Chapter 1

INTRODUCTION

The regulation of inheritance law on the basis of the essential personal or social conditions always appears to be a reflection of the various opinions of an age, which are shaped by national character, its cultural level, and economic considerations.

Heinrich Ahrens (1871, 249)

1.1. Inheritance and Modern Society

Everyone who dies leaves something behind. Everyone who owns property leaves it behind. But to whom does this property belong? All societies that recognize individual property rights need rules to reallocate property upon the owner's death. In modern societies, a codified inheritance law defines the rights of the testator to dispose of his or her property by will, the rights of the deceased's family members, and the rights of the state to appropriate all or part of the property. But societies regulate these issues in different ways. *How* to regulate them became a major topic of intense political, legal, economic, sociological, and philosophical debate in the nineteenth and twentieth centuries. For Alexis de Tocqueville the question of inheritance was so important to a society's development that when "the legislator has once regulated the law of inheritance, he may rest from his labor" (1980 [1835], 1:48). John Stuart Mill (1968 [1848], 202–3) saw inheritance law as the most critical area of law, equaled in significance only by contract law and the status of laborers.

The present book explores the development of inheritance law in Germany, France, and the United States since the late eighteenth century. By examining four central controversies over inheritance law during these three centuries, I try to explain how inheritance law developed and why differences exist to this day between the legal systems of these three countries. The four areas of conflict are (1) the degree of testamentary freedom; (2) the legal rights of the testator's relatives, especially his or her spouse and children; (3) entails; and (4) inheritance taxation. Why is the testator allowed only minimal testamentary freedom in France, while that freedom is almost

unlimited in the United States? Why did the principle of real partitioning come to prevail in France? Why do family interests play a much more important role in German inheritance law than in American inheritance law? Why, in all three countries, was inheritance taxation introduced or fundamentally reformed in the early twentieth century? Why were much higher estate taxes introduced in the United States than in Germany? Why were entails banned in Germany only in 1919, 140 years later than in the United States and 70 years later than in France?

Inheritance Law and Social Solidarity

These questions lie at the heart of the present study. At the same time, its analysis is embedded in a comprehensive theoretical framework that owes much to Émile Durkheim's sociology of law (1984, 1992).[1] Durkheim analyzed the development of legal institutions as an aspect of the macrosocial evolution of society. He regarded the development of the relationship between individuality and the normative structures of society as a major topic for the sociological analysis of the process of modernization.[2] According to Durkheim, the development of the law is an indicator for the relationship "of the individual to social solidarity" (1984 [1893], xxx).

As early as *The Division of Labor in Society*, but especially in the lectures *Professional Ethics and Civic Morals,* Durkheim applied his view of the law to property rights. According to Durkheim (1992 [1957], 146), the right of property expresses a direct moral bond between the thing owned and the owner. The moral position of the individual is reflected in the legal rights of the owner. The violation of property rights is punished because society recognizes it as a violation of the owner himself. According to Durkheim, the moral status of the individual in relation to the family, to intermediary institutions, and to the state is admitted into the rights and duties of the disposition of property because of the link between property rights and the person. These law-based normative structures of modern society become visible through an examination of the historical genesis of property law.

Durkheim touched on inheritance law in the fragmentary book of lectures *Professional Ethics and Civic Morals,* but his analysis concentrated on contract law. Yet it is the study of the development of inheritance law that allows us to trace most clearly the structures of the relationship of individuality and its social embeddedness. In conflicts over inheritance law, questions about the relationship between individual freedom in the disposition over property, the claims of the family and the state to this property, as well as the role of ascription and individual achievement take center stage and provide a concise indicator of the normative structures that carry out the social integration of the individual. The close link of inheritance law to this question of social integration can also be seen in the fact that inheritance as a social problem emerges only when property

rights are individualized and a purely family-based understanding of private property is transcended.

The development of modern inheritance law is linked to the dissolution of the economic unit of the household, in which there was no right of inheritance in the modern sense, because the unit itself was considered immortal (Weber 1978 [1922], 1:359). Upon death, a member ceased to be the bearer of an idealized "share" of the property, but that did not amount to a real transfer of property. According to Max Weber, it was only the processes of differentiation through individualized forms of acquisition, the separation of household and workplace, the growing significance of capital in relation to land as a factor of production, and the institution of dowry that led to increasingly calculated internal family relations and to the individualization of property rights. This, in turn, contributed to the dissolution of the household and created the social problem of assigning property *mortis causa*. Thus, the development of inheritance law is intimately linked with processes of social differentiation. However, as I want to show, this is *not* a process of individualization, understood as an increasing separation of the individual from society, but rather, in the Durkheimian sense, a *transformation* of social solidarity. *How* individual disposition over property *mortis causa* is embedded in conceptions of social solidarity in the three societies investigated is the subject of the present book.

Discourse on Inheritance Law and Legal Development

Although this book follows Durkheim in connecting the examination of the evolution of law with the understanding of modernization, my approach is different from Durkheim's: in *The Division of Labor in Society*, Durkheim suggested that we consider social reactions to violations of the law as an indicator of the development of individuality and social solidarity. For Durkheim, the declining importance of criminal law reflected the diminishing relevance of "solidarity through likeness" and the increasing crystallization of the individual as the moral subject of modern society. The decline of the repressive sanctions of criminal law, through which traditional societies assure their social cohesion, can be read as a sign of the waning significance of collective consciousness. This indicator of moral development, however, is unsuitable for inheritance law. From the outset, inheritance law concerns mostly questions of civil law—although criminal law plays an indirect role with regard to crimes like tax evasion, forgery, or fraud. Moreover, Durkheim's emphasis on the changing reactions to the violation of legal provisions leads him to focus on the actual development of the law. However, Durkheim's focus on the examination of the evolution of legal rules is limited because it obscures most information about the collective representations concerning the transmission of wealth that exist in society. Much of that information can only be found through an analysis of the political discourses surrounding the reform of inheritance law.

As a result, this study is focused largely on the legal and political *debates* on questions of inheritance law. To be sure, some aspects of the relationship between the testator's individual rights of disposal and obligations toward his or her family and society can be seen in the development of the law itself. Yet the goals of the actors and the arguments for or against certain provisions become clear only if one looks at the legal and political discourse conducted within the legislative process, and sometimes outside of it. The structure of these debates provides insights into the perception of causal relationships, the values held by the actors involved, and the structures of political power and the changes they undergo. The discourses reveal *different* positions along with the fundamentally contentious nature of the legal provisions ultimately adopted. I thus follow Durkheim's insight that the development of law can be used as an indicator of macrosocial processes of change. At the same time, the inclusion of legal and political discourses allows for an expanded study that makes the significance of discursive structures accessible for the purpose of studying the development of the law. Among other things, including this level of analysis may allow different collective representations in the three countries to become apparent, representations that might otherwise be hidden behind similar legal developments.

The acceptance of legal regulations, as Durkheim noted, depends on a moral core from which they derive their legitimacy. The emphasis on linguistic processes of communication points to something else in addition, namely the role that a value-oriented formation of political objectives plays in the social integration of modern societies. The political sphere is the "forum" in which—on the basis of the ideas of social justice and causal relationships implicit in a political culture—the legitimacy of rules of law is created or contested, a legitimacy that is usually the precondition for the political enforceability of these rules, and in every case the basis for their practical acceptance. Thus, the examination of legal and political conflicts over the institutionalization of inheritance law takes on a double meaning: the arguments advanced for or against legal reforms are an indicator of the development of ideas about "social solidarity"; at the same time, the moral constitution of society is created and reproduced precisely in these discursive processes.

It is therefore not a question of simply replacing one indicator with another, but of advancing Durkheim's approach on a theoretical level.[3] Durkheim believed that norms derive their validity from religious symbols that in turn, derive their significance from collective experiences during religious rituals. Jürgen Habermas, in particular, objected that Durkheim's explanation did not adequately recognize the "trend toward the linguistification of the sacred" (Habermas 1987, 2:46) and thus the important role that linguistically mediated, norm-guided interaction plays in the integration of modern societies. Social solidarity is created precisely out of linguistic processes of communication (*Verständigung*) in which actors are forced to

justify their claims about what constitutes appropriate actions within the normative context of roles and institutions (1987, 2:56). Habermas thus refers to the production of morally binding forces in discourse and rejects the idea of a simple imprinting of norms and values in the process of socialization.

While I share Habermas's assessment of the importance of the role of discourse to the normative development of society, the way in which I incorporate it into my analysis differs from Habermas. Unlike Habermas, I am not concerned with the development of a procedural ethics and with the orientation of processes of communication toward claims of universal validity and the concepts of secularization that go along with this. The role of discourses can also be understood in a very different way.

In his critique of Durkheim's sociology of religion, Hans Joas (2000, 67ff.) pointed out that Durkheim linked processes of institutionalization too directly to experiences of collective excitation. What Durkheim's theory of institutions obscures, Joas argued, is that "the individuals who participate in the collective experience having developed differing interpretations of this experience, . . . only then refine into a collective interpretation through a process of discussion and argument (a process that is pervaded with power)" (2000, 67–68). It is only out of the dynamic of this contingent process of dealing with collective experiences—that is, the interpretation of causes, reasons, results, and possibilities—that institutions emerge, change, and solidify.

Against this background, I regard discourses on inheritance law as processes that generate socially recognized viewpoints and thus lay the foundation for the process by which inheritance law becomes institutionalized. They are not analyzed as ways of generating universally recognized norms of behavior, or as symbolic reflections of the infusion of power into social relations. Instead, the goal of my approach is to examine the intersubjective and conflictual creation of ideas of justice as well as the conceptions of causal relationships and their significance for explaining the development of inheritance law.

Orders of Justification in Inheritance Law

By explaining the development of inheritance law and how it has differed in France, Germany, and the United States, on the one hand, and by examining the development of the relationship of the individual to society, on the other, I am pursuing two goals in this study. These goals are linked by the thesis that the development of inheritance law itself cannot be explained independent of the discursive structures in each of the three countries. The explanation of the development of inheritance law that I am striving for is based on a multidimensional heuristic that incorporates economic interests, demands by the state, and the role of social institutions (especially the family

and the legal system), as well as culturally based values that are expressed in the discourse on inheritance law. All of these dimensions are significant for each of the four areas of conflict examined here, although different elements of explanation are paramount in each area. What emerges, therefore, is a complex picture of the development of institutions of inheritance law, which depicts this development as dependent on economic, governmental, social, and cultural influences. This multidimensional explanation of the development of inheritance law stands close to Max Weber, whose theory of institutions was based precisely on the presumed link between ideas and interests.[4]

The three countries included in this comparative study, Germany, France, and the United States, can be seen as part of modern Western capitalism as defined by Max Weber. From the late eighteenth to the early twentieth centuries, all three countries were undergoing a process of profound social, political, and economic transformation. While this development took place against the background of different initial conditions, its thrust was essentially the same in all three countries, as a result of which they confronted fairly similar functional problems. The selection of Germany, France, and the United States is based on this relative similarity, which suggests that inheritance law might have developed in parallel ways.

At the same time, however, the three countries differ in many of the values expressed in the debates over how the law should deal with "inherited wealth." The discourses on inheritance law reflect different ways in which the moral and political problems posed by inheritance were articulated, as well as differences in the consequences the actors ascribed to specific rules of inheritance law. I will show that different "guiding problems" (Kaufmann 2001) exist in each of the three countries for the regulation of inheritance law. These problems form a "discursive field," which is expressed in the justifications offered by actors for their acceptance or rejection of proposed institutional reforms. The term *discursive field* is meant to express that while there is no homogeneous point of view of inheritance law in each of the three countries, the contending parties defend their clashing views with certain dominant patterns of argumentation that are stable over the long term. Discursive fields establish boundaries of discussion and define a spectrum of problems that can be addressed (Wuthnow 1989, 13). Discursive fields thus give expression to socially available systems of meaning, which can provide a basis of legitimizing support for, or opposition to, efforts to change inheritance law. Here one can also speak of "orders of justification" (Boltanski and Thévenot 1991).[5] Discursive fields have a binary structure. The stark juxtaposition of binary alternatives is a mechanism for simplifying complex contexts, and this simplification makes it possible to articulate guidelines for decision making.[6] This book will examine how these orders of justification differ between Germany, France, and the United States, and how—along with economic and political aspects—they influence the development of inheritance law.

Starting from this multidimensional explanatory approach, my thesis is not that the orders of justification expressed in the discursive fields can explain the development of inheritance law, but rather that orders of justification influence legal development *along with* other aspects. The specific lines of conflict in legal discourse are a cultural element of the public sphere that represent *one* factor of explanation for the evolution of law, alongside material interests and functional demands. What makes the discourses relevant to actors is that worldviews are articulated and shaped in them; as cultural background, these views then feed into the interpretations of a given situation. Moreover, they shape the perceptions of causal relationships, thereby contributing to the legitimation or delegitimation of particular positions and thus influencing their political chances of being implemented (Beckert 2002, 106). One reason such a context can be posited is that the successful political implementation of legal reforms is always dependent on legitimation, at least when dictatorial coercion is not available. Legal reforms that can be legitimated with reference to deep-seated cultural understandings thus have an "evolutionary advantage," an advantage that should manifest itself in a link between the structure of the discursive field and the development of the law.

The influence of evaluative schemata that are culturally anchored arises also from the constitutive, a priori understanding of the actors (Beckert 2003; Biernacki 1995; Dobbin 1994). The predominant evaluative standards are related not only to the goals that are considered legitimate, but also to the strategies that guide the rational, intentional choice of means to achieve the desired ends. The deeper underlying reason is this: because complexity and novelty render causal relationships uncertain, a rational choice of strategy as defined by economic theory is ruled out and actors must resort to the "substitute rationalities" they find in their social environment (Beckert 1996, 2002). This critical perspective on economic institutionalism emphasizes the importance that the causal relationships *as asserted* by the actors have for the development of institutions. What I contend is that the choice of the causal relationships regarded as valid from among all the *possible* relationships between the specific rules of inheritance law and their desired or rejected effects is also derived from the orders of justification. The intent here is not to deny the existence of objective causal relations, but to shift attention to the *perceptions* of these relationships, which themselves exert an effect on the political process. In this sense, as I try to show in this book, "ideas" play a role in the development of inheritance law.

Notions of Property and the Structure of Discourses on Inheritance Law

The lines of conflict over inheritance law in the three countries are structured around the question of what kind of intervention in the private disposal over property is legitimate. The unlimited power of disposal by

testators over their wealth encounters opposition in all three countries. Yet actors who plead for intervention in this right resort to *specific* arguments that differ *between* the three countries, but exhibit a great long-term continuity *within* the countries. The phrase "notions of property" refers to the primary, *specific* justifications for restrictions on the unchecked individual disposal over private property that appear in the discourses on inheritance law in a given country. By the late eighteenth and early nineteenth centuries—in some cases even earlier—these understandings had shaped and structured the discourses in the subsequent key phases of the development of inheritance law examined in the present study. Some of the argumentative patterns that were relevant during the French and American revolutions as well as in the political debates on inheritance law conducted at about the same time in Germany are still found today. What these arguments consist of and how they differ will be described in the main chapters of the book. Let me offer a brief characterization of the respective notions of property.

In the United States, two fears were dominant: first, that a dynastic concentration of wealth would destroy the social bases of the republican order, and, second, that inheritances would undermine the equality of opportunity, a "sacred" principle behind the justification of social inequality. These fears were countered by arguments that defended the right to unimpeded testamentary disposal over wealth as an integral part of private property, and by economic arguments that rejected intervention in inheritance law as economically detrimental.

Germany saw the emergence of very different structures of justification. In the nineteenth century, unlimited testamentary freedom was frequently seen as a possible cause behind an unbridled individualism (which was rejected on normative grounds) and thus as destructive to social relations within the family and society. There has been a strong tendency to regard property as family property, which makes the legal owner appear as the trustee for the estate of the clan; the owner's death does not lead to a real transmission of property. Moreover, in Germany, government interference in the individual disposal over private property was legitimated with the goal of social justice. This can be traced back to the debates over private property in the first part of the nineteenth century, and it still found its way into the Basic Law of the Federal Republic as the principle of the social obligation of property. One side of the discursive field argued that the testamentary freedom of the testator must be limited to protect the family and—through inheritance taxation—to generate the funds for a social policy aimed at redistributive balance. The point of reference is not equality of opportunity, but rather the result-oriented principle of social justice. In other words: while the American order of justification takes the individual and his or her freedom more strongly as a normative point of reference, in Germany the individual is tied more clearly into a familial and social context. At the same time, the discursive field in Germany also contains liberal economic voices that advocate unrestricted property rights and

point to the negative economic consequences of interference in the right of inheritance. Against the background of a stronger individualistic perception of social integration, they infer a right of inheritance unrestricted by state and family.

In France, one side of the debate has maintained that the state has an obligation to the general welfare while maintaining strict neutrality with regard to private interests. This is expressed primarily in a dominant reference to the principle of equality in intestacy law, but also in resistance to the progressive taxation of inheritances, and in the attempt to use inheritance laws for the goals of population policy. Ever since the debates on inheritance law in the Constituent Assembly, this has been opposed by a position that objects to the implementation of the principle of equality by the state and instead emphasizes the individual rights of inheritance of the testator, which are considered to strengthen the family and avoid the economically deleterious consequences of institutionalizing the principle of equality—especially the fragmentation of landed property. In contrast to the German debates, a significant current of the French discourse has argued that the family is endangered precisely by governmental restriction on the rights of the testator. In contrast to the United States and Germany, in France equality and social justice do not play much of a role with respect to individual opportunities or goals of social policy; rather, their main reference is to the problematic relationship between the state and civil society.

For the sake of brevity and greater emphasis, I speak of the individualist-meritocratic understanding of property in the United States, the family-social understanding of property in Germany, and the egalitarian/family-based understanding of property in France. My intent is not to claim that there is a homogeneous perception of property in the respective societies, but to characterize the dominant tensions within which inheritance law reforms take place. The discursive field is structured cognitively and normatively by the respective perceptions of property. In the discourses on inheritance law, the justifications for interventions in the individual disposal over property can be read as cognitive and evaluative differences between actors in the three countries.

At the same time, the ambiguity of the orders of justification when it comes to institutional implementation and the selective reference by actors to specific positions within the discursive field produce a potential for conflict, since opposing views can find *simultaneous* legitimizing support. The discursive field provides no script for determining concrete rules of inheritance law; it merely represents a frame of reference in which actors position themselves by using specific justifications for positions in the debates. Nor can the orders of justification simply be attributed to a right-left schema. Instead, the examination of the legal discourse on inheritance law and parliamentary debates reveals that actors with different material interests justify their political goals sometimes by invoking the same available social patterns of interpretation. In Germany, reference to the principle of

family is used both to justify limiting testamentary freedom and introducing escheat as an instrument of social policy, and to reject inheritance taxation as an illegitimate intervention in family wealth. In France, reference to the principle of equality is used both to legitimate restrictions on testamentary freedom aimed at more equal property relations and to reject a progressive inheritance tax. In Germany, testamentary freedom is seen largely as advancing an individualism that is hostile to the family, while in France it is considered by many as providing protection for the family.

Outline of the Book

The core of the book is subdivided into four chapters, each devoted to a central area of conflict in inheritance law. The four areas represent the crucial legal and political debates on inheritance law since the late eighteenth century. Because the significance of the areas of conflict varies in the three countries, the subchapters differ in length. Aspects concerned primarily with technical legal questions are not examined. This includes issues having to do with the specific form of wills or with international cases of inheritance. All chapters, except for chapter 3, focus on examining the debates on these four areas of inheritance law. The analysis centers on legal-theoretical as well as economic and sociological writings on inheritance law during the last two centuries. This provides insight into the structure of the discursive field and how it has changed in each of the three countries. The hermeneutic interpretation of this empirical material is supplemented by the quantitative analysis of parliamentary debates. It is this analysis that offers the best prospect of identifying the dominant lines of conflict in dealing with "unearned wealth." The parliamentary debates are evaluated—as far as possible[7]—in a quantitative content analysis, which helps support the hermeneutic interpretation. More detailed references to the methodology can be found in the appendix.

The actual development of the law is considered along with the discourses on inheritance law. The analysis will identify to what extent the observed changes and the persistent legal differences between the three countries can be explained by changing economic and political conditions, new social contexts, and the different orders of justification.

Chapter 2 examines controversies about testamentary freedom. Testamentary freedom is the fundamental legal institution dealing with the testator's right to individual disposal over property. The question of testamentary freedom and its limitation in the form of an obligatory share for members of the testator's family was an especially controversial area of inheritance law in France and Germany. To what extent do interventions in testamentary rights represent illegitimate limitations on the private disposal of property? What sort of rights do family members have to the testator's property? The starting conditions in the late eighteenth century varied considerably in the three countries. In the United States, which largely took

