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ENCOURAGING CHARITABLE BEQUESTS IN
WILLS**

Kristine S. Knaplund

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ARTICLE

BECOMING CHARITABLE: PREDICTING AND ENCOURAGING CHARITABLE BEQUESTS IN WILLS

Kristine S. Knaplund*

I. INTRODUCTION

What causes people to leave their property to charity in their wills? Many scholars have explored the effects of tax laws on charitable bequests,¹ but now that

* Professor of Law, Pepperdine University School of Law. The Author wishes to acknowledge the outstanding work of her research assistants Scott Tarbell and Rachel Hunt, as well as research librarians Jennifer Allison and Alyssa Thurston. Thanks also go to the Dean's Summer Research Fund at Pepperdine University School of Law. © 2015 Kristine S. Knaplund.

¹ See, e.g., Jon Bakija et al., *Charitable Bequests and Taxes on Inheritances and Estates: Aggregate Evidence from across States and Time*, URBAN INST., Apr. 2003, at 2, available at http://www.urban.org/uploadedPDF/310665_TPC-DP7.pdf (“[W]e find evidence of a strong incentive effect of estate and inheritance taxes on charitable bequests.”); Michael J. Brunetti, *The Estate Tax and Charitable Bequests: Elasticity Estimates Using Probate Records*, 58 NAT'L TAX J. 165, 186 (2005) (“Results from a number of different models suggest that estate and inheritance taxes are significantly related to charitable bequests”); Charles D. Clotfelter, *Charitable Bequests*, in FEDERAL TAX POLICY AND CHARITABLE GIVING 222, 249 (University of Chicago Press 1985) (out-of-print), available at <http://www.nber.org/chapters/c6777.pdf> (“[B]equests appear to be subject to a tax-induced price effect in much the same way as are contributions by living individuals.”); Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259 (1983); David Joulfaian, *Estate Taxes and Charitable Bequests by the Wealthy*, 53 NAT'L TAX J. 743, 743 (2000) (“The overall effects of the estate tax, however, are modest; while the tax stimulates giving by lowering the tax price, it also discourages giving as it reduces terminal wealth.”) (emphasis omitted); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L.J. 283 (1994); James R. Repetti, *Democracy, Taxes, and Wealth*, 76 N.Y.U. L. REV. 825 (2001).

more than 99% of Americans' estates are exempt from federal taxes,² what non-tax factors predict charitable giving? This Article explores charitable bequests before Congress enacted the federal estate tax³ and a deduction for charitable bequests.⁴ By examining two years of probate files in Los Angeles and St. Louis, in which 16.6% of St. Louis testators,⁵ but only 8.3% in Los Angeles,⁶ made charitable bequests, we can begin to discern why testators in St. Louis were far more inclined to give to charity. The surprising results may help policy makers encourage those in the United States and in developing countries to give beyond their family and friends.

This Article is unique in that it is the first to examine not just whether a will included a charitable bequest, but whether the charity *received* it. This crucial information adds key insight into who gives to charity. In fact, if we compare the two cities by looking at charitable bequests that were actually received, St. Louis testators are even further ahead of their Los Angeles counterparts, with 15% of St. Louis testators giving to charity, compared to 6% in Los Angeles.

Articles examining probate records have reported varying results as to the percentage of testators who included a charitable bequest in their wills. Two studies of nineteenth-century wills in New York and New Jersey found that the percentage of testators leaving charitable bequests varied from 3%⁷ to 8–10%.⁸ Several studies

² Paul Sullivan, *The End of a Decade of Uncertainty Over Gift and Estate Taxes*, N.Y. TIMES, Jan. 5, 2013, at B5. An estate tax is levied on gross estates in excess of \$5 million, an amount indexed for inflation and worth \$5,430,000 in 2015. Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, Pub. L. No. 111-312, tit. III, § 302(a), 124 Stat. 3296, 3301 (current version at I.R.C. § 2010(c) (2012)); *Estate Tax*, IRS, <http://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Estate-Tax> (last updated Jan. 9, 2015).

³ Revenue Act of 1916, Pub. L. No. 271, ch. 463, § 201, 39 Stat. 756, 777–80 (current version at I.R.C. §§ 2001–2210 (2012 & Supp. I 2013)).

⁴ The Revenue Act of 1918 allowed for a deduction for bequests, legacies, devises, or gifts to religious, charitable, scientific, literary, or educational purposes, specifically mentioning the encouragement of the arts and prevention of cruelty to children or animals. Revenue Act of 1918, ch. 18, § 403, 40 Stat. 1057, 1098 (1919) (current version at I.R.C. § 2055(a) (2012)).

⁵ See Section II, *infra*.

⁶ *Id.*

⁷ Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 47 (1964) (finding one of thirty wills in 1850 and two of sixty wills in 1900 in Essex County, New Jersey, had charitable bequests).

⁸ *Id.* at 47 (finding six of sixty wills, or 10%, in 1875 Essex County, New Jersey had charitable bequests). A second study of 191 wills in New York from 1880–1885 found that sixteen wills, or 8.4%,

of twentieth-century wills have found that about 8% to 10% of those who die testate make a charitable bequest.⁹ One large study of wills in 1963 Michigan produced higher numbers of such bequests at 16%,¹⁰ while two studies in Washington and Texas found smaller numbers of 4%¹¹ and 7%.¹² IRS data suggest that, of those with estates large enough to file federal tax returns, as many as 18% make charitable bequests.¹³

contained charitable bequests. Stuart Henderson Britt, *The Significance of the Last Will and Testament*, 8 J. SOC. PSYCHOL. 347, 351 (1937).

⁹ See, e.g., MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 113–17 (1970) (finding 3.8% of 659 estates in Ohio in 1964 and 1965 included charitable bequests); Lawrence M. Friedman et al., *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1463 (2007) (finding 7.9% of three hundred and forty-two wills in 1964 San Bernardino County, California included charitable bequests); T.P. Schwartz, *Testamentary Behavior: Issues and Evidence About Individuality, Altruism and Social Influences*, 34 THE SOC. Q., No. 2, 337, 344–45 (1993) (finding thirty-three of three hundred and nineteen wills (over 10%) in 1985 Providence included bequests to “a combination of local and non-local organizations and people, besides family members, relatives and friends” plus one will with “bequests only to local churches”). Schwartz’s study may understate the number of wills with charitable bequests since the author included only those who gave “more than a trifling amount (usually more than one percent or \$100.00)” to those other than family, kin, or friends. *Id.* at 344. Cf. CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 181 (Rutgers University Press 1987) (noting that 10% of the testators in the study of Los Angeles and 13% in Bucks County, Pennsylvania made charitable bequests).

¹⁰ Olin L. Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1314 (1969) (finding thirty of one hundred and eighty-seven wills made charitable bequests). Similarly, a study of San Francisco probate records in 1980–1982 concluded that 13.8% of testators made charitable bequests. Brunetti, *supra* note 1, at 172.

¹¹ SYLVIA KATHLEEN BENNETT, *THE ECONOMICS OF BEQUEST PATTERNS* 29 tbl.3 (Rice University 1990), *microformed on* Order 9110946 (Univ. Microforms Int’l) (showing twenty-five of six hundred and eighteen estates with a bequest to charity).

¹² John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 317 (finding four of fifty-nine decedents made “substantial” charitable gifts at death).

¹³ Clotfelter, *supra* note 1, at 230 tbl.6.4 (finding 12.8% of estate tax returns filed in 1977 included a charitable bequest); Martha Britton Eller, *Charitable Bequests: Evidence from Federal Estate Tax Returns*, in *COMPENDIUM OF FEDERAL ESTATE TAX AND PERSONAL WEALTH STUDIES* 521, 523 fig.C (2001) (finding 18.7% of estate tax decedents in 1992, and 18.3% in 1995, were charitable donors); Joulfaian, *supra* note 1, at 749 (finding 17% of estate tax returns for decedents in 1992 included charitable bequests); JON M. BAKIJA & WILLIAM G. GALE, *URBAN-BROOKINGS TAX POLICY CENTER, EFFECTS OF ESTATE TAX REFORM ON CHARITABLE GIVING* 2 tbl.1 (No. 6 2003), *available at* http://www.urban.org/uploadedPDF/310810_TaxPolicy_6.pdf (finding 17.3% of estate tax returns filed in 2001 included charitable bequests); DAVID JOULFAIAN, U.S. DEP’T OF TREASURY, *OTA PAPER NO. 95, BASIC FACTS ON CHARITABLE GIVING* 11 (2005), *available at* <http://www.treasury.gov/resource-center/tax-policy/tax-analysis/documents/ota95.pdf> (finding 18% of estate tax returns in 2003 included a charitable bequest). See also IRS, *2 COMPENDIUM OF FEDERAL ESTATE TAX AND PERSONAL WEALTH STUDIES* (listing articles detailing studies on federal estate tax returns and charitable giving from 1992 to

What predicts that a testator will make a charitable bequest? Does the size of the estate matter, or how many relatives are left behind? Does education count? What other factors might help the analysis? The impetus for this Article arose from the author's earlier study, in which Los Angeles probate files were examined to determine whether women, especially married women, bequeathed their property differently than men.¹⁴ After reading several hundred wills, one conclusion was unanticipated: very few testators in Los Angeles were leaving anything at all to charity. Even very wealthy testators left nothing outside their immediate families. For example, Alfred Armstrong, the owner of twelve parcels of land plus personal property worth a total of almost \$9 million in today's dollars, left everything to his wife and four children.¹⁵ Presley Baker, with extensive real estate holdings in Pasadena, Monrovia, Arcadia, downtown Los Angeles, San Diego, San Bernardino, and Texas, and a total net worth of over \$5 million in today's dollars, gave all to his wife and his stepson.¹⁶ Lorenzo van der Leek, a widower worth almost \$1.3 million in today's dollars, split his estate between his married daughter and his son.¹⁷ Another widower, Roger Plant, gave his property, including land in Santa Monica, downtown Los Angeles, and San Diego's Coronado Island, to his nine adult children.¹⁸ Williamson Dunn Vawter, a widower who was one of the founders of the city of Santa Monica, California, and also instrumental in establishing the Presbyterian Church there,¹⁹ left his estate to his children and grandchildren.²⁰

2007, with returns reflecting charitable bequests ranging from a low of 16.9% for 1998 to a high of 20.6% in 2004).

¹⁴ Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 HASTINGS WOMEN'S L.J. 3 (2008).

¹⁵ Case 433 Alfred Armstrong. His assets, appraised at \$130,000 for the real property and \$206,000 in personal property, would be worth \$8,842,763.18 in 2014 dollars. *See id.*

¹⁶ Case 329 Presley Baker. His estate was appraised at \$194,920. *Id.* His will gave \$25,000 to his stepson and the rest to his wife. *Id.* \$194,920 would be worth \$5,129,736.84 in 2014 dollars.

¹⁷ Case 438 Lorenzo van der Leek. His real property of \$40,000 and \$9,000 in personal property would be worth \$1,289,473.68 in 2014 dollars. *See id.*

¹⁸ Case 522 Roger Plant. His estate included \$91,350 in real property and \$4,531 in personal property, collectively worth \$2,452,306.58 in 2014 dollars. *See id.*

¹⁹ 3 JAMES MILLER GUINN, A HISTORY OF CALIFORNIA AND AN EXTENDED HISTORY OF LOS ANGELES AND ENVIRONS 868 (1915), available at http://books.google.com/books?id=cxYVAAAAYAAJ&pg=PA868&lpg=PA868&dq=Williamson+Dunn+Vawter&source=bl&ots=_cokxX3oUq&sig=fzLYTwUsrTKyUx4hhgHhksupwyk&hl=en&sa=X&ei=9si9U8quDJTpoASc7oK4CQ&ved=0CFMQ6AEwCw#v=onepage&q=Williamson%20Dunn%20Vawter&f=false.

Wealthy testators with no children also left nothing to charity. For example, Antonio Franco Coronel left virtually his entire estate to his wife, plus “one peso in American money” to each of his six nieces and nephews.²¹ The testators in California who executed a form will²² were warned, “All property may be disposed of by will. Land to charitable institutions requires a special deed.”²³ The latter phrase may have discouraged a few from making charitable bequests, as only one of the forty-three gave anything to charity.²⁴

St. Louis was chosen to compare with Los Angeles, in part because of the similar demographics of the two cities, and in part because of the accessibility of their probate records. The files for this study were obtained as follows: all the probate files in Los Angeles County for 1893 and 1894, the earliest years stored in the archives, were examined. No sampling was done in Los Angeles because only 788 files were available, and those included 276 guardianships and adoptions. A total of 514 decedents’ estates were examined—302 intestate estates and 210 testate.²⁵ Wills and intestate files from St. Louis, Missouri, were also examined. The city²⁶ was chosen in part because the city, at that time, was much bigger and more established than Los Angeles, and in part because the probate records were available online.²⁷ The St. Louis archives included 877 decedents in 1893 and 737

²⁰ Case 673 Williamson Dunn Vawter. His estate included real property valued at \$11,000 and personal property, mostly stocks, of \$49,000. *Id.*

²¹ Case 572 Antonio Franco Coronel. The will was written in Spanish. *See id.* His estate, appraised at \$90,876, was the subject of three lawsuits by his nephews, all of which were dismissed. *Id.*

²² A total of forty-four form wills were in the Los Angeles files, but one testator, Mary Perham, executed her form will in Vermont in 1878. Case 230 Mary Perham. Her 1891 codicil in Pasadena, California was not executed on a form. *Id.* None of the wealthiest Los Angeles testators used a form will.

²³ Case 212 James Stewart. His file includes the “Directions” for completing the form. *Id.*

²⁴ Case 342 Antoine Charvoz. His estate of \$545 includes no real property. *Id.* He gave his half-interest in a barbershop, valued at \$200, to his business partner, and all the rest, after debts of \$201, to the French Charity Society of Los Angeles. *Id.*

²⁵ For a description of the Los Angeles wills from 1893 and a summary of findings, see Knaplund, *supra* note 14.

²⁶ Missouri’s 1875 Constitution authorized the separation of the city of St. Louis from the county of St. Louis and treated the city as a county for purposes of representation in the legislature, collection of state revenue, and so on. MO. CONST. art. IX, §§ 20–25 (1875). Accordingly, the city separated from the county in 1876, and the probate files for St. Louis examined for this study are for the city, not the county. *Missouri’s Judicial Records*, MISSOURI DIGITAL HERITAGE, <http://s1.sos.mo.gov/records/archives/archivesdb/JudicialRecords/> (last visited June 21, 2015).

²⁷ To examine the probate records in St. Louis or other jurisdictions in St. Louis, see *Missouri’s Judicial Records*, *supra* note 26.

in 1894, so these records were sampled in the following manner: to ensure that files were included for all months of the year, all files with the final digit “5” were sampled.²⁸ A second sampling occurred by choosing a file ending in “1,” then the next file ending in “2,” and so on through “0.” A total of 317 files in 1893 and 1894 were sampled for this study. Although the St. Louis files did not include guardianships and adoptions, they did include one file to establish a conservatorship and six files to dissolve partnership agreements on the death of a partner; those seven files were excluded. Thus, 134 intestate estates and 172 wills from St. Louis were included in the study.

II. HISTORICAL BACKGROUND

Both cities had experienced tremendous growth in the preceding decade, with the growth in Los Angeles far exceeding that in St. Louis. Los Angeles County had a population of 33,381 in 1880; ten years later, the county had tripled in size to 101,454, even though by that time, Orange County, with a population of 13,589, had split from Los Angeles.²⁹ The city of Los Angeles grew from 11,000 in 1880 to more than 50,000 in 1890, of whom perhaps only one-quarter had been living there for more than four years.³⁰ The growth of the railroad system helps to explain the population rise. In 1876, the Southern Pacific Railroad (“Southern Pacific”) connected Los Angeles to the rest of the country.³¹ When the Atchison, Topeka, and Santa Fe Railroad (“Sante Fe”) arrived nine years later, a price war developed, with the price of a ticket from Chicago falling from \$85 to as low as \$1.32.³² In 1886, 120,000 passengers arrived in Los Angeles via the Southern Pacific, and “the Santa Fe had three or four trains a day arriving” there, bringing in still more.³³

²⁸ Probate files are assigned a number in the order in which the initial paperwork, typically a request for letters of administration or to appoint an executor, is received by the probate office. However, the online files are arranged in alphabetical, not numerical, order.

²⁹ CENSUS OFFICE, DEP’T OF THE INTERIOR, REPORT ON THE POPULATION OF THE UNITED STATES AT THE ELEVENTH CENSUS: 1890, at 11 tbl.4 (1895).

³⁰ 1 WILLIAM A. SPALDING, HISTORY AND REMINISCENCES, LOS ANGELES CITY AND COUNTY, CALIFORNIA 298 (1931).

³¹ JOSEPH S. O’FLAHERTY, THOSE POWERFUL YEARS: THE SOUTH COAST AND LOS ANGELES 1887–1917, at 16 (Exposition Press 1978).

