WEALTH AND INCOME, SEN. DOC. No. 126, 69th Cong., 1st Sess. (1926); NATIONAL INCOME IN THE UNITED STATES 1799-1938, NATIONAL INDUSTRIAL CONFERENCE BOARD STUDIES No. 241 (1939).

22. For a detailed description of post-revolutionary finance, *see* EAST, BUSINESS ENTERPRISE IN THE AMERICAN REVOLUTIONARY ERA (1938). Much, however, of the speculation here described is in real estate development, and compares favorably with the Florida bubble of the 1920's. There was also considerable gambling in depreciated currency, *id.* at 214 *et seq.*, and securities, as in post-war Germany. *Plus ça change, plus c'est la même chose.*

23. Chinn v. Respass, 1 T. B. Mon. 26 (Ky. 1824); Sneed v. Ewing, 5 J. J. Marsh 460 (Ky. 1831); McDonald v. Walton, 2 Mo. 48 (1828); McCollum v. Smith, Meigs 342 (Tenn. 1838).

24. Thus we still find in our law the ancient presumption against charge of legacies on real property, vestigial remnant of the centuries of landed wealth. The same principle operated in the political field, as witness the property qualifications for franchise contained in many early state constitutions. 1 ADAMS, THE MARCH OF DEMOCRACY (1933) 235.

does not debate the obvious. In fact, the very thought of any contrary view appeared so absurd, that Hamilton wrote in the *Federalist*:

> "The propriety of a law, in a constitutional light, must always be determined by the nature of the powers upon which it is founded. Suppose, by some forced constructions of its authority (which indeed cannot easily be imagined), the Federal Legislature should attempt to vary the law of descent in any State; would it not be evident, that in making such an attempt, it had exceeded its jurisdiction, and infringed upon that of the State?"[25]

The evolution of the national economy must be analyzed from two very different avenues of approach. In the first place, there are the changes that have taken place in the composition of the national wealth iself. These changes have to do with shifts in the relative importance of economic goods to be found within the territorial limits of the United States. In the second place, there are changes from the standpoint of the use of national wealth in the daily lives of the citizenry, changes in the form of ownership of property, in the form of accumulation of capital, and in the form of its distribution upon the death of the owner. The two modes of analysis must not be confused.

For instance, there is outstanding in the United States at the present time about 76 billion dollars of ordinary life insurance.[26] From the standpoint of the national wealth, this item is represented by the real estate on which the insurance companies hold mortgages, the railroad tracks and equipment, the water works and power plants against which they hold bonds. From the standpoint of individuals, the insurance policies represent, of course, contracts calling for certain cash-surrender rights during the lifetime of the insured and certain agreed payments upon his death. If this distinction be borne in mind it will be seen that from both standpoints the composition of the national economy has been quite radically modified.

Before considering changes in the constituent elements of the national wealth, we have to remind ourselves how greatly the aggregate has increased. The total taxable property, real and personal, in the United States in 1850 was only 7 billion dollars. By 1922 the value of the railroads alone was 20 billion.[27] If we extend these figures backward to 1790, and forward to include the expansion in the production of useful goods during the last eighteen years, we can see how far we have left behind us this simple agricultural economy which knew no

25. THE FEDERALIST (Dawson ed. 1870) No. XXXI.

26. N. Y. Times, May 9, 1939, p. 38, col. 7, 110 billion dollars, including all life insurance, as of Dec. 31, 1937; N. Y. Herald Tribune, Oct. 24, 1939, p. 29, col. 8; Paul, *Life Insurance and the Federal Estate Tax* (1939) 52 HARV. L. REV. 1037.

27. WEALTH, PUBLIC DEBT AND TAXATION, *loc. cit. supra* note 20.

railroads, no automobiles, no mass production, no holding companies, no kited credits. And the progression has become geometric, since every new invention has initiated another era of growth and expansion.

