TWO SIDES OF THE SAME COIN: THE IMPLICATIONS OF *HODEL V. IRVING* ON PENNSYLVANIA'S INHERITANCE TAX

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ABSTRACT: *This article argues that the right of inheritance consists of two complementary rights, the right of transmission and the right of succession, both of which should be afforded constitution protection under the Fifth Amendment following the United States Supreme Court's decision in Hodel v. Irving. The article, using Pennsylvania's inheritance tax and related case law as an example, examines the commonly held view that the right to inherit is a privilege created or permitted by the state that can be eliminated by the state at any time, whether by outright escheat or confiscatory taxation. In reviewing the Supreme Court's Irving decision, the article also evaluates and responds to arguments aimed at having that decision narrowly applied. Seeking to expand the application of the Irving decision to inheritance tax contexts, the paper notes the direct relationship between estate taxes and inheritance taxes and analogizes the right of succession with the constitutionally protected right to be the recipient of free speech.*

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I. INTRODUCTION

Americans take the right of inheritance for granted. Parents and elderly persons assume that their property will be appropriately transferred to their loved ones by will or the intestate system after they pass away. Sometimes, children presumptuously expect to receive inheritances from their parents. While individuals may consider the existence of legal obstacles that could impede the transfer of property to their heirs, few people, if any, anticipate legislative action that would abolish inheritance entirely. In the United States, as in other Western countries, inheritance has achieved nearly institutional status, and much scholarship has examined the societal role of inheritance.[1] However, the highest court in nearly every state in the union has handed down at least one decision expressly stating that the right of inheritance could be abolished by legislative fiat at any time by way of escheat provisions or confiscatory inheritance taxes. Regardless of whether a state would ever take such dramatic action, most Americans would, presumably, be shocked and alarmed to hear that state governments wield such extensive power over something considered as intensely personal and private as inheritance rights.

Until 1987, no constitutional authority provided any limit, either explicit or implicit, on the states' claim to sweeping control over inheritance rights.[2] In that year, however, the Supreme

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1 *See e.g.*, RONALD CHESTER, INHERITANCE, WEALTH, AND SOCIETY (Indiana University Press, 1982); ROBERT K. MILLER, JR. & STEPHEN J. MCNAMEE, INHERITANCE AND WEALTH IN AMERICA (Plenum Press, 1998).

2 *See e.g.*, Daniel J. Kornstein, *Inheritance: A Constitutional Right?* 36 RUTGERS L. REV. 741, 749 (1983-1984) (concluding that the right of inheritance is not a constitutionally-protected right).

Court of the United States decided the case of *Hodel v. Irving*. In articulating its reasoning in that decision, the Court implied that the right to transmit property by will or intestacy is a natural right that cannot be completely abolished without violating the "takings clause" of the United States Constitution, thus further implying that the right to inherit property is also a constitutionally protected right.

This article seeks to examine the implications of the Supreme Court's decision in *Hodel v. Irving* on Pennsylvania's inheritance tax, which, in light of the unanimity of state case law on the nature of inheritance rights, serves as a proxy for all state inheritance taxes. Part II begins by introducing the Commonwealth's inheritance tax and discussing the nature of inheritance and the inheritance tax. Part III examines and interprets the Court's decision in *Hodel v. Irving*. Part IV seeks to determine the significance of the *Irving* decision by applying its reasoning to the Pennsylvania inheritance tax and then concluding that the right of inheritance is protected by the Constitution and, accordingly, cannot be abrogated by the Commonwealth's *inheritance tax*. Part V provides a brief summary and conclusion of the ideas developed in the preceding four parts.

II. Pennsylvania's Inheritance Tax

Besides being the first state to levy an inheritance tax, having done so in 1826,[3] Pennsylvania is one of only a handful of states

3 1825-26 Pa. Laws 227-30.

that still imposes an effective inheritance tax as of 2012.[4] Pennsylvania's inheritance tax law[5] requires that an inheritance tax be paid on inherited property at pre-determined, statutory rates.[6] Not all inherited property is taxed, however, and several categories of transfers are exempt from the inheritance tax.[7] Taxable transfers of inherited property are taxed at rates based on the relationship between the decedent and the receiving heir.[8] Transfers to a decedent's spouse are taxed at a rate of zero percent.[9] Transfers to a decedent's grandparents, parents, sons-in-law, daughters-in-law, and lineal descendants are taxed at a rate of four and one-half percent.[10] Siblings of a decedent who receive inherited property are taxed at a rate of twelve percent,[11] and transfers to all other collaterals are taxed at a rate of fifteen percent.[12]

As Pennsylvania's case law makes clear, the Common-

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4 As state and federal tax law changes, this list is constantly in flux. For an example of the changes to the list of states with effective inheritance taxes, see JULIEANNE E. STEINBACHER & ADRIANNE J. STAHL, PENNSYLVANIA TRUST GUIDE: A HANDBOOK FOR TRUSTEES AND THEIR ADVISORS 525 (2008) (listing states with effective inheritance or estate taxes as being Connecticut, Indiana, Iowa, Kansas, Kentucky, Maryland, Nebraska, New Jersey, Oregon, Pennsylvania, and Tennessee). *See also* Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 877-79 (2006) (listing many of the states with effective inheritance taxes and discussing how the list of states with effective inheritance or estate taxes is in flux).

5 72 PA. STAT. ANN. §§ 9101-9196.

6 *Id.* § 9106.

7 *Id.* §§ 9111-9113.

8 *Id.* §§ 9106, 9116.

9 *Id.* § 9116(a)(1.1)(ii).

10 *Id.* § 9116(a)(1). Transfers to a parent from a decedent twenty-one years of age or younger are taxed at a rate of zero percent. *Id.* § 9116(a)(1.2).

11 *Id.* § 9116(a)(1.3).

