Inheritance in America: A Civil, Not a Natural Right

From the time of the Revolution, American legal thinkers viewed both the rights 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. In this, they were heavily influenced by William Blackstone (Ascher, 1990) who argued in his *Commentaries on the Law of England* that inheritance was "no natural, but merely a civil right":

> For naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for ... ages after him; which would be highly absurd and inconvenient. (Blackstone, 1803, pp. 10-11).

Blackstone thought inheritance was simply a custom that society ultimately turned into law. Because children and other near relations were usually
around the decedent at death and generally became the next occupants of his or her property, society delineated from this a clear rule of succession to property to avoid the "endless disturbances" that might otherwise develop. (p. 10).

Since John Locke, an earlier Briton who greatly influenced American thought, had generally favored the natural rights view of inheritance (see Chester 1982a, esp. pp. 13–17), why did Americans so clearly prefer Blackstone's positivistic position (Ascher, 1990)?

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. Any society that respects lifetime property rights must find a suitable way of reallocating those rights at the property owner's death. Rather than viewing inheritance as one of the varied facets of property (such as the right to exclude), the American revolutionary generation saw inheritance law in a utilitarian way: as a tool useful to civil society in reallocating the rights of an individual no longer alive (see Ascher, 1990). Had it considered inheritance rights fundamental, this generation would have limited its freedom to alter the establishment of dynastic rule such as the one against which it had rebelled.

Among the revolutionary generation, Thomas Jefferson and his circle best exemplified American legal and political theory on the subject (Chester, 1982a). Their view was in turn grounded in the works of British utilitarians such as Jeremy Bentham and John Stuart Mill (Chester 1982a) and thus had a distinctively pragmatic bent. The Jeffersonians argued that any rights to transmit or to receive property at an owner's death were "civil" not "natural rights": rights created by our society for its own convenience.1 Jefferson himself addressed the subject in 1789 in a letter to James Madison: "Earth belongs in usufruct to the living; the dead have neither powers nor rights over it. The portion occupied by an individual ceases to be and reverts to society" (Ford, 1895, pp. 115–116).

Thomas Paine emphasized that letting the dead control property was a danger, to be strictly controlled by society. He wrote: "[No] generation [has] a property in the generations which are to follow.... It is the living and not the dead that are to be accommodated.... When man ceases to be, his power ceases with him" (Foner, 1945, p. 251). Likewise, Jefferson's personal physician, the influential Dr. Gem, concluded that "the dead and those who are unborn can have no [natural] rights of property" (Koch, 1964, p. 64).

American courts, beginning with the Virginia case of Eyre v. Jacob, 55 Va. 526 (1858), were quite consistent in applying the Jeffersonian, positivistic view of the right to transmit and receive property at death (Chester, 1982a). The Virginia court's declaration of the civil as opposed to natural origin of these rights became a mainstay in the power of the states to tax inheritance (Chester, 1982a). The opinion states: