The question of inheritance in mid-nineteenth century French liberal thought

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1. Introduction

After having increasingly interested the French jurisconsults and law professors of the first half of the nineteenth century (Veauce 1864), the question of inheritance was taken up by the French liberal economists in the mid-1840s. Their interest in this apparently juridical topic was motivated by historical, political and economic reasons. From a historical perspective, the economists wanted to find an explanation for the economic inferiority of France in comparison to Britain and particularly the problem of the excessive division of industrial and landed properties. In that respect, they sought to investigate if the 1804 Civil Code was responsible for the institutionalisation of egalitarian inheritance between the heirs.1 From a political point of view, the French revolution of February 1848 and the upsurge of the socialistic and Saint-Simonian movements popularised

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1 The French 1804 Code Civil (particularly Book III) established equality between the legal heirs without any distinction of gender or primogeniture. It also removed the entail (substitutions) that allowed the testator to condition the choices of their heirs. Another characteristic of this system relies on the principle of the reserve or quotit disponible; each testator had the right to do as they pleased with a certain portion of estate at their discretion, depending on the number of their children. The more children a testator has, the smaller their quotit disponible is (see Book III, Chapter III, Section 1/913). Primogeniture and entail were refused as typical elements of the Ancien régime, which were considered incompatible with the revolutionary principles of freedom and equality (Beckert 2007). During the Restoration, Charles X tried to reintroduce primogeniture and entail.
new conceptions of property rights that the Liberals considered harmful to their principles.\(^2\) From a theoretical point of view, inheritance and liberty of bequest were both treated as proper economic questions by these economists,\(^3\) who regarded inheritance laws as necessary for the production and distribution of wealth (Faucher 1853; Parieu 1853; Puynode 1859). However, this renewed interest was especially due to the flurry of socialistic theories in the 1840s (Proudhon, Fourier, Blanc, Cabet) which challenged the liberal definition of property rights and required its reconsideration.

On the most of theoretical subjects – the theory of value, of international trade, etc., the French Liberal School often restricts itself to taking up the ideas of the British classics, especially those of Adam Smith, John Stuart Mill and John R. MacCulloch. It has no real specific theoretical contribution according to most of the historians of economic thought (Béraud, Gislain and Steiner 2004). The topic of inheritance shows a very different sequence: the French liberal economists developed views on property rights and inheritance which were very different from those of their British contemporaries, e.g. Mill (Béraud and Etner 1993).

The general question of inheritance has been little studied in the history of economic thought, apart from the survey of Erreygers (1997). The mid-nineteenth century French debate is better known, thanks to the contribution of Philippe Steiner (2008) which presents the terms of the discussions and shows the interdependence between the political, familial and economic spheres.

\(^2\) The Saint-Simonian tradition denied any legitimacy of the legatee with regard to the father’s wealth, because of the discrepancy between the effort and the result. According to Henri Fournel,\(^2\) ‘the heir does not sweat; his only effort is to be born; (...) he produces nothing, he consumes, and he necessarily consumes what belongs to others’ (1831, p. 20–1). In the case in which an individual receives more than what he (or she) deserves through his capabilities, the general principle of the Saint-Simonian doctrine is compromised: ‘from each according to his capacity, to each according to his work’ (Ibid.). In Saint-Simonian thought, inheritance is considered as resulting from a right of birth, and not from a right following the capacities of the individuals (Erreygers 1997; Steiner 2008).

\(^3\) There was a disciplinary interpenetration between Law and Economics in this period. Economists were even sometimes at the same time Professors in Law, like Rossi. An 1877 decree lays down obligatory lessons in economics in the Facultés de Droit; in order to teach economics, the Professors have to be Doctors in Law (Le Van-Lemesle 1980). As a result, Michel Chevalier, one of the most influential French economists at that time, gives the following definition: Political economy ‘is the application of the general principles of the existing and recognized law, to the exchange of the goods and the services between the individuals’ (1849, p. 9–10).
We aim to further Steiner’s study by presenting the theoretical arguments of the French economists more in depth. In liberal thought, we observe miscellaneous positions on inheritance and on the liberty of bequest, proving the irrelevance of considering it as a homogeneous school. It raises the question of the typology classifying French liberal authors: should these economists be categorised from the most orthodox to the most moderate? Or is there another perspective to consider? On this note, we point out tensions in the Liberal School of thought, whose fundamental principles – the absolute natural property right, the natural right of the heir or the efficient distribution of wealth – appear to collide.

The novelty of our work consists in exposing the issues of the French debate on inheritance laws and the discrepancy between the two lines of thought of the Liberal School. Our study highlights the fact that the different liberal analyses of inheritance are linked to the more general problem of the foundation of property rights, which suggests two interpretations: the naturalist and the utilitarian conceptions, which are brought to light through other contemporary debates. However, our main contribution is to show that the first debate is not reducible to the second problem at variance with other interpretations; according to us, the contrasted positions regarding inheritance and the contradictions between the liberal principles are well explained by different views of the State constitutive of the French Liberal School.

In the following sections, we present the multiplicity of the ideas on inheritance in the French School (Sections 2 and 3). We then expose the division of this school concerning the definition of property rights, and show that the opposition between natural rights and utility principles is not sufficient to explain their different views on inheritance (Section 4). Finally, we relate the positions of the writers to their different conceptions on public policy; we establish that their views on inheritance are explained by different conceptions of the State (Section 5). Section 6 expounds our conclusions.

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4 It is possible to distinguish between two main topics in this respect: that of the legitimacy of inheritance, which raises the question of the philosophical and ethical foundations of property rights and especially of the transfers of estate within families; and that of the trade-off between inheritance laws and the principle of the liberty to bequeath, which brings up the problem of the extent to which the individual should be free to do as they please with their private property.

