An Historical-legal Analysis Of The Influence Of Public Policy On Gifts From Individuals To Institutions Of Higher Education.

Bargerstock, Charles Thomas

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AN HISTORICAL-LEGAL ANALYSIS OF THE INFLUENCE OF PUBLIC POLICY ON GIFTS FROM INDIVIDUALS TO INSTITUTIONS OF HIGHER EDUCATION

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Charles Thomas Bargerstock

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Special committee directing
the doctoral work of
Charles Thomas Bargerstock

Chairman

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TABLE OF CONTENTS

ABSTRACT

AN HISTORICAL-LEGAL ANALYSIS OF THE INFLUENCE OF PUBLIC POLICY ON GIFTS FROM INDIVIDUALS TO INSTITUTIONS OF HIGHER EDUCATION

Charles T. Bargerstock
Lehigh University
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Purpose of the Study

The purpose of this study is to provide an analysis of the influence of public policy on charitable giving by individuals to institutions of higher education. This will be accomplished by first examining the law of charity in England from the sixteenth century and tracing its evolution to colonial America where it was adopted, modified and then expanded during the nineteenth century. An analysis of twentieth century developments in the law, which have affected giving to higher education, forms the heart of the study.

Procedure

Legal research methodology is used extensively because federal and state legislative, judicial and administrative mandates make up the relevant body of public policy. Traditional tools and sources for such

research have been supplemented by reference to existing scholarship on the topic.

Conclusions:

The analysis has produced the following conclusions:

1. The legal principles which have influenced giving by individuals to institutions of higher education are found in the tax law, estate and trust law and the law of charitable dispositions, etc.

2. The principles have resulted from various political, economic and social factors which reflect a societal ambivalence towards charity.

3. Generally speaking the incentive dimension of the law of charity applies to donors and the restrictive dimension to charitable organizations.

4. The incentive dimension of the law of charity with regard to donors has resulted from a strong cultural tradition of charitable giving in America. This favorable attitude towards donors seems to be predominant in the twentieth century.

5. The restrictive dimension of the law of charity with regard to organizations has its roots in a perceived need to limit the power and activities of charities. There has been some erosion of this

dimension, e.g. in the abrogation of the Mortmain Statutes in some states.

6. While most states have adopted charitable gift solicitation statutes, most provide for some exemption for colleges and universities.

7. Most states have laws which regulate the administration of private donor funds by establishing the powers and duties of charitable trustees as to the proper investment and uses of donor funds. Federal policy limits the administration of scholarship funds which discriminate on the basis of race, religion or sex.

8. Emerging developments, reflecting a continued debate on the role of charity in society, indicate a continuing change in the law to meet the changing needs of society.

Chapter 1

INTRODUCTION

Colleges and universities have increased educational fund raising activities because of the need for additional revenues to help balance institutional budgets.[1] The major sources of voluntary

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[1]The text and footnote format for this study will primarily follow William G. Campbell and Stephen V. Ballow, Form and Style (5th ed.; Boston: Houghton Mifflin Co., 1978); primary legal source references, e.g. cases and statutes, etc., for the most part will follow the Harvard Law Review Association, A Uniform System of Citation (12th ed.; Avon, Mass: Lorell Press, 1976). In some instances a hybrid style will be utilized: for instance, "ibid." will be used throughout rather than the legal style "id." in the repetition of consecutive sources. Other variations in style will be evident; for instance, secondary (non-legal) sources will typically utilize "p." to indicate page locations; legal sources will utilize "at" to indicate page location when different from the first page of the previous citation. The terms "infra" (below) and "supra" (above) will be utilized in cross referencing notes and/or text.

The importance of increasing fund raising efforts by colleges and universities in the 1980s was revealed in a recent study by Lester M. Salamon and Alan J. Abramson of the Urban Institute in the Federal Government and the Nonprofit Sector: Implications of the Reagan Budget (Washington. D.C.: The Independent Sector, 1981), as cited in Jack Magarrell, "Study Shows Gifts to Nonprofits Must Rise 44 Pct. in 5 Years to Offset Cuts, Inflation," The Chronicle of Higher Education, 22(14):1, May 26, 1981. The report states that a total of $5-billion dollars in aid cuts to education by the federal government is expected in the period from 1981 to 1984. (Magarrell, loc. cit., p. 1).

financial support to colleges and universities are from religious denominations, corporations, foundations, and individuals.[2] Gifts from alumni and friends represent the largest source of voluntary support for institutions of higher education.

