Can The 'Death Tax' Kill Charity Too? The Impact of Legislation on Charitable Bequests

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Abstract

The national debate over the federal estate tax has caused fear in American charities over the past ten years, a fear that is likely to continue for the foreseeable future. Since Congress acted in 2001 to repeal the dreaded “death tax” for one year, for decedents dying in 2010, charities and individuals have become increasingly concerned about the impact of a repeal on charitable donations. While only a small percentage of charitable gifts come in the form of gifts at death, these few but generous incidents in fact amount to billions of dollars, and are imperative to the operation of our charities. Today, the vast majority of estates are already exempt from the tax. If the estate tax is repealed, or, as widely expected, the exemption simply remains at the current $3.5 million, will those testators exempt from the estate tax in turn exempt charity from their estates?

Legal literature has addressed many of the factors that affect whether a testator gives to charity, including tax laws, the economy, the individual decedent’s wealth, the family members the decedent leaves behind and the financial status of each. This article will focus on one factor that has been, thus far, largely ignored: state laws that impede gifts to charity at death. While true mortmain statutes are rare in the U.S., such impediments do still exist and must be examined in order to fully appreciate the impact on charitable donations.

Part I of this article discusses the federal estate tax enacted in 2001, and the potential impact on charities if a repeal ever occurs. Part II traces the history of federal estate tax law and charitable exemptions or deductions, and contrasts the federal law with state limitations on charities, especially churches, and testators by examining four types of state statutes that serve as impediments to charitable giving: state laws designed to protect testators from overreaching by charities; state laws designed to protect testators’ families from a testator who is giving away too much; state laws designed to raise revenue from taxing charities; and true mortmain statutes, which limit the amount or value of property a charity can hold. Part III looks at our current laws, beginning with the Revenue Act of 1916, to see how many of these state laws still exist. Part IV concludes the article with a prediction of charitable donations in the future.

1 Giving USA Foundation, U.S. Charitable Giving Estimated To Be $307.65 Billion In 2008, http://www.philanthropy.iupui.edu/News/2009/docs/GivingReaches300billion_06102009.pdf last visited Aug. 2, 2009). In 2008, charitable bequests were estimated to be $22.66 billion, which equals 7 percent of the total charitable donations given in the United States. Id. at 3.

2 See infra notes 6-27 and accompanying text.

3 See infra notes 28-186 and accompanying text.

4 See infra notes 187-226 and accompanying text.

5 See infra notes 227-50 and accompanying text.
I. The Federal Estate Tax Today

In 2001, as the United States Congress considered repealing the federal estate tax, the New York Times published an advertisement declaring the proposed repeal “bad for our democracy, our economy, and our society.”6 The advertisement was signed by more than 100 of America’s wealthiest, including billionaires Warren Buffett, George Soros, and William Gates, Sr., who stood to benefit from the repeal.7 As William Gates, Sr. explained in an editorial published two days earlier, “[r]epeal would ripple through our economy, reducing not just federal but also state revenues, and decimating the charitable sector.”8 Charities, too, opposed the repeal.9 They worried that fewer and smaller bequests would result if decedents no longer needed the tax benefit offered by charitable donations.10 Their worries were based, in part, on history. Charitable bequests had declined under the previous law reforming the estate tax. The Economic Recovery Tax Act enacted in 1981. That Act, , which applied to the estates of those dying on or after January 1, 1982, reduced the top tax rate, increased the unified credit, and allowed unlimited gifts to a surviving spouse.11 Soon after its enactment, charities experienced a decline in both the value of gifts and the number of decedents making gifts to charity.12 Ten years later, the 2001 Economic Growth and Tax Relief Reconciliation Act was enacted.13 This

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7 Id.


10 Id. (citing a PricewaterCoopers study commissioned by Independent Sector that repeal of the estate tax would eliminate up to $6 billion a year in charitable bequests).


12 Barry W. Johnson and Martha Britton Eller, Federal Taxation of Inheritance and Wealth Transfers, at 17, http://www.irs.gov/pub/irs-soi/inhwlttr.pdf (last visited Aug. 3, 2009) (Figure 3 showing a drop in the percentage of filers making charitable bequests from 22% in 1976 to 17% in 1982).

Act increased the effective exemption from $600,000 to $1 million, and eventually to $3.5 million in 2009, and decreased the top tax rate, from 55 percent, to 50 percent, and then to 45 percent in 2007. Finally, the Act provided for the estate tax to be repealed entirely, albeit only for one year purportedly for budgeting reasons, for those dying in 2010.

Once this proposal became law in 2001, charities turned their efforts toward avoiding a permanent repeal of the estate tax. Americans for A Fair Estate Tax, a Washington lobbyist group representing several hundred nonprofits including charities, churches and labor groups, worked hard in 2002 to accomplish just that, fearing that a permanent repeal would substantially diminish charitable giving. A study by Independent Sector predicted that charitable bequests would fall by $1.5 billion to $5 billion if repeal were made permanent, while a study by the Brookings Institute and the Urban Institute predicted an even greater loss of $10 billion a year. The Congressional Budget Office calculated that charitable bequests would fall 16 percent to 28 percent. However, not all agreed with these dire predictions: some argued that repeal would

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14 Economic Growth and Tax Relief Reconciliation Act §§ 521, 511.


17 Francis, supra note 16.


have little or no effect on charitable giving because “the wealthy have come to see philanthropy as a core part of their identity.”

A seemingly insignificant 10% of charitable donations are “bequests” in wills. However, such contributions mean billions of dollars a year for charities. In 2004, for example, charities received $18.46 billion in bequests, about 8% of that year’s total estimated charitable giving of $245.22 billion. More than 80% of those charitable bequests came from estates large enough to be required to file federal estate tax returns. In 1995, charities received about $10 billion in bequests, roughly 7% of charitable giving that year. In a 1997 study of 329 taxable estates exceeding $20 million, “182 made charitable contributions with an average gift of over $41 million.” Certainly, a great number of wealthy decedents include charitable bequests in their wills.

Charitable groups, legal commentators, and others have assumed that tax law substantially impacts charitable donations. As a New York court held in Estate of Moore, “I do not think the legislature ever intended to tax benevolently inclined people for the privilege of making legacies designed to relieve the state of its burdens. No more effectual way of stopping such benevolence could be well devised.” But an examination of state laws reveals that they may have a greater impact on charities than the federal laws. A historical perspective on charitable bequests and tax laws reveals dramatic changes in the ways the individual states

20 Nazareno, supra note 19 at 10H.

21 “Bequests” are gifts of personal property in a will. William M. McGovern, Jr. and Sheldon F. Kurtz, Wills, Trusts and Estates 2 (3rd edition 2001). “Devises” are gifts of real property in a will. Id. at 6. This article will simply say “bequests” rather than “bequests and devises” to apply to gifts of real or personal property by will for the sake of brevity. The word “devise” will be used if the statute applies only to real property.


23 Id. at 272 (citing a Giving USA report in 2006 that “83% of charitable bequests dollars came from estates above the filing threshold.”)


regarded charitable organizations, especially churches, and reveals what may happen in the years after 2010.

II. Three Precursors to The Current Federal Estate Tax

A. Stamp Act of 1797

The earliest federal tax laws regarding probate matters were clearly not designed to encourage charitable gifts, as they taxed charities at the highest rate. The first federal statute, the Stamp Act of 1797, enacted to finance the naval war against France, required federal stamps for all wills offered for probate, inventories, letters of administration, and other documents. A stamp tax was levied on the receipt of an inheritance greater than $50; while widows, children, and grandchildren were exempt from this tax, charities were not. The tax was repealed in 1802.

The federal tax on charitable bequests can best be understood by examining the struggles of state legislatures regarding charities, and especially churches. Shortly before the American Revolution, eleven colonies (all but Pennsylvania and Rhode Island) had an established church. From 1776, when four states officially disestablished religion, until 1833, the states gradually withdrew from their practice of financially supporting a particular church, a process that was finally completed when Massachusetts stopped its funding of the Congregational Church. At the same time, states enacted curbs to prevent churches, and in some states, other charities, from acquiring too much property. These curbs were generally termed “mortmain statutes,” and in

27 Johnson and Eller, supra note 12, at 4 (noting that “Stamps were also required on receipts and discharges from legacies and intestate distributions of property.”).

28 Id. Those receiving $50 to $100 were taxed 25 cents; $100 to $500 were taxed 50 cents, and each subsequent $500 bequest was taxed $1. Id.

