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VALIDITY OF STATE RESTRICTIONS ON TESTAMENTARY DISPOSITION TO THE UNITED STATES*

Freedom in making a will, while an accepted principle of American law,1 is seldom considered a constitutionally protected right.2 Accordingly state statutes prescribe the persons capable of making a will,3 detail the requisite formalities,4 and determine what property may be devised.5 California and a leaves me cold. "Enforcement or protection of the rights of an individual is surely not adequate if it turns on the amount or increase of the judicial labors in the Federal courts. It may be true that ninety-nine out of every hundred petitions of these convicts, who allege that the rights of the Federal Constitution were denied them, are mistaken, and the applications are without merit. On the other hand, it may be that one in a hundred is entitled to the relief. Clearly, no Federal court may say nay, before hearing, to any petitioner who, in or out of jail asserts his confinement resulted from a denial of a right so treasured as those found in the Federal Constitution." Judge Evans concurring in Potter v. Dowd, 146 F2d 244, 249 (7th Cir. 1944) (emphasis added). Judge Evans has suggested that if the courts are too busy to hear petitions, a separate court be created for this purpose. Id. at 250.

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3. Wisconsin is alone in asserting that freedom of testation is constitutionally protected. See Will of Rice, 150 Wis. 401, 444-7, 136 N.W. 956, 973-4 (1912). Even Wisconsin, however, is willing to grant that testation may be subjected to reasonable legislative regulation. Nunnemacher v. State, 129 Wis. 190, 108 N.W. 627 (1906).
few other states also stipulate who may receive a bequest or devise. The California Probate Code allows natural persons, the state, counties, and fourteen types of public corporations and associations to take by will. Faced with this statute, the California Supreme Court, in *Estate of Burnison*, invalidated a bequest to the United States Government.

Doctrinally the California court was on firm ground. The Probate Code discloses no legislative intent to include the United States in any specific class of eligible legatees. No other California law mentions the Government.

6. CAL. PROB. CODE § 27 (Deering, 1949); New York's law, the first prohibiting testamentary disposition to corporations not authorized by statute to take under a will, applies only to devises. N.Y. DEC. EST. LAW § 12, Downing v. Marshall, 23 N.Y. 366, 386 (1861). States subsequently enacting legislation narrowing classes of eligible legatees extended the restriction to bequests. MONT. REV. CODE tit. 91, § 104 (Choate & Wertz, 1947); N.D. REV. CODE § 56-0205 (1943); OKLA. STAT. ANN. tit. 84 § 45 (1938); S.D. CODE § 56.0205 (1939).

7. "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanitarium purposes, or primarily for the public preservation of forests or natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. . . ." CAL. PROB. CODE § 27 (Deering, 1949).

The Section, as first enacted in 1872, CAL. CIV. CODE § 1275 (1872), allowed no corporation to take from a California testator unless expressly permitted by statute. The legislature, as expediency dictated, excepted one corporation after another from this requirement of statutory authorization. No serious attempt has been made to rewrite the provision in a more rational fashion. See Estate of Burnison, 33 Cal.2d 638, 641, 204 P.2d 330, 332 (1949); Bodfish, *The Destructive Effect of the 1937 Amendment of Section 42 of the Probate Code of California upon the Limitations Regarding Testamentary Disposition to Charities*, 26 CALIF. L. REV. 309, 322 (1938).

8. CAL. PROB. CODE § 27 (Deering, 1949).


10. The few reported cases which have involved testamentary disposition to the United States agree that the disposition's validity depends on state law. United States v. Fox, 94 U.S. 315 (1876) (United States cannot be a devisee when prohibited by state statute); Dickson v. United States, 125 Mass. 311 (1878) (Government can take when not inhibited by state law); see United States v. Perkins, 163 U.S. 625, 629 (1896); cf. Mississippi Valley Trust Co. v. Ruhland, 222 S.W.2d 750, 752 (Mo. 1949). In England the nation's right to take by will is well established. E.g., *Re Smith*, [1932] 1 Ch. 153; Nightingale v. Goulburn, 5 Hare 484, 67 Eng. Rep. 1003 (Ch. 1847), aff'd, 2 Ph. 594, 41 Eng. Rep. 1072 (Ch. 1848).