5 The opposition between natural right (jusnaturalism) and utilitarianism also seems to give structure to other controversies of this period, for example, about patents, intellectual property or expropriation (see Silvant 2010).
2. The defence of the full liberty of bequest

In the first half of the nineteenth century in France, there was a debate between the defenders of the share of inheritances between the heirs and the advocates for birth right. The controversy progressively turned into an opposition between two ideas in the middle of the century: the full liberty of bequest or its limitation through the law (Baudrillart 1872). In particular, many liberal economists consider inheritance itself as subject to contradiction: how to justify the coexistence of transfer of estate through legacies and the rule stating every income should come from work? (Broglie 1848; Dupuit 1865). The French Liberals have two different answers to this question.

The studies on inheritance in the history of economic thought often present the terms of the debate as an opposition between two antagonist views: the defence of total liberty of bequest against the advocacy for its limitation through legislation (Erreygers 1997; Sigot 2009). We firstly analyse the diversity of the positions in the French Liberal School in light of this traditional distinction.

Most of the French liberal authors defended the full liberty of bequest (Bastiat, Baudrillart, Broglie, Courcelle-Seneuil, Dunoyer, Faucher, Fontenay, Garnier, Le Play, Levasseur, Molinari, Parieu, Passy, Puynode). This advocacy relies on moral, political and economic arguments (Steiner 2008). From a moral point of view, inheritance is viewed as a way to

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6 According to Wedgwood, the differences between French and British systems of succession have often been overestimated. Testamentary freedom is not an ancient tradition of the British law as it dates back to 1688. In particular, he denounces the confusion around primogeniture; he underlines the fact that in Britain ‘the Law of Primogeniture only applies to land which has not been disposed by will or settlement’. In other words, the law only applies in very few and exceptional cases where the proprietor dies intestate. There is no obligation on the English landowner to do so, unless it is an obligation imposed by a settlement or entail in the previous generation’. (1929: 70) (If not directly quoted from an English source, translations from French are mine.)

7 Frédéric Le Play is considered the leader of the group of the defenders of the liberty of bequest by Cauwès (1878-79/1), but we do focus our study on his arguments which are quite different from those of the liberal economists. Besides belonging to the Société d’Économie Sociale, and opposed to the liberal Société d’Économie Politique, his advocacy for the liberty of bequest is also driven by sociological reasons rather than economic ones: an unequal division of the fortunes through inheritance would reinforce the famille-souche, by favouring the most capable son and by aggregating the whole family around him. About Le Play, see Baudrillart (1872) and Cauwès (1878–1879: II) for their commentary.
strengthen family and to incite individuals to have moral behaviour. The political arguments highlight the superiority of inheritance in terms of social and political stability. Moral and political arguments are far from being insignificant in the writings of the liberal economists, but as they are well dealt with in Steiner’s article (2008) we focus on the economic aspect of their developments. We deliver a synthetic presentation of the liberal arguments in favour of the testamentary freedom; they all share the idea that the full right to bequeath is more efficient than its limitations in two respects.

First, for the liberal economists who defend it, the full freedom of bequest gives better ex ante incentives than the primogeniture or egalitarian share of legacies for the legatees as well as for the testators. The liberty to bequeath is then a necessary condition for capital accumulation: without having the liberty to choose the heirs receiving the legacy, the incentive to save money is reduced. The most important incentive is admittedly the possibility for a producer to reap the fruits of his labour in his lifetime. However, such incentives are not optimal in the long run: without the possibility to choose his legatees, the testator would be tempted to stop his efforts the moment his own needs are fulfilled.

The full liberty of bequest allows an intertemporal maximisation of efforts, and also that of production: only this can incite the testator to take on lifetime projects (Baudrillart 1857b; Broglie 1848; Coquelin 1852; Courcelle-Seneuil 1858-59/II, 1865, 1868; Levasseur 1868; H. Passy 1839; Puynode 1859) and to develop an interest in saving money instead of spending it. By encouraging saving rather than consumption, the transfer of estate through inheritance produces economic progress in the minds of these Smith- and Say-inspired economists. In contrast, if inheritance is regulated by the legislator with no possibility of discretionary choice for the testator, the latter has less incentive to preserve and enhance his own capital value because he knows his wish will not be respected (Courcelle-Seneuil 1858-59/II, 1868; Baudrillart 1857a).

Testamentary freedom is also supposed to yield the best incentives for the legatees. If the children feel they are co-owners of the family estate, then they are dissuaded from working. This expected co-ownership acts as a brake to the development of savings and thrifty behaviour and could also

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8 From a moral point of view, inheritance allows the maintaining of family relationships (Baudrillart 1857b; Faucher 1853; Puynode 1859; Parieu 1853); inheritance encourages the limitation of births by giving high responsibilities to the parents vis-à-vis their children, complying with Malthus’ recommendations (Dunoyer 1845; Puynode 1859). The political arguments emphasise the social stability stimulated by inheritance.
discourage moral attitudes towards the family. According to Courcelle-Seneuil (1858-59/II and 1868), children should never be certain of getting a share of their parents’ estate: they should not be raised with the expectation to be rich because they would then have no incentive to work. This is the worst economic and social danger. In contrast, potential unequal conditions among children give rise to virtuous behaviour; according to H. Passy (1839, p. 310), ‘all the improvements in the social positions are caused by the inequality of wealth’.

Primogeniture as well as the French egalitarian system is denounced by the Liberals. They particularly attacked the system of primogeniture and accused it of encouraging unequal and inefficient behaviour in families; the eldest son having no incentive to work because of his expectation to benefit entirely from his parents’ wealth (Courcelle-Seneuil 1858-59; Baudrillart 1857a; 1857b; Puynode 1859). The French system suffers from this inadequacy since this lack of work ethic affects all the descendants. Thus, the most efficient system is the one which preserves uncertainty concerning inheritance, and incidentally which provides no systematic transfer of estate.

The second main argument relies on the better ex post allocation of resources allowed by the liberty of bequest. This positive effect works on two different levels – microeconomic and macroeconomic. From every family’s perspective, it would allow better individual consideration of the different faculties and needs of the children. Children have different gifts, unequal abilities and varying aptitudes to study or to work. Consequently, they do not have the same power to make efficient use of the inherited capital, and it would be unfair to transfer the same amount to each. Despite a certain informational asymmetry,9 the parents remain the best informed agents concerning the abilities and behaviour of their children, and should hence be the only decision-makers in the transfer of their estate (Parieu 1853; Baudrillart 1857b). Furthermore, unequal distribution of inheritance is considered as fair because it complies with natural inequalities and respect for the natural order (Puynode 1859; Baudrillart 1857b).

Subsequently, most French Liberals maintain that there would be no rational justification to limit the quotité disponible (available share). Inspired by Bentham, they refuse Mill’s proposition to establish a maximum allowed inheritance (Courcelle-Seneuil 1858-59/II; Faucher 1853; Bastiat 1848; Baudrillart 1857b, 1872; Puynode 1859). Since most of the richest

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9 The liberal authors who defend the full freedom of bequest do not neglect the possibility that a child could deceive their parents’ opinion; they only judge that the latter are in the best position to collect information despite possible mistakes.
citizens are those who made the wisest choices during their lifetime, there is no reason why they would act irrationally concerning their succession. By letting them freely dispose of their own estate, the society indirectly benefits the efficient decisions of the rich.

At a macroeconomic level, the advantage of the liberty to bequeath is particularly significant in terms of national agriculture. The possibility for a testator to concentrate their estate on a few heirs can avoid the dispersion of landed properties; the French economic inferiority is attributed to this by many economists.\textsuperscript{10} Thus some of them establish a causal link between the forms of property and the wealth of a country, while observing the differences in inheritance laws between France and Britain. The causal link refers to the physiocratic debate about \textit{grande culture} and \textit{petite culture}\textsuperscript{11} since the physiocrats assume that the maximum net product is given by the lands exploited in \textit{grande culture}. They consider that splitting of estate has negative effects in terms of production and financial equilibrium.\textsuperscript{12} In particular, the system of equal share tends to reduce the size of agricultural plots, generations after generations, thus entailing a less efficient agricultural use of lands (Courcelle-Seneuil 1858-59/II; Baudrillart 1857b). In this case, the legacy can yield optimal agricultural results if it is decided by the owners themselves: instead of sharing their wealth equally between their children, they may prefer to concentrate it in the hands of one successor.

According to us, the liberal economists’ interpretation of the physiocrats is strongly influenced by Tocqueville’s perspective. Instead of considering the characteristics of \textit{grande} and \textit{petite culture} (1756) in their whole complexity (regarding the use of oxen or horses or the choice between tenant farming and leasing) as per François Quesnay, the French authors focus their arguments on the size of the landed properties (Wedgwood 1929).\textsuperscript{13} However, some French economists broaden this agricultural problem to the insufficient concentration of wealth in France, particularly for commercial and industrial activities; France would lack big companies capable of undertaking civil engineering (Courcelle-Seneuil 1858-59).

\textsuperscript{10} However, this idea is far from being shared by all liberal economists (see, for example, Passy (1839) or Legoyt (1857a)).
\textsuperscript{11} See the article ‘Fermiers’ by Quesnay (1756). More details on the Liberals’ interpretation of the \textit{grande} and the \textit{petite culture} are exposed by Marmier (1836), Courcelle-Seneuil (1858-59/II), Legoyt (1857a, 1857b).
\textsuperscript{12} The division of the landed property has as a consequence the decrease in fiscal resources, because small lands are exempted of the land tax.
\textsuperscript{13} According to Wedgwood (1929), Alexis de Tocqueville ‘has drawn a vivid picture of the contrast between the effects of the English and the French systems’ and has introduced the idea that French law is conducive to land splitting.
As a result, the individual freedom of testators should only be bounded by the respect of the individual rights of the heirs: the substitutions should be removed because they also conflict with the efficient incentives like the fair distribution described above (Puynode 1859; Baudrillart 1857b; Faucher 1853; Bastiat 1848). However, the advocates of testamentary freedom legitimise inheritance laws only in the case of intestacy. In this situation, the law should presume the will of the father as most liberal economists uphold the equal division of legacy. According to Courcelle-Seneuil (1858-59/II), the law should be designed for the highest public utility; although individual decisions are always more efficient than those of the public authorities, the State should establish rules compensating the individual’s failures and make inheritance rational and efficient.

3. The advocacy for the restriction of the liberty of bequest

Many authors close to the French Liberal School were opposed to testamentary freedom (Rossi, Dupuit, Cauwès, Royer, Wolowski). To summarise their thoughts, we identify three main grounds for this rejection: the economic consideration of legatees, the false argument of land parcelling and the social utility of its limitations. By presenting these arguments, we aim to clarify the debate and show that the economists opposed to the complete freedom of bequest are more influenced by Pellegrino Rossi’s ideas than those of Bentham’s, at variance with the ideas defended by other commentators.

3.1. Taking into account the economic interests of the legatees

Some French liberal economists refuse the full liberty of bequest, and claim for equal share of the legacies between the heirs (Wolowski, Cauwès, Royer), according to Rossi (Dufour 1980) and previously Montesquieu. It must be underlined that the refutation made by these authors also relies on the fact that the limitation by law of the individual right to bequeath is more efficient and yields a better income distribution than full freedom.

Before exposing the arguments of advocates for limitations of testamentary freedom, the idea that they are strong supporters of the principle of inheritance has to be made clear. As explained in our Introduction, it would be incorrect to associate them with the Saint-Simonian movements.