29 Edeck v. Ranuer, 2 Johns. 423 (Sup. Ct. N.Y. 1807).


31 Id. at 23 (Maryland, New Jersey, North Carolina, and Delaware).


33 See infra notes 45-48 and accompanying text.
some cases were modeled after those adopted in England to limit the power of the Catholic church.\textsuperscript{34}

1. Mortmain History in England

A true mortmain statute focuses on the charity’s ability to hold property, rather than on the donor’s ability to give it. Restrictions on the donor’s power “are not mortmain statutes in the true sense of the word. They are not passed to protect the state from the dangers incident to excessive financial power lodged in charitable corporations.”\textsuperscript{35}

A statute enacted in 1225, often cited as the first mortmain statute, made unlawful both the gift of land to a religious house and the holding of land by the religious house, and further declared that such a “gift shall be utterly void.”\textsuperscript{36} As Lord Coke explained, “A dead hand yieldeth no service,”\textsuperscript{37} thus leading to the statutes being termed “mortmain” (dead hand). In addition to losing the service of knights, the Crown could not collect its usual fees when a property owner died, married, or was knighted, since the church could not die, marry or accept a peerage.\textsuperscript{38} By the early 17\textsuperscript{th} century, English statutes greatly facilitated gifts to charity,\textsuperscript{39} but were again tightened a century later to prohibit a devise by will. A charity could only accept gifts of real property by a deed delivered twelve calendar months before the death of the donor and enrolled in chancery within six months of execution.\textsuperscript{40} That ban was finally lifted in 1891.\textsuperscript{41}

2. Mortmain Statutes in Early United States History

\textsuperscript{34} See infra notes 104-16 and accompanying text.


\textsuperscript{36} Comment on Recent Cases, 2 Cal. L. Rev. 257, 311 (1914) (citing 9 Hen. III, c. 36 (1225) (Eng.)).

\textsuperscript{37} Id. at 313.

\textsuperscript{38} Richard Selden Harvey, Ancient Mortmain and Modern Monopoly, 19 Green Bag 352, 354 (1907).

\textsuperscript{39} See, e.g., 43 Eliz., c. 4 (1601) (Eng.).

\textsuperscript{40} Comment on Recent Cases, supra note 37, at 317 (citing 9 Geo. II, c. 36 (1736) (Eng.)).

\textsuperscript{41} 54 & 55 Vict., c. 73, § 5 (1891) (Eng.).
In 1776, the same year Maryland disestablished the Church of England,\(^{42}\) the Maryland Declaration of Rights made void every gift, sale or devise of real property to any religious order or minister absent legislative approval.\(^{43}\) Delaware, which, like Maryland, had disestablished the Church of England in 1776, enacted a stricter statute in 1787, voiding all devises of land to religious corporations.\(^ {44}\) New York, which disestablished the Church of England in its constitution of 1777,\(^ {45}\) enacted legislation to simply limit the amount of land religious societies could acquire.\(^ {46}\)

Jurisdictions other than the original colonies also passed restrictions on religious bodies. Shortly after it was founded, the District of Columbia enacted the Organic Act of 1801 to ban all gifts, sales, devises and bequests to religious sects or ministers, except for at most two acres for a church or cemetery.\(^ {47}\) Kentucky also limited the amount of land religious societies could hold, allowing only four acres in 1814, ten acres in 1824, then fifty acres in 1852.\(^ {48}\)

3. Did American Law Allow Charitable Trusts?

These state statutes restricting the accumulation of property by churches were relatively straightforward and easy to administer. Far more complicated was the issue of whether American law recognized charitable trusts. Was a bequest in a will “for the care and education


\(^{43}\) *Speer v. Colbert*, 100 U.S. 130, 141 (1906). The original Declaration of Rights of the State of Maryland Sec. 34 provided an exception for a devise of land not exceeding two acres and specifically for use as a “church, meeting, or other house of worship,” or burying ground. *Beatty v. Kurtz*, 27 U.S. 566, 583 (1829).


\(^{46}\) *Levy v. Levy*, 33 N.Y. 97, 112-113 (1865) (*citing* 1 Greenl. Laws, 71 (1784)).

\(^{47}\) The Organic Act of 1801, ch.15, § 1, 2 Stat. 103 (1801).

[This Act declared] every gift, sale or devise of lands, to any minister, public teacher, or preacher of the gospel, as such; or to any religious sect, order, or denomination; and every gift or sale of goods or chattels to go in succession, or to take place after the death of the seller or donor, to or for such support, use or benefit; and also every devise of goods or chattels to or for the support, use, or benefit of any minister, public teacher, or preacher of the gospel, as such; or any religious sect, order, or denomination, without the leave of the legislature, shall be void...

*Id.* As in Maryland, an exception was made for “any sale, gift, lease, or devise, of any quantity of land, not exceeding two acres, for a church, meeting, or other house of worship, and for a burying ground...” *Id.*

of the poor in Caroline County,” enforceable? Courts struggled to answer a raft of questions: Did the common law allow such trusts, or was enabling legislation required? Was the Statute of Elizabeth, enacted in England in 1601, adopted here? If so, what effect did the statute have? And had the statute been repealed?

These questions, first addressed by the United States Supreme Court in Trustees of the Philadelphia Baptist Association v. Hart’s Executors took decades to resolve, causing numerous courts to void charitable bequests in wills. The testator in Hart, Pennsylvania resident Silas Hart, executed a will in 1790 giving some of his property to the Philadelphia Baptist Association “for the education of youths of the Baptist denomination, who shall appear promising for the ministry,” with a preference for members of his own family. Chief Justice Marshall concluded that, because the Baptist Association was not incorporated by the Pennsylvania legislature until two years after the testator died, it could not take the bequest. He went on to consider whether the common law of England instead allowed such bequests to the members of the Association as individuals, and concluded that it did not: “a conveyance to officers, who compose the corporate body itself, or in other words, a conveyance to any persons not incorporated to take in succession, although for charitable purposes, would be void if not supported by the statute of Elizabeth.” Because Pennsylvania had repealed all English statutes in 1792, including the statute of Elizabeth, the bequest was deemed void.

Seven years after Hart, a Connecticut court unanimously held that a devise to an unincorporated Quaker meeting for the establishment of a Quaker school was void. Other

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49 Dashiell v. Attorney General, 6 Harris and Johnson 1, 8-9 (1823) (no: beneficiaries too indefinite to enforce).

50 Tr. Of Philadelphia Baptist Ass’n v. Hart’s Ex’rs, 17 U.S. 1 (1819).

51 For more about the validity and application of the Statute of Elizabeth see James J. Fishman, The Development of Nonprofit Corporation Law and an Agenda for Reform, 34 Emory L. J. 617 (Summer 1985); see also Adam J. Hirsch, Bequests for Purposes: A Unified Theory, 56 Wash. & Lee L. Rev. 33 (Winter 1999); see also Carl Zollman, The Development of the Law of Charities in the United States, 19 Colum. L. Rev. 91 (1919).

52 Tr. of Philadelphia, 17 U.S. at 1.

53 Id.

54 Id. at 41-42.

55 Id. at 52 (“the plaintiffs [trustees of the Baptist Association] are incapable of taking the legacy for which this suit was instituted…”).

56 Green v. Dennis, 6 Conn. 292, 9 (1826).
states invalidated charitable bequests on these or similar grounds, including Maryland,\(^{57}\) Virginia,\(^{58}\) New York,\(^{59}\) Minnesota,\(^{60}\) Wisconsin,\(^{61}\) and Michigan.\(^{62}\) It was not until twenty-five years after the *Hart* decision that the Supreme Court in *Vidal v. Girard’s Executors* admitted its error, holding that English common law did in fact allow bequests to charity independent of the statute of Elizabeth.\(^{63}\) In spite of this realization, the controversy continued.

B. Tax Act of 1862

To raise revenue for the Civil War, the Tax Act of 1862 was enacted.\(^{64}\) Like the Stamp Act, a tax was placed on various probate documents and on the receipt of an inheritance.\(^{65}\) Gifts to charity were taxed at the top rate of 5%, “despite pleas from many in Congress that the tax should be used to encourage such gifts.”\(^{66}\) The Act was amended in 1864 to extend the tax to all

\(^{57}\) *Dashiell v. Attorney General*, 5 Harris and Johnson 392, 398 (1822) (invalidating bequest for the poor children belonging to the congregation of Saint Peter’s protestant Episcopal church in Baltimore); *Dashiell v. Attorney General*, 6 Harris and Johnson 1, 8-9 (1823) (invalidating bequest in same will for the care and education of the poor in Caroline County).

\(^{58}\) *Gallego v. Attorney General*, 3 Leigh (30 Va.) 450, 482-83 (1832) (bequest in trust for the Roman Catholic Church and for “needy and respectable widows” invalid).

\(^{59}\) *Owens v. Missionary Society of the Methodist Episcopal Church*, 14 N.Y. 380 (1856) (bequest to unincorporated mission society invalid for lack of definite beneficiary).

\(^{60}\) *Little v. Willford*, 17 N.W. 282, 283-84 (Minn. 1883) (deed of property in trust for the Methodist Episcopal church void).

\(^{61}\) *Ruth v. Oberbrunner*, 40 Wis. 238, 264 (1876) (devise of real property in trust for a Roman Catholic order of nuns and a female academy is invalid).


\(^{64}\) Johnson and Eller, *supra* note 12 at 5.

\(^{65}\) *Id.*

transfers of real property, with transfers to charities again taxed at the highest rate, now 6%. The inheritance tax was repealed in 1870.