12 *Id.* § 9116(a)(2).

wealth's inheritance tax is a levy on the right of inheriting property from a decedent rather than the transfer of inherited property itself. This right, also known as the right of succession, is well-recognized in Pennsylvania jurisprudence[13] and is applicable when property is inherited either by will or intestacy.[14] With regard to the right of succession, however, Pennsylvania case law has not used the term "right" in the deontological, status-based sense. Instead, Pennsylvania courts have equated the right of succession with "the *privilege* of receiving at death the property possessed by a decedent."[15] In characterizing such transactions as a privilege, Pennsylvania courts have also been unequivocal in articulating the statutory basis of that privilege.[16]

A. The Privilege of Succession

Pennsylvania case law unambiguously affirms the assertion that the right of succession is merely a privilege created, permitted, and sustained by the legislature. This conclusion has been expressed with increasing clarity in the decisions of the Commonwealth's Supreme Court and Superior Court.

One of the Court's earliest opportunities to address the nature of succession came in 1866 in the case of *Strode v. Commonwealth*.[17] In that case, Pennsylvania's Supreme Court was

13 In re Kirkpatrick's Estate, 275 Pa. 271 (1922); In re Tack's Estate, 325 Pa. 545 (1937); In re Lacey's Estate, 19 Pa.C.C. 431 (1897).

14 In re Lacey's Estate, 1897 WL 3417; In re Tack's Estate, 325 Pa. 545 (will); In re Webb's Estate, 250 Pa. 179 (intestacy). In re Belefski's Estate, 413 Pa. 365 (both); In re Wright's Estate, 391 Pa. 405 (both).

15 In re Kirkpatrick's Estate, 275 Pa. 271, 274 (1922) (emphasis added).

16 *Id.*

17 Strode v. Commonwealth, 1866 WL 6214 (Pa. 1866).

asked to determine the taxability of inherited bonds issued by the federal government.[18] The lower court, in deciding for the Commonwealth that the bonds were taxable, described the nature of inheritance and the inheritance tax:

> [A]s the right to take by succession and testament is derived from the state, it must necessarily be enjoyed subject to such conditions as the state may impose. And if a condition be that the kindred or legatees shall pay a bonus, this is not a tax or burthen imposed on *their property,* or on the property of anybody else. It is simply the price of the privilege which the state has conferred upon them. If they do not choose to avail themselves of the privilege they need not pay the price, and are no worse off than before.[19]

In quoting and briefly affirming the lower court's decision, the Supreme Court explained that "the opinion of the learned judge below is so satisfactory as to leave very little for us to add."[20]

In 1895, the Pennsylvania Supreme Court decided *Commonwealth v. Henderson* and relied on the statutorily-created character of inheritance rights in reaching its decision.[21] Although the case raised the issue of whether a decedent's nephew, who was adopted by the decedent pursuant to a special act of the Commonwealth's General Assembly, was required to pay a collateral inheritance tax on property devised to him by the decedent, the court also

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18 *Id.* at *1.

19 *Id.* at *3.

20 *Id.* at *6.

21 Commonwealth v. Henderson, 172 Pa. 135 (1895).

examined the nature of inheritance.[22] In finding that the defendant-nephew was not liable for the collateral inheritance tax, the court noted, "The right of inheritance at all is, so far the administration of justice is concerned, purely statutory, and one of the results from the power to grant this right is that the legislature may prescribe the terms of taking."[23]

Seventeen years later, in *Goldstein v. Hammell*, the Pennsylvania Supreme Court was asked to resolve the question of whether a child adopted after the execution of the adopter's will has a claim on the adopter-decedent's testamentary estate.[24] The Court explained, "The right of inheritance is purely statutory, and he who claims a share in the inheritance must point to the law which transmits it to him."[25] As there was no basis for an adopted child's claim under Pennsylvania's then-existing pretermitted heir statute, the Court proceeded to rule against the adopted child, who was unable to support her claim with Pennsylvania law.[26] In 1921, the Court again applied this reasoning in *Boyd's Estate*, the dispositive facts of which were virtually identical with those in *Goldstein*.[27] Once again, the Court noted that "the right of inheritance is purely statutory."[28]

In *Kirkpatrick's Estate*, decided in 1922, the Court reiterated

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22 *Id.*

23 *Id.* at 139. In light of the constitutional jurisprudence, it is interesting to note the Court's, perhaps unwitting, use of the term "taking" to describe the extent of the General Assembly's power.

24 Goldstein v. Hammell, 236 Pa. 305 (1912).

25 *Id.* at 309.

26 *Id.*

27 In re Boyd's Estate, 270 Pa. 504 (1921).

28 *Id.* at 507.

the statutory nature of the right of succession.[29] When petitioned to decide whether amounts paid to the federal government for the federal estate tax could be deducted from a decedent's taxable estate for purposes of calculating Pennsylvania inheritance tax liability, the Court again reviewed the nature of inheritance.[30] Additionally, the Court also commented on the extent of the legislative power to tax inheritances: "[The] right or privilege [of inheritance] is purely a creature of statutory law. It did not exist at common law, and individuals possess no natural right to such succession; the sovereign authority that gives it may demand payment for the gift."[31]

In 1929, the Court decided *Knowles' Estate*, which provided yet another opportunity to comment on the nature of succession by inheritance.[32] Resolving a dispute about the relationship between the federal estate tax and the Pennsylvania inheritance tax and who is liable for payment of the latter, the Court concluded that the appellants were unaffected by the taxes and, therefore, were not interested parties.[33] In making this finding, the court noted that "the right to take under a will or by inheritance is a privilege...."[34]

Six years later, the Court commented once more on the nature of inheritance when it decided the matter of *Link's Estate*.[35] In *Link's Estate*, the Court was asked to determine whether suffi-

29 In re Kirkpatrick's Estate, 275 Pa. 271 (1922).
30 *Id.* at 273-74.
31 In re Kirkpatrick's Estate, 275 Pa. 271, 274 (1922).
32 In re Knowles' Estate, 295 Pa. 571 (1929).
33 *Id.* at 576-92.
34 *Id.* at 589.
35 In re Link's Estate, 319 Pa. 513 (1935).

cient evidence had been presented to conclude that the appellants were the decedent's surviving next-of-kin, which would keep the decedent's estate from escheating to the Commonwealth.[36] While explaining the justification for the state's power to escheat property, the Court stated, "It is only by the grace of the commonwealth that heirs or legatees are permitted to receive any benefit from a decedent's toil and energy."[37]

In *Tack's Estate*, the Court also discussed the nature of inheritance and its implications with regard to the inheritance tax.[38] Primarily about whether bonds issued pursuant to a statutory tax exemption could be included in a decedent's taxable estate, *Tack's Estate* provided the Court the opportunity to assert that a broad consensus existed with regard to views of the basis for right of succession.[39] The Court stated:

> The right to transmit or to receive property by will or through intestacy is not a natural right but a creature of statutory grant. Students of law all agree that the state has a right to declare an escheat of all the property of a decedent and therefore, as the price of allowing a legatee, devisee, or heir to inherit, it may appropriate to itself any portion of the property which it chooses to exact.[40]

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36 *Id.* at 515-18.