14 With regard to free trade, Paul Cauwès’ position differs from that of the other Liberals: he stands for a rational protectionism inspired by List’s theories (see Ravix 1991). However, on many other theoretical subjects, his thoughts comply with that of his liberal contemporaries.
which urged the removal of this institution: for all the French Liberals, inheritance is a necessary condition without which individual property rights are incomplete as long as the individuals are dispossessed of their goods at the end of their lives. According to Rossi, ‘the individual land appropriation is not conceivable without inheritance’ (1840-41/II, p. 121) and the State should regulate inheritance for a juridical reason such as each child having a ‘sacred’ property right over the family capital (1840-41/II, p. 152). Cauwès also advocates the limitations of the liberty of bequest on the grounds that each child would have a ‘certain right over the father’s estate (héritage paternel)’ (1878-79/II, p. 161). The possibility to disinherit children would break their legitimate rights. On this legal ground, Royer and Dupuit add that the father’s right over the family estate is generally low considering his own marginal contribution to its increase (Dupuit 1865, p. 195; Royer 1862/I, pp. 314–8). As a result, he does not have the legitimacy to do as he pleases with the whole capital according to his own will. In this regard, the State has a kind of ‘co-ownership’ over the fortune accumulated during his lifetime.15

However, there are also strong economic reasons to substantiate regulation of inheritance: the father’s decision is not systematically a rational one. His choices concerning the selection of his heirs and the division of his legacy can each be manipulated and need not always be economically efficient; in spite of his informational advantage, the testator can be subjected to irrational behaviour (Cauwès 1878-79, p. 160; Dupuit 1865).

A third argument put forth by Rossi (1840-41/II, p. 138), Cauwès (1878-79, p. 165) and Leroy-Beaulieu (1877) highlights the high efficiency of an egalitarian share of the father’s estate, from a social point of view. It should be a familial duty to take charge of his children (Dupuit 1865; Wolowski 1857) but in the absence of inheritance laws the father does not have any constraint or positive incentive to support them. He could even have a strong incentive to transfer the responsibility and the material support of those he has disinherited on to public structures. In this case, the testamentary freedom yields a negative externality: the father does not internalise the social cost of material support for his children. The liberty of bequest is costly from a social point of view.

From the legatee’s point of view, equal share also gives better incentives to work: there are no contradictory personal interests in families, and each member aims at improving the total family estate. Furthermore, as the

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15 In every inheritance or legacy, the current generation owns their forefathers’ rights, and in compliance with their services, a share of their properties, a legal and imprescriptible mortgage. (…) An estate can be appropriated, a capital accumulated, only thanks to the social activity’ (Royer 1862/I, 319–20).
final individual legacy may not be sufficient for survival, it will give strong encouragement to work rather than to live an idle life and stay unproductive (Cauwès 1878-79/II, pp. 164–5). Consequently, Cauwès, Wolowski and Rossi consider that the inviolable part of every legacy should correspond as much as possible to the minimal amount required to maintain the standard of living that each individual benefited during their childhood. The best arrangement would consist of a sufficient degree of freedom,\textsuperscript{16} which would allow the father the possibility of a ‘free appreciation of particular circumstances or facts’ without ‘the disadvantages of the full liberty of bequest’ (Rossi 1840-41/II, p. 141).

3.2. The response to the accusation against land parcelling

These economists do not accept the criticism according to which the egalitarian share of legacies could induce a land division. To be more precise, they maintain that if parcelling of land takes place, it does not necessarily mean that there would be a development of petite culture, and consequently an agricultural and economic decline.

On one hand, there is no systematic relationship between the size of properties and the type of agriculture (Legoyt 1857a, 1857b; Wolowski 1857, pp. 645–8; Cauwès 1878-79, pp. 167–70). The concentration of landownership may comply with a multitude of farmers leasing plots and practising petite culture individually; reciprocally, the small owners may band together by sharing their tools and by gathering their lands. Furthermore, the dispersion of landed property may escape the inefficiencies of small farming through association (Wolowski 1848, pp. 309–10; Chevalier 1849). Wolowski (1857) adds the fact that the petite culture can be appropriate and efficient in certain crop types, complying with Quesnay’s argument (1756, p. 131).

On the other hand, the division of landed properties has significant positive political and economic effects. Apart from preserving and consolidating social harmony between antagonist social classes by an extension of landed property, some authors consider the spread of small ownership a facilitator of investments and production. By increasing the number of landowners, the discrepancy between the individual interests of the owners and those of the farmers decreases. The small landowners are encouraged to develop foresight and parsimony, which increases returns. It complies as well with economic efficiency as with morality since the extension of

\textsuperscript{16} The empirical solution presented by Rossi is the following: ‘the réserve should in no case be inferior to one quarter nor superior to three quarters of the legacy’ (Rossi 1840-41/II, p. 141).
private ownership goes together with the moral improvement of the poor class.\textsuperscript{17}

3.3. Public utility and limitations of the right of bequest

Dupuit’s and Rossi’s positions rely on the superiority of utility as a criterion to appraise the respective economic advantages of both the systems of legacy – the liberty of bequest and its limitations. In his article in 1865, French engineer Jules Dupuit also refuses the full liberty of bequest while criticising Courcelle-Seneuil’s position. Also underlining the possible contradiction between the legitimate property right of the father and the lawful rights of his children, Dupuit gives up the concept of a natural liberty of bequest. To this end, he proposes a rereading of Blaise Pascal’s and Pellegrino Rossi’s reflexions. According to Rossi, the limitations of inheritance laws are legitimate, because ‘laws and institutions allow the most utile (utile) use of a producing factor as many powerful as the land’ (1840-41/II, p. 142).

Dupuit tries to investigate the criterion according to which inheritance should be determined: ‘Society shall rule property and inheritance, so that the sum of everyone’s possessions is as high as possible’ (1861a, p. 339). As it should be the case in every economic area, according to Dupuit (Etner 1987; Ekelund and Hébert 1999), inheritance laws should not be defined according to the principle of freedom, but in accordance with to the principle of utility. If we define utilitarianism as an ethical theory appraising the policies according to their consequences in terms of welfare for aggregated individual interests (Arnsperger and Van Parijs 2000), Dupuit’s, Rossi’s as well as Bentham’s conceptions can be said to belong to this philosophical trend.