11. California confines eligible legatees to those specified by the Probate Code. E.g., Estate of Barter, 30 Cal.2d 549, 184 P.2d 305 (1947) (British government ineligible); *In re Loring's Estate*, 168 P.2d 224 (Cal. D. Ct. App.) rev'd on other grounds, 29 Cal.2d 423, 175 P.2d 524 (1946). Two years before the *Burnison* case, a California court had validated a bequest to the Veterans Administration. The court felt that the legislature
ment as a proper recipient of a testamentary gift.\textsuperscript{12} While federal law might supply the necessary statutory authorization,\textsuperscript{13} no congressional statute of general application authorizes the United States to acquire property by will.\textsuperscript{14} Thus a testamentary disposition to the United States is void, unless the California law could be proved unconstitutional. And the Supreme Court of the United States, reviewing the Burnison case on appeal, set this doubt to rest by upholding California's right to bar bequests to the Government.\textsuperscript{15}

The Government maintained that the California statute could not stand in the face of the Supremacy Clause.\textsuperscript{16} In the absence of restrictive state legislation, the United States undoubtedly can accept a voluntary bequest as an incident to its sovereignty.\textsuperscript{17} If in addition the Government's inherent

could scarcely have intended excluding the United States from taking under a California testator's will. Estate of Hendrix, 77 Cal. App.2d 647, 652, 176 P.2d 393, 401 (1947). Although a federal statute authorized the Veterans Administration to take by will, see note 14 infra, the statute was not essential to the decision. The dissenting judge in the Burnison case believed that the Hendrix decision should be followed. 33 Cal.2d 638, 646, 204 P.2d 330, 335 (1949). See also note 12 infra. For an implication that the drafters of the Probate Code failed to anticipate exclusion of the Government from taking by will, see Evans, Comments on the Probate Code of California, 19 CALIF. L. REV. 602, 609 (1931).

12. A corporation, while not mentioned in the Probate Code, may be authorized by another statute to take by will. CAL. PROB. CODE § 27 (Deering, 1949). Thus California business corporations may be devisees. CAL. CORP. CODE ANN., § 802 (Deering, 1947). The same privilege is extended domestic non-profit corporations. Id. § 9501. But the Government is nowhere mentioned.

The legislature did, however, exempt property transferred to the United States from the California inheritance tax. CAL. REVENUE AND TAX CODE § 13841 (Deering, 1944). While the United States can acquire property on death by contract, Stevens v. United States, 302 U.S. 623 (1938), it seems more than likely that a transfer by will was contemplated in granting the exemption.


14. Congress has, however, enacted nearly a score of statutes authorizing specific agencies to accept bequests and devises. E.g., 60 STAT. 537, 38 U.S.C. § 14 (1946) (Veterans Administration); 58 STAT. 709 (1944), 42 U.S.C. § 219 (1946) (Public Health Service). While these statutes have never been challenged their constitutionality would seem certain. Cf. Hunt v. United States, 278 U.S. 96 (1928); Johnson v. Maryland, 254 U.S. 51 (1920); Ohio v. Thomas, 173 U.S. 276 (1899).


17. Dickson v. United States, 125 Mass. 311 (1878); cf. Fay v. United States, 204 Fed. 559 (1st Cir. 1913) (inter vivos transfer) see Russell v. Allen, 107 U.S. 163, 170
power to take under a will derived from one of the constitutionally enumerated powers, states could not interfere. But the Supreme Court rejected this argument, holding that there is no overriding federal policy capable of limiting state action.\textsuperscript{18}

While legislatures can thus apparently forbid bequests to the United States Government, the limitation is irrational and archaic. State laws restricting bequests and devises are adaptations of the English Statute of Wills,\textsuperscript{19} which was enacted primarily to prevent testamentary dispositions to the Church.\textsuperscript{20} Although this reason has long since vanished, the restraint on a testator's power to convey his property remains.\textsuperscript{21}

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(1882). The United States appears to have "resultant" powers, \textit{i.e.}, those neither expressed in the Constitution, nor implied by any of its provisions, but which result from the sum of all of its powers. \textit{E.g.}, Neilson v. Lagow, 12 How. 98, 107 (U.S. 1851) (to take security for a debt); United States v. Bradley, 10 Pet. 343, 359 (U.S. 1836) (same); United States v. Tingey, 5 Pet. 115, 127 (U.S. 1831) (to enter into contracts); Dugan v. United States 3 Wheat. 172, 181 (U.S. 1818) (to sue in its own name). \textit{But cf.} Kansas v. Colorado, 206 U.S. 46, 90 (1907) (powers of a national character not delegated by the Constitution "are reserved to the people").