However great the changes in the aggregate of our national wealth, the internal modifications of its constituent elements are much more significant. It is the shifting relation of one element to another that indicates direction. As recently as 1860 agriculture represented 48 per cent. of our national wealth. By 1890 it accounted for only 21 per cent., and in 1932 only 8 per cent. On the other hand, urban real estate maintains today at least the same relation to the total national wealth as it did in 1860. The large percentage increases during the period in question have been in working capital, distribution, chattels, stocks of goods, and transportation facilities.[28]

The Immigration Act of 1924 has accelerated these trends. The annual freshet of new immigrants has been shut off, relaxing, as the years pass by, the pressure for homes and farms. Need for real estate is substantially stabilized, while the increase in manufactured goods continues to mount. Moreover, the closing of territorial frontiers at the beginning of the century has permanently fixed the land foundation on which the national economy is constructed.[29]

But this is not only half of the picture, and the form of the evolution will not appear complete until the other half is examined. The nature of ownership has been transmuted as rapidly as the nature of the things owned. From the standpoint of long-term change, we find certain striking phenomena. In 1799 agriculture accounted for 39.5 per cent. of realized private production income, and together with such dependent industries as transportation, represented well over two-thirds of the total private production income of the United States. By 1937 the percentage of such income arising from agriculture was 12.3, after falling in 1932 to a low of 8.2. Manufacturing, on the other hand, which had represented in 1799 only 4.8 per cent. of private production income, had risen in 1937 to 30.3 per cent.[30]

If we approach the matter from the short-term standpoint there are equally pointed morals to be drawn. The national wealth shrank from 1929 to 1932 some 252 billion dollars. Only 47 billion of this shrinkage was incurred by corporations, banks, insurance companies, institutions, government holdings and the like.[31] The balance was all suffered by individuals. The banks and the insurance companies actually increased their total holdings during that vertiginous interval. To-

28. DOANE, *op. cit. supra* note 20, at 10, 13.
29. *See* N. Y. Times, May 7, 1939, p. 1, col. 5.
30. NATIONAL INCOME IN THE UNITED STATES 1799-1938, *loc. cit. supra* note 20.
31. DOANE, *op. cit. supra* note 20, at 22, 25.

tal national wealth in corporate or institutional form is on an ever-rising plane, which occasional interruptions have not served to deflect.

One more set of figures must be resorted to. An analysis made in 1926 by the Federal Trade Commission of 41,788 decedents' estates, shows that the proportion of real property diminishes steadily as the total size of the estate increases. In estates over a million dollars the proportion is less than 19 per cent., although the average of all the estates is 33.4 per cent.[32] The significance of these figures lies to some extent in their own inaccuracy. The Commission treated incorporated real estate holdings as personalty. Stocks and bonds of real estate companies were classed as chattels. Consequently, the low proportion of real property in the larger estates may be attributable to incorporation of investment realty.[33] In any case it is clear that either the large estates hold relatively little real property, or hold it in such form that the indicia of ownership can pass freely in the stream of finance. In either case the capital aggregation is no longer moored to any specific territorial situs.

This economic trend is a familiar story, and dull statistics can only underline the obvious. The preponderance of agricultural real estate has diminished constantly. Urban real estate has maintained a stable relation to the total national wealth, but is either owned or controlled in large proportion by corporations, banks or insurance companies. Its title and the fruits of its use flow from hand to hand along with stocks, bonds and mortgage notes. Upon this foundation arises a colossus of personalty wealth consisting of all the machinery of industrial production and the myriad products of that machinery. Finally, many owners of this fluid wealth maintain their homes in several different states simultaneously, and thus tend to eradicate by their own mode of life the social and economic connotations of state boundaries.[34]

But early conceptions are stubborn. Up to the twentieth century the Federal Government never seriously entered the field of estate taxation, except for temporary revenue during periods of war. The Civil and the Spanish-American Wars evoked short-lived succession taxes. These taxes were adopted to assist the fisc, and were abandoned as

32. NATIONAL WEALTH AND INCOME IN THE UNITED STATES, SEN. DOC. No. 126, 69th Cong., 1st Sess. (1926) 62. No similar study has since been made by the commission.