We want to qualify the idea that Dupuit’s viewpoint on inheritance would have Benthamite roots; certainly ‘his arguments also parallel those of Bentham and Mill’ (Ekelund and Hébert 1999, p. 330) but they rely on a very different conception of the State compared to those of Bentham (cf. Section 4.). In the case of conflict between security and equality, Bentham thinks equality must prevail (Erreygers 1997), contrary to Dupuit who uses his criterion of utility to decide without prejudging which of them should prevail over the other. As a matter of fact, the French ‘utilitarian’ conception is original because it also differs from Mill’s interpretation of Bentham’s principles on inheritance, as from the doctrine of natural rights.

\textsuperscript{17} This moral improvement consists of a reduction in the number of children, of the development of more economically rational behaviours, an increase in savings and individual responsibility (Wolowski 1857).
To conclude this section, we underline the fact that despite their oppositions regarding the extent of the liberty of bequest, the Liberals had the same enemies: the advocates of the removal of inheritance. As far as we know, we observe that no one among them defends the abolition of inheritance, even though it could be a way to make but one fool in the family, to paraphrase Jonhson. However, the Liberals refuse this perspective; in their mind, whatever their positions on the liberty of bequest, the principle of completeness of the property right prevails over the rule stating property should be based on labour. In addition, the question of inheritance is always considered in a more general framework, in relation to familial or juridical concerns. We do not find authors analysing inheritance as a market during this period. The consideration of inheritance and bequest as complex economic, sociological and philosophical questions allows our economists to reject both Saint-Simonian views and purely market-oriented analyses, which could lead to condemnation of the general principle of inheritance.

4. Inheritance and property rights

We now aim at investigating the origins of such a discrepancy. An area of research relates the arguments exposed in the preceding sections to a more general question: that of the definition of property rights. Our contribution in this section reveals that the debate on the liberty of bequest is an extension of the debate on property rights, but that the former cannot be reduced to the latter.

4.1. Natural vs. legal property rights: The traditional explanation

The oppositions between the advocates of the freedom of bequest and those of its limitations are usually explained by their adhesion to the respective doctrines of natural rights or of public utility (Sigot 2009, 2010; Erreygers 1997). We do not disprove this intuitive analysis, but we want to show that it is not sufficient to fully explain the different conceptions of inheritance among the economists of the Groupe de Paris.

The first approach shows that the debate on the liberty of bequest would seem to be an extension of another debate of high importance during the mid-nineteenth century in France: the controversy opposing the natural

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18 Johnson is the father of the famous sentence: 'Primogeniture makes but one fool in the family'.
19 For modern analyses of the market of inheritance, see Atkinson (1971) and Ishikawa (1974).
rights doctrine to a legalistic conception of property. Consequently, we replace the debate on inheritance in the context of this larger discussion.

Most of the French liberal economists adopted the doctrine of natural rights to explain the origins of property rights which they considered prior to the law (Thiers 1848; Coquelin 1852; Chevalier in SEP 1855; Baudrillart 1857a; Fontenay in SEP 1855; Levasseur 1868; Leroy-Beaulieu 1896). According to Baudrillart, ‘The right differs from the law. The right exists previous to the law and constitutes its foundation’ (1857a, p. 42). Their main fear concerning the legalistic conception of property rights is its ‘artificial’ nature, since they depend on the historical institutions of each period; the criterion of utility is subjective and could easily be manipulated by the government. Thus, in its majority, the French School develops very hostile arguments to the Benthamite philosophy which considers rights as a result of the law. This rejection also has to do with the contemporaneous controversy about natural laws in economics.

The traditional scheme of the natural rights doctrine considers property as a result of the labour force, which is a consequence of the natural (unequal) abilities activated by individual freedom (Bastiat 1848; Baudrillart 1857a, 1857b; Broglie 1848; Garnier 1846; Faucher 1853; Legoyt 1857b; Levasseur 1858; Molinari 1854; Parieu 1852-53, Puynode 1859; Thiers 1848).20 In the last instance, we see that labour is the main foundation of property rights, to which all the other principles could be reduced (the first appropriation, the individual abilities, etc.). The sequence we set out above supposes the following corollaries: every intervention by the authorities can only serve to drive away the natural distribution of wealth. The property of a capital is complete only when there is no restriction to its private use, when there is the right to give or to exchange it, and when there is individual freedom to bequeath it. The freedom of bequeath then appears to them as a necessary condition for natural property rights: there is no private appropriation if goods can not be transmitted either by inheritance or by the possibility of bequest;21 as transferability is the main characteristic of private appropriation, the full right to bequeath being a condition for the completeness of contracts.

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20 They proclaim their intellectual affiliation with Tocqueville and Locke, but also Quesnay, Mercier, Dupont de Nemours, Baudeau and Turgot against Mirabeau, Bentham and Montesquieu (see Baudrillart 1857a; Baudrillart 1857b; Legoyt 1857b; Puynode 1859).

21 ‘The right to bequeath is only a consequence of the property right. The goods which could be transferred neither through inheritance, nor through a testament would not really belong to their owners; the legislator could dispose them of in every case of death, according to necessary variable interests or viewpoints.’ (Puynode 1859, p. 19)
However, the French Liberal School cannot be reduced to this viewpoint of the majority (Silvant 2010). Some major liberal economists of that time\textsuperscript{22} refused the naturalist conception of property rights. According to Courcelle-Seneuil (SEP 1855, 1858-59/II), Dupuit (SEP 1855, 1861a, 1861b, 1865), Royer (1862) and Rossi (1840-41), public utility should be applied to the definition of property rights and to the right of bequest. As inheritance laws are changing through centuries, the assumption that they would be natural laws is immediately withdrawn. Dupuit, Courcelle-Seneuil and Rossi observe that the ‘property right and the right to bequeath are instituted in accordance with the principle of public utility, and their limits shall be researched in that principle. The laws are designed to contribute to the well-being and the welfare of all members of society’ (Dupuit 1865, p. 196).