37 *Id.* at 516.

38 In re Tack's Estate, 325 Pa. 545 (1937).

39 In re Tack's Estate, 325 Pa. 545, 546-49 (1937).

40 *Id.* at 548.

By 1939, the Supreme Court of Pennsylvania had firmly established as authoritative precedent its views on the nature of inheritance. In that year, the Commonwealth's Superior Court integrated those views into its decision in *Crossley's Estate*.[41] In holding that adopted children and their descendants cannot inherit from their natural parents or grandparents through intestacy, the Superior Court noted, "The right to transmit or to receive property by will or through intestacy is not a natural right, but a creature of statutory grant."[42] Sixty-four years later, those views were still cited as precedential authority. The Superior Court, in *Estate of Rosen*, emphasized the power of the state: "It is only by the grace of the commonwealth that heirs or legatees are permitted to receive any benefit from a decedent's toil and energy."[43]

One of the most lucid explanations of the nature of inheritance and its implications is found in Justice John C. Bell's dissenting opinion in *Estate of Wright*.[44] There, the Supreme Court was asked to construe the provisions of a will to determine which beneficiaries would be saddled with the corresponding inheritance tax liability.[45] Disagreeing with his colleagues, Justice Bell concluded that the will in question should not be interpreted to have the inheritance taxes paid from the residuary bequests.[46] In articulating his reasoning, Justice Bell noted the state of the law with

41 In re Crossley's Estate, 135 Pa.Super. 524 (1939).

42 *Id.* at 527.

43 In re Estate of Rosen, 819 A.2d 585, 589 (2003) (quoting In re Link's Estate, 319 Pa. 513, 516 (1935)).

44 In re Estate of Wright, 138 A.2d 102 (Pa. 1958).

45 *Id.*

46 *Id.* at 417-34.

regard to the nature of inheritance:

> The law is well settled that beneficiaries of a decedent's estate (whether by will or descent) have *no natural or vested right* to receive such property; on the contrary, whatever rights such beneficiaries possess are derived from and governed by statute and consequently the beneficiaries take under and subject to applicable statutes. Unfortunately, it is established law that a State may validly escheat *all* of a decedent's net estate and such action would violate neither the United States nor the Pennsylvania Constitutions.[47]

The treatment of the nature of inheritance by Pennsylvania's courts is hardly exceptional. Courts or legislative bodies in every state, with the notable exception of Wisconsin, and the District of Columbia have reached conclusions similar to those expressed in Pennsylvania case law.[48] From a historical perspective, courts

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47 *Id.* at 431-32.

48 Daniel J. Kornstein, "Inheritance: A Constitutional Right?" 36 RUTGERS L. REV. 741 (1983-84). *See, e.g.*, Parker v. Foreman, 252 Ala. 77 (1949); Alaska Statutes §§ 13.11.005, 13.11.150 (1973); In re Estate of Wilkens, 54 Ariz. 218 (1939); Rockafellow v. Rockafellow, 192 Ark. 563 (1936); In re Estate of Burnison, 33 Cal. 2d 638 (1949); Wolfe v. Mueller, 46 Colo. 335 (1909); Appeal of Nettleton, 76 Conn. 235 (1903); Riggs Nat'l Bank v. Zimmer, 304 A.2d 69 (Del. Ch. 1973); In re Estate of Blankenship, 122 So. 2d 446 (Fl. 1960); Alexander v. Lamar, 188 Ga. 273 (1939); In re Estate of Lawrence, 45 Hawaii 199 (1961); Simmons v. Ewing, 96 Idaho 380 (1974); Ramsay v. Van Meter, 300 Ill. 193 (1921); Earle v. Indiana Nat'l Bank, 246 Ind. 251 (1965); In re Estate of Bradley, 210 Iowa 1013 (1930); State v. Mollier, 96 Kan. 514 (1915); Traughber v. King, 235 Ky. 658 (1930); Minor v. Young, 149 La. 583 (1920); United States Trust Co. v. Douglass, 143 Me. 150 (1948); Safe Deposit & Trust Co. v. Bouse, 181 Md. 351 (1943); Merchants Nat'l Bank v. Merchants Nat'l Bank, 318 Mass. 563 (1945); In re Estate of Hill, 349 Mich. 38 (1957); In re Eggert, 245 Minn. 401 (1955); Wilson v. Polite, 218 So. 2d 843 (1969); State ex rel. McClintock v. Guinotte, 275 Mo. 298 (1918); State ex

from other states have also agreed that the ability to inherit property is a statutorily-created privilege.[49] Professor Ronald Chester, a noted historian of American property law, asserts:

> From the time of the Revolution, American legal thinkers viewed both the right to transmit and to receive property at the death of its owner as positivistic, not natural rights: rights created and regulated by the state, rather than fundamental rights....To the leaders of a new nation casting off the shackles of a hereditary monarchy, the notion of inheritance rights as a creation of civil society, subject to its regulation, must have seemed both logically and politically sensible.... Among the revolutionary generation, Thomas Jefferson and his circle best exemplified American legal and political theory on the subject.... The Jeffersonians argued that any rights to transmit or receive property at an owner's death were "civil" not "natural rights": rights created by our society for its own convenience....American courts beginning with the Virginia case of *Eyre v. Jacob* were quite consistent in applying