This second federal tax was enacted in a somewhat different legal climate than the first. By the middle of the 19th century, most states had resolved the issue of whether churches and other charities could hold property, including property bequeathed to them in wills, although strict limits on the accumulation of property were still in force. But the second issue – whether charitable trusts were valid, the issue in Hart – was still very much alive, despite the decision in Vidal v. Girard’s Executors. The public’s attitude toward charitable giving had changed by this time as well. While the Stamp Act appeared in an era when states were still deciding how best to fund churches, the early nineteenth century saw the Second Great Awakening with its “dramatic increase in religious fervor and church attendance.” Increased urbanization in the country had led to movements to benefit the poor, and charitable organizations proliferated. Certain states, especially those in the East, promoted charitable giving by enacting provisions in their constitutions which encouraged philanthropy.

Thus, around the time of the Civil War and the enactment of the Tax Act of 1862, courts and legislatures were more favorably inclined to churches and other charities, but a number of impediments still remained. States continued to limit the amount of property religious groups could hold. In addition, they enacted statutes to protect the donor and his or her family from undue influence by such groups. At the same time, the struggle epitomized by Hart – the debate as to whether entities could hold property for indefinite beneficiaries – was still an issue in some jurisdictions.

1. More States Limited Church Ownership of Property

67 Johnson and Eller, supra note 12, at 5.
68 Id. at 6.
72 Id. at 157 (citing Pennsylvania, Massachusetts, Vermont and New Hampshire).
73 See infra notes 76 to 94 and accompanying text.
74 See infra notes 108-120 and accompanying text.
By the middle of the nineteenth century, an increasing number of states limited the total amount of real and personal property that could be held by a charitable corporation such as a church or religious society. Iowa statutes restricted both the purpose and amount of land which could be held by religious societies in 1843 and 1844, respectively. Mississippi, likewise, singled out religious groups. In 1857, statutes voided devises or bequests to any religious or ecclesiastical society or denomination. Also regulating religious groups in particular, Missouri’s 1865 constitution provided that a church or religious society could only hold so much land as it needed for a house of worship, chapel, parsonage, and cemetery, in no event to be more than 5 acres in the country, or one acre in a town or city, all other gifts, sales or devises of land to a minister or religious order were void.

Virginia was especially worried about religious bodies controlling too much land. As Judge Tucker stated in 1832 in *Gallego v. Attorney General*:

No man at all acquainted with the course of legislation in Virginia can doubt, for a moment, the decided hostility of the legislative power to religious incorporations. Its jealousy of the possible interference of religious establishments in matters of government, if they were permitted to accumulate large possessions, as the church has been prone to do elsewhere, is doubtless at the bottom of this feeling. The legislature knows, as was remarked by counsel, that wealth is power.

While an 1839 statute broadly declared valid any devise or bequest “for the establishment or endowment of unincorporated schools, academies, or colleges,” Virginia in 1842 limited the amount of land a religious congregation was permitted to hold, and restricted the use of such property to a handful of purposes. In addition, the Supreme Court of Virginia, in *Seaburn’s*

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75 DeCamp v. Dobbins, 31 N.J. Eq. 671, at *16 (1879) (the information cited may be found in the notes following the opinion in the West Reporter).


77 Mo. Const. art. 1, § 12 (1865).

78 Id. at § 13.

79 *Gallego*, 3 Leigh (30 Va.) at 477.


81 1842 Va. Act Ch. 102, § 4.

[This statute provided that] trustees for the use of any religious congregation shall not hereafter take or hold at any one time any tract of land in the country exceeding in quantity thirty acres, or in any incorporated town exceeding two acres; nor shall such real property be held by them for any other use than as a place of public worship, religious or other instruction, burial ground and residence of their minister.

*Id.*
 Executor v. Seaburn

narrowly interpreted legislation designed to allow churches to take property to embrace only inter vivos conveyances, and not those by will. The Virginia legislature had enacted a statute following the decisions in Gallego and Hart which declared that:

Every conveyance, devise or declaration shall be valid, which since the first day of January 1777 has been made, and every conveyance shall be valid which hereafter shall be made, of land for the use or benefit of any religious congregation as a place for public worship or as a burial place or a residence for a minister; and the land shall be held for such use or benefit and for such purpose and not otherwise.

The issue before the court was whether a bequest in Seaburn’s will to a religious congregation was valid. In other words, did the word “conveyance” a second time in the statute include a bequest or devise? The court noted that the first phrase of the statute made good any “conveyance, devise or declaration” completed before 1777, but the second phrase, the one applicable to Seaburn’s will, said simply “conveyance.” The court reviewed other legislation recently passed in Virginia, including an 1851 constitutional provision which stated for the first time that no church or religious denomination could be incorporated in Virginia. The court declared that the purpose of this provision “was to prevent the accumulation of church property,” and thus all devises and bequests to churches were void. Apparently the Virginia legislature disagreed with the decision in Seaburn, since in 1860 a law was passed to expressly allow devises of real property for the use or benefit of any religious congregation as a place of public worship, burial place, or residence for a minister. Still, the strict limits enacted in 1842 persisted: a religious congregation could hold only two acres in an incorporated town, and no more than 30 acres outside of such a town. The 30-acre limit was increased to 75 acres in 1873. West Virginia allowed benevolent associations to hold no more than five acres of land within an incorporated town or city, and no more than 50 acres outside the city or town, but religious congregations were only permitted to hold 2 acres within an incorporated town, and 30 acres outside.

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83 Id. at 426-27 (citing Va. Code § 77-8 (1859)).
84 Id.
85 Id. at 429.
86 Id. at 430, 433.
88 Id. § 22-77-12.
89 Va. Code § 22-76-12 (1873).
91 Id. at § 56-5.
An 1845 Illinois law allowed a religious society to hold no more than 10 acres of land. The purpose, according to the Illinois Supreme Court, was “to keep landed estates as much unfettered as possible, so that their free transfer from one person to another may not be interrupted or hindered, and it will not be denied that to permit corporations to acquire real estate to an unlimited extent would be destructive of this policy.” The court held that a deed of 80 acres of land to St. Peter’s Church, which already held the maximum 10 acres, was “absolutely void.” The court was not entirely hostile to such gifts, however. In a case three years later, the testator attempted to devise the same land to the Bishop as trustee, who would then sell it and create an orphanage with the proceeds. This bequest was declared valid because it was essentially a gift of personal property, not land.

While these states were especially worried about religious bodies, others enacted statutes applicable to a broad range of charitable groups. In 1848, New York limited the amount of property a benevolent, charitable, scientific or missionary society could hold to no more than $50,000 in value in real property, no more than $75,000 in personal property, and a total annual income from both not to exceed $10,000. These amounts were increased to no more than $2 million in combined real and personal property in 1885, with an annual income up to $100,000, and to $3 million in holdings (with an annual income of $250,000) in 1890. Gifts or bequests in excess of these amounts were void. Cornell University’s legislative charter authorized it to hold “real and personal property to an amount not exceeding three millions of dollars in the

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92 Illinois Revised Statutes 1845, chap. 35, sec. 44 (cited in St Peter’s Roman Catholic Congregation v. Germain, 104 Ill. 440 (1882)).

93 St. Peter’s Roman Catholic, 104 Ill. at 446.

94 Id.

95 Germain v. Baltes, 113 Ill. 29, 33 (1885).

96 Id.

97 N.Y. Laws 1848, ch. 319 Sec. 2 (1848). The legislative charter of a corporation might prescribe different amounts. For example, the Missionary Society of the Most Holy Redeemer was authorized by statute to take and hold property by devise, bequest or purchase provided the annual value of such property did not exceed $10,000. Laws of 1864, chap. 88 (1864) (cited in In the Matter of the Construction of the Last Will and Testament of Dooper, 212 N.Y.S. 616, 620 (1925)). This amount was increased to $20,000 in 1888, and amended to limit only real property holdings. Laws of 1888, chap. 46.

98 N.Y. Laws ch. 88 Sec. 2 (1885); N.Y. Laws 1890 ch. 553 Sec. 1 (1890). In 1870, universities and colleges were permitted to take and hold up to $1 million. N.Y. Laws 1870 ch. 51 (1870). These educational corporations were later subject to the 1885 and 1890 statutes.
aggregate.”99 When Jennie Fiske died in 1881, her will left the balance of her estate to Cornell.100 Her husband sued, alleging that Cornell already owned property totaling $3 million; the U.S. Supreme Court agreed.101 Pennsylvania in 1855 limited the amount of real and personal property held by “any literary, religious, charitable or beneficial society, congregation, association or corporation” to an annual value of five thousand dollars, unless otherwise permitted by legislative sanction.102 Similarly, Oklahoma limited corporations formed either for religious or charitable purposes to “no more real property than may be reasonably necessary for the business and objects of the said association with a maximum value of $50,000.”103

Another method to limit charitable bequests was to require that a charity be expressly authorized by its charter to take such gifts. An 1827 case in New York held void a devise to an orphan asylum incorporated in that state, because its charter only gave it the power to purchase real property.104 Two years later, the New York legislature codified that holding.105 New York had “expressly repealed its mortmain statutes, but a devise to a corporation of land for charitable purposes is absolutely void where the corporation is not expressly authorized either by its charter or by some other statute to take lands by devise.”106 An 1874 case voided a devise of real property situated in Illinois to a New York corporation, the American Bible Society.107 Since the American Bible Society was not authorized to take such property in New York, the court held it was not authorized to acquire Illinois real property either.108 California and Oklahoma enacted similar laws in 1872 and 1893, respectively: “A testamentary disposition may be made to any person capable by law of taking the property so disposed of, except that no corporation can take under a will, unless expressly authorized to so take.”109