The most \textit{utile juridical} ex post arrangement complies with justice. The legacies to the individuals yielding the highest social utility are in conformity with the idea that everyone should benefit from society in accordance with the abilities. However, this optimal situation cannot be achieved through the liberty of bequest: there is no reason why the fathers would spontaneously choose a social optimum without public incentives at the time of bequeathing their estate (\textit{id.}).

\subsection*{4.2. The unclear frontier between utility and natural rights}

According to the preceding arguments, the theory of property rights – natural or legalistic – seems to have a strong connection with the type of inheritance law our economists advocate and has become the traditional explanation for the discrepancies of the Liberal School. However, the preceding studies of the historians of economic thought failed to give us a satisfying explanation and this precise study leads us to reconsider their hypotheses.\textsuperscript{23}

Here we show that, on one hand, there is no systematic relationship between natural rights and liberty of bequest, while, on the other hand,  

\textsuperscript{22} Dupuit, as we mentioned above, was highly acclaimed in the Société d’Économie Politique, particularly for his expertise on the questions of civil engineering and public economics. Rossi was one of the greatest professors of Law and Economics in the first half of the nineteenth century, and is considered to be one of the founding fathers of the Constitutional Law by the historians of law. Finally, Courcelle-Seneuil was a respected Professor of Political Economy at the École Normale and at the University of Santiago de Chile, and an economic advisor to the Chilean government (see Le Van-Lemesle 2004; Marco 1991; Breton and Lutfalla 1991).

\textsuperscript{23} See Appendix 1 for a synthetic presentation of these various positions.
The legalistic conception of inheritance does not always imply the limitation of the right of bequest. Some important liberal authors develop different arguments which do not fit into this simple enunciation. Vandeveld advocates that 'the question of legitimacy of inheritance and inheritance taxation disturbs the familiar oppositions in economic and ethical thought and in political philosophy and practice'. (1997: 1) We illustrate this complication by an example of some emblematic figures of the French Liberal School – Jean-Gustave Courcelle-Seneuil, Paul Cauwès and Louis Wolowski.24

The first refinement of this notion was made by Courcelle-Seneuil (SEP 1855, 1858-59/II) and in a certain way by Garnier (SEP 1855, p. 1873). According to Courcelle-Seneuil, ‘property rights have their foundations in social and public utility’ (SEP 1855, p. 142). He advocates for the full liberty of bequest but does not subscribe to the natural law theory. In his mind, it does not make sense to define absolute property rights since such a conception would imply no change, even negligible, in the distribution of income, and make social measures of any type impossible (1858-59/II, SEP 1855).25 As Dupuit, Courcelle-Seneuil refers to Pascal while considering inheritance laws a result of legislator’s choices motivated by social utility.26 The liberty of bequest is rendered compatible with a utilitarian view of property rights; he develops the original concept of ‘legitimate expectations’ (espérances légitimes). Individuals make decisions by considering the current social and legal state; they have legitimate expectations in the realm of this existing state. A change in inheritance laws (particularly the freedom of bequest) could increase these expectations for the testator as well as for the heirs and could maximise social utility (1858-59/II, 1868).

A second complication is introduced by Louis Wolowski and Paul Cauwès who are both followers of the natural law doctrine but simultaneously claim for the limitation of the liberty to bequeath. They refuse the Benthamite theory of property rights and like the majority of the Société d’Économie Politique, consider labour as the basis for property (Cauwès 1878-79/II; Wolowski 1848; Levasseur and Wolowski 1874). Nevertheless both authors sustain that the liberty of bequest should be limited: ‘from

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24 We have already brought J.G. Courcelle-Seneuil’s ideas to light. Louis Wolowski was a Professor of Political Economy at the Conservatoire des Arts et Métiers.
25 This argument responds to the accusation of the lack of realism made by Dupuit and advocates for the limitation of the liberty of bequest.
26 Courcelle-Seneuil sustained that ‘concerning inheritance, it is not the outcome of any natural and personal right of the heir, but only of the lawmakers. I think, as Pascal said, that the lawmakers had good reasons to establish that right [to bequeath]; but these reasons come from social utility and not at all from the individual right’ (SEP 1855, p. 143).
the idea that liberty of bequest is a natural consequence of private property, it must not be inferred that the positive law has no legitimate authority to regulate or limit its exercise’ (Cauwès 1878-79/II, p. 157). In particular, according to Wolowski and Cauwès, it is necessary to maintain inheritance laws which restrict the arbitrary power to the father: the 1804 French Civil Law which states equality between the heirs and reduces the parent’s leeway.

How can this apparent contradiction be explained? The limitation of the natural right to bequeath is a result of the consequences of the legal system in terms of public interest. The natural right, which is regarded as unquestionable in principle, should be defined differently according to its effects on public interest: it is necessary to impose an ‘equitable limitation’ on individual property rights (Cauwès 1878-79/II, p. 132; Wolowski in SEP 1855) each time public utility requires it. As a last resort, in the next section, we will see that what determines the opposition between the freedom of bequest and inheritance laws is their different views of the state attributes.

5. Inheritance as a question of public economics: The French liberal conceptions of the State

Our study proposes an explanation of the different conceptions of inheritance in French liberal thought by considering the viewpoints on the State. We show that the advocacy for the liberty of bequest is related to a minimal conception of the State and to strong individualism, while the defence of a legalistic perspective relies on a regulatory view of the State. It refers to an opposition between two views of its role: the State as an administrative authority enforcing natural property rights and the State as a government and a regulator of property rights in the sense of public utility. We propose a novel line of inquiry at variance with the existing studies, linking together these contrasting positions to diverse views of public intervention. Appendices 1 and 2 give a synthetic presentation of our results.