This conclusion also disposed of an alternative claim that California, by permitting testamentary gifts to itself while forbidding them to the United States was unlawfully discriminating against the Federal Government. \textit{Id.} at 4192. Under the Supremacy Clause a state may not refuse to enforce a right based on federal law while enforcing one based on its own law. \textit{E.g.}, Testa v. Katt, 330 U.S. 386 (1947); Republic Pictures Corp. v. Kappler, 151 F.2d 543, 546-7 (8th Cir. 1945). By analogizing the capacity of the United States to take by will to a right based on federal law, the Government contended that California was unlawfully discriminating. But the Supreme Court disposed of this contention under its previous conclusion that the "power" of accepting bequests could not be elevated to the level of a "right" to do so. And the Court further held that the mere fact that the United States is being treated differently from California constitutes no violation of the Fourteenth Amendment. 18 U.S.L. WEEK 4192.

The Supreme Court had previously intimated that mere incidents to sovereignty are not, by virtue of the Supremacy Clause, immune from curtailment by state legislation. \textit{See, e.g.}, Neilson v. Lagow, 12 How. 98, 107 (U.S. 1851); United States v. Tingey, 5 Pet. 115, 127 (U.S. 1831). \textit{See also}, Penn Dairies v. Milk Control Commission, 318 U.S. 261 (1943) (where Congress has not specifically exempted sales of milk to United States Army from state milk control law, the Constitution itself implies no immunity from state control).

19. 34, 35 Hen. VIII c. 5 (1542-1543) (a devise may be made to any person except "bodies politic and corporate").

20. The first Statute of Wills, 32 Hen. VIII c. 1 (1540), very nearly ended the earlier ban on testamentation. Henry evidently felt this was too liberal, for in 1542 he introduced the second Statute of Wills. \textit{See note 19 supra}. Ostensibly designed to explain the earlier enactment, 4 HOLDSWORTH, A History of English Law 466 (1st ed. 1924), the second statute was really aimed at ending the priestly practice of high-pressuring dying parishioners to devise their lands to the Church. 2 Bl. Com. *375.

21. Courts have rarely attempted to justify the continued existence of restrictive will statutes. They are occasionally defended on the ground that corporate ownership in perpetuity should be prevented. Downing v. Marshall, 23 N.Y. 366, 386 (1861). This explanation applies only to devises, and even as so applied is not particularly convincing.
Fortunately, these statutory carry-overs from a feudal society are easily avoided. Testators have no difficulty in bequeathing property to ineligible legatees. Indeed, several drafting devices are available to effectuate the purpose frustrated in the *Burnison* case. The simplest method is a bequest to the United States in trust for the American people. Although the Government, if it is prohibited from accepting the bequest, cannot serve as trustee, the court has power to appoint a competent substitute. California's Supreme Court, in deciding the *Burnison* case, might well have implied such a trust. Similarly, a testamentary disposition to a federal official, in trust for governmental purposes, might succeed. Also, a transfer at death to the Secretary of the Treasury or any other Government official, probably would not be disqualified as a transfer to the United States. While the grantor cannot bind the Government officer, he can express in the document

For the typical restrictive statute allows any corporation to take under a will if it is authorized by law to do so, and there are few corporations not so authorized. See note 12 *supra*. Moreover, the explanation makes little sense when applied to the United States which already owns 46,484,391 acres of California land in perpetuity, some 46 per cent of the total land in the state. *Statistical Abstract of the United States* 160 (1949).

One judge has advanced the novel theory that restrictions against testamentary benefactions exist to prevent those who will not be charitable during their lives from being charitable after death. Coleman v. Whipple, 191 Miss. 237, 302, 2 So.2d 566, 569 (1941) (dissenting opinion).


23. *Catt v. Catt*, 118 App. Div. 742, 103 N.Y. Supp. 740 (1st Dep't 1907); *cf.* Estate of Barter, 30 Cal.2d 549, 184 P.2d 305 (1947). Where no restrictive state statute intervenes, however, there is no objection to the Government’s serving as trustee. Yale College's Appeal, 67 Conn. 237, 34 Atl. 1035 (1896); Dickson v. United States, 125 Mass. 311 (1878).