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rel. Bankers' Trust Co. v. Walker, 70 Mont. 484 (1924); State ex rel. Slabaugh v. Vinsonhaler, 74 Neb. 675 (1905); Kanable v. Birch, 86 Nev. 558 (1970); Thompson v. Kidder, 74 N.H. 89 (1906); In re Santelli, 28 N.J. 331 (1958); Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12 (1949); In re Estate of Becker, 47 Misc. 2d 443 (Surr. Ct. 1965); Vinson v. Chappell, 275 N.C. 234 (1969); Moody v. Hagen, 36 N.D. 471 (1917); Ostrander v. Preece, 129 Ohio St. 625 (1935); In re Will of Abrams, 182 Okla. 215 (1938); United States Nat'l Bank v. Snodgrass, 202 Or. 530 (1954); Hazard v. Bliss, 43 R.I. 431 (1921); Gibson v. Rickard, 143 S.C. 402 (1928); Fransioli v. Podesta, 21 Tenn. App. 577 (1937); Poole v. Stark, 324 S.W.2d 234 (Tex. Civ. App. 1959); State Tax Comm'n v. Backman, 88 Utah 424 (1936); In re Estate of Stacy, 131 Vt. 130 (1973); Commonwealth v. Fleet's Ex'r, 152 Va. 353 (1929); In re Estate of Ward, 183 Wash. 604 (1935); Black v. Maxwell, 131 W. Va. 247 (1948); Colonna v. Alton, 23 App. D.C. 296 (1904).

49 *See supra* note 47.

> the Jeffersonian, positivistic view of the right to transmit and receive property at death. The Virginia court's declaration of the civil as opposed to natural origin of these rights became a mainstay in the power of states to tax inheritance.[50]

B. Inheritance Tax on the Privilege of Succession

Pennsylvania case law also clearly establishes the nature of the Commonwealth's inheritance tax as a tax on the right of succession rather than a tax on the right of transmission or the property itself. In this sense, it is an excise tax levied on the occurrence of a particular event (*i.e.*, a transfer of property resulting from someone's death).[51] The Supreme Court made this clear in a highly-publicized case shortly before the Great Depression dealing with the estate of Henry Clay Frick, one of Pennsylvania's wealthiest residents at the beginning of the twentieth century.[52] In *Frick's Estate*, the court was called upon to decide how to apply the state's inheritance tax to an extensive estate with assets located in several states under a testamentary distribution scheme that included large bequests to charities.[53] It determined that "a multitude of authorities state...that this is not a tax on the tangible personalty in [other states], but *only on the right of transmission given by the laws of this state*, where testator and [the] distributees

50 Ronald Chester, "Inheritance in American Legal Thought," in INHERITANCE AND WEALTH IN AMERICA 23-24 (Robert K. Miller, Jr. and Stephen J. McNamee, eds., Plenum Press, 1998).

51 Estate of Super, 428 Pa. 476, 479 (1968) (citing Wright's Estate, 391 Pa. 405 (1958)).

52 In re Frick's Estate, 277 Pa. 242 (1923).

53 *Id.*

alike were and are domiciled."[54]

Eighteen years later, in *Schmuckli's Estate*, the Supreme Court of Pennsylvania reaffirmed this explanation of the inheritance tax.[55] There, the court found, "It is well settled, as argued by the Commonwealth, that an inheritance tax is not a tax upon the property itself, but rather a tax on the succession or right of inheritance of the assets of the estate of the decedent."[56] In 1960, the Court issued two opinions that further clarified the nature of the inheritance tax and distinguished it from estate taxes.[57] "The [inheritance] tax is on the beneficiary's right of succession to, or the privilege of receiving, either by will or under the intestate law, property possessed by a decedent at his death."[58] Furthermore, "[a]n inheritance tax is not an estate tax; the former is a tax on the right of succession to property and the latter is a tax on the transmission of property."[59] In *Estate of Remmel*, the Pennsylvania Supreme Court described inheritance taxes somewhat differently: "A]n inheritance tax is neither a tax on the property of the decedent or on the transfer of such property but rather a tax on the right of succession in the estate of the decedent."[60] Despite

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54 *Id.* at 260 (emphasis added).

55 In re Schmuckli's Estate, 341 Pa. 36 (1941).

56 *Id.* at 38 (citing In re Tack's Estate, 325 Pa. 545).

57 In re Estate of Hoffman, 399 Pa. 96 (1960); Estate of Loeb, 400 Pa. 368 (1960).

58 Estate of Loeb, 400 Pa. 368, 371 (1960) (citing Shugars v. Amusement Enterprises, Inc., 284 Pa. 200 (1925)).

59 In re Estate of Hoffman, 399 Pa. 96 (1960) (citing In re Wright's Estate, 391 Pa. 410 (1958); In re Harvey's Estate, 350 Pa. 58 (1944); In re Mellon's Estate, 347 Pa. 520 (1943)).

60 Estate of Remmel, 425 Pa. 325 (1967) (citing Belefski Estate, 413 Pa. 365 (1964); Tack's Estate, 325 Pa. 545 (1937); Orcutt's Appeal, 97 Pa. 179 (1881)).

subsequent statutory revisions, this view of the Commonwealth's inheritance tax has been consistently maintained by the state's appellate courts.[61]

III. *Hodel v. Irving*

In 1987, however, the Supreme Court of the United States handed down a decision calling into question the manner in which Pennsylvania case law characterized the Commonwealth's inheritance tax and the nature of inheritance itself.[62] *Hodel v. Irving* reached the Court on the issue of whether a federal statute violated the "takings clause" of the Fifth Amendment.[63] In deciding for the appellees that the statute effectuated an unconstitutional taking, the Court noted that the statute eliminated a property owner's