33. In the State of New York, 33,984 real estate corporations filed reports for 1938. As such corporations are confined to those "*wholly* engaged in the purchase and sale of, and holding title to real estate" (N. Y. TAX LAW § 182, italics supplied), these figures, obtained from the State Tax Commission, give only an inkling of the extent of real estate owned by corporations. Neither the City nor the State of New York, as I am informed, has compiled any analysis of the value of real estate so held.

34. Texas v. Florida, 306 U. S. 398 (1939).

soon as the emergency passed.[35] No one considered them of particular moment, and no one foresaw how very deep and lasting their influence might become. The Civil War statute was summarily approved by the Supreme Court as a quite ordinary excise on the privilege of succession.[36] *Knowlton v. Moore,* which upheld the Spanish-American War tax is, of course, an extended and thorough if rather turgid opinion. But when *Knowlton v. Moore* was argued and decided, its profound public significance was not in the least appreciated.[37] On May 15th, 1900, the day after the decision, the New York Times devoted its leading article to news of the hottest May 14th in the history of the weather bureau. There had been six heat prostrations. The Times was still looking under its bed for Aguinaldo, and was writing bitter editorials against the monopoly enjoyed by the American Ice Company. *Knowlton v. Moore* was not even mentioned, but much attention was given to the arrival of three envoys of the Boers.

It is easy to feel superior thirty-nine years after the event.[38] We now know that the *Knowlton* case laid the foundation for one of the most ambitious programs of estate taxation in the world.[39] What has not been appreciated is the extent to which this tax program has operated upon the national economy. It is time to recognize the actual existence of a new juridical fact: that the Federal Government now regulates the disposition of large estates.

III

Some day perhaps a way will be found to harness and employ all the heat that has been engendered on the subject of taxation to regu-

35. The history of these excises is rehearsed in Knowlton v. Moore, 178 U. S. 41 (1899). See also MYERS, THE END OF HEREDITARY AMERICAN FORTUNES (1939) c. 19 *et seq.*

36. Scholey v. Rew, 23 Wall. 331 (U. S. 1874).

37. Before the decision, the constitutionality of the tax had been sanguinely denied by at least one author. Hewitt, *Gifts and Sales of Intoxicating Liquors Contrasted* (1899) 47 AM. L. REG. 737. The decision was virtually ignored in the leading law reviews. The only contemporary comment of value which I have found was an editorial (1900) 61 ALBANY L. J. 314, quoting the Solicitor-General. The latter viewed as highly important the holding that the Federal Government might tax a privilege which it had not conferred. Moreover, a lengthy editorial of The Philadelphia Press is here reprinted, with emphasis upon the sanction, in *Knowlton v. Moore,* of progressive rates of taxation. It will be noted that the dissent in the *Knowlton* case was directed to this feature only.

38. It is noteworthy that, in the early debates leading up to the Sixteenth Amendment, a resolution provided that "The Congress shall have the power to lay and collect taxes on incomes and inheritance." 44 CONG. REC. 1548 (1909). So little had *Knowlton v. Moore* won national attention.

39. The estate tax rates in U. S. S. R. do not exceed the maximum in the United States, until the sum of 500,000 rubles is passed. Moreover, Soviet government bonds and deposits in state banks are wholly exempt. Haensel, *Public Finance in the U. S. S. R.,* 16 TAX MAG. 517, 634 (1938). This compares significantly with the American Treasury's generous interpretation of 40 STAT. 1311, 31 U. S. C. A. § 750 (1919), by which the exemption of government bonds beneficially owned by non-resident aliens is extended to gift and estate taxes, obviously to invite investment. U. S. Treas. Reg. 79, Art. 2; U. S. Treas. Reg. 80, Art. 13.

late. "Taxation for strictly fiscal purposes" is, of course, the panache of the orthodox. We find current economic and social opinion here deeply divided,[40] with the customary tendency to exaggerate the issues involved and to erect fictitiously absolute standards to which only the unwise or the dishonest will repair. Arguments on both sides have been shot through with what I like to call the fallacy of Humpty Dumpty's cravat.