24. *Cf.* Doughton v. Vandever, 5 Del. Ch. 51, 77 (1875); Yard's Appeal, 64 Pa. 95, 100 (1870); ZOLLMAN, AMERICAN LAW OF CHARITIES § 473 (1924).

25. This device might prove more satisfactory than a bequest to the Government itself in trust. See notes 23 and 24 *supra*. There would, at least, be no doubt that the trustee could serve. Estate of Robinson, 63 Cal. 620 (1883) (bequest to the Mayor of San Francisco for the destitute of that city upheld where outright bequest to the city would have failed). See the discussion of the *Robinson* case in *In re Loring's Estate*, 163 P.2d 224, 231 (Cal. D. Ct. App.), *rev'd on other grounds*, 29 Cal.2d 423, 175 P.2d 524 (1946). *Cf.* Christian Church v. Church of Christ, 219 Ill. 503, 513, 76 N.E. 703, 705 (1905) (to trustees of “Christian Church”); Tucker v. Seaman's Aid Society, 48 Mass. (7 Met.) 188, 200 (1843). For a variation of this device, see Rine v. Wagner, 135 Iowa 626, 113 N.W. 471 (1907) (to “Right Reverend James O’Connor, bishop of Omaha . . . [or] his successor” for charitable purposes).

his wishes that the property be devoted to Government use. Under this
device the grantor retains use of the property for life and the eligible legatee
statute is avoided on two counts: the transfer is inter vivos and it is to a
private trustee.

It is unrealistic for states to invalidate direct bequests to the United
States if drafting devices can accomplish the same result indirectly. States
with restrictive statutes should enlarge the class of eligible legatees to in-
clude the United States. If state laws are not broadened, however, a federal
statute authorizing the Government to take by will should be enacted. This
would permit bequests to the Government in those states which, like Cali-
fordia, require express authorization "by statute." A law of this type would
not raise problems under the Tenth Amendment so long as it recognized
the states' apparently primary power to determine testamentary succes-
sion. Although this legislation would solve the problem of bequests to the

however, would fail wherever the charity could not take directly. In re Houk's Estate,
186 Cal. 643, 200 Pac. 417 (1921).

This avoidance device has the further advantage of simultaneously escaping additional
statutes which limit the portion of an estate a testator may leave for charitable uses.
Cf. Cal. PROB. CODE §§ 40–43 (Deering, 1949) ; Mont. Rev. CODE tit. 91, § 142 (Choate &
Wertz, 1947) ; N.Y. DEC. EST. LAW § 57 ; THOMPSON, WILLS § 24 (3d ed. 1947). If
property is left to a government official, it cannot be said to be devoted to charitable uses.

27. Cf., e.g., Estill v. Ballew, 26 S.W.2d 778 (Mo. 1930) ("I request that she ...");
Matter of Keleman, 126 N.Y. 73, 26 N.E. 968 (1891). The principal weakness of preca-
tory language is that the legatee and his successors in interest remain wholly unbound.
Zollman, op. cit. supra note 24, § 512 ("Human Nature is Human Nature, and the risk
of an abuse of the confidence reposed is always present").

Should the legatee be notified of the testator's wish before his death, courts may infer
the creation of a secret trust, though the legatee has never expressed assent. In such a
case, the charitable beneficiary would be limited to the statutory share of the estate. See
Ct. 1904) ; Gore v. Clarke, 37 S.C. 537, 550, 16 S.E. 614, 619 (1892). Contra:
O'Donnell v. Murphy, 17 Cal. App. 625, 120 Pac. 1076 (1911), where the legatee advised the testa-
trix that her bequest would fail if left in trust, whereupon she revised her will leaving
the bequest to the legatee absolutely. Cf. In re Bickley’s Estate, 270 Pa. 101, 113 Atl. 68
(1921) (bequest to charity or in the alternative to head of charity).