100 Id. at 152.
101 Id. at 200.
103 Oklahoma Statutes of 1893 Sec. 1101 (1893). The statute was amended in 1909 to remove the $50,000 limit, but retained the original statute’s requirement that the real property must be reasonably necessary for its business or objects. Amendment 1909, Oklahoma Compiled Laws of 1909 Sec. 1453.
108 Id. at 54.
109 CA. Civil Code § 1275 (West 1875); Oklahoma Statutes of 1893 Sec. 6169.
Even in cases where the corporation was authorized to take property by will, the bequest could still be set aside if for an unauthorized purpose. A Maryland court held that a bequest of over $20,000 to the Maryland Baptist Union Association to build an orphans’ home was void because the Union’s charter, “to advance the cause of true religion in Maryland and the District of Columbia by efforts to aid feeble Baptist Churches and supply destitute neighborhoods with preaching,” did not give it the power to establish an orphans’ home.\(^{110}\)

2. Limits on the testator’s ability to give to charity

In addition to statutory limits on the purpose or amount of property a church or charity could hold, some states approached the matter from the opposite direction. These states enacted statutes to protect either the donor or the family of the donor from large and improvident gifts to charity. Some states required the will to be executed more than 30 days before death in order to give effect to a bequest or devise to charity,\(^{111}\) thereby protecting the testator from any undue influence on his or her deathbed; others went so far as to require its execution at least twelve months before death.\(^{112}\) Another approach limited the percent of the estate that could be given to charity if the testator left close family members.\(^{113}\) In some states, the statutes did both, thus protecting both the donor and the family.\(^{114}\)

A District of Columbia statute enacted in 1866 relaxed the earlier absolute ban on gifts to religious persons or organizations\(^{115}\) and allowed such bequests on the condition that they were made at least one calendar month before the death of the donor or the testator.\(^{116}\)

\(^{110}\) *Curtis v. Maryland Baptist Union Ass’n*, 5 A.2d 836, 840, 842 (1939).

\(^{111}\) See, e.g., Legislature of Pennsylvania Act of 1853, and 1855 Session Laws page 328 Sec. 11, (requiring any devise or bequest for religious or charitable uses be in a will executed at least one calendar month before the testator’s decease).


\(^{113}\) See, e.g., Iowa Code § 1198 (1860) (limiting devise to any institution or corporation to no more than 1/4 of the estate if the deceased left a wife, child or parent surviving).

\(^{114}\) See, e.g., Ga. Code § 2419 (1873) (limiting devise to any charitable, religious, education or civil institution to no more than 1/3 of the estate where the deceased left a wife or child, and requiring that, in all the cases, the will must be executed at least 90 days before death or the devise shall be void). The statute was reenacted in 1882 in Georgia Code of 1882 Sec. 2419 and again as late as 1933, GA. Code of 1933 Section 113-107.

\(^{115}\) The Organic Act of 1801, ch.15 Sec. 1, 2 Stat. 103 (1801).

\(^{116}\) D.C. 14 Stat. 232, enacted July 25, 1866, provided that “A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or
secular charities were valid whenever made. The purpose of the statute was “to preclude ‘deathbed’ gifts to clergymen and religious organizations by persons who might be unduly influenced by religious considerations.”\textsuperscript{117} The statute remained on the books until the 1970s, when two courts declared it invalid as violating first and fifth amendment rights.\textsuperscript{118}

A Pennsylvania law restricting gifts to charities was enacted “to protect heirs from large and improvident dispositions by persons on their deathbeds, or when their minds are enfeebled by the hopes and fears of approaching dissolution.”\textsuperscript{119} Public Law 537, enacted in 1855, required that any devise, bequest or conveyance of real or personal property to any person or organization for religious or charitable uses must be attested by two credible and disinterested witnesses “at least one month before the decease of the testator or alienor...”\textsuperscript{120} Proof that the object of the statute was to protect the family rather than limit religious or charitable groups was the fact that heirs or next-of-kin could waive the benefit of the Act and allow the charity to take.\textsuperscript{121} Had the purpose been to simply limit the property owned by charities, the Act would have made the attempted transfer void.\textsuperscript{122}

New York placed a number of limits on charitable bequests in addition to the monetary limits previously discussed. If the testator was survived by a wife, child or parent, he could devise no more than 1/4 of his estate in a will executed at least two months before death.\textsuperscript{123} In 1860, the law was amended to allow no more than ½ of a testator’s estate to such charities; to make clear the provision applied to female testators as well, the statute specifically included a testator who left a husband surviving her.\textsuperscript{124}

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\textsuperscript{117} In re Estate of French, 365 A.2d 621, 622 (1976).

\textsuperscript{118} In re Estate of Small, 100 Wash. L. Rptr. 453 (1972) (statute violated first amendment); In re Estate of French, 365 A.2d at 623 (statute invalid under equal protection and due process principles).

\textsuperscript{119} The Forum, Gifts To Charities, Section XI, ACT April 26\textsuperscript{th}, 1855, 12 F. FORUM 167, 167 (1907-1908).

\textsuperscript{120} Id.

\textsuperscript{121} Id. at 168.

\textsuperscript{122} Id.

\textsuperscript{123} N.Y. Laws 1848, ch. 319 Sec. 6 (1848).

\textsuperscript{124} N.Y. Laws 1860 ch. 360 Sec. 1 (1960).
3. Continuing Doubts About the Validity of Charitable Trusts

Decades after the Supreme Court’s 1819 decision in Hart, questions still arose as to whether a charitable trust could be maintained for indefinite beneficiaries. New York in 1865 considered whether a bequest in trust to establish an agricultural school for the children of warrant officers in the United States navy was valid.\(^\text{125}\) Reviewing the New York legislation abolishing the Statute of Elizabeth and other English laws, the court considered whether:

Sagacious men, who shaped the legislation of the State in the early periods of the government, would designedly leave in force a system of indefinite trusts, without any restraint whatever, when the experience of the mother country had shown that a system of public or charitable uses, without legislative restraint, was not to be tolerated.\(^\text{126}\)

The legislation, which allowed charitable and religious societies to incorporate and strictly limited the amount of property they could hold, was seen as a “harmonious and symmetrical” system that would be rendered “useless and nugatory, if gifts to unincorporated bodies, without any restraint whatever, were to be tolerated.”\(^\text{127}\) The court concluded that, in New York, only bequests in trust to incorporated entities were valid and all others would fail for a variety of reasons: lack of ascertained beneficiaries, violation of the rule against perpetuities, and failure to conform to New York statutes.\(^\text{128}\) Michigan, like New York, decided that such charitable trusts could not be sustained where the res included real property.\(^\text{129}\) Michigan courts later extended that rule to include trusts of personal property as well.\(^\text{130}\) Minnesota did the same.\(^\text{131}\)

By the end of the nineteenth century, however, the tide was turning. A key event occurred in 1887 when Samuel Tilden, a corporate lawyer and 1876 Presidential candidate,

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\(^{125}\) *Levy v. Levy*, 33 N.Y. 97 (1865).

\(^{126}\) *Levy v. Levy*, 33 N.Y. at 110-111.

\(^{127}\) *Id.* at 117-118.

\(^{128}\) *Id.*

\(^{129}\) *Methodist Episcopal Church v. Clark*, 3 N.W. 207 (Mich. 1879) (trust for church void from its creation because it purported to suspend alienation for longer than two lives in being). Additionally, Michigan law made no distinction between charitable trusts and others, and thus the “indefinite charitable” trust was not valid. *Id.* at 215.

\(^{130}\) *Hopkins v. Crossley*, 96 N.W. 499, 501 (Mich. 1903) (trust for poor and needy or disabled fire department members or their families void).

\(^{131}\) *Shanahan v. Kelly*, 92 N.W. 948, 951 (Minn. 1903) (bequest to bishops for masses and education of Catholic priests void “for the reason being that the beneficiaries are not certain, nor capable of being rendered certain.”).
willed 2/3 of his estate of roughly $4 million for charitable purposes. Although Tilden’s will had provided $1.4 million to his relatives, his nephews challenged the charitable bequest, claiming the provisions for such “charitable, cultural and scientific purposes” as his executors determined were “beneficial to the interests of mankind” were too indefinite to carry out. After several appeals, the nephews eventually won. The holding in Tilden, coupled with the failure of the Fiske trust the following year and the death of one of the wealthiest men in the country, Jay Gould, in 1892 with a will leaving no money to charity, led reformers including J.P. Morgan and the dean of Harvard Law School determined to change New York law on charitable bequests. A year later, the 1893 New York legislature passed the “Tilden Act,” declaring charitable gifts valid despite “the indefiniteness or uncertainty of the persons designated as beneficiaries.”