³² *Id.*

³³ *Id.*

The city of St. Louis was far bigger than Los Angeles. The population in 1890 for St. Louis City was tallied at 451,770, but it, too, was growing rapidly, with a 29% increase from 350,518 in 1880.³⁴ Like Los Angeles, part of this growth was due to railroad expansion. The 1874 completion of the Eads Bridge, a 520-foot, two-story structure and the biggest bridge in the world at that time, allowed the railroads on both sides of the Mississippi River to unify.³⁵ Before the bridge, freight had to be off-loaded from the trains onto ferries to be shipped into or out of St. Louis—a time-consuming and expensive delay.³⁶

St. Louis' growth could also be explained by its large German population and their desire for a beer that tasted like home. German immigrants in St. Louis produced lager, in which the beer was stored in wooden casks to age, and by the mid-1800s, more than fifty breweries were in operation in St. Louis.³⁷ In 1876, German immigrant Adolphus Busch created an American-style lager beer, Budweiser, which became the first beer to be pasteurized so that it could be shipped long distances from St. Louis, especially once Busch developed refrigerated railcars in the late 1870s.³⁸ In addition to beer, St. Louis was a major source of production for shoes,³⁹ including the Hamilton-Brown Shoe Company, which first opened in 1872 to sell shoes made on the East Coast and later opened its own factory in St. Louis in 1888.⁴⁰

³⁴ CENSUS OFFICE, *supra* note 29, at 221 tbl.5.

³⁵ Nat'l Park Serv., U.S. Dep't of the Interior, *James B. Eads and His Amazing Bridge at St. Louis*, MUSEUM GAZETTE, Jan. 2001, at 1, 3, available at <http://www.nps.gov/jeff/historyculture/upload/eads.pdf>.

³⁶ *Id.*

³⁷ *Dedication to Our Craft*, ANHEUSER-BUSCH, <http://anheuser-busch.com/index.php/our-heritage/history> (last visited June 21, 2015).

³⁸ WILLIAM KNOEDELSEDER, BITTER BREW: THE RISE AND FALL OF ANHEUSER-BUSCH AND AMERICA'S KINGS OF BEER 16–17 (Harper Collins 2012).

³⁹ Two decedents in the study were in the shoe business: Abraham Rosenberg owned a shoe store at 612 Franklin Street in St. Louis; his inventory included hundreds of pairs of shoes. Case 20880 Abraham Rosenberg. The inventory of Carl Hurlleman noted thirty pairs of assorted shoes. Case 20425 Carl Hurlleman.

⁴⁰ NAT'L PARK SERV., U.S. DEP'T OF THE INTERIOR, NATIONAL REGISTER OF HISTORIC PLACES REGISTRATION FORM: HAMILTON-BROWN SHOE FACTORY § 8, at 5 (Mar. 30, 2000), available at <http://www.dnr.mo.gov/shpo/nps-nr/00000437.pdf>. Once the St. Louis Browns baseball team was established in St. Louis in 1902, the city's informal moniker was "First in shoes, first in booze, and last in the American League." *St. Louis Browns*, BASEBALLLIBRARY.COM, http://www.baseballlibrary.com/teams/team.php?team=st_louis_browns (last visited June 21, 2015).

Both cities included substantial numbers of immigrants with 25% of the population foreign-born.⁴¹ The Los Angeles files included twenty-four decedents who left family in Scotland, England, France, Ireland, Germany, Switzerland, Italy, Mexico, Spain, and Syria.⁴² In the St. Louis files, twenty decedents had ties to Germany,⁴³ Ireland,⁴⁴ Austria,⁴⁵ Canada,⁴⁶ England,⁴⁷ Turkey,⁴⁸ and Wales.⁴⁹ St. Louis had far more inhabitants with a foreign-born father or mother than Los Angeles; in the 1890 census for cities with populations of at least 25,000, St. Louis ranked fifth in the country (behind only New York, Chicago, Philadelphia, and Brooklyn, New York) in “White persons” with at least one foreign-born parent,

⁴¹ CENSUS OFFICE, *supra* note 29, at 451 tbl.19.

⁴² *Testate*: Case 143 Joseph Naud (France); Case 206 George William Spawforth (England); Case 212 James William Earle Stewart (Scotland); Case 321 Terrence Kenney (Ireland); Case 342 Antoine Charvoz (France); Case 343 Jacob Stengel (Germany); Case 361 Charles Wagner (Germany); Case 366 C.U. Mueller (Switzerland); Case 401 Albert Herminghaus (Germany); Case 495 Edward Willike (Germany); Case 544 Robert Fleming (England); Case 591 John Bergdahl (Sweden); Case 605 Horatio Perry (Germany); Case 639 Juan Del Amo (A resident of Mexico, he was a native of Spain); Case 744 Joseph A. Arbeely (Yusef Aouad Arbely) (Syria). *Intestate*: Case 120 Andrew Danielson (Sweden); Case 157 Josefa de Celis (Mexico and Spain); Case 320 Andrew Rein (Germany); Case 351 Pietro Luciaridi (Italy); plus four decedents from Ireland: Case 95 Bridget Wilson, Case 306 Alicia Walsh, Case 307 Olivia Bovaird, and Case 404 Edward Herne.

⁴³ Case 19465 Maria Braght (sister in Germany); Case 19510 Francis Saler (inventory showed share of stock in Herold des Glaubens (German Printing and Publishing Association) and cash in the German Savings Institution); Case 19564 Theobald Rees (brothers and sisters in Germany); Case 20051 Carl Clemens (decedent was a German national and the case was opened in St. Louis to allow Carl to inherit from his brother, Otto Clemens, who died there); Case 20115 John Leuze (will written in German and executed in Stuttgart, Germany); Case 20160 John H. Baumann (receipt from one charitable beneficiary, Diaconissen Home, in German); Case 20235 Mary Laske (born in Hanover, Germany); Case 20769 Hermann Bredestege (will written in German; bequests to Germans); Case 20778 Sophie Flohr (will written in German and executed in the Kingdom of Prussia); Case 20909 Theresa Lohrum (daughter signed receipt in German); Case 20967 Adolphus Boeckeler (wife and brothers in Germany; testator buried there).

⁴⁴ Case 19645 Daniel Malone (mother and brother in County Cork, Ireland); Case 19685 Mary Jane Ranken (Irish citizen who executed will in Ireland); Case 20415 John Murphy (one daughter in Ireland); Case 20990 Mary Lyons (niece in Ireland).

⁴⁵ Case 19997 Abraham Geist (bequests to niece and brother-in-law in Krakau, Austria).

⁴⁶ Case 20248 Michael Walsh (two sons in Ontario, Canada).

⁴⁷ Case 19907 Thomas Silence (brother in London, England expressly left nothing in will).

⁴⁸ Case 19700 George Hachadoorian (intestate heir in Sivas, Turkey; signed by mark).

⁴⁹ Case 20255 Thomas Stephens (one brother and children of deceased sister in Wales).

while Los Angeles ranked fifty-second.⁵⁰ In that census, 152,810 inhabitants of St. Louis had both parents born in Germany.⁵¹ Another 11,322 in St. Louis had at least one parent born in Germany.⁵² In comparison, just 5,141 in Los Angeles had both parents born in Germany,⁵³ plus another 775 with one parent born in Germany.⁵⁴ Ireland was the second most common country of origin in St. Louis and the third most common country of origin in Los Angeles.⁵⁵ For St. Louis, 54,972 inhabitants had both parents born in Ireland,⁵⁶ and another 6,980 had one parent born in Ireland.⁵⁷ Los Angeles had far fewer inhabitants with Irish born

⁵⁰ CENSUS OFFICE, *supra* note 29, at 704 tbl.50.

⁵¹ This number is the difference between Table 52 (at least one parent born in Germany and the other of foreign birth, at 152,810) and Tables 61 (father born in Germany and foreign mother born elsewhere, at 3,017) and 62 (mother born in Germany and foreign father born elsewhere, at 2,763). *Id.* at 708 tbl.52, 726 tbl.61, 728 tbl.62.

⁵² This number is the sum from Table 55 (father born in Germany and native mother, at 23,295), Table 58 (mother born in Germany and native father, at 5,542), Table 61 (father born in Germany and foreign mother born elsewhere, at 3,017), and Table 62 (mother born in Germany and foreign father born elsewhere, at 2,763). *Id.* at 714 tbl.55, 720 tbl.58, 726 tbl.61, 728 tbl.62.

⁵³ This number is the difference between Table 52 (at least one parent born in Germany and the other of foreign birth, at 5,141) and Tables 61 (father born in Germany and foreign mother born elsewhere, at 335) and 62 (mother born in Germany and foreign father born elsewhere, at 225). *Id.* at 708 tbl.52, 726 tbl.61, 728 tbl.62.

⁵⁴ This number is the sum from Table 55 (father born in Germany and native mother, at 829), Table 58 (mother born in Germany and native father, at 215), Table 61 (father born in Germany and foreign mother born elsewhere, at 335), and Table 62 (mother born in Germany and foreign father born elsewhere, at 225). *Id.* at 714 tbl.55, 720 tbl.58, 726 tbl.61, 728 tbl.62.

⁵⁵ *Id.* at 708 tbl.52, 714 tbl.55, 720 tbl.58.

⁵⁶ This number is the difference between Table 52 (at least one parent born in Ireland and the other of foreign birth, at 54,972) and Tables 61 (father born in Ireland and foreign mother born elsewhere, at 1,669) and 62 (mother born in Ireland and foreign father born elsewhere, at 2,193). *Id.* at 708 tbl.52, 726 tbl.61, 728 tbl.62.

⁵⁷ This number is the sum from Table 55 (father born in Ireland and native mother, at 6,222), Table 58 (mother born in Ireland and native father, at 3,118), Table 61 (father born in Ireland and foreign mother born elsewhere, at 1,669), and Table 62 (mother born in Ireland and foreign father born elsewhere, at 2,193). *Id.* at 714 tbl.55, 720 tbl.58, 726 tbl.61, 728 tbl.62.

parents—2,632 with both parents born in Ireland⁵⁸ and 775 with one parent born in Ireland.⁵⁹

Both places were largely White: 94% in Los Angeles⁶⁰ and St. Louis.⁶¹ While no racial identifiers could be found in the Los Angeles files, three references to race were in the St. Louis files. In one, the testatrix identified herself as a “mulatto woman” and left all of her property to two children, ages eleven and eight, who she identified as “colored persons” and the grandchildren of Berryman Ramsey, “a colored man.”⁶² Ramsey was one of the witnesses to the will; the testatrix and both witnesses signed by mark.⁶³ In another will, also signed by mark, the testatrix identified herself as “a colored woman” and gave her property to her children.⁶⁴ In a third file, a bill for nursing services indicated that \$1 was paid to a “colored assistant”; the nurses, but not the assistant, were identified by name.⁶⁵

Both cities reflected the economic downturn in 1893, with substantial numbers of estates either declared insolvent or with no known property. In Los Angeles, seven estates with attested wills⁶⁶ and thirty-one intestate estates lacked assets, for a total of 7% of the estates. Not surprisingly, many of the insolvent estates declared that the decedents had no known heirs: six of the insolvent intestate estates in Los Angeles,⁶⁷ plus another six solvent intestate estates,⁶⁸

⁵⁸ This number is the difference between Table 52 (at least one parent born in Ireland and the other of foreign birth, at 2,632) and Tables 61 (father born in Ireland and foreign mother born elsewhere, at 225) and 62 (mother born in Ireland and foreign father born elsewhere, at 311). *Id.* at 708 tbl.52, 726 tbl.61, 728 tbl.62.

⁵⁹ This number is the sum from Table 55 (father born in Ireland and native mother, at 376), Table 58 (mother born in Ireland and native father, at 219), Table 61 (father born in Ireland and foreign mother born elsewhere, at 225), and Table 62 (mother born in Ireland and foreign father born elsewhere, at 311). *Id.* at 714 tbl.55, 720 tbl.58, 726 tbl.61, 728 tbl.62.

⁶⁰ *Id.* at 451 tbl.19.

⁶¹ *Id.* at 466 tbl.19.

⁶² Case 19856 Priscilla Hurst.

⁶³ *Id.*

⁶⁴ Case 20018 Nancy Johnson.

⁶⁵ Case 20236 Isabella Devine.

⁶⁶ Case 72 Lorenz; Case 73 Brophy; Case 143 Naud; Case 345 Mell; Case 357 Gustin; Case 361 Wagner; Case 589 Champagne.

⁶⁷ Case 160 Sheehan (single male; assets of \$300); Case 235 McMahon (single male; assets of \$81); Case 337 Price (single female; assets of \$95); Case 421 Munro (single male; assets of \$25); Case 594

resulted in escheat. In addition, in another six estates in Los Angeles, locating family members was an issue. In two attested wills, the testator declared that he had lost track of his family.⁶⁹ In a third file, the surviving widow declared that the decedent had children from his first marriage but did not know their names or whereabouts.⁷⁰ In a fourth Los Angeles will, the testator, a widower, asked that his two children, ages eight and ten, be placed with the Los Angeles Orphans Home.⁷¹ In two Los Angeles intestate cases, finding family members proved difficult. In one case, the administrator located two half-siblings of the decedent who were entitled to the estate in place of the original claimants, the decedent's brother and nephew.⁷² In a second intestate case, the minor decedent's missing mother was belatedly found re-married and living in Boston.⁷³

In St. Louis, thirty-five of the files—six with attested wills and twenty-nine in intestacy—were insolvent, or 11%. Three St. Louis cases revealed difficulties in locating family. In one, family members differed over the number of nieces and nephews entitled to inherit in intestacy.⁷⁴ In the second, the intestate distribution resulted in a partial escheat because one of the decedent's daughters never appeared to collect her share.⁷⁵ In the third case, the decedent's daughter stated that her brother had not been heard from since 1868 and thus “she [was] unable to state whether said August [was] alive or dead.”⁷⁶ In four other St. Louis cases, the

Gibson (single male; assets of \$50 before debts and expenses); Case 648 Ney (single male; assets of \$201).

⁶⁸ Case 91 Montagono (single male committed to insane asylum; assets of \$26); Case 434 Sentt (single male; assets of \$610); Case 496 Kronberg (single male; assets of \$582); Case 631 Kerr (single male; assets of \$321); Case 748 Darr (married man; real property inventoried at \$350 but sold for \$150; \$6 escheated to state in 1910); Case 755 Huffman (single female; assets of \$708).

⁶⁹ Case 146 Mattie Prairo (all to husband; sister's whereabouts unknown); Case 223 Gerry Wells (will stated, “I had two brothers and one sister but have not heard from them for many years and do not know whether any of them is living now”). In another example, Charlotte Maxwell executed her will in 1892 leaving all to her four children, apparently unaware that her daughter, Maria, died almost two years before her will was executed. Case 10 Charlotte Maxwell.

⁷⁰ Case 348 B. Homer Fairchild.

⁷¹ Case 494 Weinheimer.

⁷² Case 435 Hodge.

⁷³ Case 743 Porter.

⁷⁴ Case 20473 Samuel Beall.

⁷⁵ Case 20945 Hunter. The decedent owned three lots of real property, so the estate did have assets. *Id.*

⁷⁶ Case 19755 Friedicke Tanzberger.

executor or administrator filed papers to qualify to preside over the estate and then disappeared.⁷⁷

In other ways, files from the two cities were markedly different. Los Angeles in the late 1880s and early 1890s was a popular destination for those wanting to invest in land. In 1886, the Southern Pacific brought in 120,000 passengers, and the Santa Fe line ran three or four trains a day to the city.⁷⁸ The passengers were swarmed by real estate agents looking for purchasers for their property developments. “While they gulped free lunches, brass bands blared and daredevils risked the balmy skies with balloon ascensions. A mania seized them. Why not buy building lots on credit, and then resell a few days later for a profit?”⁷⁹ Not surprisingly, 74% of all the files, testate and intestate, in Los Angeles included real property,⁸⁰ while only 63% in St. Louis included real estate.⁸¹ While we might expect a much higher level of testacy in those with real property, that is not true in Los Angeles: 77% of the testate decedents owned real property at death, compared to 72% of intestate decedents. In St. Louis, by contrast, testate decedents were far more likely to own real property: 78% of the testate decedents and only 43% of intestate decedents owned real property. Los Angeles decedents also differed from those in St. Louis in the quantity of real property. The Los Angeles probate files

⁷⁷ Case 19455 John Ellis (will named wife as executrix; a “Citation to Make Settlement” was returned with the notation, “The within named Sarah Ellis cannot be found in the City of St. Louis”); Case 19651 Ellen Powers (will named husband as executor, who qualified and later was ordered to file accounts and make settlement, but cannot be found); Case 19858 Joseph Lewis (widow declined to administer estate and son appointed instead; court issued several citations to make settlement and to file inventory, but as of March of 1895, the son “cannot be found”); Case 20256 Mary Siffley (husband qualified as administrator, collected the \$500 in insurance, and then abandoned his three children, ages thirteen, eight, and five).

⁷⁸ O’FLAHERTY, *supra* note 31, at 16.

⁷⁹ DAVID LAVENDER, LOS ANGELES TWO HUNDRED 49–50 (Continental Heritage Press 1980).

⁸⁰ Seventy-four percent is 373 divided by 504. One hundred and sixty-one testate decedents and 212 intestate decedents had real property listed in an inventory filed with the court. In eight cases, two testate and six intestate, no inventory was filed, and so those eight cases are excluded from the total.