According to the American Association of Fund-Raising Counsel, the amounts of total philanthropic giving for fiscal 1979 from the following sources were: foundations, $ 2.2 billion; business, $ 2.3 billion; and individuals, $ 36.5 billion.[3]

According to the Council for Financial Aid to Education, in 1979-80 gifts to colleges and universities were estimated at $ 3.80 billion dollars. Of this amount approximately 23.5 percent was received from individuals who were alumni and 22.2 percent from nonalumni.[4]

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[2]Foundations will not be considered as within the scope of this study. Appendix A, however, will supply some operative and legal perspectives on foundations which will facilitate an understanding of the philanthropic environment.

[3]As cited in Jack Magarrell, "Less Money, More Competition for Grants Seen by Foundations," Chronicle of Higher Education, 21(11):1, November 3, 1980.

[4]Voluntary Support of Education 1979-80 (New York: Council for Financial Aid to Education, 1981), as cited in Jack Magarrell, "Corporations' Gifts to Colleges Up 25 Pct. in 1980; Smaller Increase Likely this Year," Chronicle of Higher Education, 22(13):1, 8-9, May 18, 1981; the article stated that, "Alumni gave an estimated $910-million, an increase of 16 per cent over the previous year, and non-alumni gave $847-million, an increase of 15 per cent." (At p. 9.)

Thus, as of 1979-80, individuals were annually contributing about $ 1.4 billion to institutions of higher education. The total percentage increase in giving to institutions of higher education from the previous fiscal year was 17.6 percent, which exceeded the inflation rate at that time.[5]

In times of financial stringency, particularly, support from individual donors has not only helped to insure institutional survival but also has done much to improve the quality of higher education. Buildings, scholarships, library books, and endowed professorships have been added in this way. Voluntary support will probably become more crucial in the future.

The Problem

Because of the importance of private donor gifts in financing higher education, it has become imperative that college and university administrators, especially fund raisers, be aware of federal and state legislative, judicial and administrative mandates and the operative public policy factors which have an influence on

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[5]Ibid., p. 1.

charitable giving from individuals.[6]

The study will examine the following questions:

1. What are the major federal and state legislative, judicial and administrative provisions directly affecting charitable giving by individuals to institutions of higher education?

2. How have political, economic, social or other public policy factors influenced the development of these provisions?

With regard to the first question, the major laws and principles affecting giving to higher education to be considered in the study will be grouped as follows:

1. the law of charitable uses and educational purposes;

2. the law of charitable dispositions (including trusts, gifts, subscriptions, cy pres, mortmain, perpetuities, etc.);

3. the law of taxation (including charitable income and estate tax deductions, life income arrangements, etc.);

4. the law on charitable organizations (including charitable incorporation, tax exemption, gift solicitation, fund administration, etc.).

As to the second question, the various political, economic, social or other public policy

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[6]Francis M. Betts, III, in a recent doctoral dissertation advocated the need for a greater "understanding of basic legal, economic, and psychological factors involved in fund raising by educational administrators." ("The Development of Objectives for a Training Program in Fund Raising for Educational Administrators" (Doctoral dissertation, University of Pennsylvania, 1978), p. 27.)

factors influencing the development of the major laws and principles have been embodied in a variety of arguments. The basic arguments, either for or against charitable support, have included the following:

1. arguments favoring the support of charity, charitable activities and charitable giving--

    a. charitable activities by individuals and organizations have benefited the society as a whole by meeting human social, economic, educational and religious needs;

    b. charitable support by individuals reduces the burden of providing funds and services for a variety of social needs;

    c. charitable organizations provide services which otherwise would have to be provided by the government.

2. arguments for limiting charity, charitable activities and charitable giving--

    a. society must define what is charitable, i.e. as to what are permissible charitable uses and purposes;

    b. society should have something to say about the manner in which individuals direct their wealth in order to protect any heirs and even the donors themselves;

    c. incentives for charitable giving divert tax revenues from public coffers and in essence permit taxpayers rather than the society through the government to determine social priorities;

    d. the accumulation of power, wealth and influence by charities should not remain unchecked;

e. Charitable status should not be allowed for organizations whose activities contravene public policy;

f. abuses by charities in the solicitation and uses of charitable funds necessitate some societal control over those types of activities.

These basic arguments, pro and con, will be observed in the various issues raised in the study. Occasionally, one or the other rationale will be seen to prevail. In other instances a process of balancing of conflicting rationale will be observed to have taken place in the formulation of public policy on a particular issue.