Michigan, Wisconsin and Minnesota all followed New York’s lead in passing their own versions of the Tilden Act, to make clear that charitable trusts were to be held valid in their state despite having indefinite beneficiaries. However, the validity of charitable trusts remained doubtful in several states. Minnesota’s statute was held unconstitutional in 1904. The issue was finally resolved for Minnesota twenty four years later, when a new statute was passed by the legislature. Maryland finally enacted a statute in 1931 to give courts of equity jurisdiction to


133 Id. at 158-159.

134 Tilden v. Green, 130 N.Y. 29, 45-46 (1891). “Nothing could be more indefinite or uncertain, and broader and more unlimited power could not be conferred than to apply the estate to ‘such charitable, educational and scientific purposes as in the judgment of my executors will render said residue of my property most widely and substantially beneficial to mankind.’” Id.

135 Id.

136 Id. at 160. Maryland had passed a similar statute in 1888. Md. Code Ann., Est. & Trusts § 93-93 (West 1888).


138 Watkins v. Bigelow, 100 N.W. 1104 (Minn. 1904). The statute violated the Minnesota requirement that “no law shall embrace more than one subject, which shall be expressed in its title.” Id. at 1108; Const. art. 4, § 27. Thus, the court held that “the subject matter of the act is not expressed in its title, and therefore the whole act is unconstitutional.” Watkins, 100 N.W. at 1109.

139 Minn. Laws 1927, ch. 180 at 272.
enforce charitable trusts. Virginia, which had no statute, held charitable trusts to the same requirements as all other trusts, which often meant that bequests attempting to create charitable trusts were declared void for uncertain beneficiaries.

A few states had an additional impediment to charitable trusts. Virginia’s constitution prohibited churches and any other religious denomination from incorporating, and thus a church could not take title to property absent an express statute. Similar provisions were included in the constitutions of West Virginia and Maryland.

C. 1898 War Revenue Act and the First Federal Exemption for Charitable Bequests


141 See, e.g., Fifield v. Van Wyck’s Executor, 27 S.E. 446, 449 (1897) (residue to two ministers in trust for church declared void; the beneficiaries were uncertain and the purposes undefined); Kain v. Gibboney, 101 U.S. 362 (1879) (residue to the Roman Catholic Bishop of Wheeling, Virginia, for the benefit of the Sisters of Saint Joseph was void); Wheeler v. Smith, 50 U.S. 55, 80 (1850) (bequest to three individuals for the benefit of the town and trade of Alexandria was void because “the beneficiaries of the trust are uncertain, and the mode of applying the bounty is indefinite.”); Gallego’s Executors v. Attorney General, 30 Va. 450, 462 (1832) (bequests to Roman Catholic church to build chapel were void: no legal interest is vested, and the beneficiaries are too vague).

142 Va. Const. Art. IV, Sec 14 provided: “The General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law.” Moore v. Perkins, 192 S.E. 806, 811 (Va. 1937). An earlier 1784 statute expressly authorized the incorporation of the Protestant Episcopal church, but was repealed just two years later. Terrett v. Taylor, 9 Cranch 43, 47 (U.S. 1815). Soon after, in 1801, the legislature asserted their right to all property owned by the Episcopal churches. Id. at 48.

143 Paul G. Kauper and Stephen C. Ellis, Religious Corporations and the Law, 71 Mich. L. Rev. 1499, 1501 (1972-73) (asserting that two legal devices, the trust and the corporation, allowed churches to receive and hold property); Douglas G. Smith, The Establishment Clause: Corollary of Eighteenth-Century Corporate Law? 98 Nw. U. L. Rev. 239, 255-56 (2003) (“If a religious entity could not incorporate, then it could not hold property as an entity.”); J. Rodney Johnson, Virginia Laws Affecting Churches – Restated, 17 U. Rich. L. Rev. 1, 6 (1982) (citing a “one hundred and fifty year old rule established by the Virginia Supreme Court that, unless expressly validated by statute, a trust for indefinite beneficiaries is void if the named trustee is an individual or an unincorporated body.”).

Congress attempted to tax inheritances as income in 1894, but the statute was invalidated by the United States Supreme Court in 1895. The Spanish-American War led to the enactment of the 1898 War Revenue Act, which taxed bequests of personal property over $10,000 according to the relationship of the recipient to the deceased. In 1901, the statute was amended to exempt bequests to “charitable, religious, literary and educational organizations and gifts to organizations dedicated to the encouragement of the arts and the prevention of cruelty to children.” The Act was repealed in 1902 when the war ended. A 1904 survey reported that “annual philanthropic giving increased from $29 million in 1893 to $107 million in 1901.” Though an unknown percentage of these amounts were bequests in wills, perhaps the 1901 amendment to exempt charities had some effect.

Given the 1901 exemption in the federal statute, one might expect the climate toward charities in state laws to have changed. State inheritance tax laws did indeed reflect a trend toward encouraging such bequests, but other statutes, including mortmain statutes, still proliferated.

1. State Tax Laws on Inheritance

    Just as early federal laws taxing estates or inheritances did not exempt charities, state laws also taxed charities, and at the highest rates. An 1887 Pennsylvania statute imposed a tax of $5 on every $100 of devises or bequests, except for those to close relatives (parents, spouse, lineal descendants and so on). In 1900, when several charities objected to paying this tax on a bequest of almost $50,000 in the will of the Reverend John Finnen, the Supreme Court of Pennsylvania helpfully explained that this is “not a tax upon the property or money bequeathed, but a diminution of the amount that otherwise would pass under the will or other conveyance,”


    146 War Revenue Act, 20 Stat. 448 Sec. 29 (1898). The act was upheld as constitutional in Knowlton v. Moore, 178 U.S. 41, 60 (1900).

    147 War Revenue Act, 20 Stat. 448, Sec. 29 (1898).

    148 Id.

George J. Hagar, Magnitude of American Benefactions, The American Monthly Review of Reviews 29, 464,465 (Volume 4, 1904). This estimate excluded gifts and bequests under $5,000, national, state and municipal appropriations, and “all ordinary contributions to regular church organizations and missionary societies.” Id. at 464. 1901 is described as a “high water mark” because of the $31 million gift of Andrew Carnegie that year; for 1902, the estimate was $94 million, and for 1903 it was $95 million. Id.

150 Act of May 6, 1887, P.L. 79, Purdon’s Digest, 305.
and hence that which the legatee really receives is not taxed at all.” Thus, the charitable bequests were subject to Pennsylvania’s inheritance tax. Kentucky was another state that did not exempt charities or religious institutions, but held that “[t]he tax is not levied upon the fund, but upon its transmission...” and thus a public school, although its property was ordinarily tax exempt, must still be taxed on the bequest.

The California Inheritance Tax, enacted in 1893, placed a tax on those receiving an inheritance, but exempted certain direct relatives such as the decedent’s parent, spouse, child, sibling, the wife or widow of a son, and the husband of a daughter; it also exempted estates of less than $500. A study of all the probate files in the Los Angeles County Archives in the first year still stored there, 1893, found very few charitable bequests: of the 108 testators, only five (4.6%) left any property to a charity. Four of the five had no surviving spouse or issue; a fifth left a small amount to her surviving spouse, but had no issue. The statute was finally amended twenty two years later, in 1915, to exempt charities receiving property from a will.

Even when states amended their tax laws to exempt bequests to charities, the exemption applied only to entities within the state. An 1893 Minnesota law exempted bequests to the state’s cities or villages from inheritance tax, and limited the use of such bequests to certain associations within ten miles of the recipient city or village. Missouri also in 1893 restricted its inheritance tax exemption to purposes within its state. In New Hampshire, a 1905 statute exempted from the state inheritance tax legacies to charitable institutions “in this state.” Thus,

152 In re Finnen’s Estate, 46 A. 269, 270 (Pa. 1900).


156 Id. at n. 180-81: Case 68 John Greenleaf Whittier, Case 101 Anna Ogier, Case 423 Henrietta Losee, and Case 342 Antoine Charvoz, all had no surviving spouse or issue. Case 95 Bridget Wilson was survived by her spouse. Id. at 31.


158 Minnesota Laws of 1893 Ch. 84 Sec. 6

159 Missouri Laws of 1917 page 117 Sec. 4 exempts from inheritance tax “all transfers of property or any beneficial interest therein to be used, and actually used solely for county, city, town or municipal purposes, or for religious, charitable, or educational purposes in this state.”