⁸¹ Sixty-three percent is 191 divided by 305. One hundred and thirty-three testate decedents and fifty-eight intestate decedents had real property. For one testate decedent, no inventory was filed, and so that case was excluded from the total.

included a number of decedents who owned scores of lots.⁸² In St. Louis, only one decedent owned dozens of lots.⁸³

Another contrast was in the administration of the probate estates, including the length of time required to probate the estate in Los Angeles and the number of estates that were reopened decades later. Seventeen estates in Los Angeles took ten years or longer to close. Three of the seventeen might be explained by the fact that the decedents were nonresidents.⁸⁴ In another seven cases, either a principal person in the case died, or the estate was subject to substantial litigation.⁸⁵ The remaining seven cases reveal no indication why administration took many years.⁸⁶ In addition to these seventeen, in another four Los Angeles cases, the estates were closed promptly and then re-opened years, even decades, later.⁸⁷ In St. Louis, in contrast, only five cases, all involving residents, took more than ten years to close.⁸⁸

⁸² See, e.g., Case 4 Patrick Conroy (ninety-five parcels); Case 56 Thomas Brown (over 100 parcels); Case 216 Charles Langford (fifty parcels); Case 472 Sereno Chaffee (inventory for guardianship listed in Case 376 included dozens of lots valued at over \$50,000); Case 500 Annie McAnany (109 parcels).

⁸³ The exception is the estate of George Tower, whose real property inventory covered seventeen pages and included ninety-five unimproved lots and five improved lots in Missouri, eighty-three improved acres in New Hampshire, plus unimproved property in New Hampshire, Illinois, and Arkansas. Case 20185 George Tower. Two others in St. Louis owned multiple lots. Case 19622 David Armstrong (fifteen lots); Case 20278 Thomas Rielly (six lots).

⁸⁴ Case 306 Walsh (intestate; resident of Ireland); Case 307 Bovaird (intestate; resident of Ireland and sister of Walsh); Case 774 Bolton (intestate; Massachusetts resident; decree of distribution dated 1895 was filed in 1909).

⁸⁵ Case 108 Cochran (intestate; administratrix-wife's attorney was Case 390 Henry O'Melveny, who died in 1893; closed in 1921); Case 130 Steele (attested; wife, named executrix, died in 1899; closed in 1912); Case 293 Flanagan (attested; will contested because signed by only one witness; estate distributed in intestacy; closed in 1907); Case 298 Eichenberger (attested; lots of litigation; closed in 1904); Case 305 Baker (intestate; lots of litigation; closed in 1906); Case 574 Rheinart (holograph; wife predeceased him in 1893 (Case 227); closed in 1911); Case 610 Sherman (intestate; lots of litigation; closed in 1921).

⁸⁶ Case 111 Richards (intestate; closed in 1917); Case 310 Gifford (holograph; closed in 1906); Case 384 Sloan (intestate; inventory filed in 1903); Case 481 Barron (attested; closed in 1903); Case 562 Caulfield (intestate; closed in 1907); Case 629 Mead (attested; inventory filed in 1911); Case 689 Sanchez (intestate; closed in 1940).

⁸⁷ Case 80 Swartwout (intestate; resident of Louisiana; re-opened in 1926); Case 81 Morgan (intestate; re-opened in 1944); Case 101 Ogier (attested; re-opened in 1932 to quiet title); Case 295 de Lamarca (intestate; re-opened in 1907).

⁸⁸ Case 19622 David Armstrong (attested; lots of litigation over omitted wife and wrongdoing by executor, leading to removal; closed in 1909); Case 20185 George Tower (attested; largest file in study with lots of litigation; closed in 1919); Case 20235 Mary Laske (intestate; re-opened in 1903); Case

Laws on the execution of wills also differed between Missouri and California. The age of testamentary capacity for males in Missouri was twenty-one with respect to real property and eighteen with respect to personal property;⁸⁹ for females it was twenty-one for both real and personal property.⁹⁰ These requirements were the law for 148 years, from 1807 to the enactment of the 1955 Missouri Code. As the author of one practice book noted:

To admit a will to probate the proponent must establish that the testator was of the required age. While there is no decision on the point in Missouri there is little doubt but that the testator must have attained the required age at the time of the will's execution. It is not sufficient that the testator remain passive and not alter his previously executed will after attaining the required age.⁹¹

California required male and female testators to be eighteen and of sound mind.⁹² While at one time a married woman needed her husband's consent to execute a will,⁹³ after 1864 his consent was no longer required. Still, she could only devise her separate property, as the community property belonged solely to her husband after her death.⁹⁴ A married woman's interest in the community property, as Chief Justice Field of the California Supreme Court held in 1860, "[was] a mere expectancy, like the interest which an heir may possess in the property of his ancestor."⁹⁵ Justice Cope explained a year later:

20544 Jules Casey (intestate; closed in 1907); Case 20865 Augustus Pullis (attested; assets valued at \$81,625 later sold for \$10; re-opened in 1905).

⁸⁹ MO. ANN. STAT. § 468.130 (West 1949) (repealed 1955).

⁹⁰ *Id.*

⁹¹ JOHN A. BORRON, JR., MISSOURI PRACTICE SERIES: PROBATE LAW AND PRACTICE § 92 (3d ed. 2015).

⁹² Act of Apr. 10, 1850, ch. 72, § 1, 1850 Cal. Stat. 177, 177 ("Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will, shall descend as the estate of an intestate, being chargeable in both cases with the payment of all the testator's debts.") (repealed 1931). The 1874 Civil Code included the same requirements. CAL. CIV. CODE § 1270 (West 1874) (repealed 1931).

⁹³ Act of Apr. 10, 1850, ch. 72, § 2, 1850 Cal. Stat. 177, 177 (repealed 1931).

⁹⁴ CAL. CIV. CODE § 1401 (West 1874) (repealed 1931). Married women finally gained the right to will away their half of the community property in 1923. Act of Apr. 16, 1923, ch. 18, § 1, 1923 Cal. Stat. 29, 30 (codified at CAL. CIV. CODE § 1401 (West 1923)) (repealed 1931).

⁹⁵ *Van Maren v. Johnson*, 15 Cal. 308, 311 (1860).

The wife has no voice in the management of these affairs, nor has she any vested or tangible interest in the community property. The title to such property rests in the husband, and for all practical purposes he is regarded by the law as the sole owner. It is true, the wife is a member of the community, and entitled to an equal share of the acquests and gains; but so long as the community exists her interest is a mere expectancy, and possesses none of the attributes of an estate, either at law or in equity.⁹⁶

The result was that married women in both Missouri and California had substantially equivalent property rights. They could manage and devise their separate property but could not will away property gained through their husband's earnings. The California Legislature restricted the husband's right to give away community property by requiring the wife's written consent as of 1891,⁹⁷ but that statute had little effect on our testators, as the California Supreme Court ruled in 1897 that the statute applied only to property acquired *after* 1891.⁹⁸ Married women at that time were unlikely to have their own earnings after marriage. While the probate files often revealed the occupation of male decedents, few women decedents appeared to be employed at the time of their deaths. Male decedents included a number of attorneys,⁹⁹ in addition to a few with jobs we rarely see today, such as a tinsmith,¹⁰⁰ a blacksmith,¹⁰¹ and a Basque shepherd.¹⁰² Five women, only one married at the time of death, indicated a source of their income: a

⁹⁶ Packard v. Arellanes, 17 Cal. 525, 538 (1861).

⁹⁷ Peter M. Moldave, *The Division of the Family Residence Acquired with a Mixture of Separate and Community Funds*, 70 CALIF. L. REV. 1263, 1272 (1982) (citing Act of Mar. 31, 1891, ch. 220, 1891 Cal. Stat. 425).

⁹⁸ Spreckels v. Spreckels, 116 Cal. 339, 349 (1897).

⁹⁹ *Los Angeles*: see, e.g., Case 110 Alexander McCoy (personal property, including law books, valued at \$14,718); Case 344 Thomas Wilson (petition to probate will states that decedent was an attorney); Case 372 William Wade (inventory included law library and copyrights on law books written by decedent); Case 390 H.K.S. O'Melveny (probate attorney and former judge who died intestate; son founded prominent Los Angeles law firm, O'Melveny & Myers); Case 654 Samuel McKinlay (law library valued at \$300); Case 693 John Robarts (law library with 1,776 volumes valued at \$2,300); Case 694 Langston Winston (law library and office furniture worth \$200); Case 740 W.H. Mitchell (died intestate with inventory including law books and interests in patents); Case 741 C.C. Stephens (widow's petition to be named administratrix stated that decedent was actively practicing law until a few days before death).

¹⁰⁰ Case 355 Kennedy (intestate).

¹⁰¹ Case 404 Herne (intestate).

¹⁰² Case 333 Sorzabal (intestate).

married pawnshop owner in St. Louis,¹⁰³ a widow who owned two houses in St. Louis with thirty-two rooms for rent,¹⁰⁴ a widow who served as Assistant Postmistress in St. Louis,¹⁰⁵ a widowed winemaker,¹⁰⁶ and a rooming house owner in Los Angeles.¹⁰⁷

In both California and Missouri at that time, married women could inherit property, but St. Louis testators were often careful to keep the inheritance from their sons-in-law. For example, Philip Curtis directed his executor to sell all of the real property in the estate, give \$1 to Curtis' son, and then divide the remaining property into shares with one part to his beloved daughter, Eliza, "as her sole and separate property, free from all use and control of her husband"; a similar bequest was made to another married daughter, Edmonia; for a third daughter, a widow, the property was to be "free from all use and control of any future husband that she may have."¹⁰⁸ In a similar manner, Bernhard Hoelscher bequeathed his property to his widow for her life, "free from the control or interference of anyone else whomsoever," and then to his married daughters, "free from the control or interference" of their husbands.¹⁰⁹ Samuel Warren left half of his property to his wife and half to his married daughter, with the proviso that all property bequeathed to his daughter "shall be held by her as her separate estate, without any control thereof by her husband. I make this provision not from any lack of confidence in her husband, whom I hold in the highest regard, but solely as a matter of prudence for her future best interests."¹¹⁰ That language may have been needed for the real property in Hoelscher's and Warren's estates, but it was unnecessary for the personal property: Missouri in 1875 had enacted its version of the Married

¹⁰³ Case 20155 Mary Miller.

¹⁰⁴ Case 20633 Maria Schmidt.

¹⁰⁵ Case 20965 Alice Hall (only asset was "[one] month's salary as Assistant Post Mistress" valued at \$76.09).

¹⁰⁶ Case 489 E.A. Leeper (inventory included 9,000 gallons of wine at \$50 per gallon, one crusher, one wine press, and ten wine kegs).

¹⁰⁷ Case 359 Trantum (widow; owned eleven Bunker Hill lots with rooming houses).

¹⁰⁸ Case 19572 Philip Curtis. His daughter, Eliza, was also given a share in trust for another married daughter, Martha Mills, "for the reason that my said daughter, Martha Mills, is of weak mind." *Id.* His son, Philip Curtis, was given his share outright. *Id.*

¹⁰⁹ Case 20995 Bernhard Hoelscher.

¹¹⁰ Case 20755 Samuel D. Warren.

Women's Property Act, declaring that any personal property inherited by a married woman was her separate property and under her sole control.¹¹¹

In Los Angeles, while one testator used language even more restrictive than that in the St. Louis wills,¹¹² several simply gave all of their property outright evenly to married daughters or granddaughters.¹¹³ From the time California entered the Union, all property acquired by inheritance was regarded as separate, not community, property. This concept was spelled out in the California Constitution of 1849:

All property, both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, shall be her separate property: and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband.¹¹⁴

¹¹¹ 1875 MO. LAWS 61. The same language appears in MO. REV. STAT. § 3296 (1879). See R. Richard Geddes & Sharon Tennyson, *Passage of the Married Women's Property Acts and Earnings Acts in the United States: 1850 to 1920*, in 29 RESEARCH IN ECONOMIC HISTORY 145, 179–80 (Christopher Hanes & Susan Wolcott eds., 2013).

¹¹² Case 5 John W. Polley (decedent devised half of his real property in California to his daughter and the other half equally to his two sons; his daughter, but not the sons, was given “no power to mortgage, encumber, or in any way convey the property, or to transfer an interest therein, or to assign her right to receive the rents and income therefrom without the written consent of the executors” and the two sons). A court might also use language similar to the St. Louis terms. See, e.g., Case 738 Lena Brenner (decedent died intestate, survived by her son and a married daughter; the court decreed that half of the property went to son, Jacob, and the other half went to daughter, “Rosa Haas, wife of Julius L. Haas, for her sole and separate use and benefit”).

¹¹³ See, e.g., Case 10 Charlotte Maxwell (on a form will, she gave all her property in California “to my four children Mareta R. Ramsey, Maria M. Bonman, Samuel A. Maxwell and George B. Maxwell”; daughter, Maria, died almost two years before the will was executed); Case 15 Maria G. Herrera (survived by two adult daughters and three adult grandchildren (two grandsons and a granddaughter); form will left all to the five descendants to “share and share alike equally”); Case 230 Mary Perham (will left all the rest to her two granddaughters and a grandson in equal shares); Case 408 Elias Bixby (in a typed will, he gave all his real property in Los Angeles to his son, Lewis Bixby, and all his property in the state of Missouri “to my beloved daughter Madora Bixby Willis, of Sherman, Texas, and to her heirs forever . . .”; he further directed that his body be properly embalmed and transported to Missouri to be buried with his wives (plural!) and children); Case 487 Henry Nelson (in an attested will executed the day he died, he left all his property equally to his five children, including three minor children living with his ex-wife in Philadelphia, Pennsylvania).

¹¹⁴ CAL. CONST. art. XI, § 14 (1849). The same provision appears in the Texas Constitution of 1845. TEX. CONST. art. VII, § 19 (1845).

The California Legislature acted in 1850 to declare that the husband had sole management and control of his wife's separate property, although her consent was needed before it could be transferred or encumbered.¹¹⁵ In 1872, a new statute gave the wife full managerial power over her separate property,¹¹⁶ and in 1889, the Legislature declared that property conveyed to a married woman by written instrument was presumed to be her separate property.¹¹⁷ This presumption furthered the intention of the parties, "[s]ince a married woman could only control separate property . . . [a] grantor's decision to place title in a married woman must have represented a desire that she exercise control."¹¹⁸ With that 1889 presumption, there was no need for a testator to expressly declare that the bequest to a California married woman was free from her husband's control, and thus it is not surprising that the language is largely absent from California wills.

Testators in both states routinely named their widows as executrix, even in cases in which the widow signed by mark and thus may have lacked the ability to read and write.¹¹⁹ Several testators named their daughter or niece, rather than a male relative, to be executor,¹²⁰ although in some cases, the daughter was disqualified because she was married.¹²¹

¹¹⁵ Moldave, *supra* note 97 (citing Act of Apr. 17, 1850, ch. 103, § 6, 1849–50 Cal. Stat. 254).

¹¹⁶ 1 CODES AND STATUTES OF CALIFORNIA § 5162, at 595 (Theodore H. Hittel ed., 1876). Earlier, the California Supreme Court had held that the rents and profits of separate property were also separate and did not belong to the community. *George v. Ransom*, 15 Cal. 322, 323–24 (1860).

¹¹⁷ Moldave, *supra* note 97, at 1272 (citing Act of Mar. 19, 1889, ch. 219, 1889 Cal. Stat. 328).

¹¹⁸ Susan Westerberg Prager, *The Persistence of Separate Property Concepts in California's Community Property System, 1849–1975*, 24 UCLA L. REV. 1, 44 (1976).

¹¹⁹ *St. Louis*: see, e.g., Case 19564 Theobald Rees (will gave \$1 each to testator's brother and sister in Germany; rest to wife); Case 19735 Lambert Walter (will named widow to serve as executrix without bond); Case 20240 Gerhard Poser (both testator and wife-executrix signed by mark); Case 20664 Joseph Whetstone (will did not provide for waiver of bond); Case 22996 Michael Shea (widow-executrix died in 1897, leaving three sons and two daughters; daughter, Mary, then appointed successor administrator). *Los Angeles*: 71% of the married men who designated an executor in their wills named their wives; two-thirds of the married women named their husbands. Knaplund, *supra* note 14, at 19.

¹²⁰ *St. Louis*: see, e.g., Case 20025 Arndt Klein (typed form will provided for testator's five daughters and four sons, and named one daughter to serve as executrix without bond); Case 20352 C. Auguste Calame (in a will signed by mark, testator named his niece, not his brother in St. Louis, as executrix to serve without bond). *Los Angeles*: see, e.g., Case 88 Mary C. Saunders (will named the testator's daughter-in-law, not the testator's husband or son, as executrix); Case 326 Richard Chippendale (will gave all to daughter, Maria, and named her executrix; other children not mentioned in will; Maria relinquished her right to act as executrix, and her brother served instead); Case 636 Martha Ashmead (testator survived by husband, three adult daughters, and two adult sons; oldest daughter named

The St. Louis files differed from the Los Angeles files in other respects. Decedents in St. Louis were far more likely to be testate than their Los Angeles counterparts. In addition, women in St. Louis were far more likely to have an administered estate than those in Los Angeles.