Scope of the Study

For the purpose of the study it is recognized that there is a complex interplay between legislative, judicial and administrative decision making both on federal and state levels. An attempt will be made to identify the influences of these factors, either singly or collectively, as they relate primarily to these four topics:

1. What are the legal incentives for gifts to institutions of higher education?

2. What are the legal limitations on gifts to institutions of higher education?

3. What are the legal restrictions on the solicitation of gifts by institutions of higher education?

4. What are the legal regulations which affect the administration of private donor funds by institutions of higher education?

Because the law of charity is pervaded by both incentive [1.] and limitation [2.] aspects, it will be convenient to discuss both aspects simultaneously with regard to particular dimensions of the law of charity. For instance, when one discusses the tax law, one should consider the charitable income tax deduction as having both incentive and limitation characteristics. Or as to charitable dispositions, the Mortmain Acts should be considered in the context of permissive and restrictive characteristics and trends.

In a similar fashion restrictions on the solicitation of gifts [3.] and on the administration of private donor funds [4.], as two major aspects of governmental regulation of charitable organizations, can be discussed in terms of incentives and limitations (under the general topic of the law of charitable organizations). The Methodology section below will detail more specifically how the scope of the study will be developed within this conceptual framework.

Whenever the state law aspect is considered in the study, Pennsylvania law will be emphasized. However, it is expected that there will be an examination of the law of other jurisdictions where major issues are treated differently.

Related Literature

A basic assumption for this study has been that it is important for higher educational administrators to be aware of the law on charitable giving. A study by Francis M. Betts has underscored the importance of raising the legal awareness of educational fund raisers.[7] Betts perceived the need to provide more comprehensive knowledge in this area, and, accordingly, has proposed a course of study for fund raisers which would include a number of topics related to the legal and organizational bases of fund raising.

In order to understand the basic forces which have shaped the law of philanthropy, as it is applied in America today, one must consider the history of the law of charity from its English roots. Several definitive works have provided this background. W. K. Jordan

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[7] Ibid.

analyzed English philanthropy from 1480-1660,[8] and David E. Owen examined the same subject from 1660-1960.[9] These works, while concerned with philanthropy generally, do discuss some aspects of the law of charity.

One insightful treatment of the topic of the history of the law of charity in England is supplied by Gareth H. Jones.[10] The Jones study analyzes the law in the period from 1532-1827. Jones' work is extremely valuable because it clearly presents the evolution of basic legal principles which would be adopted or modified and incorporated as part of the American law of charity. For instance, he traces the role of the court of chancery in the development of the law of charitable uses and in the growth of the doctrine of cy pres.

An excellent presentation of how the English law was altered to fit the unique needs of American

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[8]W. K. Jordan, Philanthropy in England 1480-1660 (London: George Allen & Unwin, Ltd., 1959).

[9]David E. Owen, English Philanthropy 1660-1960 (Cambridge, Mass.: Harvard University Press, 1964).

[10]Gareth H. Jones, History of the Law of Charity 1532-1827 (Cambridge, England: Cambridge University Press, 1969).

society has been made by Howard S. Miller.[11] Miller's well written focused analysis of the development of the law of charity in America from 1776-1844 reveals some important examples of the application of the law of charity to higher education. These cases, which he analyzes, including several United States Supreme Court decisions, historically illustrate the impact of the courts on giving to colleges and universities during the formative period of the American law of charity.

Miller's analysis is significant for this study for two major reasons. First, Miller describes the modification of English law to the unique needs of America. This provides helpful insights into the evolution of public policy to its present state. Second, he discusses the evolution of that policy in terms of a permissive and restrictive law of charity.[12] It is this latter notion which has been adopted in this study as a key conceptual basis for examining the law of charity from 1500 to the present.

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[11]Howard S. Miller, The Legal Foundations of American Philanthropy 1776-1844 (Madison, Wis.: The State Historical Society of Wisconsin, 1961).

[12]See especially, ibid., pp. xi-xii.

Apart from these major historical works, a number of other sources have helped elaborate different aspects of the history of the law of charity. Arnaud C. Marts examines philanthropy's role in civilized society.[13] Edith L. Fisch studies the cy pres doctrine, as a major concept in the law of charity, in America.[14] Lawrence M. Friedman has touched on several relevant matters, such as the prudent investor rule, in his treatise on the history of American law.[15] Other historical insights have been provided in various law review articles which will be cited throughout the study.