160 Peter V. Ross, Inheritance Taxation: A Treatise on Legacy, Succession and Inheritance Taxes 196 (Bancroft-Whitney Co. 1912). An 1895 statute had already exempted the property of charitable associations from taxation. Id.
a court in 1908 held that, if the principal purpose of the charity was to do work abroad, a charitable bequest was not exempt from the tax, even if it did some work within the state.161 A bequest to the Home Missionary Society, whose local society spent very little of its funds in New Hampshire, was subject to taxation, as was a bequest to the Auxiliary of the Woman’s Foreign Missionary Society for “the evangelization of heathen women,” despite the latter society’s connection with a local church and its existence in the state as an association.162 As recently as 1954, the Supreme Judicial Court of Massachusetts held that “a society or institution must be a Massachusetts corporation in order to qualify for an exemption.”163 Charities that were voluntary associations did not qualify because they were not incorporated; instead, the burden was on the charity, in this case a Masonic Lodge, to establish that “no substantial part of the charitable purposes of Columbian Lodge was carried on outside the Commonwealth.”164 Not until 1984 did Massachusetts hold that tax exemptions for state corporations receiving bequests, but not for out-of-state corporations, violated the Equal Protection clause.165

What was the rationale for exempting in-state charities, but not others? The New York Court of Appeals held, “It is the policy of society to encourage benevolence and charity. But it is not the proper function of a state to go outside of its own limits and devote its resources to support the cause of religion, education or missions for the benefit of mankind at large.”166 An Ohio court stated a slightly different purpose:

The premises upon which such exemptions are based are the just and equitable grounds that (1) the function of a democratic government is to benefit the people it serves, the public, and the only justification for taxes is that the money derived therefrom helps defray the cost of such benefits, and (2) if a succession is made for the sole purpose of public charity then the benefits of such succession are actually serving the same purpose as the benefits of a tax.167

Not only did Ohio require that the bequest or devise be to the benefit of those in Ohio, it further required that such geographical limitation must be expressly stated in the terms of the will, and thus taxed a $1 million bequest to a trust for the poor and the destitute, and the advancements of


162 Id. at 784-85.


164 Id. at 331.

165 Davis v. Commissioner of Revenue, 458 N.E.2d 1195, 1996 (Mass. 1984), (citing Mary C. Wheeler School, Inc. v. Assessors of Seekonk, 368 Mass. 344 (1975)) (which had held almost ten years earlier that exempting only Massachusetts charities from a real property tax violated the Equal Protection clause).

166 In re Estate of Prime, 32 N.E. 1091, 1095 (N.Y. 1893).

167 In re Estate of Bremer, 141 N.E. 2d 166, 171 (Ohio 1957).
Similarly, in 1960 the Supreme Court of Oregon upheld the assessment of an inheritance tax on a charitable bequest of $100,000 because “the gift in question does not expressly limit the use of the student loan fund to uses ‘within this state.’” Even a charitable bequest to the United States was taxable because, while the United States was a “body politic” capable of taking the legacy under New York law, it was not a domestic corporation and thus could not benefit from the exemption. At least in New York the bequest was valid, even if it was taxed; in some states, the bequest itself was void. The United States Supreme Court in 1950 upheld a decision by the California Supreme Court that a California domiciliary could not make a charitable bequest to the United States, despite a statute allowing such bequests to the state of California, its counties or its municipalities.

As the U.S. Supreme Court explained, “A state may by statute properly prefer itself in this way, just as states have always preferred themselves in escheat.”

While many states encouraged charitable bequests, at least to entities within the state, Mississippi hardened its position, adding its statutory ban on devises and bequests to religious societies to its constitution in 1890. Section 269 of its constitution voided any devise of land to any religious association or any body politic “for the use and benefit of such religious corporation” or for “charitable uses or purposes.” Section 270 voided a religious or charitable bequest of more than one-third of the testator’s estate if he or she thereby excluded a spouse, child, or descendent of a child, or if such a bequest was executed within ninety days before the testator’s death. One testator tried to avoid the ban on bequests to religious organizations by giving the residue of his estate to three members of the Sisters of Mercy, a religious order, declaring,

Let it be known and understood that the bequest and devise to these ladies is to them individually, and not to them as members of the Sisters of Mercy, or for the use and benefit of the Sisters of Mercy, or any other charitable or religious corporation or association. The bequest and devise is absolute to the ladies named.

The Mississippi Supreme Court held that the Sisters of Mercy, having taken vows of poverty and obedience, were not able to hold property in their own names and were simply trustees for the

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168 Id.

169 In the Matter of the Estate of Jenkins, 355 P.2d 729, 733 (Or. 1960).


172 Id.

173 Mississippi Constitution of 1890, Sec. 269.

174 Mississippi Constitution of 1890, Sec. 270.

175 Maas v. Sisters of Mercy of Vicksburg, 99 So. 468, 469 (Miss. 1924).
benefit of the Society; thus, the attempted bequest was void.176 Sections 269 and 270 were repealed in 1940.177

Montana law prohibited devises of more than one-third of the decedent’s estate to charitable or benevolent societies or corporations unless such a devise was made at least thirty days before the testator’s death.178 In 1904, Ohio took a harsher approach and enacted a meticulous statute which voided a devise of any amount to “any benevolent, religious, educational or charitable purpose, or to this state or [to] any other state or country, or to any county, city, village, or other corporation or association in this or any other state or country” if the testator left issue, an adopted child, or legal representatives of either, unless executed at least one year before the testator’s death.179

California law likewise made it difficult to give to charity, requiring both that the will be executed more than thirty days before death, and that no more than 1/3 of the estate be given to charity.180 Thus in 1912, after John W. Hunt died leaving an estate worth $1,197,000, Hunt’s half-brother challenged the will’s residuary clause which left the bulk of the property in trust to establish and maintain “such charitable or benevolent institution as the executors might select as a memorial to” the testator.181 The challenge noted both that the will was executed shortly before Hunt’s death and that the residuary clause exceeded 1/3 of the estate.182 Similarly, in 1915, two cousins of Miss Bena Knox, a former teacher who left $1,000 of her $10,000 estate to the purchase of books and other necessary things for the needy blind, successfully challenged the bequest on the grounds that the will was executed within thirty days of her death.183 Several years later, the statute was amended to exempt bequests to the state or to any state institution from the 30 day/1/3 requirement (in 1917) and to exempt any educational institution (in 1919).184 Also in the 1919 amendment the time period was extended to six months, but rather than voiding

176 Id. at 517. The statute was held not to apply to a Sister of Mercy who took the property by intestacy and then deeded it in trust to the Bishop for the benefit of her order. State ex. rel. Knox v. Sisters of Mercy, 115 So. 323, 332-34 (1928).

177 Laws 1940 ch. 325.

178 1893Mont. Laws page. 69 Sec. 1.

179 Ohio Revised Annotated Statutes of 1904, Title II Ch. 1 Sec. 5915.


182 Id. The article reports the California law as requiring the will to be made six months before the testator’s death.

183 LOS ANGELES TIMES, Public Service: City Hall, Courts, September 24, 1915, at II 10.

all charitable bequests, it allowed the testator’s surviving heirs (parent, husband, wife, child or grandchild) to waive the restriction in writing six months before the testator’s death.\footnote{\(185\)}

III. Statutes on Charitable Bequests in the Twentieth Century

1. The Revenue Act of 1916

In 1916, Congress enacted an estate tax whose basic structure remains in place today. The Revenue Act of 1916 “allowed an exemption of $50,000 and fixed rates which ranged from one per cent on the first $50,000 of taxable assets to ten percent on any amount over $5 million.”\footnote{\(186\)} The 1916 Act did not include any exemption or deduction for charitable bequests, despite the fact that by this time, virtually all states with an inheritance tax did so.\footnote{\(187\)} This omission is likely because the federal statute was meant to raise revenue and decrease the reliance on consumption taxes.\footnote{\(188\)} Another possible explanation is that very few testators included charitable bequests in their wills, so the effects of no exemption would be minimal. A 1916 publication for lawyers on “How To Prepare a Will” noted, “Gifts for public charities are rather infrequent. If an attorney is required to provide for one in a will, he should make careful search of statutes and authorities.”\footnote{\(189\)}

In 1917, the Citizens’ Committee of the City of New York published a Letter to the Editor of the New York Times, urging Congress to amend the estate tax to exclude gifts to charities.\footnote{\(190\)} The letter declared that the tax dealt a “staggering blow” to educational, philanthropic, charitable and religious institutions “which have been the very first to come forward in patriotic service, the first to offer everything they have to the Union, and to the successful issue of the present war.”\footnote{\(191\)} When the amendment came before the House Ways and Means committee, Columbia Law Professor Samuel McCune Lindsay, testifying in his capacity as chair of the Committee on War Charity and Social Work, urged its passage.\footnote{\(192\)} While H.R.

\footnote{\(185\)} Cal Civ. Code Sec. 1313 (1919).

\footnote{\(186\)} Eisenstein, 11 TAX L. REV. at 230 (citing Revenue Act of 1916, Secs. 201 and 203(a)(2)).

\footnote{\(187\)} Peter V. Ross, Inheritance Taxation: A Treatise on Legacy, Succession, and Inheritance Taxes 41-42 (Bancroft-Whitney Co. 1912) (citing Kentucky, Pennsylvania and Virginia as three states with inheritance tax statutes that did not exempt charities).

\footnote{\(188\)} Id., citing H.R. REP. NO. 922, 64TH CONG., 1ST SESS. 5 (1916), 1939-1 CUM. BULL. (Part 2) 23.

\footnote{\(189\)} George Fox Tucker, How To Prepare A Will 37 (Blackstone Institute 1916).

\footnote{\(190\)} Henry Fairfield Osborne, The Tax on Philanthropy, N.Y. TIMES, June 24, 1917, at 22.

\footnote{\(191\)} Id.