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61 In re Estate of Kleinhans, 454 Pa. 539, 545 (1973) (citing Remmel Estate, 425 Pa. 325, 328 (1967); Belefeski Estate, 413 Pa. 365, 369-70 (1964); Hoffman Estate, 399 Pa. 96, 100 (1960); Tack's Estate, 325 Pa. 545 (1937); Shugars v. Chamberlain Amusement Enterprises, Inc., 284 Pa. 200, 205 (1925); Orcutt's Appeal, 97 Pa. 179, 185 (1881)) ("[t]his Court has often recognized that the inheritance tax is imposed upon the privilege of receiving decedent's property, or alternatively, is a 'tax on the right of succession in the estate of the decedent'"); In re Estate of Morell, 455 Pa. 512, 516 (1974) (citing Hoffman Estate, 399 Pa. 96 (1960)) ("[t]he Pennsylvania inheritance tax is a tax on the right of succession to property....On the other hand, the Federal estate tax is a tax on the transfer of property...."); Estate of Beck, 489 Pa. 276, 280 (1980) (citing Remmel Estate, 425 Pa. 325 (1967); Tack's Estate, 325 Pa. 545 (1937)) ("[t]he Pennsylvania Inheritance Estate Tax is not a tax on property, but upon the right of succession or the privilege of receiving property possessed by the decedent"); Estate of Ross, 815 A.2d 30 (Cmwlth, 2003) (quoting In re Estate of Remmel, 425 Pa. 325, 328 (1967)) ("[a]n inheritance tax is neither a tax on the property of the decedent or on the transfer of such property, but rather a tax on the right of succession in the estate of the decedent").

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

63 *Id.* at 706 ("[t]he question presented is whether the original version of the 'escheat' provision of the Indian Land Consolidation Act of 1983...effected a 'taking' of appellees' decedents' property without just compensation").

ability to transmit a certain category of property by either will or intestacy.[64]

Since the late nineteenth century, the fractionalization of Native American land ownership had been a serious and perpetual problem. Studies conducted by Congress in the 1960s indicated that approximately half of all acreage held in trust for the Native Americans by the federal government was owned in fractional shares.[65] Additionally, parcels totaling about three million acres were fractionally owned by six or more persons.[66] By the 1980s, when *Irving* was decided, the problem had only worsened. For example, forty acre parcels in the Sisseton-Wahpeton Sioux tribe's Lake Traverse Reservation were oftentimes subdivided into hundreds of undivided interests.[67] "The average tract [had] 196 owners, and the average owner [had] undivided interests in 14 tracts."[68] Forty-acre parcels generated annual total rents of $1,000, but several owners received only pennies in rental income from their share.[69] And, as the Court noted, the difficulty did not end there.

64 *Id.* at 716-18.
65 *Id.* at 708-09.
66 *Id.* at 709.
67 *Id.* at 712.
68 *Id.*
69 *Id.*

> The administrative headache [caused by fractional ownership] can be fathomed by examining Tract 1305, dubbed "one of the most fractionated parcels of land in the world." Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming that the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.[70]

In 1983, Congress attempted to tackle the fractionated land ownership problem by passing the Indian Land Consolidation Act.[71] By having all fractional shares in land that did not meet certain requirements escheat to the tribe in whose reservation the land was located, Section 207 of the Act eliminated the possibility of inheriting those fractional shares.[72] Therefore, once a fractional

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70 *Id.* at 713.

71 *Id.* at 712.

72 *Id.* at 709. The text of Section 207 of the Indian Land Consolidation Act provided as follows:

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

share became a small, statutorily-defined size, it would automatically be escheated to the tribe upon the death of the owner. The tribe would then be able to consolidate these shares and, hopefully, stem the tide of further fractionalization.

Although many Native Americans favored the legislation,[73] some who would have otherwise inherited escheated fractional shares claimed that it violated their constitutional rights and filed suit in the United States District Court for the District of South Dakota.[74] The District Court found Section 207 of the Indian Land Consolidation Act to be constitutional,[75] holding that the plaintiffs "had no vested interest in the property of the decedents prior to their deaths and that Congress had plenary authority to abolish the power of testamentary disposition of Indian property and to alter the rules of intestate succession."[76] Consequently, the plaintiffs appealed to the Eighth Circuit Court of Appeals, which reversed the decision of the district court.[77] The Eighth Circuit conceded that the plaintiffs lacked a vested interest in the decedents' property.[78] It concluded, however, that the decedents had held a right to control the disposition of their property at death, which was derived from an early Sioux allotment statute.[79] The federal government subsequently appealed to the Supreme Court of the Unit-

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73 *Id.* at 712. The Sisseton-Wahpeton Sioux tribe, which appeared *amicus curiae* in support of the Department of the Interior, is one such example. Id.

74 *Id.* at 710.

75 Hodel, 481 U.S. at 710.

76 *Id.*

77 Irving v. Clark, 758 F.2d 1260 (8th Cir. 1985); Hodel, 481 U.S. at 710.

78 Irving, 758 F.2d at 1264; Hodel, 481 U.S. at 710.

79 Irving, 758 F.2d at 1264-65; Hodel, 481 U.S. at 710.

ed States.[80]

In its opinion, after summarizing the history of the Indian Land Consolidation Act and the procedural posture of the case, the Supreme Court concluded that the owners' descendants had standing to bring their lawsuit and then proceeded to analyze the descendants' claims under Fifth Amendment "takings clause" jurisprudence.[81] Quoting from the opinion authored by Chief Justice Rehnquist in *Kaiser Aetna v. United States*, the Court explained that "it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance."[82] Using this test, the Court found that the economic impact of the regulation and its interference with the reasonable investment backed expectations of the property owners were likely insufficient to support a finding that Section 207 of the Act was unconstitutional.[83] The Court noted, however, that "the character of the Government regulation [under Section 207 was] extraordinary."[84] It articulated its legal reasoning in the traditional language of property rights:

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80 Hodel, 481 U.S. at 710.

81 Hodel, 481 U.S. at 711-14.

82 *Id.* at 714 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

83 *Id.* at 714-16.

84 *Id.* at 716.

> In *Kaiser Aetna v. United States*, we emphasized that the regulation destroyed 'one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.' Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest-to one's heirs.[85]

That property owners had the ability to dispose of their property using inter vivos transfers during life did not persuade the Court of the Act's constitutionality.[86] In holding that the Act, which completely abolished both descent and devise, was an unconstitutional taking, the Court reaffirmed the broad power of the state and federal governments "to adjust the rules governing the descent and devise of property without implicating the guarantees of the [Fifth Amendment]."[87] Drawing a distinction between prior Court decisions and its holding in *Irving*, the Court emphasized that under the facts of *Irving*, both descent and devise were completely abolished by the Act.[88]

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85 *Id.*
86 *Id.* at 716-17.
87 *Id.* at 717.
88 *Id.* at 718.