Of the 512 Los Angeles files, 59% (302/512) were intestate, and only 41% (210/512) involved holographic or attested wills. In St. Louis, the percentages were almost the reverse, even though no wills were holographs: 56% (172/306) of the files involved attested wills, and 44% (134/306) were intestate. The gender ratios in the two cities were different as well. In Los Angeles, 28% of the decedents, intestate and testate, were female, while in St. Louis, 35% were female. Women were a greater percentage of testators in St. Louis than in Los Angeles: 37% of those executing wills in St. Louis were female, while only 29% of Los Angeles testators were female.

A high percentage of testators in St. Louis signed by mark, much higher than in Los Angeles at that time: 21% (35/168) were signed by mark in St. Louis,¹²² compared to 5% (11/215) in Los Angeles.¹²³ Another nineteen files in St. Louis contained signatures by mark by heirs or devisees, the executor named in the will, and others.¹²⁴ While some of those signing by mark may have been incapacitated

executrix; three daughters to receive shares outright; son, George, to have sole use of certain real property for six years “at the end of which if he is living a sober, upright life in every way he is to have the deed of the property”; son, Arthur, “not to receive his share until he is out of debt, has real property to the value of two hundred dollars . . . and becomes steady and does not spend his evenings out”).

¹²¹ See, e.g., Case 20693 Mary O'Connor (testator named married daughter as executrix and provided that property should be divided among her three sons; after her daughter was disqualified, her son served as administrator); Case 20875 Charles Masschelein (testator named one of two married daughters to be executrix); Case 22596 Nicholas Ast (testator's only child disqualified because married; her husband named administrator in her place). In at least three intestate estates, a daughter served as administrator: Case 19962 Mary Powers (letters revoked after daughter married); Case 20505 Helena Zimmerman (decedent's son and three daughters waived right to serve in favor of decedent's fourth daughter); Case 20792 Albert Trevor (same).

¹²² A total of 172 St. Louis wills were included in this study. In four cases, documents in the file established that the decedent died testate but no copy of the will was included in the file, so it is unknown if the testator signed by mark.

¹²³ In five of the 220 Los Angeles will files, the will, itself, was not included in the file.

¹²⁴ *Heirs or devisees signing by mark*: Case 19695 Christoph Wall; Case 19700 George Hachadoorian; Case 20315 Louis Kirchoff; Case 20385 James Tarlton; Case 20395 John Kroeger; Case 20473 Samuel Beall; Case 20645 Patrick Fox; Case 20805 John Callahan; Case 20880 Abraham Rosenberg; Case 20964 Margareth Linkenfelter. *Executrix signing by mark*: Case 19564 Theobald Rees; Case 19735 Lambert Walter; Case 20664 Joseph Whetstone; Case 22996 Michael Shea. *Others signing by mark*:

by stroke or other infirmity,¹²⁵ it is likely that the majority of those signing by mark could not read or write, given the educational climate in Missouri and the rest of the country in the nineteenth century. A public education system in Missouri was first created after the Civil War when the 1865 State Convention directed the General Assembly to provide free public schooling for children between ages five and twenty-one and mandated a minimum attendance of sixteen months at some time prior to age eighteen.¹²⁶ St. Louis set up several public schools in 1865 but still turned away about 2,000 eligible White children that year.¹²⁷ Five years later, the 1870 census reported that, state-wide, 59% of eligible White children were attending school.¹²⁸ Blacks in Missouri were even less likely to receive an education, as an 1847 amendment to the Missouri Constitution declared it unlawful to teach any “Negro” to read and write.¹²⁹ Some defied the law, with Catholic nuns in St. Louis periodically conducting classes.¹³⁰ In 1856, the first Black-run school was established in St. Louis: 150 children paid the monthly tuition of \$1 to attend, but the school operated for only one year.¹³¹ In 1864, a group of both Blacks and Whites in St. Louis operated four subscription schools with about 400 students,

Case 19612 Martin Mears (witness to will); Case 20089 Henry Ebmeyer (appraiser filing inventory); Case 20248 Michael Walsh (affiant); Case 20297 Adeline Charpiot (four witnesses in trial); Case 20335 Timothy Scott (creditor); Case 20639 Charles Starkes (worker).

¹²⁵ For example, David Armstrong in St. Louis signed his will by mark the day before he died, but another document in the file includes his signature. Case 19925 David Armstrong. Francis Saler in St. Louis also signed his will by mark. Case 19510 Francis Saler. He was the publisher of a German daily and weekly newspaper, so it is unlikely that he was illiterate. JAMES COX, OLD AND NEW ST. LOUIS: A CONCISE HISTORY OF THE METROPOLIS OF THE WEST 430 (1894), available at <http://books.google.com/books?id=ZtEyAQAAAMAJ&pg=PA430&lpg=PA430&dq=Francis+Saler+St+Louis+Cox&source=bl&ots=ZoHA1SsGyz&sig=TxgL5fOOu6D8vcnuQxFEaqWXXF8&hl=en&sa=X&ei=HHS8U6zkAoLwoATGuoKABg&ved=0CDUQ6AEwBQ#v=onepage&q=Francis%20Saler%20St%20Louis%20Cox&f=false>.

¹²⁶ 3 WILLIAM E. PARRISH, A HISTORY OF MISSOURI 1860–1875, at 170 (1973). School terms in the nineteenth century were quite short and generally followed the agricultural cycle. For example, the school term in Cape Girardeau County, Missouri was four months long in the 1870s, beginning after the harvest in late October and ending in early March before the spring planting season. 4 LAWRENCE O. CHRISTENSEN & GARY R. KREMER, A HISTORY OF MISSOURI 1875–1919, at 54 (1997).

¹²⁷ PARRISH, *supra* note 126, at 171.

¹²⁸ *Id.* at 163.

¹²⁹ *Id.* at 145.

¹³⁰ *Id.* at 158. Before the Civil War, about two-thirds of the free “Negroes” in Missouri lived in St. Louis. *Id.* at 145.

¹³¹ *Id.* at 158.

increasing to 600 a year later. In 1865, the General Assembly repealed the restrictions on educating Blacks,¹³² and in 1866, it mandated that each town or city board of education establish and maintain at least one separate school for “Negro children” where the number of eligible students exceeded twenty.¹³³ St. Louis responded by opening three such schools with a combined 437 students,¹³⁴ a fourth school, funded by Blacks, opened in 1869 and was burned down a month later.¹³⁵ The 1870 census reported that more than 9,000 Black students were attending school state-wide, a huge increase over a few years earlier, but still constituting only 21% of those eligible.¹³⁶ By 1875, Missouri had established primary schools in most parts of the state for Black students, so the state was moving forward much faster than other former slaveholding states.¹³⁷ That year, St. Louis opened the first high school for Black students, becoming the only such school west of the Mississippi River.¹³⁸

St. Louis testators who were born in another state and later moved to Missouri were also part of a patchwork educational system. Before 1830, most American schools were privately operated and had short terms similar to those in Missouri of about three months.¹³⁹ Many states, like Missouri, first established public schools after the Civil War.¹⁴⁰ The 1870 census reported an overall U.S. illiteracy rate of 20%, with Whites (native and foreign-born) at 11.5% and Blacks and other minorities at 79.9%.¹⁴¹ In 1880, the overall illiteracy rate had dropped slightly to

¹³² *Id.* at 160.

¹³³ *Id.* at 161. The 1875 Missouri Constitution continued the requirement of segregated schools. CHRISTENSEN & KREMER, *supra* note 126, at 59.

¹³⁴ PARRISH, *supra* note 126, at 162.

¹³⁵ *Id.* at 164. The loss was estimated at \$10,000. *Id.*

¹³⁶ *Id.* at 163. Blacks constituted 6.9% of Missouri’s population in 1870, with over 99% born in the state. *Id.* at 151. Missouri began to restrict immigration of Blacks into the state starting in 1825. *Id.* at 145.

¹³⁷ *Id.* at 169.

¹³⁸ CHRISTENSEN & KREMER, *supra* note 126, at 59. In contrast, White women could even attend college or law school: a White woman was first admitted to the University of Missouri in 1868, and two White women were admitted to St. Louis Law School in 1869. *Id.* at 60.

¹³⁹ HARRY G. GOOD & JAMES D. TELLER, A HISTORY OF AMERICAN EDUCATION 134–35 (2d ed. 1973).

¹⁴⁰ *Id.* at 146–68.

¹⁴¹ Nat’l Assessment of Adult Literacy, *120 Years of Literacy*, NAT’L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/naal/lit_history.asp#educational (last visited June 21, 2015). The 1870 census did not report separate rates for native versus foreign-born Whites. *See id.*

17%, with native Whites at 8.7%, foreign-born Whites at 12%, and Blacks and others at 70%.¹⁴² In 1890, the overall rate was 13.3%, with native Whites at 6.2%, foreign-born Whites at 13.1%, and Blacks and others at 56.8%.¹⁴³

Several of the St. Louis wills were either written in German¹⁴⁴ or provided bequests for those in Germany and other German-speaking areas of Europe,¹⁴⁵ a reflection of the large German population in St. Louis. At the beginning of the Civil War, St. Louis had a German population of about 60,000, resulting in many schools teaching in German as well as English.¹⁴⁶ In 1865, the Missouri Legislature funded the State Board of Immigration to encourage settlement in Missouri, sending agents to Europe and distributing some materials in German.¹⁴⁷ By 1870, over 100,000 foreign-born citizens resided in St. Louis County, about half of whom were German.¹⁴⁸ In contrast, while a substantial number of Los Angeles decedents had ties to Germany,¹⁴⁹ no wills were executed in that language. However, two Los Angeles wills were executed in Spanish.¹⁵⁰

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Case 20115 John Leuze (will written in German; executed in Stuttgart, Germany); Case 20778 Sophie Flohr (will written in German; executed in the Kingdom of Prussia).

¹⁴⁵ Case 19465 Maria Braght (sister in Germany); Case 19510 Francis Saler (inventory showed share of stock in Herold des Glaubens (German Printing and Publishing Association) and cash in the German Savings Institution); Case 19564 Theobald Rees (siblings in Germany); Case 20051 Carl Clemens (decedent was a German national); Case 20235 Mary Laske (born in Hanover, Germany); Case 20909 Theresa Lohrum (daughter of decedent signed receipt in German); Case 20967 Adolphus Boeckeler (wife and brothers in Germany; testator buried there).

¹⁴⁶ PARRISH, *supra* note 126, at 178.

¹⁴⁷ *Id.* at 200.

¹⁴⁸ *Id.* at 201. The population of the city of St. Louis in 1870 was 310,825, making it the fourth largest city in the United States with a 93.4% increase from 1860. *Id.*

¹⁴⁹ *Testate*: Case 343 Jacob Stengel (all to five siblings in Germany); Case 361 Charles Wagner (half to sister in Germany); Case 366 C.U. Mueller (brother in Zurich, Switzerland); Case 401 Albert Herminghaus (all to siblings and nieces and nephews in Germany and St. Louis; German Consul in San Francisco named executor; many documents in German and translated); Case 495 Edward Willike (decedent born in Germany; property to siblings in Germany). *Intestate*: Case 320 Andrew Rein (relatives in Germany); Case 606 Otto Singer (wife and one son lived in Dresden, Germany; decedent was a pupil of Franz Liszt in Weimar, Germany and moved to the United States in 1867).

¹⁵⁰ Case 572 Antonio Coronel (nearly all to wife and “one peso in American money” to nieces and nephews); Case 756 Vicenta Machado de Lugo.

In both Los Angeles and St. Louis, most testators executed their last wills within a year of their deaths: 195 Los Angeles wills and 168 St. Louis files included both the date of the will and the date of death. The majority of these wills were executed within a year of death: 62% in Los Angeles and 54% in St. Louis.¹⁵¹ Roughly 10% of the wills were executed within three days of death.¹⁵² Given the medical practices at the time, it is likely that many testators writing wills within a few days of their deaths knew that they were dying.¹⁵³

III. WHO GAVE TO CHARITY IN ST. LOUIS AND LOS ANGELES?

When examining the charitable bequests in the wills in both St. Louis and Los Angeles, several patterns emerge. First, the St. Louis bequests were overwhelmingly to religious institutions, while in Los Angeles, they were to a mix of charities. Second, women were slightly more likely to give to charities than were men. Finally, earlier studies finding that those with no close family were more likely to give to charity are not duplicated here; the testators are a mix of married and single, with children or grandchildren and without.

Most of the charitable bequests in 1893 were to religious organizations and were permissible relatively recently in each state's history. In Los Angeles, of the seventeen testators giving to charity, eight bequests were to religious entities,¹⁵⁴

¹⁵¹ *Los Angeles*: 195 files indicated a date of execution and a date of death; 121 of those were executed within a year of death. *St. Louis*: ninety of 168 wills with both dates were executed within a year of death.

¹⁵² *Executed within three days of death*: 10% (20/195) of the Los Angeles wills and 9% (15/168) of the St. Louis wills. *Executed on the day of death*: 4% (7/195) of the Los Angeles wills and 5% (8/168) of the St. Louis wills. *Executed within one month of death*: 31% (60/195) of the Los Angeles and 26% (44/168) of the St. Louis. *Executed within three months of death*: 42% (44/168) of the Los Angeles wills and 38% (64/168) of the St. Louis wills.

¹⁵³ See, e.g., Case 95 Bridget Wilson (seriously burned in a fire, she executed her will three days before her death); Case 366 C.U. Mueller (executed his holographic will the day before he committed suicide).

¹⁵⁴ Case 95 Bridget Wilson (\$1,000 to Reverend Aloysius Ellery in trust to the Catholic Church to be used in masses every month for the repose of her soul; \$500 to the Roman Catholic Orphan Asylum in Boyle Heights, Los Angeles; \$10,000 to Father Scanlon, Catholic priest of Pasadena, and \$500 to the Roman Catholic priest in Dunkirk County, Ireland for the worthy poor); Case 101 Anna Ogier (\$500 to Los Angeles Catholic Orphans Asylum in Boyle Heights; \$500 to Los Angeles Protestant Benevolent Society; \$500 to the Trinity Methodist Church south of Los Angeles); Case 298 John Eichenberger (\$100 to Bishop Thoburn of the AME Church in trust for missions in India); Case 387 Helen Lowth (all to her two children, but if they die without issue, to the Bishop of the Diocese of Milwaukee, Wisconsin to be used at his discretion for the best interest of the Episcopal Church in that Diocese); Case 485 Ida Lehmer (\$500 to husband in trust for the Mission Board of the German Baptist Brethren Church of Southern California, to be paid when the church or meeting is built and not before); Case 492 Hugh Webster (\$100 to Buffalo Baptist Union of Buffalo, New York "to aid in its purpose and work"); Case

and another three were a mix of religious and other purposes.¹⁵⁵ Six charities were entirely secular.¹⁵⁶ Four of the seventeen testators giving to charity were nonresidents whose estates were subject to ancillary administration in California because of property in the state.¹⁵⁷ If we examine the Los Angeles resident testators, six bequests are religious, two are a mix, and five are secular. The religions aided by Los Angeles testators include Baptist, Presbyterian, and Catholic.

In St. Louis, of the twenty-seven testators giving to charity, twenty-three gave to religious entities,¹⁵⁸ another gave to a mix of religious and secular charities,¹⁵⁹

592 Thomas Ellis (all to the First Presbyterian Church of East Syracuse, New York; otherwise to his nephew if the church would not accept; church sold property to nephew for \$1); Case 713 John McKee (real property in Colorado to be sold and the proceeds given to the Trustees of the Reformed Presbyterian Church of North America for the benefit of the poor widows of deceased ministers of the Reformed Presbyterian Church).

¹⁵⁵ Case 68 John Greenleaf Whittier (\$1,000 to Haverhill City Hospital; \$500 to American Peace Society; \$500 to Amesbury Charitable Society; \$200 to the Friends in Amesbury for the care of their burial grounds; half of the residue to the Amesbury and Salisbury Home for Aged Women, the Anna Jacques Hospital in the City of Newburyport, and the Normal and Agricultural Institute for “colored and [I]ndian” pupils at Hampton, Virginia); Case 518 John Downey (from his estate worth \$1.5 million: \$1,000 to Bishop Mora, Archbishop of the Diocese of Monterey and Los Angeles; \$1,000 to Sisters of Charity; \$1,000 to the Los Angeles Women’s Club); Case 546 Amos Throop (\$20,000 to California Universalist Convention to be used for the use and benefit to the promotion for the training of ministers for the propagation of the Universalist cause on the Pacific Coast; all the rest to Throop Polytechnic Institute (now “CalTech”) “upon the express condition however that it shall always be an unsectarian institution”).

¹⁵⁶ Case 342 Antoine Charvoz (residue to the French Charity Society of Los Angeles); Case 377 Willet Doty (executor directed to use the residue to help poor and deserving persons); Case 423 Henrietta Losee (residue in trust for Hanover College in Hanover, Indiana, to endow a chair in astronomy in memory of her father); Case 503 Annie Pratt (\$20,000 to sister Louise “to be distributed by her within two years after my death to such charitable institutions in San Francisco, and in such amounts to each, as she may think would most coincide with my wishes, were I living”); Case 528 Caroline Campbell (residue to the Prohibition Trust Fund Association for prohibition work among the Negroes of Alabama and women who seek to strive and educate themselves); Case 538 Virgil Chaplin (if his nieces and nephews failed to survive, residue to Pierceton, Indiana for a library “provided that my executors have the right to assist in the selection of the books . . . and no books of unchaste, immoral or evil tendency to be selected”).