A number of treatises have been written on the contemporary law of charity. One example of particular merit, which has been authored by Edith L. Fisch, Doris Freed and Ester Schacter, provides an encyclopedic treatment of various aspects of the law of charity.[16]

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[13]Arnaud C. Marts, Philanthropy's Role in Civilization (New York: Harper & Brothers, Publishers, 1953).

[14]Edith L. Fisch, The Cy Pres Doctrine in the United States (New York: Matthew Bender & Co., 1950).

[15]Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973).

[16]Edith Fisch, Doris Freed and Ester Schacter, Charities and Charitable Foundations (Pomona, N.Y.: Lond Publications, 1974).

Separate chapters in this volume focus on subjects such as cy pres, charitable trusts, the regulation of charitable gift solicitation, etc. Fisch, Freed and Schacter present an approach similar to that employed in law encyclopedia like Corpus Juris Secundum, i.e. summarizations of the operative legal principles in a narrative form with extensive footnote references. This approach facilitated an identification of specific higher education cases which illustrate particular principles of law.

Another notable treatise has been written by Luis Kutner.[17] Kutner, like Fisch, et al., examines a broad spectrum of issues, e.g. charitable trusts, cy pres, charitable solicitation statutes, etc., but in contrast to the encyclopedia/hornbook treatment of Fisch, Freed and Schacter, Kutner focuses more sharply on the underlying rationale for the law. He discusses specific cases and reviews major authorities and scholarly analyses of various issues.

Edwin S. Newman[18] and Bruce R. Hopkins and

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[17]Luis Kutner, Legal Aspects of Charitable Trusts and Foundations (Chicago: Commerce Clearing House, Inc., 1970).

[18]Edwin S. Newman, Law of Philanthropy (New York: Oceana Publications, 1955).

John H. Meyers[19] have likewise written treatises on the law of philanthropy, although these works are not as comprehensive as the Fisch, Freed and Schacter or the Kutner treatments. The Newman work suffers from lack of proper referencing. In addition it is rather outdated, but does provide some important insights. The Hopkins and Meyers study focuses mostly on tax consequences, but deals with other ramifications like charitable gift solicitation.

As might be expected, much has been written on the tax law and charitable giving. One good introductory overview of charitable giving and the incentive and regulatory aspects of the tax law has been written by the Arthur Andersen & Co. accounting firm.[20] It covers specific tax implications of particular types of charitable gifts--outright, testamentary, life income, etc. A similar, but more technical, manual is the U.S. Master Tax Guide.[21]

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[19] Bruce R. Hopkins and John H. Meyers, The Law of Tax Exempt Organizations (Washington, D.C.: Lerner Law Book Co., Inc., 1975).

[20] Arthur Andersen & Co., Tax Economics of Charitable Giving (Chicago: Arthur Andersen & Co., 1979).

[21] [1980] U.S. Master Tax Guide (Chicago: Commerce Clearing House, Inc., 1979).

Several scholarly works have explored individual aspects of the tax law as they have had an impact on higher education. Richard L. Desmond has studied the federal tax history of life income gifts to higher education.[22] His analysis, however, predates the Tax Reform Act of 1969, which has limited the particular form of life income arrangements which are eligible to receive special tax treatment. The Tax Institute of America has presented a report which has analyzed the impact of the 1969 Act on giving to higher education.[23]

The Tax Reform Act of 1976, which has had additional major implications for charitable giving, has been discussed in other literature. In one doctoral dissertation Robert B. Byars has attempted to establish decision criteria for giving under the 1976 Act.[24] His study illustrates that decisions, as

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[22]Richard L. Desmond, "The Federal Tax History of Life Income Gifts to Higher Education" (Doctoral dissertation, University of Michigan, 1965).

[23]D. Dillion, Tax Impacts of Philanthropy (Princeton: Tax Institute of America, 1972).

[24]Richard B. Byars, "Decision Criteria for Gifts under the 1976 Tax Reform Act" (Doctoral dissertation, North Texas State University, 1977).

to whether and in what form, to make a charitable gift are extensively influenced by public policy changes. He claims, for instance, that charitable giving under the pre-1976 law could permit one to construct an advantageous estate planning strategy, but that because these advantages were substantially reduced under the 1976 law, incentives for charitable giving were likewise reduced. Gerald P. Moran has also considered the impact of the federal tax system and tax policy specifically as to private colleges and universities.[25] His paper, while suitable as an introduction to various law of charity issues such as charitable gift solicitation laws does not explore them in great detail.