IV. Implications of Hodel on Pennsylvania's Inheritance Tax

The implicit reasoning employed by the Court in *Hodel v. Irving* has the potential to undermine nearly a century and a half of jurisprudence defining the nature of the right of inheritance.[89] By recognizing the right of transmission as a natural right, an uncompensated taking of which would constitute a violation of the Constitution, the foundation is laid for questioning the plenary power of the separate states to abolish the right of succession, whether by direct escheat or through confiscatory taxation.[90] However, an attempt to challenge the states' broad power over inheritance on Fifth Amendment grounds is contingent upon the Court's decision in *Irving* being interpreted as denying the government the right to abolish the right of transmission.

A. The "Strange Case" of Hodel v. Irving?[91]

At least one scholar of American inheritance law has concluded that *Irving* can and should be interpreted to limit its "radi-

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89 See e.g., Suzanne S. Schmid, *Escheat of Indian Land as a Fifth Amendment Taking in Hodel v. Irving: A New Approach to Inheritance?* 43 U. Miami L. Rev. 739, 758-63 (1989).

90 This precedent is contrary to the principle that inheritance is not a constitutionally-protected right previously identified by Daniel J. Kornstein, *supra* note 2 at 749. *See also* J.D. Truth & Shahid A. Butler, *Resurrecting "Death Taxes": Inheritance, Redistribution, and the Science of Happiness*," 16 J. L. & Pol. 765, 780-83 (2000) (arguing that the Supreme Court's decision in *Irving* should be narrowly interpreted and limited to its specific factual situation).

91 Ronald Chester, *Is the Right to Devise Property Constitutionally Protected? – The Strange Case of Hodel v. Irving* 24 Sw. U. L. Rev. 1195 (1995) (using the phrase "strange case" to describe *Irving* in light of the author's analysis).

cal potential" and its "importance in the field of inheritance law."[92] In presenting this argument, Ronald Chester has identified three reasons as to why the decision in *Irving* lacks precedential value or should be narrowly interpreted.[93] Chester first asserts that the decision really only ends up protecting the right to transmit at death by will, which lacks the historical pedigree of the right to transmit by intestacy.[94] Focusing on a single sentence of the opinion, Chester thus concludes that the Court intended only to protect the right to devise by will.[95] He then suggests that the decision may lack weight because the right to devise is "much less established than that of intestate succession."[96]

This reading of *Irving* is problematic for several reasons. It focuses on a single sentence in the Court's opinion and attempts to interpret the rest of the decision exclusively through the lens of that brief line. In the process, Chester ignores that sentence's context. That the Court concluded that it may be constitutionally permissible to abolish the right of descent must be considered in light of the fact that abolishing the right of descent would also have solved the land fractionalization problem facing the tribes and the Department of the Interior. The right of transmission is realized through either the right of descent or the right of devise, and abolishing only one would, therefore, not constitute an abolition of the right of transmission. The *Irving* decision could just as

92 *Id.* at 1207 (1995).
93 *Id.* at 1207-11.
94 *Id.*
95 *Id.*
96 *Id.* (quoting JESSE DUKEMINIER AND STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 13-14 (4th ed. 1990)).

easily be interpreted to mean that the government could abolish the right of devise so long as it left the right to descent intact. Such a reading accords with the "both" language employed by the Court: "What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests..."[97] Furthermore, Chester's conclusion that the Court's decision protects only the right to devise does not necessitate a narrow reading of *Irving*. On one hand, the assertion that the right of devise is less well-established is questionable on historic grounds. Even if the right to devise had only scant historical support, however, the Court's unambiguous decision to protect it with a binding, precedential opinion neither could nor should be easily tossed aside and disregarded.

Second, Chester claims that *Irving* "is not technically saying that the complete abrogation of the rights of descent and devise is in itself unconstitutional."[98] Instead, he argues, "What the Court is saying is that 'complete abolition of both descent and devise of a particular class of property may be a taking' in circumstances such as those in *Irving*, where the Court felt alternative means of passing property at death were not realistically available."[99] To bolster his interpretation of *Irving*, Chester emphasizes the widespread

97 Hodel v. Irving, 481 U.S. 704, 718 (1987). The Court used the same language earlier in the opinion as well when it stated that "[i]n holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." *Id.* at 717.

98 Chester, *supra* note 91 at 1209.

99 *Id.*

availability and use of will substitutes.[100] Once again, Chester's reading of *Irving* is too narrow. The Court's decision should be analyzed from a perspective that takes into account both the narrower factual context and the full text of the decision. For example, the passages on which Chester focuses could just as easily (or, perhaps, more easily) be seen as an application of the general rule—that the right of descent and the right of devise cannot both be abolished—in light of the specific facts of *Irving*.

The Court's mention of the impracticality of using will substitutes is additional, unnecessary commentary on the particular factual circumstances in *Irving* and is not an explication of the general rule established in the decision. That Chester bases his conclusion on only a small portion of the opinion is problematic because, in doing so, he fails to address other parts of the decision that suggest the practical availability of will substitutes is of no legal consequence when the rights of descent and devise are both abrogated. For example, in discussing the economic impact of Section 207, the Court conceded, "Of course, the whole of the appellees' decedents' property interests were not taken by § 207. Appellees' decedents retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*."[101] Nonetheless, immediately after recognizing this fact, the Court added, "There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right."[102]

Related to his second argument's focus on will substitutes,

100 *Id.* at 1208-09.

101 Hodel, 481 U.S. at 715.

102 *Id.*

Chester's third argument is that *Irving* should be interpreted as a reaffirmation of the government's broad, all-encompassing authority over the privileges of descent and devise.[103] Therefore, as Chester suggests, the government has the power to abolish both of these privileges when individuals are able to use will substitutes, which differ from descent and devise in that they are privately regulated legal arrangements.[104] This explanation, however, does not limit the "radical" potential of *Irving*. While his third argument certainly reasserts and explains the government's authority over the rights of descent and devise (and, accordingly, its power to regulate those rights), his explanation fails to provide a sufficient justification for establishing the state's plenary power to abolish the right of transmission in its entirety.