¹⁵⁷ Case 68 John Greenleaf Whittier; Case 538 Virgil Chaplin; Case 592 Thomas Ellis; Case 713 John McKee.

¹⁵⁸ Case 19510 Francis Saler (\$100 to the German St. Vincent’s Orphan Association; \$100 to pastor of St. Mary’s Church for masses); Case 19605 John Callaghan (eighty acres to the Society of the Congregation of the Mission of St. Louis for educational purposes; \$50 to the Roman Catholic Orphan Asylum in St. Louis; \$25 to the English branch of the St. Vincent DePaul Society at St. Vincent’s Church in St. Louis); Case 19625 Joseph O’Neill (\$3,000 to the Roman Catholic Orphan Board; \$3,000

and three gave to entirely secular entities.¹⁶⁰ As in Los Angeles, four of these testators were nonresidents.¹⁶¹ The twenty-three religious bequests by St. Louis

to the Little Sisters of the Poor; \$3,000 to the St. Vincent DePaul Board; \$500 to the Knights of Father Matthew in St. Louis; \$500 to the Convent and Asylum of the House of Good Shepherd; \$1,000 to St. Louis University in trust toward the building of the new St. Francis Xavier Church in St. Louis; \$500 to the Pastor of St. Paul's Roman Catholic Church); Case 19645 Daniel Malone (\$300 to Reverend Kielty, pastor of Holy Angels Church, for masses; \$200 to Reverend Kielty; \$100 to Reverend Foley, assistant pastor of Holy Angels Church; \$100 to the Roman Catholic Male and Female Orphans Asylums; \$100 to the Sisters of the Good Shepherd; \$100 to the Little Sisters of the Poor, all of St. Louis); Case 19674 Sophia Kuehne (\$200 for St. Paul's Church; \$100 to the German Orphans Home; \$100 to the Good Samaritan Hospital; \$100 to the Lutheran Theological Seminary of St. Louis); Case 19691 Anna Thole (\$50 for masses; \$50 for St. Francis de Soles Church; \$25 to the St. Vincent German Orphan Asylum of St. Louis); Case 19745 Edward Scheele (\$200 to the German St. Vincent Orphan Association of St. Louis); Case 19782 Catherine Hart (\$25 for masses; \$100 to the Little Sisters of the Poor for the benefit of aged men and women); Case 19985 Emerette Ingraham (\$100 to the Rector of Trinity Church in Toledo, Ohio for missionary purposes); Case 19997 Abraham Geist (\$300 for the Home for Aged and Infirm Israelites of St. Louis; \$200 to the Jewish Orphan Asylum of Cleveland, Ohio; \$100 to the United Hebrew Relief Association of St. Louis; \$100 whenever a Jewish hospital is erected in St. Louis); Case 20160 John Baumann (\$50 to Evangelical St. Paul's School; \$50 to the Evangelical Ministers' Seminary; \$30 to the Protestant Orphan Asylum; \$35 to the Samarythen (Good Samaritan) Hospital; \$35 to the Diaconissen Home, all in St. Louis); Case 20236 Isabella Devine (all in trust for the South Presbyterian Church of St. Louis to purchase or build a house for the use of the congregation as a house of worship); Case 20265 Mary Allen (if daughter died without issue, to Roman Catholic Orphan Asylum); Case 20325 Susan Barbour (\$3,000 to her husband as executor to give to three Catholic charities or three poor Catholic churches to be distributed among them as he deems best); Case 20633 Maria Schmidt (\$100 for masses; \$100 for the use and support of St. Joseph's Roman Catholic Church in St. Louis; \$100 for the German St. Vincent Orphan Association; \$50 to the St. Vincent DePaul Society; \$50 to St. Boniface Society); Case 20769 Hermann Bredestegge (\$50 for masses; \$150 to the Rector of S.S. Peter and Paul's Congregation of St. Louis for the poor children of the congregation; \$100 to the German St. Vincent's Orphan Association; \$100 to the St. Aloysius Congregation of St. Louis; \$100 to the Little Sisters of the Poor of St. Louis); Case 20819 Patrick Muldoon (\$500 to the pastor of St. Bridget's Church; \$100 to the assistant pastor; \$1,000 to the Little Sisters of the Poor; \$2,000 to the pastor of St. Francis Xavier Church to be used toward building a church); Case 20927 Karl Linz (all to the Alexian Brothers of St. Louis for fifty masses; remainder applied to the benefit of the poor). Six were solely for masses: Case 20155 Mary Miller (\$100); Case 20205 Franciska Brueggemann (\$50); Case 20395 John Kroeger (\$100); Case 20440 Maria Kneuppel (\$100); Case 20633 Mary O'Connor (\$100); Case 20955 Maria Homelsen (\$25).

¹⁵⁹ Case 20115 John Leuze (100 marks to the local poor of Eringen; 500 marks to the Basler Mission in Switzerland; will written in German and executed in Germany). The Basler Mission, also known as the Basel Mission, was founded by Protestants in 1815. *Missionary Training*, GRIFFITH UNIV., <http://missionaries.griffith.edu.au/missionary-training/basel-mission-society-1815> (last visited June 21, 2015).

¹⁶⁰ Case 20193 Sidney Francis (\$500 to charity "to be used as my sisters decide"); Case 20778 Sophie Flohr (1,000 marks to the Children's Hospital in Osnabruck, Prussia for the free bed fund; 500 marks to the Kleinkinder Bewalwanskalt in Osnabruck; 1,000 marks to the City Hospital of Osnabruck for the free bed fund; 1,000 marks to the Women's Home in Osnabruck; will written in German and executed in Osnabruck, Kingdom of Prussia); Case 20806 Sidney Homer (charitable bequests totaling \$16,000, including \$1,000, each, to the Home for Aged Men in Boston, Massachusetts, the Home for Aged

residents were overwhelmingly Catholic, with eighteen of the twenty-three including bequests for masses, the German St. Vincent's Orphans Home, Little Sisters of the Poor, and other Catholic groups.¹⁶² Given the large number of Catholics, particularly German Catholics in St. Louis at this time, it is not surprising that so many made charitable bequests. These testators came from a country with a long history of providing for churches through formal, state-sanctioned means. For example, German principalities began instituting a "church tax" in 1827 starting with Lippe, in the northeastern part of today's North Rhine-Westphalia.¹⁶³ A church tax is still paid today in modern Germany by members of Catholic, Evangelical, and Latter Day Saints churches, members of Jewish synagogues, and those in the Salvation Army and the German Humanist Association, together comprising over three-quarters of Germany's population.¹⁶⁴

Women, the Home for Destitute Children, and the Institution for Foundling Children; \$2,000 to Harvard College for the use of the public library of the college, income to be expended in the purchase of works on political economy; \$1,000 to the Society of Natural History in Boston, Massachusetts).

¹⁶¹ Case 20115 John Leuze; Case 20325 Susan Barbour; Case 20778 Sophie Flohr; Case 20806 Sidney Homer.

¹⁶² The five who did not give exclusively to Catholics are Baumann, Devine, Geist, Ingraham, and Kuehne. John Baumann gave to a Protestant organization (Protestant Orphan Asylum) and to Catholic organizations (Evangelical St. Paul's School, Evangelical Ministers' Seminary, and the Good Samaritan Hospital). Case 20160 John Baumann. Isabella Devine gave all her property to the Presbyterian Church. Case 20236 Isabella Devine. Abraham Geist gave significant bequests to Jewish institutions and also requested in his will that his son marry a Jewish girl. Case 19997 Abraham Geist ("It is my earnest desire and request that whenever my said son Zelky Geist shall marry he shall select for his wife a maiden born of Jewish parents and of the Hebrew faith and race."). Emerette Ingraham's bequest to the Trinity Church in Toledo, Ohio could be a gift to the Trinity Lutheran Church established in 1874, or to the Trinity Episcopal Church built in 1863. Case 19985 Emerette Ingraham. *See History*, TRINITY LUTHERAN CHURCH & SCHOOL (2014), <http://www.trinitylutheran.org/about/history/>; *Trinity Episcopal Church (Toledo, Ohio)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Trinity_Episcopal_Church_\(Toledo,Ohio\)](http://en.wikipedia.org/wiki/Trinity_Episcopal_Church_(Toledo,Ohio)) (last modified Jan. 25, 2015). Sophia Kuehne, like John Baumann, gave to a mix of Protestant (the Lutheran Theological Seminary of St. Louis) and Catholic (St. Paul's Church and the Good Samaritan Hospital) entities. Case 19674 Sophia Kuehne.

¹⁶³ Stephanie Hoffer, *Caesar as God's Banker: Using Germany's Church Tax as an Example of Non-Geographically Bounded Taxing Jurisdiction*, 9 WASH. U. GLOB. STUD. L. REV. 595, 599 (2010). Churches had earlier been funded through a tax on the producers of agricultural products and trade wares, but another source was needed when Germany became increasingly industrial and urban. *Id.*

¹⁶⁴ *Id.* at 603–04. Catholics and Evangelicals, roughly 70% of the German population, have their church taxes withheld directly from their paychecks. *Id.* at 605–06.

Those included in the study with ties to Ireland might have also had some experience with tithing, although the system was abolished in Ireland in 1871.¹⁶⁵

In contrast to the German history, American jurisdictions largely abolished funding churches after the eighteenth century. While eleven of the American colonies imposed church taxes,¹⁶⁶ after 1776, they eliminated this practice, with Massachusetts being the last state to do so in 1833.¹⁶⁷ Missouri never had an established church.¹⁶⁸ Thus, German immigrants, and possibly some Irish immigrants, having been accustomed to a tax to support their church or synagogue, might have been more inclined than American-born testators to give something to their religious organizations in their wills.

Women were somewhat overrepresented among those leaving charitable bequests: 41% of the testators giving charitable bequests in Los Angeles were women, compared to 29% of the testators as a whole. For St. Louis, women comprised 50% of those with charitable bequests, compared to 37% of testators of all wills. Testators who were not married at death were more likely to leave a charitable bequest than their married counterparts: in Los Angeles, 65% (11/17) of the testators with charitable bequests were not married. In St. Louis, 75% (21/28) were not married. Whether the testator had surviving children did not seem to be a factor in either city. In Los Angeles, nine testators with surviving children, and eight without, gave to charity. In St. Louis, thirteen with children, and fifteen without, did so.

In other published studies of charitable bequests, Browder, Dunham, and Sussman concluded that testators who left only collateral kindred such as siblings were more likely to leave bequests to charity. Browder noted that while 26% of the testators in his 1963 Michigan study left only collateral kindred, nineteen of the thirty who made charitable bequests had only collateral kindred, and thus, “it can be inferred that the absence of any nuclear family is a factor in the incidence of

¹⁶⁵ *Tithe*, ENCYCLOPAEDIA BRITANNICA ONLINE (Nov. 6, 2013), <http://www.britannica.com/EBchecked/topic/597211/tithe>.

¹⁶⁶ Only Pennsylvania and Rhode Island lacked a state-supported church. Kristine S. Knaplund, *Charity for the “Death Tax”: The Impact of Legislation on Charitable Bequests*, 45 GONZ. L. REV. 713, 717 (2010).

¹⁶⁷ *Id.* at 717–18.

¹⁶⁸ Hoffer, *supra* note 163, at 603–04. The American system worked quite differently from the German system, requiring all taxpayers regardless of religious affiliation to support the state-sponsored church. *Id.* at 628.

charitable gifts.”¹⁶⁹ Similarly, Dunham’s study of ninety-seven wills filed in 1953 in Cook County, Illinois found that “ten of the fifteen charitable gifts appeared in estates in which brothers and sisters were the closest relatives of the deceased.”¹⁷⁰ Sussman, examining 422 wills in Cuyahoga County, Ohio in 1965, observed that, of the seven wills leaving more than 15% of the estate to charity, the testator had no surviving spouse, children, or grandchildren.¹⁷¹

This may be a correct assessment of twentieth-century behavior, but the pattern does not appear to hold true for our 1893–1894 testators. Of the seventeen charitable testators in Los Angeles, seven left collaterals only. In St. Louis, thirteen of the twenty-eight left collaterals only, meaning a majority of those giving charitable bequests in either city were survived by a spouse, children, or both. For example, Maria Schmidt, a St. Louis widow survived by eight children, gave \$400 to various Catholic entities and the rest to her children in equal shares.¹⁷² Her personal property was inventoried at \$3,772, and she also owned two three-story brick houses with thirty-two rooms to rent, so she had fairly substantial means for the time.¹⁷³ Amos Throop, who died married in Los Angeles with a surviving daughter and three grandchildren, gave his wife a life estate and all the rest of his property, save a \$20,000 bequest to the California Universalist Convention, to Throop Polytechnic Institute, now known as the California Institute of Technology (“CalTech”); his codicil revoked an earlier \$1,000 annuity to his daughter.¹⁷⁴ One Los Angeles testator provided the following insight into why she was leaving so little to her husband: Bridget Wilson, married with no children and owning over \$285,000 in property, left a sizeable bequest of \$10,000 to the Roman Catholic priest of Pasadena and smaller bequests for masses and the Roman Catholic Orphan Asylum; she gave \$50 a month to her husband John for the rest of his life, but “if

¹⁶⁹ Olin L. Browder, *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1314 (1969).

¹⁷⁰ Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 254 (1963). Overall, Dunham found that 15% (15/97) of the estates included charitable bequests. *Id.*

¹⁷¹ SUSSMAN ET AL., *supra* note 9, at 115.

¹⁷² Case 20633 Maria Schmidt. Her handwritten will was signed by mark. *Id.*

¹⁷³ *Id.*

¹⁷⁴ Case 546 Amos Throop. Throop established the school in 1891 with its purpose “[t]o furnish students of both sexes and all religious opinions a liberal and practical education, which, while thoroughly Christian, is to be absolutely non-sectarian in its character.” *Id.*

my husband, John Wilson, shall marry . . . Eliza Sanchez, then the monthly payments of \$50 per month . . . shall cease.”¹⁷⁵

If we examine only those who left significant bequests to charity, which Sussman defines as over 15% of the estate,¹⁷⁶ we will see a mix of those with families and those with only collaterals. Ten testators left sizeable gifts to charity in their wills; of those, six died without a spouse or issue surviving them,¹⁷⁷ but the other four include three testators who were married with children¹⁷⁸ and one widower survived by a child and three grandchildren.¹⁷⁹ The high incidence of contingent remainders reported in Friedman¹⁸⁰ also is not repeated in this study. Only three of the forty-five charitable bequests were framed as alternatives to a relative surviving the testator.¹⁸¹

¹⁷⁵ Case 95 Bridget Wilson. The will was handwritten on a form and signed by mark. *Id.* Her husband, John Wilson, contested the will on grounds of undue influence and unsound mind; his jury verdict in the trial court was reversed on appeal, and the will was probated. *Id.*

¹⁷⁶ SUSSMAN ET AL., *supra* note 9, at 114–15.

¹⁷⁷ Case 68 John Greenleaf Whittier (\$1,200 to four named charities; half of residue to three named charities; survived by nieces and nephews); Case 342 Antoine Charvoz (residue to the French Charity Society of Los Angeles; survived by brother in France); Case 423 Henrietta Losee (residue in trust for Hanover College in Hanover, Indiana; survived by two brothers); Case 592 Thomas Ellis (all to the First Presbyterian Church of East Syracuse, New York; survived by nephew); Case 20236 Isabella Devine (all in trust for the South Presbyterian Church of St. Louis; will states she had two brothers but believes they are dead); Case 20927 Karl Linz (all to the Alexian Brothers of St. Louis; no relatives noted). Whittier, Charvoz, Losee, and Ellis were in the Los Angeles files (although Whittier and Ellis were nonresidents). *See* Case 68 John Greenleaf Whittier; Case 342 Antoine Charvoz; Case 423 Henrietta Losee; Case 592 Thomas Ellis. Devine and Linz were in St. Louis. *See* Case 20236 Isabella Devine; Case 20927 Karl Linz.

¹⁷⁸ Case 528 Caroline Campbell (residue to the Prohibition Trust Fund Association; survived by husband, one adult son, and two minor children of a deceased son); Case 713 John McKee (real property in Colorado to be sold, and the proceeds to be given to the Trustees of the Reformed Presbyterian Church of North America; survived by wife and six children, ages thirty-five to fifty); Case 19605 John Callaghan (eighty acres to the Society of the Congregation of the Mission of St. Louis for educational purposes; survived by wife and adopted daughter). Campbell and McKee were in the Los Angeles files (although McKee was a nonresident); Callaghan was in the St. Louis files. *See* Case 528 Caroline Campbell; Case 713 John McKee; 19605 John Callaghan.

¹⁷⁹ *Los Angeles*: Case 377 Willet Doty (executor directed to use the residue to help poor and deserving persons).