It will be remembered that when Alice met Humpty Dumpty, she noticed the very attractive "unbirthday" present which had been given him by the King. Her embarrassment rose out of the fact she could not decide whether the band around his middle was a cravat or a belt. It looked like a cravat because it was right underneath his face, and it looked like a belt because it was right around his equator. A sharp argument followed, ending, as most arguments do, only when the subject was accidentally changed.

Now, the essence of this dilemma was that Humpty Dumpty did have a colored band around his middle, and that was the only real fact of which notice should be compelled. Anyone who insisted upon calling it either a cravat or a belt was bound to miss part of the picture, and consequently to become very much absorbed in that part which he did see.

It is the same fallacy which underlies all "either-or" arguments. Absolute antitheses are too convenient to be true. In so complex and pragmatic a subject as taxation, they are simply not to be found. When, therefore, we are given the choice of taxation for revenue or taxation for regulation, the option is false and so is the consequent debate. Taxation must yield revenue or it is not taxation. Taxation must regulate simply because it is taxation. Hence the decision can never be made by offering, like Solomon, to split the baby in half. The economic operation known as taxation represents the indissoluble fusion of both revenue-raising and regulation.

The questions involved, therefore, remain exclusively questions of policy. We can use taxation intelligently to regulate, or we can use it inadvertently and unintelligently. Of course, money is needed for all of the purposes of government, but we cannot begin to raise money without affecting all the course and current of economic activity.[41]

40. 19 Fortune, May 1939, p. 67, and the survey of public opinion, *id.*, June 1939, p. 68. According to the latter, only 34.7 per cent. of the American public believe in heavy taxes on the rich in order to redistribute wealth. Perhaps; but who will survey these surveyors?

41. The political structure itself is similarly affected, in certain instances; at least if we are to accept the position of the States Attorneys General in their opposition to taxation of income from State securities. *The Constitutional Immunity of State and Municipal Securities* (pamphlet, 1939). The tariff on imports is an avowed instance, but by no means so exceptional as has been believed. Regulatory taxes are at least as

Sometimes, as we will find in the field of inheritance, regulation is most farreaching when it is haphazard and unintentional.

The Supreme Court's decisions on the question have been rather realistic, as evidenced by the now familiar pronouncement in the *Sonzinsky* case:[42]

> "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed. But a tax is not any the less a tax because it has a regulatory effect . . . and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed."

The Court has not been unduly troubled by charges of ulterior motives for taxes.[43] True, the taxation of products of child labor in interstate commerce was a shade too rich for its then sensitive digestion.[44] That holding, if it is still law, has been the exception rather than the rule. The excise in question had followed too close upon the heels of *Hammer v. Dagenhart*.[45] If the purpose of a regulatory tax is not crudely obtrusive, the Court will doubtless seek some way to uphold it.

The economists prove rather more timorous. They speak of taxation for regulatory motives as though taxes in general had no regulatory effect. Most of them seem to feel that where regulation is desired, taxation should be employed only as a last resort. That is because the economic consequences of regulatory taxation are less predictable, or as I should say, more unpredictable, than those of direct normative action. Taxation in the eyes of the economist is a critical operation, to be employed only after all palliatives have failed.[46]

All of this is singularly abstract. Taxation is nothing but a name for the process of collecting money for the government, and that process is itself incomplete until the money is spent. The real unit in the economic world is composed of the ebb of taxation and the flow of spending. The flow may exceed the ebb as now-a-days it does, but nothing that is taken into the government coffers, or goes out of them, can fail

old as the ancient Roman imposts on celibacy. And if wise saws require modern instances, there is, of course, the bitterly debated undistributed profits tax. Whatever the demerits of this tax its greatest fault in the eyes of its critics was its efficacy: it did compel the distribution of profits.

42. 300 U. S. 506, 513 (1937), followed in United States v. Miller, 307 U. S. 174 (1939).