Rather, Chester's explanation of the *Irving* decision would effectively redefine the right of transmission to include not only the rights of devise and descent but also the right to convey by will substitute. Apparently, the state has the power to include property transferred by will substitutes upon the owner's death in the estate of the decedent for estate tax or inheritance tax purposes.[105] Consequently, a law that either escheats a decedent's entire taxable estate or levies a one hundred percent tax rate on taxable estates would, absent an exemption, fall equally on assets transferred using will substitutes and those passed by descent or devise. If, at the very least, as Chester argues, decedents retain the right to transfer property by employing will substitutes, then special pro-

103 Chester, *supra* note 91 at 1209-11.

104 *Id.*

105 26 U.S.C.A. § 2031(a); 72 P.S. § 9107(c).

vision must be made for such property interests. Chester himself recognizes as much when he concludes that:

> The result of [his analysis] is a reading of Hodel v. Irving that contradicts [the] positivist thrust only in the extremely rare case, such as Justice O'Connor felt existed in Irving, where the modern inter vivos "escape hatch" was not practical. If this is true, legislatures, or Congress, will continue to have the ability constitutionally to regulate transfers made at death in any way they like so long as inter vivos will substitutes are not foreclosed on the facts. Thus arguably, a 100% tax on transfers by will or descent would be constitutional but not one that also tried to impose the same 100% tax on inter vivos will substitutes.[106]

Thus, Chester's interpretation of *Irving* does not undermine the natural right of transmission but instead increases the number of ways by which the right is exercised. The state must allow decedents' property to be transferred either by devise, descent, or will substitute. It cannot constitutionally abrogate transfer by all three, thereby according with the view that property transmission upon death is a constitutionally-protected natural right.

Since the Court's decision in *Irving*, courts have interpreted the decision in a way that reaffirms a natural rights view of the right of transmission. In these cases, courts have broadly described the holding of *Irving* without reference to any factors or considerations that would support a more narrow interpretation like that

106 Chester, *supra* note 91 at 1211.

proffered by Chester.[107] These courts describe the *Irving* decision as holding that a state cannot abolish both the rights of descent and devise, and they do not recognize or identify a concern by the Court about the practical availability of will substitutes.[108]

Ten years after deciding *Irving*, the Court handed down an opinion in *Babbitt v. Youpee* that further strengthens *Irving*'s implicit conclusion that the right of transmission is a constitutionally-protected natural right.[109] In that case, the Court was asked to examine the constitutionality of the same section of the Indian Land Consolidation Act that it had in *Irving*.[110] Section 207 had been amended in several significant respects, but it retained its essential character as a provision that, when certain conditions were met, escheated fractional property interests in Indian lands to the tribe.[111] In examining the amended provisions, the Court began by summarizing its decision in *Irving* in broad terms: "Key to the decision in Irving…was the 'extraordinary' character of the

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107 Eastern Enterprises v. Apfel, 524 U.S. 498, 541, 543 (1998); Boggs v. Boggs, 520 U.S. 833, 873 (1997); Amato v. Wilentz, 952 F.2d 742 (3d Cir. 1991); Philip Morris, Inc. v. Reilly, 312 F.3d 24, 43-45 (1st Cir. 2002); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 177 (4th Cir. 1988); District Intown Properties, Ltd. Partnership v. District of Columbia, 198 F.3d 874, 887-88 (D.C. Cir. 1999); Seawall Associates v. City of New York, 74 N.Y. 2d 92, 110 (Court of Appeals of New York, 1989).

108 Eastern Enterprises v. Apfel, 524 U.S. 498, 541, 543 (1998); Boggs v. Boggs, 520 U.S. 833, 873 (1997); Amato v. Wilentz, 952 F.2d 742 (3d Cir. 1991); Philip Morris, Inc. v. Reilly, 312 F.3d 24, 43-45 (1st Cir. 2002); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 177 (4th Cir. 1988); District Intown Properties, Ltd. Partnership v. District of Columbia, 198 F.3d 874, 887-88 (D.C. Cir. 1999); Seawall Associates v. City of New York, 74 N.Y. 2d 92, 110 (Court of Appeals of New York, 1989).

109 Babbitt v. Youpee, 519 U.S. 234 (1997).

110 *Id.* at 236-37.

111 *Id.* at 240-41.

Government regulation. As this Court noted, § 207 amounted to the 'virtua[l] abrogation of the right to pass on a certain type of property.' Such a complete abrogation of the rights of descent and devise could not be upheld."[112] The Court then evaluated the federal government's argument that Section 207, as amended, cured the constitutional deficiency of the original version.[113] It found, however, that the statute was still unconstitutional despite the availability of inter vivos transfers and will substitutes and the decedents' ability to devise their property to a limited class of individuals.[114] Thus, the Court reinforced the natural rights concept of the right of transmission and implicitly rejected the view that *Irving* should be narrowly interpreted.

B. Applying Irving to the Pennsylvania Inheritance Tax

With the Supreme Court's decision in *Irving* holding that governments cannot abrogate both the rights of descent and devise, it would seem that Pennsylvania, like other states, would be precluded from levying an inheritance tax at a rate of one hundred percent.[115] Such a tax would presumably violate the Fifth Amendment in light of the holding of *Irving*. The Commonwealth, however, could argue that the nature of its inheritance tax renders "takings clause" jurisprudence, and therefore the *Irving* hold-

112 *Id.* at 240.

113 *Id.* at 243-45.

114 *Id.* at 244-45.

115 Rights secured by the Fifth Amendment are protected from infringement by the fifty states by incorporation through the Fourteenth Amendment. Kelo v. City of New London, 545 U.S. 469 (2005) (applying the protections of the Fifth Amendment to determine that action by a state was not unconstitutional).

ing, inapplicable. In particular, Pennsylvania might claim that its inheritance tax, unlike the escheat provision at issue in *Irving*, is a levy on the right of succession as opposed to the right of transmission.[116] Furthermore, the Commonwealth may assert that the right of succession is 1) not protected by the Court's decision in *Irving*, which exclusively dealt with the right of transmission and, thus, is subject to the absolute authority of Pennsylvania's legislative body, the General Assembly; and 2) not a vested property interest sufficient to invoke the protection of the "takings clause."