over English inheritance law, testamentary freedom was almost unlimited; by contrast, in France shortly after the Revolution, testamentary freedom was briefly abolished completely along with the compulsory equal division of an estate among the legitimate children of the deceased. During the nineteenth century, testamentary freedom in the United States was somewhat curtailed, primarily through an expansion of the rights of the surviving spouse; in France it was not until the twentieth century that some of the restrictions enshrined in the Code Civil after 1804 were loosened. In Germany, testamentary freedom was debated in the deliberations surrounding the creation of the Civil Code (Bürgerliches Gesetzbuch, BGB) in the last quarter of the nineteenth century, and it ran into a widespread mistrust of the last will in legal philosophy and politics, for many saw it as an institution hostile to the family. Chapter 3 examines conflicts about the rights of inheritance of family members. Intestacy law, which regulates the distribution of property in the absence of a valid will, can be understood as a system of kinship classification whose development reflects changing claims of solidarity within the family system. Who is considered a family member to begin with, and in what position does he or she stand to other relatives within the kinship arrangement? The chapter examines the development of inheritance rights of sons and daughters, first and later-born children, the surviving spouse, and illegitimate children. The rights of inheritance of adopted children and same-sex life partners are also touched on. The development of the legal right of inheritance will be used to show how notions of claims of solidarity within family systems have changed, and which general lines of development can be seen in them.

Paradoxically, individual testamentary disposal over property is linked with restrictions on individual decision-making. In entails, the subject of chapter 4, the testator not only determines the heir, but also decides to whom the (landed) wealth must be bequeathed after the death of the heir. Thus, the testamentary freedom of the heir is in fact abolished. These provisions were intended to prevent the sale or overindebtedness of noble estates and to guarantee the dynastic transmission of wealth by controlling the options of the heir. Entails are connected most closely with aristocracies, which they support by creating a structural dependence between king and nobility. In the eighteenth century, contemporary observers, including Adam Smith, were already pointing to the dysfunctional consequences of entails for capitalism. While the institution did contribute to the stability of the nobility's economic and political power over the long term, it simultaneously impeded economic development. One of the central debates on inheritance law in France and Germany revolved around the abolition of entails and related legal institutions for perpetuating wealth. In France, these conflicts were finally settled at the beginning of the Second Republic; in Germany, only with the November Revolution in 1918. In the United States, entails were forbidden after the Revolution, but multigenerational strategies of bequest could also be pursued by establishing a trust.

Chapter 5 looks at the role of the state as heir. The state is involved in inheritance through taxation, and possibly also through escheat, the right of the state to inherit. This right stipulates that in intestate inheritances, the state enters as an heir if the nearest relatives lack a certain degree of kinship to the testator.[8] Far more significant, however, is the actual taxation of inheritances with which the state appropriates a part of the inherited wealth. In the nineteenth century, moderate forms of inheritance tax existed in all three countries. In the late nineteenth century, in the context of the expansion of state expenses and rising military expenditures, the inheritance or estate tax became a contested political issue in Germany, France, and the United States.

The debates about the inheritance tax revolved, on the one hand, around the growing financial needs of the state, and, on the other, around the question of fiscal justice and the distribution of wealth. Thus, the relationship between individual disposal over private property and the claims of society (the state) to a part of the wealth is also at the heart of this debate. In France, moreover, inheritance taxation was linked with the goal of boosting the birthrate. In the early twentieth century, preferential treatment for families with many children when it came to inheritance taxation was supposed to boost the number of births. What is controversial about the inheritance tax is not only the question of how high it should be and who should be taxed, but also which goals may legitimately be pursued with it. Should inheritance taxes serve as an instrument to redistribute wealth in society, to create greater tax equity, or only to cover state expenses in situations of national emergency?

The political and scholarly controversies regarding inheritance law extend over the entire period in question. Nonetheless, some periods of heightened activity can be readily identified. The debates were most intense and virulent in France and the United States during the revolutionary period and in all three countries between about 1880 and 1930. Debates on testamentary freedom and entail were concentrated in the first half of the nineteenth century, but their ramifications extended far into the twentieth century. Debates about the equality of women and the improvement of the status of adopted and illegitimate children in inheritance law began in the middle of the nineteenth and continued until the end of the twentieth century. Discussions of inheritance taxation were concentrated between 1880 and 1935, but keep flaring up later in the individual countries at various times. Since the 1970s, the estate tax has become once again an important subject of political controversy, especially in the United States. Therefore, the arrangement of chapters also follows a chronological order.

1.2. Social Dimensions of Inheritance Law

The transmission of property derives its social relevance from the influence that inheritances exert on social structures and social relationships. We can

TABLE 1.1
Social Dimensions of Inheritance Law

The economy	The state and the political order
System of values	Social and family structure

distinguish four levels: the normative level, on which the acquisition of property is justified in societies guided by the principle of meritocracy; the economic level, which deals with the economic consequences of inheritance law; the level of social and family structures; and the level dealing with the relationship between individual property and the state.

Inheritance and the Principle of Meritocracy

On the first level, the inheritance of property touches upon central values of bourgeois society: the conception of individual freedom, the meaning of obligations of solidarity, the principle of equality, and the role of the principle of meritocracy. The emancipation of the individual from traditional communal relationships as a result of the economic and cultural developments of modernization led to an understanding of property that had a much more pronounced individualistic imprint (Weber 1978 [1922], 1:375ff.). That, in turn, gave rise to two contradictory consequences for the institutionalization of inheritance law. First, it seems only consistent that the owner can freely determine into whose hands property should pass after his or her death. By means of the testament, the "last will," the testator specifies who will become the owner of the property and what conditions attach to this transfer. The disposition *mortis causa* is an individual's last act of will. However, it creates the problem of how this individual right to testamentary freedom can be reconciled with the interest that the family and society have in the transfer of property. The testator might be interested—by means of his final disposition—in exercising the greatest possible control over the affairs of subsequent generations, and thus curtailing their possibilities of deciding how the property should be used. The living, meanwhile, are interested in restricting the arbitrariness of the last will, thus making possible, simultaneously, the individual freedom of disposition on the part of the heirs. As Thomas Jefferson's famous dictum put it: "The earth belongs in usufruct to the living."