On the topics of charitable uses and charitable dispositions, the Fisch, Freed and Schacter volume supplies extensive case references.[26] Traditional research tools, however, provide the major source for case citations. These include: Corpus Juris

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[25]Gerald P. Moran, "Private Colleges: The Federal Tax System and Its Impact" (paper presented to the Center for the Study of Higher Education, Toledo, Ohio, 1977).

[26]See note 16 supra.

Secundum,[27] the American Digest System,[28] The Pennsylvania Law Encyclopedia[29] and the Vale Pennsylvania Digest.[30] These legal research tools have been utilized throughout the study.

Luis Kutner's research, mentioned above, is especially worthwhile with regard to the subject of charitable trusts.[31] Other valuable general sources on the subject of trust law include George Bogert's Law of Trusts and Trustees[32] and the Restatement of the Law of Trusts (Second).[33] A major authority on the

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[27]Corpus Juris Secundum (Brooklyn, N.Y.: The American Law Book Co., 1960).

[28]American Digest System (St. Paul, Minn.: West Publishing Co., 1981).

[29]Pennsylvania Law Encyclopedia (Philadelphia: George T. Bisel Co., 1980).

[30]Vale Pennsylvania Digest (St. Paul, Minn.: West Publishing Co., 1978).

[31]See note 17 supra.

[32]George T. Bogert, Law of Trusts and Trustees, revised 2d ed., (St. Paul, Minn.: West Publishing Co., 1977).

[33]Restatement of the Law of Trusts (Second) (St. Paul, Minn.: American Law Institute Publishers, 1959).

subject of testamentary dispositions is Page on Wills.[34]

Throughout this study reference will be made to law review articles on specific topics. Among them are two excellent analyses of the current law on mortmain dispositions. Lorraine S. Tabakin discusses the demise of the Pennsylvania Mortmain Statute.[35] The second article addresses the more general considerations of the constitutionality of these statutes.[36]

Clinton J. Najarian[37] and Robert L. Lynn[38] have studied charitable giving and the Rule Against Perpetuities, while other law article authors have focused on the issue of the use of the cy pres doctrine to obviate

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[34]W. H. Page, Page on the Law of Wills (Cincinnati: The W. H. Anderson Co., 1965).

[35]Lorraine S. Tabakin, "In re Estate of Cavill: Death of Pennsylvania's Mortmain Statute," University of Pittsburgh Law Review, 37:169, Fall, 1975.

[36]"Mortmain Statutes: Questions of Constitutionality," Notre Dame Law Review, 52:638, 1976.

[37]Clinton J. Najarian, "Charitable Giving and the Rule Against Perpetuities," Dickinson Law Review, 70:455, 1966.

[38]Robert J. Lynn, "Perpetuities: The Duration of Charitable Trusts and Foundations," U.C.L.A. Law Review, 13:1074, 1966.

the Rule against Perpetuities.[39]

On the subject of regulation of charitable gift solicitation, Bruce R. Hopkins has surveyed the law of the various states and discussed the possibility of increased federal involvement.[40] Another article emphasizes the underlying rationale for charitable gift solicitation acts, namely to curb charity cheats.[41] A third article has focused specifically on the Pennsylvania statute.[42]

Randall Dahl has studied legal problems in both the solication and administration of private donor funds.[43] The study is valuable to the extent that it introduces and briefly examines a variety of issues pertinent to these two areas. For instance, Dahl

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[39]See Chapter 3, note 219 and accompanying text infra. Luis Kutner, also, studies the issue.

[40]Bruce R. Hopkins, "Regulations of Interstate Charitable Solicitations: Implications for Colleges and Universities," Journal of College and University Law, 2(4):289 (1975).

[41]"Charitable Solicitation Acts--An Attempt to Curb Charity Cheats," DePaul Law Review, 16:472.

[42]Louis D. Apothaker, "Sweet Charity. . . as Amended--A Review of Pennsylvania's Charitable Solicitation Law," Pennsylvania Bar Association Quarterly, 45:369, 1974.

[43]Randall Dahl, "Legal Problems in the Solicitation and Administration of Private Donor Funds in Higher Education," (ERIC Document Reproduction Service No. 153-518; paper presented at Kentucky University, Lexington, Ky., 1977).

reviews the legal theories which have been used to uphold and enforce charitable gift subscriptions.