12863 reported from the House Committee on Ways and Means did not include such a provision,\textsuperscript{193} by the time the bill passed in 1919, the war had ended, and the Revenue Act of 1918 included a charitable deduction for the estates of all decedents who died after December 31, 1917.\textsuperscript{194}

The 1918 Revenue Act may have prompted an increase in bequests to charities, although the evidence is mixed. An examination of estates large enough to file tax returns indicates that, while the percentage of decedents making charitable bequests increased, the average amount given declined. From 1916 to 1920, 7.8\% of all decedents filing estate tax returns made bequests to charity; the average bequest of those donating was $88,189.\textsuperscript{195} From 1921 to 1925, 15.5\% of these decedents gave to charity, with an average donation of only $52,719.\textsuperscript{196} In that same period, the average total gross estate of filers declined from $528,540 to $388,183.\textsuperscript{197}

2. State Laws in the Early 20\textsuperscript{th} Century

By the time of the 1918 Revenue Act, most state inheritance taxes provided exemptions to charities. Pennsylvania was one of the few exceptions, providing no exemption for charitable bequests until 1956, when it excluded bequests for “religious, charitable, scientific, literary, educational and other designated eleemosynary purposes.”\textsuperscript{198} Still, other state laws and policies continued to make charitable bequests difficult, with Virginia, once again, particularly hostile to religious organizations. Statutes in Virginia allowed local congregations to take property by devise or conveyance as early as 1841, to be used as a place of public worship, a cemetery, or a parsonage.\textsuperscript{199} A later amendment in 1901 made clear that such gifts to a church or religious congregation would not be declared void for insufficient designation of the beneficiaries of the trust,\textsuperscript{200} a common reason for some of the early gifts to fail. However, the statute did not save a gift in the residuary clause of Lucinda Nuckolls’ will, giving all the rest of her property to the Reverend Moore to use the income for the benefit of the Methodist Church South for missionary work.\textsuperscript{201} The Methodist Church South was not a local congregation, and thus not covered by the

\textsuperscript{193} H. Rept. 767, 65\textsuperscript{th} Cong. 2\textsuperscript{nd} Sess.

\textsuperscript{194} 65 P.L. 254; 4 Stat. 1057, Sec. 404(a)(3).

\textsuperscript{195} Janet G. McCubbin and Jeffrey P. Rosenfeld, Looking Deeper Into The New IRS Tax Data Base, TRUSTS AND ESTATES Nov. 1989 50, 55-56 at Figure 3 and Table 8.

\textsuperscript{196} Id.

\textsuperscript{197} Id. at 56 (Table 8).

\textsuperscript{198} In re Harrigan Estate, 29 Pa. D. & C.2d 119, 122 (Orphan’s Court of Pa. 1963)


\textsuperscript{200} Acts 1901-02, ch. 323, p. 336, cited in Moore, 192 S.E. 808.

\textsuperscript{201} Moore, 192 S.E. at 807.
1901 amendment; the bequest failed because it was for an indefinite purpose.\textsuperscript{202} Virginia also limited the amount of property a church could hold, the maximum being four acres in the city and 75 acres in the country, and $100,000 in personal property.\textsuperscript{203} A bequest of more than $375,000 to the testator’s daughter and two other individuals as trustees for the First Christian Science Church of Lynchburg, Virginia was held void to the extent it caused the church to exceed this $100,000 limit in 1951, even though the church was neither the trustee nor the legal owner of the property subject to the bequest.\textsuperscript{204} As stated by the Virginia Supreme Court, “The fundamental underlying purpose of the legislature was to fix a monetary limit on ownership of personalty by churches, exclusive of books and furniture. This purpose may not be thwarted by an attempt to do indirectly that which cannot be done directly.”\textsuperscript{205} The fact that the church was the beneficiary of the trust, with the right to its income, was enough to place the bequest within the limit of the statute.

Mississippi, another state which historically targeted religious groups rather than charitable institutions in general, also continued to make religious bequests difficult. In 1940, the Mississippi legislature repealed its constitutional provisions banning all testamentary bequests and devises to religious organizations, but still restricted such gifts through another constitutional amendment.\textsuperscript{206} That amendment provided that, if a person died survived by a spouse or descendant, he or she could leave no more than 1/3 of the estate to any charitable, religious, educational, or civic institution, in a will executed at least ninety days before death.\textsuperscript{207} In addition, any land devised to a charity in compliance with these restrictions could be held for no more than ten years.\textsuperscript{208}

3. The Decline of Restrictions on Charitable Bequests and Trusts

By the middle of the twentieth century, most states had adopted policies that favored charitable trusts and bequests in wills,\textsuperscript{209} but a number of impediments remained. Several

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\textsuperscript{202} Moore, 192 S.E. at 813.
\textsuperscript{203} Acts 1926, ch. 514, and Acts 1930, ch. 265, Sec. 43, later codified as Sec. 57-12 in the Code of 1950.
\textsuperscript{204} Maguire v. Loyd, 67 S.E. 2d 885 (Va. 1951).
\textsuperscript{205} Id. at 893.
\textsuperscript{206} Miss. Const. Section 270, amending Miss. Gen. Laws 1940, ch. 326, at 580-81.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} Note, The Enforcement of Charitable Trusts in America: A History of Evolving Social Attitudes, 54 Va. L. Rev. 436, 460 (1968). “Thus it was not until 1940, after more than a century
states still had true mortmain statutes, some restricting the value of property that could be held by the charity.\textsuperscript{210} and others limiting the quantity of land the charity could hold.\textsuperscript{211} Some states limited religious organizations by their use of land, allowing only a place of worship, religious schools, parsonages, and graveyards.\textsuperscript{212} Finally, a few states limited charities to holding only that real property which is “reasonably necessary for achieving corporate objectives.”\textsuperscript{213} In addition, some states continued to protect against “deathbed” bequests to charity, or limited the percentage of the estate for such gifts. In 1965, a New York court held that the law restricting gifts to charity to no more than \( \frac{1}{2} \) of the decedent’s estate was valid, declaring “[t]here is no merit to appellants’ contention that the statute (Decedent Estate Law, Sec. 17) is unconstitutional.”\textsuperscript{214} Florida required wills with charitable bequests to be executed six months before death.\textsuperscript{215} In a two-sentence decision, the statute was declared constitutional in 1984.\textsuperscript{216}

As late as 1970, nine states and the District of Columbia still had significant restrictions on charitable bequests and devises by statutes; a tenth state, Mississippi, had a constitutional

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\textsuperscript{210} See, e.g., Me. Rev. Stat. Ann. tit. 13, § 2863(parish limited to property with income of $3,000 per year); North Dakota (1955: charity could hold property worth $500,000); Va. Code Ann. § 57-12 (religious & benevolent societies limited to $100,000 of personal property), repealed in 2003, Acts 2003, c.813.


\textsuperscript{213} Restrictions on Charitable Testamentary Gifts, supra note 212 at 291-92 (citing Arizona (1956) and Idaho (1967)).


\textsuperscript{216} Arthritis Foundation v. Beisse, 456 So. 2d 954 (Fla. Dist. Ct. App. 1984), review denied, 467 So. 2d 999 (Fl. 1985) (“Appellants challenge the constitutionality of Section 732.803, Florida Statutes (1983). We hold that Section 732.803 is constitutional under the authority of Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615 (1944)…”).
provision to that effect, but this number rapidly decreased with actions by courts and legislatures. First to be declared unconstitutional was the District of Columbia statute voiding bequests to religious organizations. The United States District Court for the District of Columbia in 1972 held the statute unconstitutional as violating the 1st amendment, while four years later the District of Columbia Court of Appeals found the statute violated the 5th amendment’s guarantees of equal protection and due process. In 1974, the Supreme Court of Pennsylvania declared that its statute, which made voidable any bequest for religious or charitable purposes in a will executed within thirty days of the testator’s death, denied the charitable beneficiaries equal protection of the laws. Soon to follow were courts of Montana, Ohio and Florida in striking down their states’ statutes. State legislatures also acted to repeal laws restricting charitable gifts. Mississippi’s statute forbidding bequests to religious groups was repealed in 1993. Idaho’s statute limiting charities to holding only that real property which is “reasonably necessary for achieving corporate objectives” was repealed in 1994. Georgia’s statute, voiding


218 In re Estate of French, 365 A. 2d 621 (D.C. 1976) (citing In re Small, 100 Wash. L. Rptr. 453 (D.D.C. 1972)).


220 In re Estate of Kinyon, 615 P. 2d 174, 175 (Mont. 1980) (statute requiring will to be executed at least thirty days before death, and allowing not more than 1/3 of estate to be bequeathed for charitable purposes; violation made bequest void; statute is “wholly arbitrary in that the classifications created by the statute are not reasonably related to its purported statutory objective”).

221 Shriner’s Hospital for Crippled Children v. Hester, 492 N.E. 2d 153, 157 (Ohio 1986)(statute, requiring bequest for benevolent, religious, educational or charitable purposes must be made in a will executed more than six months prior to testator’s death, and could not exceed twenty-five percent of estate, violated equal protection clause). The statute was repealed by the Ohio legislature effective August 1, 1985.