However, the institution of inheritance finds itself in a problematic relationship also with the emerging, individual conception of property, because it contradicts the meritocratic self-conception of modern societies (Beckert 1999a). Inherited property has come to the heir "effortlessly" through the death of another person; it was not earned by personal effort. The institution of inheritance thus runs counter to the justification of unequal distribution of wealth based on individual merit and achievement. In one central respect, inheritance perpetuates social privileges independent

of achievement, even though bourgeois society defined itself precisely in opposition to this practice. How can the "unearned" acquisition of wealth be justified within the context of a social order that legitimizes social inequalities as the product of different contributions its members make through personal achievement? Once legal privileges derived from birth and the heritability of offices were abolished, the inheritance of property was and is the central institution of social privilege in modern societies that is based not on effort, but on birth.[9] Critics reject the inheritance of wealth as an alien normative practice in societies that are oriented towards the principles of individualism and achievement. This break with the individualistic justification of the distribution of wealth also violates the principle of equality of opportunity, which asserts that the starting conditions should be as equal as possible for all, so that differences in wealth can reflect the actual accomplishments of individuals.

Inheritance and Inequality of Wealth

Every time one generation succeeds another, the private wealth that exists within a society is allocated to new owners through inheritance or gifts. Given the large amount of private wealth, enormous sums are bequeathed every year. In Germany, the wealth that is currently passed on every year is estimated at between €150 and €200 billion; in the United States the figure is between $600 and $900 billion (Havens and Schervish 1999; Sieweck 2000; Szydlik 1999, 81). However, it is not the size of the wealth transfer by inheritance as such that turns it into a socially important institution. Rather, the issue is how inheritances affect a society's social inequality, the efficient operation of the economy, and the motivation that drives the behavior of economic subjects.

Figure 1.1 shows the current distribution of wealth in the three countries that are the subject of this study. This data should be taken with a grain of salt, because it is the product of different methods of collection and because the numbers on which it is based are not entirely reliable. Still, one can detect a general picture, which shows that a small elite owns large shares of the available private wealth, while large segments of the population have virtually no private wealth at all. In all three countries, the distribution of wealth is far more unequal than the distribution of income.[10] In 2000, for example, the Gini coefficient for the distribution of wealth in the United States was 0.80, compared with 0.36 for income distribution. In Germany, the Gini coefficient for the distribution of wealth was 0.67, compared with 0.27 for income distribution. For France the respective figures were 0.73 for the distribution of wealth and 0.28 for income distribution (Davies et al. 2006, 50; OECD Factbook 2006).[11]

How important are inheritances to the unequal distribution of wealth? It is clear that wealth is acquired not only through individual effort, but also through inheritance. However, the question of what share of private wealth

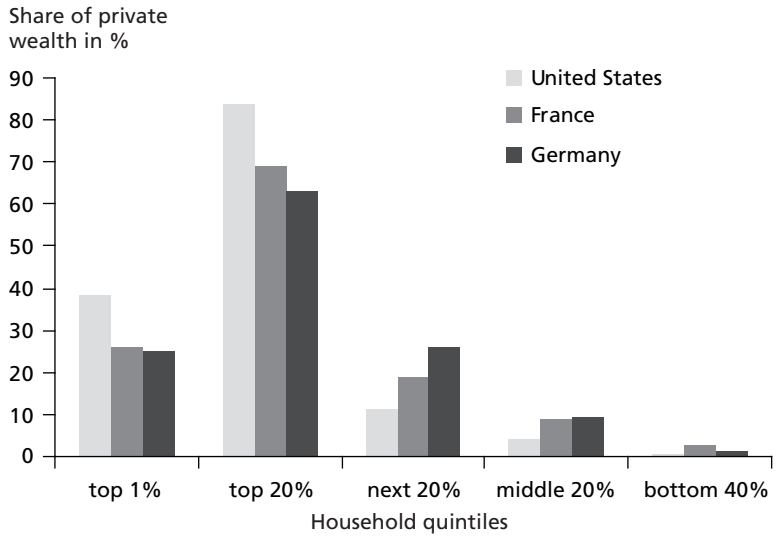

Figure 1.1 The distribution of private property
Note: The data for the United States refers to 1995, for France to 1986, for Germany to 1998.
Sources: Keister 2000; Wolff 2002; Hauser and Stein 2001.

is derived from inheritances is hotly debated by scholars. In the case of the United States, Kotlikoff (1988), using model calculations, concluded that 80% of wealth was based on inheritance, while Modigliani (1988) posited a share of only 20%. This broad divergence is explained by different definitions of what an inheritance is, and what present-day effects on wealth come from an inheritance in the past. Kotlikoff includes all wealth transfers to children after they reach the age of eighteen, along with the accumulated interest after the wealth transfer. Modigliani, by contrast, counts only actual bequests and large gifts and uses only the real value of the wealth transfer in his calculations. Kessler and Masson (1988) use a different approach, asking by what percentage private wealth would be reduced if inheritances were confiscated. In a simulation model, their calculations for the United States and France show that inheritances account for between 35 and 40% of private wealth.