¹⁸⁰ Friedman et al., *supra* note 9, at 1464.

¹⁸¹ *Los Angeles*: Case 387 Helen Lowth (all to two children, but if they die without issue, to the Bishop of the Diocese of Milwaukee, Wisconsin); Case 538 Virgil Chaplin (if nieces and nephews failed to survive, residue to Pierceton, Indiana for a library). *St. Louis*: Case 20265 Mary Allen (if daughter died without issue, to Roman Catholic Orphan Asylum).

IV. PREDICTING WHO GIVES TO CHARITY IN THEIR WILLS

Comparing St. Louis charitable bequests to those in Los Angeles at a time the two cities were in their formative stages and no federal tax law impacted these gifts gives us valuable insight into the prerequisites for successful charitable giving. Five steps are crucial to ensure that charities receive the bequests in a will.

A. Step One: To Create a Charitable Bequest, Execute a Will

A bequest to charity is possible only if a will is executed. In all fifty states, the laws of intestacy distribute the probate property to the decedent's family: to the spouse, then to descendants such as children and grandchildren, then to parents, and then to more remote kindred.¹⁸² We might expect more testate decedents in California because California allowed holographic wills, while Missouri did not. Indeed, 23% (49/210) of the Los Angeles wills were holographs. An even greater number of Los Angeles wills were printed forms filled in by hand: 27% (44/164) of the attested wills in Los Angeles were form wills. Despite the ease of executing a will in Los Angeles, decedents in Los Angeles were more likely to be intestate than those in St. Louis. Overall, 59% of the Los Angeles decedents died intestate,¹⁸³ with a proportionate number of women (58%) and men (59%) dying intestate; 41% died after executing a will.¹⁸⁴

In St. Louis, 56% (172/307) of the probate files contained wills, meaning that these decedents died testate. Even if we exclude the eight nonresident files from the calculation (all testate), the percentage changes little: 55% (165/299) of the files had wills. Only 3% (5/168)¹⁸⁵ of the attested wills were executed on forms, far fewer than the 27% in Los Angeles, so the ease of using a form does not appear to lead to more wills and in turn to more charitable gifts. In both cities, most wills were handwritten,¹⁸⁶ as were most of the documents in the files. Although the first

¹⁸² JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS AND ESTATES* 65 (9th ed. 2013).

¹⁸³ Three hundred and two out of 512 files for wills and intestacy equals 59%. If only Los Angeles residents are counted, the percentage is virtually the same: two hundred and seventy-three intestates out of 449 total files equals 61%.

¹⁸⁴ As with the total files, the numbers are similar if we count only Los Angeles residents. Seventy-seven women died intestate out of 128, which equals 60% intestate; 196 men out of 321 died intestate, which equals 61%.

¹⁸⁵ In four files, the will, itself, was not in the file and so we could not ascertain if a form was used.

¹⁸⁶ For examples of typed wills, see Case 408 Elias Bixby (Los Angeles) and Case 20025 Arndt Klein (St. Louis).

English patent for a typewriter was issued in 1714, and an American patent in 1829, the first popular typewriter, the Remington, was finally produced in the United States in 1868.¹⁸⁷ Sales were slow until the early 1880s.¹⁸⁸ In 1878, the first typewriter to include both upper and lower case letters (via the “Shift” key) helped to improve sales, but in 1881, the Remington sold only 1,200 typewriters and 1,400 the following year.¹⁸⁹ In 1887, 14,000 of its typewriters sold nationwide.¹⁹⁰ After 1883, the typist could see what was printed on the paper as he or she typed,¹⁹¹ but until the 1890s, typing “was practiced only by operators of exceptional skill.”¹⁹²

Women were found at somewhat higher rates in the St. Louis files than in Los Angeles: 35.5% (109/307)¹⁹³ of the total files in St. Louis were women. In Los Angeles, 28% (144/512)¹⁹⁴ were women.

Advantage: St. Louis. Even though St. Louis required two witnesses to execute a will, and few testators used form wills, a higher percentage of those with probate estates died testate than in Los Angeles. Another surprise: literacy did not appear to affect will execution, as 21% of the St. Louis testators signed by mark.

B. Step Two: The Will Must Be Valid

The number of will contests in the two cities was strikingly different, although other types of litigation were comparable. Fourteen wills (6%) in Los Angeles were the subject of will contests, with only three such contests (2%) in St. Louis.¹⁹⁵ Twenty-three Los Angeles wills and twenty-four St. Louis wills were

¹⁸⁷ *From Carbons to Computers: The Typewriter*, SMITHSONIAN INST., <http://www.smithsonianeducation.org/scitech/carbons/typewriters.html> (last visited June 21, 2015).

¹⁸⁸ *Id.*

¹⁸⁹ 22 ENCYCLOPAEDIA BRITANNICA 644–45 (14th ed. 1929).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ Forty-five intestate females plus sixty-four testate females equals 109 females.

¹⁹⁴ Eighty-four intestate females plus sixty testate females equals 104 women out of 512 total files.

¹⁹⁵ The percentage of formal will contests in Los Angeles is higher than most studies, while the St. Louis figure of 2% is comparable to most studies. One study of wills filed in New York County between 1914 and 1929 found that roughly 4% of wills were contested. Richard R. Powell & Charles Looker, *Decedents' Estates: Illumination From Probate and Tax Records*, 30 COLUM. L. REV. 919, 931–32 (1930). A more recent study of 7,638 wills filed in Tennessee between 1976 and 1984 concluded that sixty-six wills, or less than 1%, were contested. Jeffrey A. Schoenblum, *Will Contests—An Empirical*

subject to other forms of litigation, such as creditors' claims and orders to the executor to file inventories. A total of 18% (37/204) of the Los Angeles wills and 16% (27/172) of the St. Louis wills had either a will contest or substantial litigation. Even in cases in which the will was upheld, years of litigation had the potential to drain the estate of resources.

In St. Louis, three will contests involved wills with charitable bequests, and two of those contests resulted in the charity being denied its bequest. Francis Saler, a widower, executed an attested will, which he signed by mark on January 23, 1893, eleven days before his death in St. Louis on February 2, 1893, giving \$1 to each of his seven grandchildren, \$100 to the German St. Vincent's Orphan Association of St. Louis, \$100 to the Pastor of St. Mary's Church, St. Louis, for the purpose of having masses said for the repose of his immortal soul, and all the rest of his property to his son, Joseph.¹⁹⁶ The accounts show a charge of \$500 for attorneys' fees in a suit instituted by the grandchildren to contest the will—a suit they lost: each grandchild received \$1, and the bequests were paid to the two charities.¹⁹⁷

Two other St. Louis will contests were successful, both preventing the bequests to charity. Sidney Francis, an unmarried man, dictated his will to his sister on November 24, 1893; he signed it, but neither his sister nor his nurse, both of whom were present, signed the will as witnesses.¹⁹⁸ He died ten days later on December 4, 1893.¹⁹⁹ The will included substantial bequests to his mother, two sisters, a niece and a nephew, plus \$5,000 to charity “to be used as my sisters decide.”²⁰⁰ His estate was very large, with personal property valued at \$424,635, including two life insurance policies of \$50,000 each, and real property, including two lots he owned outright, plus one-fourth or one-third interests in seven other lots.²⁰¹ The estate was distributed in intestacy and finally closed in April of 1903.²⁰²

Study, 22 REAL PROP. PROB. & TR. J. 607, 613 (1987). Finally, 2% of the wills filed in California in 1964 were contested. Friedman et al., *supra* note 9, at 1465–67.

¹⁹⁶ Case 19510 Francis Saler.

¹⁹⁷ *Id.*

¹⁹⁸ Case 20193 Sidney Francis.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

In the final St. Louis will contest, James Monahan executed an attested will on November 8, 1892, leaving his property in equal shares to his brother, James, and his two unmarried sisters, Emma and Alice.²⁰³ A third sister, Mrs. Mary Dawley, contested the will, alleging that, while James was over eighteen in 1892, he was not over twenty-one, and thus she should receive one-fourth of the real property.²⁰⁴ Her contest was successful.²⁰⁵

In Los Angeles, fourteen wills were formally contested, including one successfully arguing that the decedent's husband had murdered her,²⁰⁶ while another twenty-three wills had substantial litigation. The litigation was over items such as the appointment of an executor, omitted children, and omitted spouses. Form wills, holographs, and those signed by mark seemed particularly vulnerable: of the fourteen will contests, two involved wills signed by mark, and four were holographs. In other files with substantial litigation, five included form wills, four were holographs, and two were signed by mark. Charitable bequests were involved in three of the will contests, and five of the remaining wills with charitable bequests had substantial litigation, so that a total of eight of the fifteen wills with charitable bequests were involved in litigation of one form or another.

For the three Los Angeles wills with formal contests, the contestants lost in two cases and prevailed in one. For Bridget Wilson, who gave her husband \$50 per month provided he did not marry Eliza Sanchez, the will contest was initially successful but overturned on appeal.²⁰⁷ Thomas Ellis' will leaving all to his church was contested by his sister on the grounds that he was "sick of body and mind"

²⁰² *Id.* Brother of Missouri Governor David Francis, Sidney was a very successful trader of grain and produce in St. Louis; the St. Louis Merchants' Exchange closed early on the day of his funeral so that traders could attend. GEORGE H. MORGAN, ANNUAL STATEMENT OF THE TRADE AND COMMERCE OF ST. LOUIS FOR THE YEAR 1893, at 22 (1894), available at <http://books.google.com/books?id=p6QoAAAAYAAJ&pg=RA3-PA22>.

²⁰³ Case 19627 James Monahan.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Case 2 Gregoria de Bentley. Her attested will left all to her husband. *Id.* The coroner ruled that the decedent was poisoned and the husband was charged with murder; he then renounced his claim to her estate. *Id.* A total of \$883 was distributed equally to her three children after payment of her debts. *Id.*

²⁰⁷ Case 95 Bridget Wilson. Both Bridget Wilson's husband and two beneficiaries of an earlier will contested the validity of her codicil, which was executed while the testatrix was suffering from severe burns from which she ultimately died. *Id.*

when he wrote it, but the will was upheld.²⁰⁸ In the only successful will contest in Los Angeles, Annie Pratt's holograph and codicil were both set aside, thus invalidating her bequest of \$20,000 to her sister, Louise, to be distributed to "such charitable institutions in San Francisco . . . as she may think would most coincide with my wishes, were I living," and her estate was distributed in intestacy in 1897.²⁰⁹

Advantage: Neither. Ultimately, this factor in the two cities ends in a draw. Despite the high number of will contests in Los Angeles, few involved wills with charitable bequests, and only one was successful. Two successful will contests in St. Louis²¹⁰ resulted in the charity not being paid. Otherwise, the litigation had no effect on the charities.

C. Step Three: The Law of the State Should Encourage, or at Least Allow, Charitable Bequests

In the late nineteenth century, restrictions on charities came in two forms: limits on a charity's ability to take or hold property and limits on a testator's ability to give to charity in a will. By the time of this study, California's laws were far more restrictive to charitable bequests than Missouri's.

California required a charity to be expressly authorized by its charter to accept bequests.²¹¹ A similar statute had been enacted in New York in 1829 after a New

²⁰⁸ Case 592 Thomas Ellis. Ellis, a New York resident, had real property in New York valued at \$5,000 and in California valued at \$750. *Id.* The devisee, the First Presbyterian Church of East Syracuse, New York, sold the California property to the testator's nephew for \$1. *Id.*

²⁰⁹ Case 503 Annie Pratt. Her holograph in 1881 and a codicil in 1885 made various bequests to her sisters, nieces and nephews, and others, plus \$20,000 to her sister, Louise, to be distributed to "such charitable institutions in San Francisco, and in such amounts to each, as she may think would most coincide with my wishes, were I living." *Id.* Shortly before Pratt's death in 1894, her daughter, Lucy Goodspeed, sued to have Pratt declared incompetent and a guardian appointed. *Id.* Goodspeed and two grandchildren later contested the will; a jury found that that the 1881 will was not signed by the decedent, and she was not of sound mind when she signed the 1885 codicil. *Id.* Goodspeed was then appointed administratrix; after more litigation by the grandchildren challenging her accounts, the property was distributed in intestacy in 1897. *Id.*

²¹⁰ Case 19627 James Monahan; Case 20193 Sidney Francis.

²¹¹ CAL. CIV. CODE § 1275 (West 1874).

York case held that a devise to an orphan asylum was void because the charter only empowered it to purchase real property.²¹²

California legislators were also worried about charities exercising undue influence at a testator's bedside. A statute enacted in 1874 required that a will making a gift to charity must be executed more than thirty days before death and that no more than one-third of the estate be given to charity.²¹³ An 1881 California Supreme Court case sorted through whether a charitable trust was subject to the Rule Against Perpetuities in California and held that it was not; the court also determined that the statutory maximum of one-third to charity should be calculated on the distributable estate rather than on the gross estate.²¹⁴ The California Supreme Court specifically addressed whether "'religion,' in the broad sense in which the word is employed, is charitable,"²¹⁵ and concluded that it was.²¹⁶ Thus, a will that left William Hinckley's "California Theater Property" in trust to certain named individuals to use the income to create "'The William and Alice Hinckley Fund' . . . to be devoted perpetually to Human Beneficence and Charity[,] . . . to foster Religion, Learning and Charity," and to provide a sum of \$300 per year as the "Hinckley Scholarship," was held valid as to one-third of Hinckley's property after payment of his debts and administrative fees.²¹⁷ A bequest to a specific denomination, rather than for "religion," generally, was also held valid in California.²¹⁸ Finally, a will giving the residue of the testator's estate equally to three Presbyterian churches was a charitable bequest, valid as to one-third of the distributable estate but void as to the rest.²¹⁹

Fortunately for the St. Louis charities, Missouri had no statute comparable to California's mortmain limitations. Of the twenty-eight charitable bequests in St. Louis wills, many were executed close to the time of death, as was true

²¹² Act of Apr. 17, 1829, ch. 159, §§ 1, 3, 1829 N.Y. Laws 258, following the decision in *McCartee v. Orphan Asylum Soc'y*, 9 Cow. 437 (1827). For a discussion of these doctrines, see Knaplund, *supra* note 166, at 726.

²¹³ CAL. CIV. CODE § 1313 (West 1874).

²¹⁴ Estate of Hinckley, 58 Cal. 457, 511 (1881).

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.* at 516.

²¹⁸ See Estate of Hewitt, 94 Cal. 376 (1892).

²¹⁹ *Id.* at 378–79.

generally for wills in 1893 and 1894: 26% of the St. Louis wills in this study were executed within a month of death, including ten wills with charitable bequests. Had California Civil Code section 1313 been in effect in Missouri to void a charitable bequest in a will executed less than thirty days before death, the charitable bequests in those ten wills, all to religious groups, would have been void on those grounds;²²⁰ the charitable bequest in an eleventh will, executed a year and a half before the testator's death, would have been partly void because it gave more than one-third of the estate to a charity.²²¹

The Missouri Supreme Court was initially quite favorable to charitable bequests. Its first case to determine the jurisdiction of courts to administer a trust created by such a bequest arose in 1860 in *Chambers v. City of St. Louis*.²²² Bryan Mullanphy, a judge of the St. Louis Circuit Court and former Mayor of St. Louis,²²³ died in 1851, leaving a valid will that gave one-third of his property to the City of St. Louis "in trust, to be and constitute a fund to furnish relief to all poor emigrants and travelers coming to St. Louis on their way, *bona fide*, to settle in the West."²²⁴ After noting that the state had no mortmain statutes at that time,²²⁵ the court upheld the bequest, stating that "the doctrine is well established that a corporation can be a trustee."²²⁶ The court rejected the appellants' concerns that the charity's purpose might "fill the city with paupers and vagabonds,"²²⁷ characterizing this objection as a "possible abuse" from which "an injury might result."²²⁸ Likewise, the objection

²²⁰ Case 19510 Francis Saler; Case 19645 Daniel Malone; Case 19782 Catherine Hart; Case 20155 Mary Miller; Case 20193 Sidney Francis; Case 20205 Franciska Brueggeman; Case 20265 Mary Allen; Case 20819 Patrick Muldoon; Case 20927 Karl Linz; Case 20955 Maria Homelsen. The bequests in the wills of Allen and Francis were not paid for other reasons: Allen's bequest was a contingent remainder which did not vest, and Francis' will was successfully contested. See Case 20265 Mary Allen; Case 20193 Sidney Francis.

²²¹ Case 20236 Isabella Devine. Testator gave all her property in trust for the South Presbyterian Church of St. Louis. *Id.*

²²² *Chambers v. City of St. Louis*, 29 Mo. 543 (1860).

²²³ *Bryan Mullanphy*, ST. LOUIS PUB. LIBRARY, <http://exhibits.spl.org/mayors/data/dt42974043.asp> (last visited June 21, 2015).

²²⁴ *Chambers*, 29 Mo. at 572.

²²⁵ *Id.* at 575.

²²⁶ *Id.* at 578.

²²⁷ *Id.* at 588.