43. Veazie Bank v. Fenno, 8 Wall. 533 (U. S. 1869); McCray v. United States, 195 U. S. 27 (1903); Carter v. Carter Coal Co., 298 U. S. 238 (1935); Magnano Co. v. Hamilton, 292 U. S. 40 (1933).

44. Bailey v. Drexel Furniture Co., 259 U. S. 20 (1921).

45. 247 U. S. 251 (1917).

46. J. P. JENSEN, GOVERNMENT FINANCE (1937) 175 (summarizing the conflicting views); A. G. BUEHLER, PUBLIC FINANCE (1936) 331-2, and see note 47 *infra*. Most of the expositions are ambidextrous, viz. "on the one hand", "on the other hand".

to divert and deflect the stream of private commerce and business. Every tax, as President Roosevelt has said, is a deterrent,[47] if only a deterrent to the retention of the amount of cash represented by the tax. Most taxes are very profound economic influences, as no one can doubt who has ever sat in on a meeting of business men when they were debating the form and desirability of a new enterprise.

When, therefore, economists assert that taxation is not per se regulation, they sound like Heine describing Madame de Staël:

> "Madame de Staël was not ugly (no woman is ugly). But I can say this much, that if Helen of Sparta had looked like Madame de Staël, there would have been no Trojan war, Priam's city would not have been burnt, and Homer would not have sung the wrath of Achilles."

If we postulate the equitable distribution of wealth as a proper purpose of government, even the economists are willing to resort to taxation. Here is distinctly an objective for which taxation is the suitable instrument.[48] The only effective way to limit incomes and fortunes is by taking part of them for public use. This seems rather obvious to the naive among us, but it has not been sufficiently so to become an accepted dogma of American political life. Perhaps not until the President's message of June 19th, 1935,[49] was inheritance taxation openly proclaimed as a deiberate means for the limitation of large aggregations of capital. The message branded huge fortunes with the stigma of inherited economic power, announced that such power was as inconsistent with our national ideals as inherited political power, and urged taxation as the means of combatting this jeopardy to the welfare of the nation.

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47. N. Y. Times, May 13, 1939, p. 1, col. 6.

48. TWENTIETH CENTURY FUND, FACING THE TAX PROBLEM (1937) cc. 9-14; BUEHLER, *op. cit. supra* note 45, at 491; JENSEN, *op. cit. supra* note 45, at 408, and bibliography of economics of inheritance taxation, at 415; SHULTZ, THE TAXATION OF INHERITANCE (1926) c. XII; *cf.* Hale, *Our Equivocal Constitutional Guaranties* (1939) 39 COL. L. REV. 563, on the use of taxation to impair constitutional immunities.

49. This is not to disparage the notable efforts extended in preceding administrations. Among many others, Theodore Roosevelt, when President, and John N. Garner and Cordell Hull, when congressmen, had helped to disseminate these concepts, which may properly be traced back to the legislation against entails sponsored by Jefferson during the Revolutionary era. The 1935 message reads in part: "The transmission from generation to generation of vast fortunes by will, inheritance or gift is not consistent with the ideals and sentiments of the American people . . . In the last analysis such accumulations amount to the perpetuation of great and undesirable concentration of control in a relatively few individuals over the employment and welfare of many, many others . . . Such inherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our Government." 79 CONG. REC. 9658 (1935). Interestingly enough, the President here advocated a special legacy tax on large inheritances by any one legatee and corresponding gift taxes to prevent evasions, the proceeds to be segregated and used to reduce the national debt. Nothing has come of this particular proposal. *Cf.* HUGHES, FEDERAL DEATH TAX (1938) 3, for a jeremiad on the estate tax rates.