In spite of this broad range of economic calculations, it is clear that inheritances account for a substantial share of private wealth. What makes this finding sociologically relevant, however, is the effect that inheritances have on the distribution of wealth. Here it is evident that inheritances contribute substantially to the inequality of wealth within a society. In France and the United States, about 60% of the deceased leave behind an inheritance (Arrondel, Masson, and Pestieau 1997, 101); in Germany about 55% of the population inherits something (Szydlik 1999, 93). But a

mere 16% of deaths involving an estate in Germany account for half of the inherited wealth (Sieweck 2000, 174). According to a French study based on data from 1987 (Arrondel and Laferrère 1994), 51% of the wealth that was passed on went to 10% of the heirs, and the top 1% of heirs accounted for no less than 19% of inherited wealth. In the United States, approximately 2% of estates are valued at over one million dollars (Havens and Schervish 2003). More than half of the testators who at their death were among the richest 1% had themselves received a substantial inheritance at an earlier time.[12] This means at the same time, however, that the vast majority of the population inherits no wealth at all or only an insignificant amount. As Arrondel, Masson, and Pestieau have said: "Inheritance is probably the main factor of wealth concentration among the richest part of the population, and of its intergenerational reproduction" (Arrondel, Masson, and Pestieau 1997, 104). Inheritance law is thus of great economic importance to the top 20% of the population; for the lower half of the population, its relevance is at most indirect, to the extent that it affects the distribution of wealth and thus social stratification.

The Economic Dimension

Like all codifications dealing with property, the rules of inheritance law have a bearing on economic efficiency. Too great a concentration of wealth can be just as dysfunctional economically as the dissolution of wealth after each generation or the removal of landed property from the market through restrictions placed on its sale by inheritance law. Extreme concentrations of wealth prevent competition and economic innovation. Real partitioning of land, or legal provisions for the equal division of an inheritance, such as existed traditionally in various parts of Europe and were introduced in France after the Revolution, limit intergenerationally effective strategies for the accumulation of wealth. The institutions of real partitioning, of the right of succession to an undivided farm estate, of entails, and of primogeniture have shaped agricultural structures in very different ways and exerted a lasting influence on the development of wealth in various regions (Alston and Schapiro 1984; Klippel 1987, 275). In the early phase of industrialization, at a time, that is, when joint-stock companies played a minor role, the long-term cohesion of capital-intensive manufacturing or trading companies also depended on the rules of inheritance law. But the preservation of wealth through inheritance can have negative consequences when unsuitable heirs acquire the capital and run a company into the ground. Inheritances undercut the allocation function of the market, because capital is being removed from competition (see Hoover 1927). An inefficient allocation also takes place through feudal inheritance institutions like family entails, which prevent landed property from being allocated through the market. If land can be neither sold nor borrowed against, it cannot be offered as collateral for loans and thus cannot be used to create investment capital.

This economic importance of inheritance law became the subject of controversy and debate in the nineteenth century, especially through the incorporation of landed property into the market process with the abolition of feudal institutions of inheritance law and the real partitioning of agricultural holdings. The relevance of agricultural landed property declines with the growth of industrial labor markets, which open up alternative sources of income. The inheritance of a farm plays a reduced economic role on both an individual and a macroeconomic level. Still, inherited landed property, especially in the case of France, can initially remain an important protection against impoverishment in the face of frequently interrupted industrial employment. The spread of joint-stock corporations whose shares are widely held, a setup that separates the functions of management and ownership, makes the running of a company largely independent of the ownership structure. It is not important who owns the joint-stock corporation, nor does it matter much that company property is divided among a multitude of anonymous owners. The continuous decline of employment in the agricultural sector, combined with the spread of wage labor, and the increasing shift of national wealth from landed property to more liquid industrial capital cause the economic importance of the rules pertaining to the partitioning of an inheritance to recede into the background. The economic interest of inheritances is increasingly focused on economic groups like the owners of family businesses and the remaining farmers, as well as the private interests of those individuals who, as heirs, benefit from the transfer of wealth *mortis causa*. The transfer of the business to the next generation poses a major problem especially for closely held enterprises (Bös and Kayser 1996; Breuer 2000).

Additionally, there is a link between inheritance and economic efficiency on the level of the motives that spur individuals to action: the possibility of the private bequest of wealth helps to diffuse and maintain the capitalistic spirit of acquisitiveness, in that inheritance can provide an important incentive to hard work and thrift.[13] However, inheritances can also have exactly the opposite effect, in that the inherited property destroys the acquisitive drive among the heirs who move into a comfortable, ready-made position in life.[14] These negative motivational effects of inheritances were invoked especially by liberal commentators, John Stuart Mill and Andrew Carnegie being the best-known examples. One American multimillionaire was quoted in the magazine *Fortune* (29 September 1986) as saying: "How the hell do we keep our money from destroying our kids?"[15] According to a U.S. study (Holtz-Eakin, Joulfaian, and Rosen 1993), the likelihood that someone will abandon the labor market is four times as great for heirs with an inheritance of at least $150,000 as for heirs who receive less than $25,000.[16]

Inheritance and Family

It would be short-sighted to see only the economic consequences and the value-oriented aspects of inheritance laws. The social policy debates over

inheritance law were never limited to these dimensions; instead, they also addressed the rights of members of the testator's family to portions of the estate, and the conditions under which these rights could be lost. Inheritance law regulates fundamental aspects of familial solidarity, which makes it relevant to the long-term stability of social structures (Clignet 1992, 1995; Kohli 1994). Bequests constitute a material foundation for family continuity and thereby contribute to the intergenerational stability of social structures (Sussman, Cates, and Smith 1970).