222 Shriner’s Hospital for Crippled Children v. Zrillic, 563 So. 2d 64, 68-69 (Fla. 1990) (bequest to benevolent, charitable, educational, literary, scientific, religious or missionary group is voidable by testator’s lineal descendants or spouse unless the will is executed at least six months before death; held to violate Florida’s constitutional property rights, and equal protection guarantees of both Florida and the United States constitutions).


any bequest of more than one-third of the estate to a religious, educational, or civil institution to the exclusion of a spouse or child unless the will is executed at least 90 days before the testator’s death, was repealed when Georgia enacted the Uniform Probate Code in 1998.\textsuperscript{225}

IV. Mortmain Statutes Today

Have any mortmain statutes survived this flood of judicial and legislative invalidation? A few still remain today, causing traps for the unwary. Most statutes still on the books restrict the amount of property a church or charity can hold. Illinois allows a corporation formed for religious purposes to receive land by gift, legacy, or purchase, but provides that only 10 acres shall be exempt from taxation, “and all such land in excess of 10 acres shall be assessed at the same valuation as if it were not a part of a cemetery...”\textsuperscript{226}

Virginia today restricts the quantity of land benevolent or other associations may hold, depending on the type of organization: general benevolent associations are allowed five acres or up to 10 acres by ordinance of a county or city, a school league can hold ten acres, the Elks are allowed 35 acres, and various veterans’ organizations may hold a maximum of 75 acres.\textsuperscript{227} A similar section restricting the land holdings of churches was repealed in 2003\textsuperscript{228} following a suit by Reverend Jerry Falwell, in which his claims were dismissed as moot because no state or local official was empowered to enforce the restriction nor showed any inclination to do so.\textsuperscript{229}

Mississippi strictly limits the amount of property any religious society, ecclesiastical body or congregation may hold by declaring that the land may be held only for certain designated purposes, “but no other.”\textsuperscript{230} Thus, a church would have no authority to accept a devise of a luxury apartment building, for example, even though it intended to use the profits for orphans or other permissible purpose. The apartment building would not be forfeited, but the state, unlike Virginia, could force a sale of the property held in excess of the statute limit.\textsuperscript{231}

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\item \textsuperscript{225} Ga. Code Ann. § 53-2-10 (2009).
\item \textsuperscript{227} Va. Code Ann. § 57-20 (2009).
\item \textsuperscript{228} Repealed Va. Code Ann. § 57-12 (2003).
\item \textsuperscript{229} Falwell v. City of Lynchburg, Virginia, 198 F.Supp. 2d 765 (D. Va. 2002).
\item \textsuperscript{230} Miss. Code Ann. § 79-11-33 (2008). Permissible purposes included a parish house, Sunday school facility, orphan asylum, and cemetery, along with a reasonable quantity of ground thereto annexed. \textit{Id}.
\item \textsuperscript{231} State ex. Rel. Knox v. Sisters of Mercy, 115 So. 323 (Miss. 1928).
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New York has a specific provision to allow a judicial investigation of an allegation that a religious corporation holds more property than the amount authorized by law.\textsuperscript{232} Religious corporations are prohibited from owning property with a value of more than fifty million dollars or the yearly income of more than six million dollars.\textsuperscript{233}

Maine’s current law is perhaps the most restrictive still on the books. Maine allows a parish to take real or personal property by gift or purchase, “until the clear annual income thereof amounts to $3,000.”\textsuperscript{234} Connecticut’s law is slightly less restrictive, allowing particular denominations to own land for the residence of their district supervisor or presiding elder so long as the annual income of the property does not exceed $15,000.\textsuperscript{235}

Massachusetts limits a Roman Catholic parish to real and personal property that does not exceed $100,000 exclusive of the church buildings.\textsuperscript{236} A similar Massachusetts statute limiting Methodist Episcopal churches to $50,000 in annual income, exclusive of the meeting house, was amended in 1991 to delete the annual income limitation.\textsuperscript{237} The District of Columbia allows the members of any religious society or congregation in the District to receive by gift or devise (or purchase) land not exceeding one acre.\textsuperscript{238}

Noticeably absent are the restrictions on the testator that prevailed in the United States through about 1940, and persisted in a few jurisdictions throughout the 20\textsuperscript{th} century.\textsuperscript{239} Legislatures are apparently no longer worried that they need to protect heirs “from hasty and improvident gifts to a charity by a testator of his entire estate to the exclusion of those who in the judgment of the legislature had a better claim to his bounty.”\textsuperscript{240} The only real danger for a testator attempting to leave something to charity in a will is that the charity selected will already hold more than its statutorily allotted amount. Still, if the testator has indicated the purpose for

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\textsuperscript{233} McKinney’s Consolidated Laws of New York Annotated Ch. 35 Art. 2 Sec. 202(b).
\textsuperscript{238} D.C. Code § 29-701 (2009).
\textsuperscript{239} I.e., Georgia’s statute repealed in 1998.
\textsuperscript{240} In re Estate of Dwyer, 115 P. 242, 245 (Cal. 1991) (referring to California Civil Code Sec. 1313, which limited bequests to charity to no more than 1/3 of the estate; the statute was repealed in 1931. Stats 1931 chapter 281).
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which the bequest is made, a court might use the doctrine of *cy pres* to reform the bequest. If the testator specified that she was leaving the bequest to her church “for the poor and needy of the county,” for example, her purpose could still be carried out with another trustee. However, testators should nevertheless be mindful of the possible effects the current mortmain statutes may have on their bequests.

**Conclusion**

Will a repeal of the estate tax, or a modification with a large exemption, cause a precipitous decline in bequests to charity? An examination of state laws regarding such gifts to charity since the founding of the United States reveals a radical shift in how these gifts are viewed, by the courts and by legislatures. While a few states still fear that charitable groups may hold too much property, thus depriving local authorities of valuable tax dollars, the fears of undue influence by clergy and charitable groups on the dying seem to have been allayed. Less than 2% of those dying each year pay the federal estate tax and thus are eligible for its charitable exemption. Changes in state law placing strict limits on charitable bequests affect many, many more, rich and poor, in writing their wills.

Profound changes in the law – allowing charitable trusts for indefinite beneficiaries, striking down laws that invalidated bequests made too soon before death or too great a proportion of the estate – demonstrate the shift in public thinking toward charities, and especially

241 *Cy pres*, meaning “as nearly as possible,” is an equitable doctrine that allows a court to “direct the application of the trust property to another charitable purpose that approximates the settlor’s intention,” in cases where the original purpose can not be accomplished for legal or other reasons. Dukeminier, Johanson, Lindgren and Sitkoff, *Wills, Trusts, and Estates* 738 (7th edition, 2005).


243 Lee Anne Fennell, *Death Taxes, and Cognition*, 81 N.C. L.Rev. 567, 593-94 (Jan. 2003). The estate tax affects the behavior of more than just 2%, however, since some very wealthy people use estate planning to successfully avoid paying any tax. Id. at 596; See also, McCaffery and Cohen, *supra* note 15 at 1187 (“many – probably most – wealthy people living in [the estate tax’s] shadows have engaged in years of planning to avoid being caught with too much loot on their deathbeds.”).
religions. “Charitable trusts are an exception to the general rule that trusts must have definite beneficiaries,” a renowned hornbook states today, but a century ago, that simply was not the case. Trusts that once were routinely held void would be upheld without question today. Consider the trust provisions held void in Dashiell: “for the poor children belonging to the congregation of Saint Peter’s protestant episcopal church in Baltimore and for the care and education of the poor in Caroline County.” Is there any doubt a court would find them enforceable today? As a comment to the Restatement on Trusts notes, “[a] trust for the relief of poverty generally, with no specification of the means to be employed, is valid as a charitable trust. Thus, a trust ‘for the benefit of the poor’ or simply ‘for the poor’ is charitable.”

Concerns about charities removing property from the stream of commerce are largely gone as well. A trust that is entirely charitable is not subject to the rule against perpetuities, and may exist indefinitely. Even if a trust is theoretically subject to the Rule, very few American jurisdictions follow the common law rule today, and instead allow trusts for hundreds of years, or in some cases, forever. Tax laws, on the other hand, are more salient when determining how much income a charity must spend or how it is managed. While changes in the federal estate tax may cause a short-term decline in bequests from the super-rich, as we saw when the marital deduction was expanded in 1981, the giving behaviors of thousands of others, sustained by the changes in state law, are likely to ensure that plenty of charitable bequests will be given in the future.


245 Dashiell v. Attorney General, 5 Harris and Johnson 392, 398 (1822) (invalidating bequest for the poor children belonging to the congregation of Saint Peter’s protestant episcopal church in Baltimore); Dashiell v. Attorney General, 6 Harris and Johnson 1, 8-9 (1823) (invalidating bequest in same will for the care and education of the poor in Caroline County).

246 Restatement of the Law, Thirds, Trusts, Sec. 28, comment on Clause (a), g. Relief of poverty, p. 5, American Law Institute, 2003.


249 See, e.g., the Bishop Estate, in Dukeminier, Johanson, Lindgren and Sitkoff, Wills, Trusts, and Estates 763-66 (7th edition, 2005), in which the Internal Revenue Service compelled the removal of trustees and monetary sanctions.