Thus the imposition of heavy duties upon the transmission of property from the dead to the living, has become an integral part of the federal program of egalitarianism. This was the intentional and purposive part of the regulation—the part that the government understood and desired to bring about. It was not the whole. Like an iceberg, more lay underneath than above the surface. The high death taxes enacted by the Federal Government have in truth served more to deflect the stream of inheritance than to scoop water out of it. Federal regulation of inheritance is a reality today, not so much because of the collection of taxes out of large estates, as because of what is done to avoid the collection. Congress passed a revenue statute without amending the elements of human nature. It reckoned not only without the taxpayer, but also without his lawyer, his accountant, his trust company, and his "gently smiling" heirs.

It regulated inheritance without purposing to do so, and with no thought of the consequences which we are about to describe. Before considering these consequences, however, let the reader imagine that he is a multi-millionaire and that on March 30th, 1939, he has read in the New York Times that an estate of fifty-four million dollars has paid a federal estate tax of about twenty-five million, and a Pennsylvania tax of about eight and one-half million. Let him also imagine that he has read that Mr. John D. Rockefeller's *inter vivos* transfers left only about twenty-six million dollars for testamentary disposition. All of this will give our hypothetical multi-millionaire furiously to think.

The federal regulation of inheritance thus has its first impact in the determination of quantum. The law provides how much a man can give and bequeath. It slices off a hearty segment of his fortune and consumes the same as effectually for public purposes as though he had so directed in his will. This has been described as the "toll theory" of inheritance taxation.[50] What is taken might be called the public compulsory share, just as we have the widow's compulsory share, and under civil law jurisprudence, the children's compulsory share. The toll theory has interesting applications. For example, Congress by allowing a partial credit for state inheritance taxes, has virtually compelled the states to enact lesser tolls of their own. And since the Supreme Court has seen no coercion in this, we must have faith that there is

50. *See* Matter of Penfold, 216 N. Y. 163, 167, 110 N. E. 497, 498 (1915); Matter of Harjes, 170 Misc. 431, 433, 10 N. Y. S. (2d) 627, 630 (1939); Matter of Ryle, 170 Misc. 450, 462, 10 N. Y. S. (2d) 597, 610 (1939); N. Y. Times, October 4, 1939, p. 21, col. 4.

none.[51] The toll is a rather heavy one, enough to make Charon blush over his modest obol.

The top bracket of a large fortune can be shrunk to the extent of 70 per cent. What serves as a mantle for the testator, may assume the proportions of a handkerchief for his heirs. But the rates look higher than they are, because the regulation has not simply a fiscal nature. It has a propulsive force as well, and induces positive as well as submissive action. The contribution to public uses and purposes is a type of regulation, but by no means the subtlest. How much a man can leave to his heirs is the end result of a series of simultaneous equations in which numerous other factors are largely determinative. What is important in inheritance taxation, is the direction which it imposes upon every factor in this equation.

For instance, the tax statutes contribute substantially to the determination of the beneficiaries. The owner of wealth is told to whom to leave his money. This is done by gentle suggestion and artful invitation. Exemptions are accorded for certain near relatives, and unlimited deductions are allowed for specified types of charitable, benevolent and educational bequests. When certain states of the Union invite the establishment of new industries through contractual tax exemptions, it is not perceived how closely they are imitating this same technique.[52] If you want new factories you get them by waiving taxes, and if you want huge self-governing foundations, you get them the same way. The difference is in the extent of the exemption. The factories have to pay taxes after a limited period of years; the foundations smile on in perpetuity. That may be as it should be. This article is concerned with other things than attacking foundations. It may be tremendously desirable to have a collection of these little independent sovereignties operating throughout the country. But we ought to know that if we get them, it will be only because we have asked for them, and because we and all who come after us will pay and continue to pay for them.

Statutory exemptions and deductions are conscious and deliberate, and have been granted for a supposed public benefit, at least equal to their worth in revenue. There are, however, other exemptions and deductions which have been granted unadvisedly through leaving the door open to tax avoidance of one kind or another. The intentional exemptions tend to determine who shall receive the capitalist largesse. The unintentional exemptions have a different operation. They dictate when it shall be received and in what form.

51. Florida v. Mellon, 273 U. S. 12 (1926). For another method of inducing state action, consult Carmichael v. Southern Coal and Coke Co., 301 U. S. 495 (1937) and companion cases.