²²⁸ *Id.* at 589.

that the beneficiaries were not specifically identified was no concern: “[f]rom the very nature of the subject, charitable gifts must be objects vague and uncertain.”²²⁹ Thus, from the start, Missouri avoided the confusion arising in other states regarding the effect of the repeal of the English Statute of Charitable Uses.²³⁰ In 1819, the U.S. Supreme Court in *Hart’s* determined that a charitable trust could not exist without the statute,²³¹ a rule followed in Virginia, West Virginia, and Maryland—all states that had repealed the English Statute.²³² Three other states followed New York’s lead in interpreting statutes, enumerating valid trusts but omitting any mention of charitable trusts, excluding the latter in those states.²³³ In 1844, the Supreme Court ruled that *Hart’s* had been decided in error and that charitable trusts could exist without the statute.²³⁴

The Missouri Supreme Court continued to favor charitable bequests for testators who died before an 1865 constitutional amendment forbidding most charitable gifts and bequests to religious persons and entities. For example, in

²²⁹ *Id.* at 590. Despite the favorable treatment of the bequest in this initial case, the trust was subject to litigation for decades. In 1898, the Missouri Supreme Court declared that the property the city held in trust from Mullanphy’s will was taxable, the same as if an individual or corporation was trustee. *City of St. Louis v. Wenneker*, 47 S.W. 105, 106 (Mo. 1898). However, because the assessment did not properly name the corporation, the tax bills were void. *Id.* In 1902, the Missouri Attorney General asked the court to apply *cy pres* because so little of the trust was being used for its initial purpose, and allow the trust to sell the property and build a hospital for indigent travelers. *City of St. Louis v. Crow*, 71 S.W. 132, 134 (Mo. 1902). Applying traditional strict rules of *cy pres*, the court denied relief, despite its finding that more than three-fourths of the income was being spent on administrative expenses, and the trust property had deteriorated and fallen into decay. *Id.* A second *cy pres* request was denied in 1920. *City of St. Louis v. McAllister*, 218 S.W. 312, 317–18 (Mo. 1920). Still, the court later granted attorneys’ fees to Mullanphy’s heirs for bringing the 1920 suit. *City of St. Louis v. McAllister*, 257 S.W. 425, 427 (Mo. 1924). *Cy pres* was finally granted in the fifth suit in 1934, although the court was careful to note that the purpose of the trust had not totally failed. *Thatcher v. Lewis*, 76 S.W.2d 677, 682 (Mo. 1934).

²³⁰ The Statute of Charitable Uses Act, 1601, 43 Eliz., c. 4 (Eng.); Bertram W. Tremayne, *Definiteness of Charitable Purpose in Missouri*, 23 WASH. U. L. REV. 556, 558 (1938).

²³¹ *Trs. of Phila. Baptist Ass’n v. Hart’s Ex’rs*, 17 U.S. 1, 7 (1819), *overruled by Vidal v. Girard’s Ex’rs*, 43 U.S. 127 (1844).

²³² *Dashiell v. Attorney Gen.*, 5 H. & J. 392, 398 (Md. 1822); *Gallego’s Ex’rs v. Attorney Gen.*, 30 Va. 450, 462 (1832); *Am. Bible Soc’y v. Pendleton*, 7 W. Va. 79, 89 (1873).

²³³ Act of Apr. 14, 1927, ch. 180, 1927 Minn. Laws 272–73; *Scudder v. Sec. Trust Co.*, 213 N.W. 131, 132 (Mich. 1927) (applying MICH. COMP. LAWS §§ 13512–13521 (1929)); *Tilden v. Green*, 130 N.Y. 29, 63–64 (1891); *In re Monaghan’s Will*, 226 N.W. 306, 307 (Wis. 1929) (construing WIS. STAT. § 231.11 (1931)).

²³⁴ *Vidal v. Girard’s Ex’rs*, 43 U.S. 127, 201 (1844).

1872, the court was asked to interpret a provision in Ann Biddle's will that devised a substantial piece of land to the Bishop of St. Louis, Peter Kenrick, in trust for the benefit of an order of nuns, the Ladies of the Visitation of St. Mary.²³⁵ When the city of St. Louis decided to erect a street through the middle of the property, thereby making it unusable by the nuns, the trustee went to court for an order permitting the sale of the property.²³⁶ The heirs of Mrs. Biddle were made parties to the suit.²³⁷ In sweeping terms, the court affirmed the devise and applied the equitable doctrine of *cy pres*,²³⁸ noting:

Where lands are vested in a corporation, as these are, and it is contemplated by the donor that the charity should last forever, the heirs never can have the lands back again. If it should become impossible to execute the charity as expressed, another similar charity will be substituted by the court²³⁹

Similarly, in 1875, after John Ruotzong deeded real property to the "Lutheran Church," and both the Evangelical Lutheran Trinity Church and the German Evangelical Central Congregation claimed the land, the court declared in *Schmidt v. Hess* that its job was to carry out the specific intent of the donor, even in cases in which the recipient had not been incorporated at the time of the gift and thus was incapable of accepting it.²⁴⁰ Satisfied that Ruotzong intended to convey to the Evangelical Lutheran Trinity Church, which incorporated in 1859, sometime after the deed, the court found for that church and permanently enjoined the German Evangelical Central Church, whose pastor "did not pretend to be a Lutheran," from further interference with the former's rights.²⁴¹

²³⁵ Acad. of Visitation v. Clemens, 50 Mo. 167, 170 (1872).

²³⁶ *Id.* at 170–71.

²³⁷ *Id.*

²³⁸ *Cy pres*, from the French phrase *cy pres comme possible*, or "as nearly as possible," is a doctrine that allows a court to substitute another charitable purpose when the original specific purpose becomes illegal, impossible, or impracticable. DUKEMINIER & SITKOFF, *supra* note 182, at 752.

²³⁹ *Clemens*, 50 Mo. at 172.

²⁴⁰ *Schmidt v. Hess*, 60 Mo. 591, 594 (1875).

²⁴¹ *Id.* at 594–96.

For testators dying after the new restrictions in the 1865 Missouri Constitution, the Missouri Supreme Court took a narrow view of gifts and bequests to churches. Under article I, section 13 of the 1865 Missouri Constitution:

Every gift, sale or devise of land, exceeding one acre in extent,²⁴² to any minister, public teacher or preacher of the gospel, as such, or to any religious sect, order or denomination, or to or for the support, use or benefit of or in any trust for any minister, public teacher, or preacher of the gospel, as such, or 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, shall be void.²⁴³

The 1865 restriction was viewed by many as anti-Catholic and anti-German.²⁴⁴ It was repealed in 1875.²⁴⁵ In the ten years the provision was in force, testators tried to circumvent it to no avail. For example, the Missouri Supreme Court invalidated an absolute bequest “to Peter Richard Kenrick,”²⁴⁶ who happened to be the Archbishop of the Roman Catholic Church in St. Louis, finding “the testatrix made her bequest to the plaintiff for the purpose of evading the policy of the law as shown in the constitutional restrictions.”²⁴⁷ Similarly, a bequest of \$5,000 for the erection of a church edifice plus \$1,000 for the support of a minister

²⁴² In *Barkley v. Donnelly*, the Missouri Supreme Court held that, where a will devised more than one acre to a prohibited entity, the devise was valid up to one acre so long as the church did not already hold property in excess of that amount, and was void as to the rest. 19 S.W. 305, 307 (Mo. 1892).

²⁴³ MO. CONST. of 1865, art. I, § 13, *repealed by* MO. CONST. of 1875, art. II, § 15.

²⁴⁴ *Post War Politics, COMMUNITY & CONFLICT: THE IMPACT OF CIVIL WAR IN THE OZARKS*, <http://www.ozarkscivilwar.org/archives/458> (last visited June 21, 2015). Section 13, along with several other sections that taxed and restricted churches, “[was] interpreted as anti-Catholic and attempts to limit religious freedom by the German community.” *Id.* Missouri thus joined many American jurisdictions that feared “the dead hand, particularly the dead hand of the church” James J. Fishman, *The Development of Nonprofit Corporation Law and an Agenda for Reform*, 34 EMORY L.J. 617, 628 (1985). For a discussion of laws similar to Missouri’s, see Knaplund, *supra* note 166. Section 13 was later eliminated by the 1875 Missouri Constitution. 1 JOURNAL OF THE MISSOURI CONSTITUTIONAL CONVENTION 1875, at 69 (1920).

²⁴⁵ MO. CONST. of 1875, art. II, § 15.

²⁴⁶ *Kenrick v. Cole*, 61 Mo. 572, 575 (1876).

²⁴⁷ *Id.* at 577.

was invalidated as “obnoxious to the provisions of the constitution before mentioned”²⁴⁸

In a third case, Leopold Schmucker’s will made a bequest of \$200 to John H. Reel, “to be applied to a specific purpose which I have explained to him,” another \$500 “for another specific charitable purpose which he well understands,” and all the rest “to apply in charity, according to his best discretion.”²⁴⁹ Schmucker’s written instructions to Reel stated that the bequests were to be given to the Benedictines of Atchison, Kansas and the German Roman Catholic churches of St. Louis for masses for the testator and his wife.²⁵⁰ The Missouri Supreme Court held that the three gifts were trusts and therefore wholly incapable of enforcement because of vagueness and uncertainty,²⁵¹ a typical common law result later deemed the doctrine of semisecret trust.²⁵² But the court did not stop there, concluding that the evidence showed that “[t]he will here was obviously made to evade the . . . constitution” and thus could not be enforced.²⁵³ As the court observed:

[M]ass can be said only by a priest, and a priest is one who ministers at the altar, and the pecuniary acknowledgement for saying the mass is applied to the

²⁴⁸ *First Baptist Church v. Robberson*, 71 Mo. 326, 332 (1879). In contrast, Amelie Brockmeyer’s will leaving all the rest of her property “to the Rev. Jeremiah J. Hasty to be treated and disposed of as he may think best without any dictation or control,” presented no such difficulties. Case 20930 Amelie Brockmeyer. After Brockmeyer died on November 30, 1894, her estate was administered and the residue, \$52.56, was paid to the Reverend. *Id.*

²⁴⁹ *Schmucker’s Estate v. Reel*, 61 Mo. 592, 595 (1876).

²⁵⁰ *Id.* at 601. Other jurisdictions were not so generous in allowing the bequest. For example, courts in New York permitted an unincorporated association to take only if the devise or bequest was made contingent on the group incorporating before the gift took effect. Howard J. Stamer & Saul B. Schneider, *Devise or Bequest to Unincorporated Association—Provision for Saving of Testamentary Intent Where Association Unable to Take at Time of Testator’s Death—Rule Against Perpetuities*, 19 BROOK. L. REV. 113, 114 (1953–54).

²⁵¹ *Reel*, 61 Mo. at 600.

²⁵² A semisecret trust is created when the will expressly declares that the beneficiary receives the property in trust but does not spell out the trust’s terms. *DUKEMINIER & SITKOFF*, *supra* note 182, at 433. Traditional common law courts were reluctant to admit extrinsic evidence to prove the terms of the trust, and thus the trust failed. *See, e.g.*, *Olliffe v. Wells*, 130 Mass. 221, 225 (1881). A secret trust, in contrast, is created when the will gives the property to the beneficiary outright, but the beneficiary had secretly agreed to hold such property in trust. *DUKEMINIER & SITKOFF*, *supra* note 182, at 433. Courts found that the admission of extrinsic evidence was essential to prevent the unjust enrichment of the devisee, and so they allowed all the terms of the trust to be admitted and thus could enforce the trust. *Id.*

²⁵³ *Reel*, 61 Mo. at 601.

support and benefit of the priest saying it. Therefore, if the bequests are carried out and applied to masses, they will be paid over to the priest or priests, saying the masses, for the support and benefit of such priest or priests. As a priest is one who ministers at the altar, he comes within the definition of the constitutional provision.²⁵⁴

Interestingly, had the bequest for masses been made in a California will, a California court would have held that it was not for the benefit of the church, thus having the effect of evading the restriction in the Missouri Constitution. For example, Patrick Lennon's will gave \$3,500 to Bishop Conaty "to have the same amount of masses celebrated as soon as possible for my soul."²⁵⁵ If this was a charitable bequest and California law applied, then section 1313 would require the will to be executed more than thirty days before the testator's death and limit the bequest to one-third of the estate. The California Supreme Court reasoned:

A charitable trust is a gift for the benefit of persons, either by bringing their hearts and minds under the influence of education or religion, by relieving their bodies of disease, suffering or constraint, by assisting to establish them for life, by erecting or maintaining public buildings, or in other ways lessening the burdens or making better the condition of the general public, or some class of the general public, indefinite as to names and numbers.²⁵⁶

A bequest for masses, the court found, "is entirely lacking in the elements of continuance and perpetuity which characterize a charitable use. It is a bequest, not for the benefit of the bishop, but for the benefit alone of the testator . . ."²⁵⁷ Rather than seeing the payment of money to the bishop as supporting religion, as the Missouri court had in *Hinckley*, the California Supreme Court sided with the English view that masses are a "superstitious use"²⁵⁸ and found that the bequest was valid as it did not come within the purview of the California Civil Code.²⁵⁹

²⁵⁴ *Id.* at 602.

²⁵⁵ *In re Estate of Lennon*, 152 Cal. 327, 329 (1907).

²⁵⁶ *Id.* at 329–30.

²⁵⁷ *Id.* at 330.

²⁵⁸ 1 Edw. 6, c. 14 (Eng.); *In re Blundell's Trust*, 30 Beav. 360.

²⁵⁹ *In re Estate of Lennon*, 152 Cal. at 329.

Continuing this restrictive view on religious bequests was the Missouri Supreme Court's decision in *Catholic Church v. Tobbein*²⁶⁰ on facts very similar to the Missouri case of *Schmidt v. Hess*.²⁶¹ In *Tobbein*, the will left half of the testator's property "to the Catholic Church at the city of Lexington, in the State of Missouri",²⁶² in *Schmidt*, the deed conveyed property to "the Lutheran Church."²⁶³ When Tobbein died, the church had not yet incorporated,²⁶⁴ as was the case in *Schmidt*.²⁶⁵ Instead of declaring that the later-incorporated church held the property, as in *Schmidt*,²⁶⁶ the *Tobbein* court found that, because the will took effect before the church was incorporated, "the provision in Tobbein's will was for the Catholic Church at Lexington, and not to the plaintiff corporation," and therefore the corporation had no standing to bring suit.²⁶⁷ The Catholic Church in Lexington then sued as an unincorporated association to probate the will, but the trial court found that the unincorporated society had no legal capacity to sue.²⁶⁸ An amended petition to probate the will filed by individual members of the church was challenged on the grounds that their petition was not filed within the statute of limitation of five years, but the Missouri Supreme Court again stepped in and found that the individuals' petition related back to the timely-filed petition of the unincorporated association and thus could proceed.²⁶⁹ In 1894, fifteen years after Tobbein's death, the Missouri Supreme Court ruled for a third time on the disposition of the estate. By this time Mrs. Tobbein had died, leaving a will giving the bulk of her estate to her niece, Maria Menke.²⁷⁰ The circuit court ruled that, once Mrs. Tobbein made her election to take one-half of the estate absolutely, the

²⁶⁰ 82 Mo. 418 (1884).

²⁶¹ 60 Mo. 591 (1875).

²⁶² *Tobbein*, 82 Mo. at 423.

²⁶³ *Schmidt*, 60 Mo. at 593.

²⁶⁴ *Tobbein*, 82 Mo. at 423.

²⁶⁵ *Schmidt*, 60 Mo. at 595.

²⁶⁶ *Id.* at 595–96.

²⁶⁷ *Tobbein*, 82 Mo. at 424. A later case found that the individual church members had standing to sue regarding the devise to the church. *Lilly v. Tobbein*, 15 S.W. 618, 618–21 (Mo. 1891). In 1894, the court determined that the church's share was one-fourth of the property, not one-half. *Lilly v. Menke*, 28 S.W. 643, 649–50 (Mo. 1894).

²⁶⁸ *Tobbein*, 15 S.W. at 619.

²⁶⁹ *Id.* at 620.

²⁷⁰ *Menke*, 28 S.W. at 646.

remaining one-half should be distributed all to the Catholic Church, apparently on the theory that Mrs. Tobbein had disposed of her half to one of her heirs, her niece.²⁷¹ Declaring that the circuit court “clearly committed error,” the court ordered a partition of the remaining one-half not claimed by Mrs. Tobbein between the Catholic Church and the heirs and legal representatives of Catherine Tobbein.²⁷² The estate finally closed in 1902 when the Missouri Court of Appeals rejected an appeal asking for costs.²⁷³

In cases where the bequest was to a secular organization not yet incorporated, the Missouri Supreme Court was more willing to effectuate the bequest. For example, an 1872 deed of land to the Missouri Historical Society, which incorporated three years later in 1875, was upheld.²⁷⁴ The court was likewise affirming in cases in which the will gave an executor or trustee broad discretion to decide which charities should receive the testator’s bounty. A bequest of the residue of \$5,000 to \$6,000 to be divided by the executor “among such charitable institutions of the city of St. Louis, Missouri, as he shall deem worthy,”²⁷⁵ or the rest amounting to \$3,000 to \$5,000 “to such charitable purposes as my said trustee may deem best,”²⁷⁶ was upheld despite challenges that these provisions were void

²⁷¹ *Id.* at 648.