5.1. The State as a protector of absolute freedom of bequest

The advocates of natural law see the State as a protector of absolute natural rights, whose essential function is the enforcement of existing laws. The claim for the liberty of bequest probably has more to do with a minimal conception of the State than with the natural rights theory. This comes from the strong influence of Turgot (Vergara 2008) and J.-B. Say over the French liberal economists. The advocacy for the full liberty of bequest is
on equal footing with a restrictive conception of the State’s intervention, and with the belief in natural economic laws and their individualism.

If we follow Say’s definition, individual property can only be limited through respect for the other citizens’ property rights and to maintain social order. In a conservative viewpoint the protection of social order means respect for the existing distribution of wealth and above all respect for the existing repartition of landed properties. As a consequence, the State should delegate its authority to the testators and should also enforce freedom of bequest by providing security. According to Baudrillart, ‘In a society the wealth of the people strictly matches the safety of property rights’. (1857a: 54) Following are the consequences of such a conception: the State’s attributes should be reduced to the role of a protector of the full right to bequeath; there should be no leeway for the statesmen to modify laws concerning the distribution of property rights.

Although these economists do not give clear indications of what the enforcement of existing property rights should mean empirically, including the right to bequeath, we suppose the State has to fix the liberty of bequest in an inviolable law, as in a Constitutional Law, for example, and use all the repressive instruments at its disposal to enforce it. Furthermore, the role of the government in such a view paradoxically is to reduce the room to manoeuvre every state intervention through the law. Public policy should confine itself to not hinder private initiatives; nevertheless the only accepted interferences can eventually be motivated by sound reasons of public utility (Courcelle-Seneuil, Levasseur, Garnier, Faucher).

State intervention should be restricted to the enforcement of natural law in the area of inheritance as in other economic fields. For this group of the Liberal School, the main economic attributes of the State are restricted to the ‘kingly’ ones: the enforcement of existing laws which protect social order and the provision of security (Molinari 1846, 1849; Puynode 1859; Faucher 1853). The State should never try to modify the distribution of property rights, even by social policy or progressive taxation. Every public policy which could break the connection between effort and wealth would be dangerous from an economic and a social point of view. Furthermore, as they considered the birth of the State as subsequent to the definition of property rights, the possibility for the former to

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27 ‘The only task of a government is to prevent the private interests of some people being detrimental to the interests of the others or of the whole society. That is its real assignment.’ (Say 1828-29, pp. 254–5) See also Say 1803. This definition is taken up by Baudrillart, Levasseur, Thiers and Garnier.

28 In their time, they saw examples of some American states which forbade inheritance taxation by declaring it unconstitutional (West 1893, p. 95).
rearrange the allocation of these rights would not be very justified as this intervention includes no intrinsic limitation. In Bastiat’s opinion, this intervention could also lead to ‘the highest concentration of privileges’ as to ‘the most integral communism’ (1848, p. 185), depending on the nature of the statesmen.

These authors are convinced that social progress is oriented towards more liberties and less public intervention. Here we find the idea of subsidiarity: the State has the legitimacy to intervene only for the activities the individuals are less capable of performing than itself. In their minds, the historical and theoretical evolution should go from less government towards more administration. In this perspective, a very large majority of the French School, following A. Smith and J.-B Say and rejecting J.S. Mill (West 1893; Seligman 1895) refused the principle of an inheritance tax. They considered it an arbitrary second taxation of the testator’s income, already imposed during its accumulation. This fiscal tool is still viewed as relatively insignificant in the period we study, but becomes a political warhorse for the French liberal thought only during the end of the nineteenth century.

However, jusnaturalism does not imply an antistatist position; at variance with Hébert and Ekelund’s interpretation (1999, 2001), we think that provision of security and defence of the material and immaterial property rights require a sophisticated political machinery and high public expenditure. This contradicts the idea of a weak or non-existent State.

5.2. The State as a modern regulator of property rights

Some liberal authors from the School of Paris developed a modern idea of state regulation: the regulatory functions of government, in the modern

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29 See particularly Puynode (1859, p. 47) and Baudrillart (1871). However, many important authors such as Clémence-Auguste Royer and Paul Leroy-Beaulieu consider inheritance taxation as an advantageous tool regarding fiscal questions. It is levied at the most convenient moment; it does not disturb the economic position of individuals as it imposes unanticipated revenues; its levy is economical. As a legacy cannot be accumulated without State protection, it is legitimate. This view is strongly influenced by Mill’s ideas on inheritance, and corresponds to a cost-of-service perspective described by West 1893, pp. 115–6 and Seligman 1895, p. 128. The inheritance tax is considered as a fee levied to compensate for the costs of enforcing the inheritance laws. As the rich benefit from these social expenses more proportionately as compared to the poor, the inheritance tax should be progressive according the amount of the legacy (Royer 1862: I; Leroy-Beaulieu 1877: I).
sense of the word, include rational state intervention and the possibility of discretionary public choices.

This trend of the minority in the Liberal School is principally influenced by Pellegrino Rossi’s interpretation of Smith and that of the physiocrats (Dufour 1980). They develop an extensive conception of the State compared to the first trend we described above. The role of the State is neither to make redistributive fiscal policies for social considerations nor to promote a certain idea of equity. Even if political economy should also be directed at the wealth of the nation as at the relief of pauperism, state intervention should always rely on individual initiatives. The institutional arrangement should sustain and encourage individual efforts, relying on the concept of general interest which was rejected by the other Liberals.