52. It is significant that these are bracketed under the caption "Subsidy Exemptions" in TAX POLICY LEAGUE, INC., TAX EXEMPTIONS (1939).

It is not necessary to add here to the volume of literature on the subject of savings through transfers *inter vivos*.[53] By now even Congress must be familiar with the fact that our present gift and estate tax structure is a potent invitation to such transactions. Double exemptions and double participation in each tax bracket have given the *inter vivos* trust a tremendous and unprecedented popularity. Whether this development is desirable either from the criterion of revenue or from that of social welfare, is beside the present point. What is here significant is that the time when property is passed on to succeeding generations, is largely influenced, if not determined, by our present mode of taxation. The will disposes of a remnant only.

Finally, there is the form of the transfer. The preferential treatment given to life insurance has had a cogent and widespread influence. The estate taxation of life insurance is still full of holes and slippery places where the federal fisc is most likely to bog down.[54] Trusts and legal life estates are, of course, familiar devices for diminishing estate taxes. They afford a ready means for bridging at least two generations before another tax must be paid.[55] And powers of appointment are still invested with all sorts of weird magic, so that representatives of the Treasury have been known to flinch and grow pale at the mere sight of a special power.[56] All of these techniques are ground out wholesale in every well-informed law office in the country, and one cannot but surmise that the government is outguessed in many instances. For our present purpose, it suffices to say that heirs are receiving their inheritance in the forms of life insurance, trusts, legal life estates, and special powers of appointment, not because these are essentially the preferences of the ancestor, but because they are favored with the grace of tax immunity.

We have traced some of the outlines of federal regulation of inheritance. The national government helps to determine (1) how much can be bequeathed; (2) to whom; (3) at what time; and (4) in what form. It is true that these propositions apply to larger estates only, but that is as it should be. The smaller estates can properly be viewed as matters of strictly local interest, while the larger do constitute, as Presi-

53. Gift tax revenue has increased from 4 million dollars for the fiscal year ended June 30, 1933, to 34 million for that ended June 30, 1938. The receipts for the year ended June 30, 1936, reached 160 million. TAX SYSTEMS OF THE WORLD (5th ed. 1934) 173; *id.* (6th ed. 1935) 356; *id.* (7th ed. 1938) 393; N. Y. Times, July 27, 1938, p. 29, col. 4. The rapid spread of state gift taxes attests the same trend.

54. *See* Paul, *Life Insurance and the Federal Estate Tax* (1939) 52 HARV. L. REV. 1037.

55. Griswold, *Powers of Appointment and the Federal Estate Tax* (1939) 52 HARV. L. REV. 929; Leach, *Powers of Appointment and the Federal Estate Tax—A Dissent* (1939) 52 HARV. L. REV. 961.

56. Schuyler, *Powers of Appointment and Especially Special Powers: The Estate Taxpayer's Lost Stand* (1939) 33 ILL. L. REV. 771; Griswold, *loc. cit. supra* note 54.

dent Roosevelt has said, inherited economic power. The national concern should therefore be limited to the latter.

Plutarch tells us of a man who threw a stone at a bitch and accidentally hit his mother-in-law. Whereupon he exclaimed: "Not bad!" But all fortuitous results are not equally happy. If the Federal Government is regulating the disposition of large estates, as it is, then that regulation should be intelligent, intentional and teleological. Haphazard control will have ill effects not only upon the economic system in general, but upon legal institutions in particular. Here are archaic devices of the law, such as special powers, exhumed and revivified out of all relation to the normal social demand. Here is the useful contract of insurance, grown ponderous and edematous. It is time that we recognize the forces with which we are playing, and that we use them advisedly. Inheritance has become a matter of national concern. The limitation of mighty aggregations of fluid capital is a necessary objective of democracy. In endeavoring, however, to attain that objective through taxation, we have largely ignored the by-products of our own fiscal program. Under the surface powerful currents run silently and unseen. It is the function of statesmanship to discover those currents and to harness them.