²⁷² *Id.* at 648–49.

²⁷³ *Lilly v. Menke*, 92 Mo. App. 354, 359 (1902).

²⁷⁴ *Mo. Historical Soc’y v. Acad. of Sci.*, 8 S.W. 346, 348 (Mo. 1888).

²⁷⁵ *Howe v. Wilson*, 3 S.W. 390, 390–91 (Mo. 1887).

²⁷⁶ *Powell v. Hatch*, 14 S.W. 49, 50 (Mo. 1890). Later decisions continued this trend when the object was not religious. *See, e.g., In re Rahn’s Estate*, 291 S.W. 120 (Mo. 1926) (upholding a 1920 will giving \$10,000 to “the German Red Cross Society, of the Empire of Germany” despite claims that the bequest violated public policy because it benefitted the enemy and did not accurately describe the donee, “the Central Committee of the German Society of the Red Cross”); *St. Louis Union Trust Co. v. Little*, 10 S.W.2d 47, 49 (Mo. 1928) (upholding a bequest of \$5,000 to Mattie McMillan “to be spent on the welfare of poor, homeless children”); *Irwin v. Swinney*, 44 F.2d 172, 172 (W.D. Mo. 1930) (upholding a bequest “for the furtherance and development of such charitable, benevolent, hospital, infirmary, public, educational, scientific, literary, library or research purposes, in Kansas City, Missouri, as said trustees shall in their absolute discretion determine to be in the public interest” despite claims that the trust was not for charitable purposes only and was vague and uncertain); *Altman v. McCutchen*, 210 S.W.2d 63, 64 (Mo. 1948) (directing executor to sell all of testator’s property and the proceeds “devoted to the charitable and other institutions devoted to alleviation of human suffering and want, which I have been devoted, and in which I am interested,” created a valid trust). Even if the object was religious, in later years the Missouri Supreme Court was more generous. For example, *A.G. Buckley’s* 1887 will left his 200-acre farm to his wife for life, and “at her decease the said land mentioned above or the value thereof to be put on interest for the use of worn out preachers in the M.E. Church in North Mo. Conference.” *Buckley v. Monck*, 187 S.W. 31, 32 (Mo. 1916). After the wife’s death in 1909, Buckley’s

for uncertainty. The Missouri Supreme Court continued to be dubious about these provisions if the object was religious, however. A 1907 case interpreting a will giving the residue to “the Methodist E. Church, South, and missionary cause” was held void for being indefinite and uncertain.²⁷⁷ The court noted, “[h]ad [the testator] said “to the Methodist E. Church, South, *for* missionary cause,” there would be less trouble,”²⁷⁸ but as the language stood, there were two distinct beneficiaries, so the provision was void.²⁷⁹ In the same vein, in *Jones v. Patterson*, a bequest to the testator’s nephew “to be used for missionary purposes in whatever field he thinks best to use, so it is done in the name of my dear Savior and for the salvation of souls,” was void.²⁸⁰ The will gave no indication of the particular form of Christian religion that she intended to promote, and thus “no court could determine whether or not he [her nephew] was abusing his trust.”²⁸¹ It was not until 1948 that the Missouri Supreme Court distinguished *Jones v. Patterson* and stated the rule of the Restatement (First) of Trusts, that “[a] charitable trust is valid, although by the terms of the trust the trustee is authorized to apply the trust property to any charitable purpose which he may select, if the trustee is able and willing to make the selection.”²⁸² In this regard, the Missouri Supreme Court was not alone. As late as 1940, a commentator observed that “there [was] no uniformity of decision in the various states of the United States as to the amount of certainty necessary in the framing of a charitable trust.”²⁸³

Advantage: St. Louis. California’s statute requiring a will to be executed more than thirty days before death would have made void many of the charitable bequests in St. Louis. While the Missouri Supreme Court was less favorable to religious bequests than its counterpart in California, few wills in St. Louis reached that court, so the charitable bequests were paid.

heirs sued to get the farm, claiming that the devise was vague, indefinite, and uncertain, and that there was no organization as the North Missouri Conference. *Id.* at 33. The court found that Buckley intended to name the Missouri Conference of the Methodist Episcopal Church, which was often called the North Missouri Conference, and which incorporated in 1907, and declared the devise valid. *Id.* at 34.

²⁷⁷ *Bd. of Trs. of Methodist Episcopal Church, S. v. May*, 99 S.W. 1093, 1094–95 (Mo. 1907).

²⁷⁸ *Id.* at 1094.

²⁷⁹ *Id.* at 1095.

²⁸⁰ 195 S.W. 1004, 1004–06 (Mo. 1917).

²⁸¹ *Id.* at 1005.

²⁸² *Altman*, 210 S.W.2d at 66 (citing RESTATEMENT (FIRST) OF TRUSTS § 396 (1935) with approval).

²⁸³ William L. Crow, *Why Charitable Trusts Fail*, 24 MARQ. L. REV. 126, 137 (1940).

D. Step Four: Tax Laws Should Encourage, or at Least Not Discourage, Charitable Bequests

In California, an inheritance tax was first enacted in 1893 and effective May 21, 1893.²⁸⁴ A tax of 5% was levied on all property passing by will or by the laws of California for all residents, as well as on property of nonresidents located in the state.²⁸⁵ To avoid evasion, it included transfers of property in contemplation of death or which took effect after the death of the decedent.²⁸⁶ Exempted from the tax was property that was transferred to certain close relatives and tax-exempt societies, corporations, and institutions.²⁸⁷ Estates of less than \$500 were not subject to the tax.²⁸⁸ The California Supreme Court ruled in 1897 that the law was constitutional despite claims that taxing bequests to nephews and nieces, but not to siblings, was arbitrary.²⁸⁹ The tax was not a robust fundraiser: in the first year, California collected \$1,365.²⁹⁰

The federal government attempted to tax inheritances as income in the Income Tax Act of 1894, which was enacted to place a 2% tax on all income, including gifts and inheritance, that exceeded \$4,000.²⁹¹ The Act was scheduled to take effect on January 1, 1895, but on April 8, 1895, the U.S. Supreme Court declared the law unconstitutional in *Pollack v. Farmer's Loan & Trust Co.*²⁹²

It is unlikely that either California or federal law affected a testator's behavior in deciding whether to give to charity. For the California wills for which we have both the date of execution and the date of death, 121 wills were executed before the

²⁸⁴ 1893 Cal. Stat. 193.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *In re Wilmerding's Estate*, 49 P. 181 (Cal. 1897).

²⁹⁰ *Inheritance Tax: Million and Half Paid*, L.A. TIMES, May 26, 1911, at 13. The amounts continued to increase. *Id.* The state received \$937,072 for the term ending May 1, 1909, \$833,311 for the term ending May 1, 1910, and \$1,508,985 for the term ending May 1, 1911. *Id.*

²⁹¹ Act of Aug. 27, 1894, ch. 349, § 27, 28 Stat. 509, 553.

²⁹² 157 U.S. 429 (1895), *opinion vacated on reargument*, 158 U.S. 601 (1895), *overruled by* *South Carolina v. Baker*, 485 U.S. 505 (1988).

effective date of the statute, including nine wills making charitable bequests.²⁹³ These 121 wills have sixty-two testators who died before May 21, 1893, in some cases, well before that date, so testators would have had no opportunity to change their wills to reflect the new restrictions.²⁹⁴ Another eight testators were out-of-state residents who, even though they died after the statute took effect, may have focused more on their home states' laws than on California's.²⁹⁵ As a result, only fifty-one California testators died after the effective date of the statute but did not update their wills in response to the new tax benefit for charitable bequests. Of these, six testators had already included charitable bequests in their wills.²⁹⁶

Seventy-four wills (38%) were executed after the effective date of the California statute of May 21, 1893, so it is possible these testators altered their plans in some way. The result is a fairly small sample of California testators who could have changed their wills after the statute but did not. For these sixty-six wills

²⁹³ Case 68 John Greenleaf Whittier; Case 95 Bridget Wilson; Case 377 Willet Doty; Case 387 Helen Lowth; Case 492 Hugh Webster; Case 503 Annie Pratt; Case 518 John Downey; Case 528 Caroline Campbell; Case 538 Virgil Chaplin. Wilson, Doty, and Chaplin died before the effective date of the statute, so their charitable bequests were not affected. *See* Case 95 Bridget Wilson; Case 377 Willet Doty; Case 538 Virgil Chaplin.

²⁹⁴ *See, e.g.*, Case 15 Maria Herara (will executed Aug. 4, 1891; died Aug. 12, 1892); Case 50 Charles Field (form will executed July 2, 1883; died Aug. 16, 1887); Case 118 Maria Avila de Machado (will executed Sept. 13, 1858; died Oct. 20, 1858); Case 310 Adelaide Gifford (holograph executed Sept. 26, 1891; died Dec. 17, 1891); Case 321 Terrance Kenney (will executed Jan. 31, 1890; died Feb. 5, 1890); Case 440 Gilbert Bailey (will executed May 5, 1891; died Sept. 28, 1891); Case 538 Virgil Chaplin (will with charitable bequest executed in June of 1891 as a resident of Indiana; died in Indiana July 16, 1891). Five testators who executed wills and died before May 21, 1893 included charitable bequests in their wills, and interestingly, four of the five were nonresidents: Case 68 John Greenleaf Whittier (will executed Feb. 11, 1890; died Sept. 7, 1892; Massachusetts resident); Case 95 Bridget Wilson (will executed Feb. 27, 1893; died Mar. 11, 1893; California resident); Case 538 Virgil Chaplin (will executed June of 1891; died July 16, 1891; Indiana resident); Case 592 Thomas Ellis (will executed Jan. 19, 1892; died Apr. 5, 1892; New York resident); Case 713 John McKee (will executed May 4, 1892; died June 12, 1892; Pennsylvania resident).

²⁹⁵ *See, e.g.*, Case 419 Elsie Herminghaus (will executed June 3, 1885; died Oct. 21, 1893; Illinois resident); Case 439 Charlotte Jerome (will executed Sept. 6, 1885; died Aug. 25, 1893; Michigan resident); Case 480 Martha Batchelder (will executed Dec. 2, 1891; died July 22, 1893; Massachusetts resident).

²⁹⁶ Case 377 Willet Doty (will executed Mar. 22, 1893; died Nov. 6, 1893); Case 387 Helen Lowth (will executed Aug. 11, 1890 in Wisconsin; died Nov. 13, 1893 in California); Case 492 Hugh Webster (will executed Nov. 16, 1891; died Jan. 25, 1894); Case 503 Annie Pratt (will executed Mar. 3, 1885; died Feb. 18, 1894); Case 518 John Downey (will executed in 1877; died Mar. 1, 1894); Case 528 Caroline Campbell (will executed in 1891; died Feb. 18, 1894).

executed after California enacted its statute, five wills (6%) include bequests to charity, and all five were California residents.

Reverend John Eichenberger gave \$100 from his estate of \$7,190 to Bishop Thoburn of the AME Church, the “sum in trust for a mission in India, the same being in fulfillment of a vow I made to the Lord if I got my back pay as an officer in the Army and which I have received.”²⁹⁷

Amos Throop, a longtime benefactor of both the Unitarian Universalist Church in Pasadena and Throop Institute, left \$20,000 of his \$94,800 estate to the Universalist Association of California, a denomination which later merged with the Unitarians for the establishment of a divinity school on the condition that the association raise an equal amount of funds for the project.²⁹⁸ In 1897, the Universalists relinquished any claim against the estate. All the rest of Throop’s estate was given to Throop Institute (later renamed the California Institute of Technology (“CalTech”)), provided it always remain non-sectarian; \$67,244.94 was delivered to the trustees of the institute.²⁹⁹

Antoine Charvoz, an émigré from France, bequeathed his half of his business to his partner, Fallonday, and all the rest of his estate of \$545 to the *Société Bienfaisance Francais* (literally “French Charity Society”) of Los Angeles.³⁰⁰ In August of 1894, after Fallonday received the half-share of the shop and funeral and medical expenses were paid, the French Charity Society received \$145.32.³⁰¹

Henrietta Losee gave the residue of her property in trust for Hanover College, Indiana, to endow a chair of astronomy for her father, Samuel Harrison Thomson.³⁰² After considerable litigation, including an action to quiet title, the

²⁹⁷ Case 298 John Eichenberger. His will was executed on August 10, 1893, twelve days before his death on August 22, 1893. *Id.* The testator was survived by his wife and adult son. *Id.*

²⁹⁸ Case 546 Amos Throop.

²⁹⁹ *Id.* He executed his will on November 11, 1893, 297 days before his death on March 22, 1894 at age eighty-two. *Id.* Earlier, he had given \$200,000 and the land for Throop University, which opened in 1891. *Amos G. Throop and Caltech*, HARVARD SQUARE LIBRARY GREAT AM. EVENTS-UNIVERSALISTS SERIES, <http://harvardsquarelibrary.org/Caltech/throop1.html> (last visited June 21, 2015). He was survived by his wife, his daughter, Martha, and three grandchildren. THE AMOS GAGER THROOP COLLECTION 13–15 (Carol H. Buge & Shelley Erwin eds., 1990), available at <http://authors.library.caltech.edu/25014/1/ThroopCollection.pdf>.

³⁰⁰ Case 342 Antoine Charvoz.

³⁰¹ *Id.* His will was executed on October 10, 1893, six days before his death on October 16. *Id.*

³⁰² Case 423 Henrietta Losee.

college gained title to some land in Oregon.³⁰³ In the case of one bequest, the charity never received any property.³⁰⁴ Ida Lehmer left \$500 of her separate property of \$2,650 in trust to the Mission Board of the German Baptist Brethren Church of Southern California; the probate court ruled that the bequest to the church was void because the will was executed within thirty days of death.³⁰⁵

Advantage: St. Louis. Missouri had no inheritance tax during the time of this study, 1893–1894. A tax on inheritance was first enacted in 1895.³⁰⁶ While the California tax does not appear to have affected testators' behavior, the law made a policy judgment that bequests to tax exempt organizations were not subject to the levy.

V. CONCLUSION

What factors predict charitable bequests in wills? By examining hundreds of wills executed before the federal estate tax was enacted, we can see patterns for the vast majority of people who die with estates far too small to be impacted by the estate tax. Certain conditions appear irrelevant: the fact that wills were easier to execute in California than in Missouri did not lead to more testate decedents in California, nor did the high rates of illiteracy in Missouri discourage people from executing wills. The most salient fact from these wills is that most people executed them within a year of their deaths. Thus, a statute like California's, voiding any charitable bequest made in a will executed within thirty days of death, can have a huge impact on whether a charity can receive a gift.

³⁰³ *Id.* Her will was executed on September 4, 1893, two months before her death on November 6, 1893. *Id.* She left certain bequests to her nieces and nephews, and all the rest to Hanover College, but the estate in California lacked assets to pay the bequests. *Id.* In 1906, the law firm of Spencer, Day, and Hampson contacted the President of Hanover College offering to clear title to the college's bequest in Oregon in exchange for one-half interest in the land. *Id.*

³⁰⁴ Case 485 Ida Lehmer.

³⁰⁵ *Id.* The will was executed on January 28, 1894, five days before her death at age twenty-four on February 2, 1894. *Id.* The will left "my silver watch to my infant son who is 20 days old who has not yet been named." *Id.* This mortmain provision was enacted in 1874 to invalidate charitable bequests unless the will was executed thirty days before death and limited any valid bequests to one-third of the estate if the testator left legal heirs. *Amendments to the Codes, 1873–74*, at 275 (codified as CAL. CIV. CODE § 1313); LOWELL TURRENTINE, INTRODUCTION TO THE CALIFORNIA PROBATE CODE 20 (1956).

³⁰⁶ 1895 MO. LAWS 278, § 1 (approved Apr. 1, 1895). Both this law and a later amendment were found to be in violation of article 10, section 3 of the Missouri Constitution. *See State ex rel. Garth v. Switzler*, 45 S.W. 245 (Mo. 1898). Missouri tried again in 1899, and that law was ruled constitutional. *See State ex rel. Fath v. Henderson*, 60 S.W. 1093 (Mo. 1901).

To encourage more charitable giving in wills, five steps must be taken. First, people need to execute wills rather than die intestate. Second, the wills must be valid and not subject to years of litigation that drain the estate of assets. Third, the jurisdiction's statutes and case law should encourage, or at a minimum allow, charitable bequests. Fourth, tax laws should likewise encourage charitable bequests.

The fact that so many more decedents in St. Louis had wills, and so many more gave to charities, points to a potential fifth step: the jurisdiction must be sufficiently stable to ensure long-term residents with deep roots to the community, the judicial system must be established enough so that wills are not endlessly contested and litigated, as in Los Angeles, and perhaps the most basic necessity for charitable gifts, *in order to have charitable bequests, we need charities to give to*. Thus, a second salient fact from the study emerges: most of the population of Los Angeles in 1893–1894 was highly transitory, as fewer than 25% had lived there for more than a few years. St. Louis, a far larger city at the time, had a much more stable population, with the potential for citizens to form long-term ties with their church, synagogue, and other philanthropic institutions. Policy makers who seek to encourage charitable giving should keep these factors in mind.