This overly formalistic analysis of Pennsylvania's inheritance tax and the implications of the *Irving* decision, however, is both unrealistic and unconvincing. The right of succession is indelibly linked to the right of transmission; what affects one necessarily affects the other. As a result of this reciprocal relationship, the rights of transmission and succession are two sides of the same coin. For example, a law restricting whom a testator may select as a legatee limits the right of transmission, yet also limits the class of persons who hold the corresponding right of succession in such a situation. Likewise, a tax on the right of transmission inherently also has an effect on the right of succession by decreasing the value of property received by virtue of the latter right. Accordingly, this logic applies equally to the inverse situation as well; a tax on the right of succession inherently also affects the right of transmission. The unitary and complementary nature of these two rights undermines creating any strict dichotomies or technical distinctions between them. In *Irving*, the Court recognized as

116 *See supra* Part II.

much, albeit in the course of deciding a different issue raised in the case. Key to the Court's conclusion that the plaintiffs had standing to challenge Section 207 was the close relationship between the plaintiffs' interests and the interests of their decedents.[117] The Court found:

> Under [the circumstances of Hodel, plaintiffs] can appropriately serve as their decedents' representatives for purposes of asserting the latters' Fifth Amendment claims. They are situated to pursue the claims vigorously, since their interest in receiving the property is indissolubly linked to the decedents' right to dispose of it by will or intestacy.[118]

An unrealistic distinction between the right of transmission and the right of succession is particularly unconvincing in the field of tax law, an area of law that has traditionally emphasized substance over form.[119] As illustrated previously, the economic reality of a tax on the right of succession is that such a tax is also levied equally on the right of transmission. Therefore, it both intuitively and logically makes sense to apply constitutional restrictions on the government's power to tax the right of transmission to the government's power to tax the corresponding right of succession.

Similar logic has been employed in other areas of constitu-

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117 Hodel v. Irving, 481 U.S. 704, 711-12 (1987).

118 *Id.*

119 Boulware v. U.S., 128 S.Ct. 1168, 1175-76 (2008); U.S. v. Williams, 514 U.S. 527, 535-36 (1995); Diedrich v. C.I.R., 457 U.S. 191, 194-95 (1982); Moorman Mfg. Co. v. Bair, 437 U.S. 267, 290 n. 6 (1978); Frank Lyon Co. v. U.S., 435 U.S. 561, 576-77 (1978); C.I.R. v. Hansen, 360 U.S. 446, 461-62 (1959); Weiss v. Stearn, 265 U.S. 242, 253 (1924).

tional jurisprudence, particularly in the protection of First Amendment free speech rights. The Supreme Court of the United States has found that the right to free speech necessarily also includes the reciprocal right to receive such speech.[120] To protect the right to free speech is practically meaningless unless the right to receive that speech is protected as well; the right to speak freely is of no substantive or practical effect if an audience is unavailable to hear one's speech. In precisely the same way, the right to transmit property by will or intestacy is of no substantive or practical value if a legatee is unavailable to inherit such property. For this reason, the Court's decision in *Irving* must protect the right of succession from the extensive powers claimed by the states. *Irving* expressly protects only the right to transmit by devise or descent. To allow a state to escheat inherited property or levy a confiscatory, one hundred percent tax on the right of succession would, however, have the same practical effect as abrogating the right of transmission. Therefore, to ensure that the right of transmission is not violated by an unconstitutional government taking, the right of succession must also be afforded Fifth Amendment protection. Consequently, Pennsylvania's power to levy a one hundred percent tax on the right of succession would be curtailed accordingly.

120 Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976). *See also Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-308 (1965) (Brennan, J., concurring).

V. Conclusion

With its decision in *Hodel v. Irving*, the Supreme Court has provided opponents of inheritance taxes with the authority to challenge the power of the states to escheat or levy a confiscatory tax on inheritances. Pennsylvania has long claimed absolute, unqualified power over inheritances, deeming the right of succession to be a privilege granted to state residents by the General Assembly.[121] Similarly, the Commonwealth has defined its inheritance tax as a tax on the right of succession, which further implies that the state has the power to levy a confiscatory inheritance tax at a rate of one hundred percent.[122] In 1987, however, the Supreme Court decided *Hodel v. Irving*, in which the Court held that a federal statute that abolished the right to transmit by descent or devise was a taking that violated the Fifth Amendment of the Constitution.[123] Although other commentators have attempted to narrowly interpret the Court's decision,[124] *Irving* is most fairly read as holding that the right of transmission is a natural right granted constitutional protection under the Fifth Amendment.[125]

In defending the right of transmission against governmental encroachment, the Court also provided constitutional protection to the right of succession, albeit indirectly. To disallow a complete abrogation of the right of transmission but to permit the abolition of the right of succession would not only be ineffectual, but

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121 *See supra* Part II.A.

122 *See supra* Part II.B.

123 *See supra* Part III.

124 *See* Chester, *supra* note 91 at 1209-11 (arguing that *Irving* should be narrowly interpreted as applied to future cases).

125 *See supra* Part IV.A.

counterproductive as well; instead of imposing a confiscatory tax on the right of transmission, Pennsylvania could simply impose a confiscatory tax on the right of succession.[126] The integrated, reciprocal nature of the rights of transmission and succession, however, should be legally recognized; one necessarily implies and is dependent upon the other.[127] Therefore, just as tax law has emphasized substance over form and First Amendment jurisprudence recognizes a reciprocal right to receive speech, the right of succession should be granted constitutional protection under the Fifth Amendment.[128] The rights of transmission and succession are two sides of the same coin, a coin that states like Pennsylvania would be able to seize completely and absolutely, despite constitutional limitations on the government's claim to one side of the coin, if the right of succession were not recognized as a protected property interest under the "takings clause" of the Fifth Amendment.

126 *See supra* Part IV.A.

127 *See supra* Part IV.B.

128 *See supra* Part IV.B.