28. Cf., e.g., President of Bowdoin College v. Merritt, 75 Fed. 480 (C.C.N.D. Cal.
1896), appeal dismissed, 167 U.S. 745 (1897) ; Cleveland Trust Co. v. White, 134 Ohio
St. 1, 15 N.E.2d 627 (1938). See Leaphart, The Use, A Factor in the Law Today, 79
U. of Pa. L. REV. 253, 261 (1931). This is the principal and most effective device for
escaping testamentary restraints. It, too, will avoid any state law allowing only a small
percentage of an estate to be bequeathed or devised for charitable uses. See note 26
supra. A settlor who retains too much control, however, may be found to have made no
transfer at all. In re Tunnell, 325 Pa. 554, 190 Atl. 906 (1937) (settlor constituted himself
trustee, retaining right to income and power to revoke or modify the trust).

v. Greenwood County, 91 F.2d 665, 673 (4th Cir. 1937), aff'd, 302 U.S. 485 (1938).

On the other hand, it is not certain whether a law categorically asserting the unre-
United States, it would fail to eliminate the anachronistic local prohibitions which prevent disposition to other disfavored legatees. Among the most frequent sufferers under these prohibitions are municipal, state and foreign governments. While these restrictions seem unjustified in any event, they are especially objectionable when invoked against domestic governments. There is every reason to honor the claims of financially hard-pressed municipalities to bequests. And it is anomolous to discourage concentration of the restricted right of the United States to take by will would survive constitutional objections. Prior to the Burnison case, the virtual demise of the Tenth Amendment seemed to indicate that no very strenuous protest against the statute could be formulated. Cf. United States v. Darby, 312 U.S. 100, 124 (1941). See Feller, The Tenth Amendment Retires, 27 A.B.A.J. 223 (1941). And the Burnison case provided no clear holding on this issue, since no federal statute was involved. The Court, however, intimated that the power to determine who may take by will is one of the powers reserved to the states by the Tenth Amendment. See United States v. Burnison, 18 U.S.L.W. 4190, 4191 (U.S. March 13, 1950). A future holding to this effect would invalidate federal legislation creating in the United States the unrestricted power to take by will.

Certainly an argument defending an absolute federal right to inherit would be difficult to frame. The Darby case, supra, involved a specific section of the Constitution, the Commerce Clause, while a statute reducing local control over inheritance would have to be based on a more nebulous power. The ability of the United States to take under a will may result from the sum of all powers. See note 17 supra. But it is apparently not immune from state legislation. Stevens v. United States, 89 F.2d 151, 154 (1937), rev'd on other grounds, 302 U.S. 623 (1938); see Neilson v. Lagow, 12 How. 98, 107 (U.S. 1851); United States v. Tingey, 5 Pet. 115, 127 (U.S. 1831).

The Federal Government's power to take by will has been termed inherent. Dickson v. United States, 125 Mass. 311, 315 (1878). But it is frequently insisted that the United States does not have such powers. See Williams, Inherent Sovereign Powers of the Federal Government, 6 University of South Carolina, Yearbook of the Select Society 1 (1942). In fact, the strongest denial of inherent power, Kansas v. Colorado, 206 U.S. 46 (1906), has not yet been directly attacked. See Scott, Judicial Settlements of Controversies Between States of the American Union 431-53 (1919); 1 Willoughby, Constitutional Law of the United States § 58 (2d ed. 1939). Although Willoughby attempts to differentiate between "resultant" and "inherent" powers, id. § 54, the distinction seems ephemeral. Cf. Feller, The Tenth Amendment Retires, 27 A.B.A.J. 223, 225 (1941); 2 Story, Commentaries on the Constitution §§ 1256, 1279 (5th ed., Bigelow, 1891).


30. See note 6 supra. The statutes are summarized in Bordwell, The Statute Law of Wills, 14 Iowa L. Rev. 1, 198 (1928). California, Montana and New York have enforced their enactments rigorously. See, e.g., In re Loring's Estate, 168 P.2d 224 (Cal. D. Ct. App.), rev'd on other grounds, 29 Cal.2d 423, 175 P.2d 524 (1946) (bequest to Iowa town); In re Beck's Estate, 44 Mont. 95, 121 Pac. 784 (1912) (bequest to State of Montana); In re Fox, 52 N.Y. 530 (1873), aff'd sub nom. United States v. Fox, 94 U.S. 315 (1876) (devise to United States). Oklahoma has been more liberal. Phillips v. Chambers, 174 Okla. 407, 51 P.2d 303 (1935) (county not a corporation within meaning of statute prohibiting corporations from taking under a will).