The State is considered as a substitute to individuals only when economic failures arise from private decisions. In the case of inheritance, the teachings of Cauwès, Wolowski, Courcelle-Seneuil and Dupuit show that the arbitrary power of the State is better than the arbitrary power of the individuals every time public utility is concerned (Cauwès 1878-79, pp. 369–72). Public decisions are not inherently inferior to private ones: because of the negative externality we underlined above, and because of the imperfection of individual decisions, public intervention is required even for the question of inheritance which apparently proceeds from privacy. More precisely, the State is then legit to fix and enforce the amount of réserve. It does not mean the legislator would be entirely free to regulates property rights because of the possibility of abuse by the statesmen:

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30 We must be precise that the understanding of the word regulation is very different from the modern sense: instead of the ‘governmental actions (…) in an avowed effort to prevent private decision-making that would take inadequate account of the “public interest”’ (Breyer and MacAvoy 1987, p. 128) as we now define it, the nineteenth century French economists understood regulations as ‘a set of prohibitive or restrictive measures, conflicting with the principles of Liberty and Property, which hinder industry, labour, production, and are harmful by nature or because of their multiplicity’ (Garnier 1873, 124). See also the headword ‘Système réglementaire’ in the Dictionnaire de l’économie politique (Clément 1853).

31 Here we must allude to the apparent opposition between the French School and the British Classics (Blanqui 1837; Gide and Rist 1909); in this line of thought, the French economist would have to have been more humane and particularly worried about the state of the poor. In our minds, this difference is to some extent: though the French School was more interested in social concerns than their English contemporaries, the economical responses they gave to these questions were largely tinged with individualism and Malthusianism, at least until the end of the 1860s (see Etner 2006).

32 Cauwès suggests to go further than Mill’s proposition and to determine the extent of the reserve with precision.
‘legislation is a rule of order and applies on the only condition that it is constant (…). Properties which are well defined are generally respected: the trouble often comes from the uncertainty of law, and from the suspicion it is vitiated by arbitrary decisions’ (Courcelle-Seneuil 1859, p. 193).

The full freedom of bequest is incompatible with public utility. These authors address a symmetrical critic against the advocates of natural rights: the principle of natural justice is variable and contains no rational rule: it is ‘a vague and uncertain concept, which varies according to the viewpoint’ (Dupuit 1861b, p. 52). In this sense, Dupuit and the other quoted authors are utilitarian, but not in the same way as Bentham. According to the French engineer, the State never should interfere with questions of social justice; it should only undertake public policies which aim to satisfy public utility. Such policies comply ex post with social justice. This conception corresponds to a rejection of Bentham’s ideas on the State which include the provision of subsistence for future generations, the prevention of disappointment and the levelling of fortunes (Erreygers 1997; Sigot 2009).

The viewpoint of these authors corresponds to an ‘extensive conception’ of the State, if we take up Cauwès’ turn of phrase (1878-79/II), whose attributions are not restricted to the protection of goods and of individuals, but which entail the legitimacy of public impulsion in many economic areas: construction and administration of civil engineering, distribution of property rights in an efficient way, correction of the individual market failures such as the lack of incentives to save or to work, and even supervision of an industrial policy according to Wolowski, Dupuit and Cauwès. Wolowski even defended the monopoly of the Banque de France, considering the issue of money a public attribute.

However, to them the role of the State stops from the moment it puts a brake on individual initiatives: ‘[the State] must not be considered as a providence’ (Cauwès 1878-79/II, p. 374), but shall offer a ‘positive protection’ to its citizens (Wolowski 1848, p. 311), at variance with the negative protection defended by orthodox economists. The criterion of public utility does not prejudge any particular type of appropriation; it only allows public regulation as often as public interest benefits from it.

This conception of property rights echoes the modern opposition between rule and discretion: while the orthodox economists gave priority to the protection of natural rights against the arbitrary public intervention through the

This extensive conception of the State is opposed to the “individualist” or “restrictive” doctrine of the State, which considers the State a necessary evil (Cauwès 1878-79, p. 358; Wolowski 1848, p. 310, Chevalier 1849). See the previous section for more details about this trend.
enactment of a fixed rule, the supporters of the utility criterion preferred to allow the statesmen a discretionary scope for making public decisions.

6. Conclusive remarks

This article has underlined the richness of the French liberal thought on inheritance insisting on the variety and the diversity of the liberal analyses; we aimed at highlighting the differences with the contemporaneous British classical theory. We then investigated the traditional explanation of the contrasting positions regarding the liberty of bequest: we argued that the divergences could not be reducible to the philosophical opposition between the natural and the legalistic views of property rights. According to us, it is correct but not sufficient to consider the former debate as a pure prolongation of the latter.

Finally, the relevant explanation lies in the different ideas of the State developed by the French liberal authors. Far from all being antistatists, we stress on the nuances in their thought: the advocacy for the limitations of the liberty of bequest is more related to the conception of the State as a regulator in the modern sense of the word, and is associated with an extensive view of public intervention. The question of the economic role of the State prevails over all the others, and its solution depends on the determination of the optimal public policy: ‘the general rules arranging the labour organisation and the wealth distribution, or, to simplify, the whole private property system whose arise our rights and our duties, depend on the solution to the problem of the decision between the State’s attributions and those of the individuals’ (Courcelle-Seneuil 1858-59/II, p. 7). The contradictions in the heart of the French liberal thought are well explained by different conceptions of the State, which are also different ways of considering the relationship between the individual and society.

References


The question of inheritance in mid-nineteenth century French liberal thought


In this paper, we explore a French debate in the nineteenth century Liberal School: the question of inheritance. We first present the opposition among the liberal economists between the advocates of the liberty of bequest and the defenders of its limitations. We then try to show that these contrasted positions cannot be reduced to the confrontation between the doctrine of natural rights and the principle of social utility. Finally, we
propose another explanation to the divergences of the Liberal School through different conceptions of the State.

**Keywords**

French liberal thought, inheritance, property rights, Jules Dupuit, history of public economics

**JEL classification:** B12, K11.

**Appendix 1. Correlation between conceptions of property rights and ideas on inheritance**

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## Appendix 2. Correlation between conceptions of the State and positions on inheritance

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