Transfers of wealth independent of individual achievement allow for the intergenerational continuity of social positions, they stabilize spheres of affiliation and thus the social structure of society, and they counteract the vagaries of success in the marketplace. Precisely because wealth disconnects social position from achievement, at least in part, it represents a protective mechanism of social belonging (Clignet 1992; Lüscher 2002; Simmel 1992 [1908], 579ff.). In nineteenth-century Germany this connection is evident in the struggle of the nobility against the abolition of entails, which were a legal institution that restricted the mechanisms of the market. In the United States, Nelson Aldrich (1996) has also emphasized the negative link between wealth and market in families of the upper class: *old money* describes a dynastic elite of a few families that are able, by means of inherited wealth, to reproduce their social status independent of their success in the marketplace, and who for the most part protect their assets from profligate spending through trusts.[17] The elitist justification for this privileged position points to contributions to society that are made possible only by this kind of material independence. Yet even for the middle class, transfers of wealth provide at least a partial buffer against the vagaries of the marketplace, which allows a better education, a higher risk tolerance, and improved living conditions. On a social level, inheritances help to make possible generation-spanning continuities in the sociostructural position of families (Levy 1983, 551).

On an individual level, inheritances—as a form of provisioning—can stabilize the material situation of the testator's family. However, the expectation of an inheritance can also be used by the testator to enforce cross-generational support within the family. The expectation of inheritance—just like gifts made during a person's lifetime (transfers inter vivos)—can promote bonds of solidarity between the generations, though it can also cause conflicts. In this way, inheritance law intervenes in the foundations of family relationships. It should be noted, though, that as a result of rising life expectancy, inheritances from parents, the most important source for heirs, generally come to children only when they are in their forties and fifties.[18]

Rules of inheritance lose importance as ways to provide for one's family especially in the twentieth century, because the spread of labor markets and the creation of state-run social security systems increasingly take on these functions at the death of a family's provider (Schröder 1987).

The institutionalization of social security and the creation of life insurance in the nineteenth and twentieth centuries have made individuals less dependent on familial support systems, while labor markets tend to make individuals independent from familial wealth as the capital basis for their own employment. In the process, the macrosociological importance of inheritances shifts to their function as factors that stabilize sociostructural continuity or social inequality by allowing for the unequal distribution of wealth in society through bequests. From a microsociological perspective, the function of the institution for the individual heir lies in a material benefit that is acquired independent of individual achievement. However, as transfers inter vivos, wealth transfers can also provide important material impulses for stabilizing the socioeconomic position of children, and thus indirectly for strengthening the intergenerational solidarity of the family (Attias-Donfut 1995, 2000; Kohli 1997, 1999; Szydlik 2000). This functional aspect of the transfer of wealth has attracted the attention of sociologists only in the last few years, and it modifies the thesis that modernization weakens the bonds of solidarity in generational relationships outside the nuclear family.

Moreover, inheritances can play a symbolic, identity-creating role in the material representation of family descent and continuity (Carrier 1991; Langbein 2003). Succession to wealth acquired by one's ancestors, as well as the inheriting of individual objects or real estate classified as valuable in the family's memory, can be experienced by heirs as an obligation toward their family background and thus influence the life decisions they make.

Inheritance and the State

In addition, inheritance law also determines, primarily through the estate tax, the contribution that estates must make to funding the state's expenditures. The flip side to the creation of social safety nets and to the relative loss of importance suffered by familial safety systems lies in the state's heightened need for revenue. The taxation of estates and the introduction of escheat contribute to the state's fiscal income. The private right of inheritance is restricted through the compulsory transfer of part of a deceased person's wealth to the state. Beginning in the early nineteenth century, we see a debate about the possible use of inheritances to finance especially social and educational policies. The initial notion was that relatively low inheritance taxes would already be sufficient to finance these policies and thus make it possible to put an end to pauperism. Although the expansion of inheritance taxes at the beginning of the twentieth century took place, in the final analysis, within the context of financing the costs of a military buildup, the idea that inheritance taxes could make a substantial contribution to a socially just financing of public expenditures remained intact until the 1930s.[19]

The imposition of inheritance taxes can serve the goal of bringing about an egalitarian distribution of income, or it can be seen as a contribution to

tax equity. However, inheritances can also be simply drawn upon pragmatically as a source of revenues to finance the tasks assumed by the state. Moreover, inheritance taxes affect the support for foundations and other charitable organizations through testamentary bequests (Joulfaian 2000). Instead of passing substantial portions of their wealth to the state in the form of taxes, testators can retain influence over the use of their estates by setting up foundations or making gifts to existing ones. Inheritance law thus acquires relevance for regulatory policy, and gives rise to controversies over fundamental questions concerning the relationship between state power, institutions of civil society, and individual disposal over private property.

The contested discussion about the private transmission of wealth through inheritance reveals important aspects of the development of the normative structures of modern societies. At the same time, the regulations of inheritance are important to the social and economic development of societies. Beginning with the bourgeois revolutions at the end of the eighteenth century, the unearned acquisition of wealth through inheritance stood in a tense relationship with the central values and functional demands of the emerging social order. That is the reason why the inheritance of wealth could become an institution that is contested to this day, as is reflected in the political and scholarly controversies over private law during the last two hundred years. These controversies lay open for the sociologist a fascinating field of research that has hitherto received little attention.