Several exemplary research studies have explored different aspects of governmental regulation of the administration of private donor funds. Two Ford Foundation reports by William L. Cary and Craig B. Bright have examined the developing law of endowment funds.[44] The reports present two lawyers' views on legal problems in institutional trust fund management. Cary and Bright focus particularly on problems such as whether capital gains from endowment could legally be considered income, and thus spendable, or as principal, and thus to be retained, when the instrument does not indicate what should be done. (This study was in part responsible for the passage of the Uniform Management of Institutional Funds Act.) Russell F. Gearin has, likewise, considered charitable gift and and trust administration problems, as they relate

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[44]William L. Cary and Craig B. Bright, The Law and the Lore of Endowment Funds (New York: The Ford Foundation, 1969); William L. Cary and Craig B. Bright, The Developing Law of Endowment Funds: "The Law and the Lore" Revisited (New York: The Ford Foundation, 1974).

mainly to private and public secondary schools.[45]

One major underlying problem for those entrusted with the administration of private donor funds concerns the determination of the nature and extent of their duties as fiduciaries. John W. Wheeler discusses this problem specifically with regard to the private sector of higher education.[46] A major aspect of Wheeler's review is that corporate and trust law dictate different standards of responsibility for fiduciaries in the financial management of charitable funds. He discusses this with respect to issues such as legal investments, security lending and borrowing against restricted funds.

On the issue of administering scholarship funds, which discriminate on the basis of race, creed, color, religion or sex, potential violations of public policy are evident. One study, which reviews the restrictive scholarship problem, indicates that there

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[45]Russell F. Gearin, "The Administration of Trusts and Endowments in Schools of the United States" (Doctoral dissertation, University of Arizona, 1970).

[46]John W. Wheeler, "Fiduciary Responsibility of Trustees in Relation to Financing of Private Institutions of Higher Education," Journal of College and University Law, 2(3):210, 1975.

are major inconsistencies in the application of the law, i.e. the pertinent statutes and regulations, among different federal agencies.[47] In addition the authors of the study, Jeffrey H. Orleans and Elizabeth D. Johnson, point out a major inconsistency in the substance of the laws themselves--namely that stricter standards exist with respect to racial restrictions in scholarships compared to standards regarding similar restrictions with respect to sex.

Regarding the influence of public policy on giving by individuals to institutions of higher education, the report of the Filer Commission in 1975 remains as one of the more definitive recent statements on the subject. The report, which was based on 85 studies of various aspects of philanthropy, discusses the economics of nonprofit activity. It makes "recommendations to the voluntary sector, Congress and to the American public at large as to ways in which the practice of private giving can be strengthened

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[47] Jeffrey H. Orleans and Elizabeth D. Johnson, "Nondiscrimination Doesn't Have to Not Work: Restrictive Scholarships, H.E.W. and I.R.S.," Journal of Law and Education, 7(4):493, 1978.

and made more effective."[48] Many of the Commission's recommendations are tied directly to tax incentives, but others involve issues such as the accountability of charities. The report, however, is less than unanimous on many points. It is valuable to note that appended to the Commission report are dissenting statements by its members on particular points in the report.

Two articles of note which also bear on the developing law of charity should be mentioned. Emil M. Sunley, Jr.[49] and Joseph C. Beckham and Galen C. Godbey[50] have written treatises on emerging federal and state tax policies. Both of these articles have focused mainly on developments in the tax law, particularly in terms of the debate on how and to what extent the government should be providing incentives for charitable giving. The articles also consider some alternatives

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[48] Commissions on Private Philanthropy and Public Needs, Voluntary Giving (1975), p. 1.

[49] Emil M. Sunley, "Federal and State Tax Policies," chapter 6 in David W. Breneman and Chester E. Finn, Jr., eds., Public Policy and Private Higher Education (Washington, D.C.: The Brookings Institution, 1978).

[50] Joseph C. Beckham and Galen C. Godbey, "Conceptualizing Federal Tax Policies Towards Higher Education in the 1980s: Balancing Social Equity and Political Realities," Journal of Education Finance, 5:449, Spring, 1980.

to the current system of incentives.

One final source of information which deserves mention is The Chronicle of Higher Education.[51] The Chronicle presents timely well-researched reports on current developments in public policy and their impact specifically on higher education. This source was particularly useful in obtaining statistical information on giving to colleges and universities. Also, during 1980-81 some major changes in the tax law were taking place; articles in the Chronicle facilitated the process of following these changes.

In summary the related literature presented in this section constitutes a core of authority and scholarship which has guided the logic of the study. It has also facilitated the search for and analysis of the pertinent statutes, regulations and cases--the primary sources of information for the findings of this study. Other sources, not reviewed in this section, will be cited in the text wherever appropriate.

Methodology

The four aspects of the scope of the study,

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[51]See BIBLIOGRAPHY listings for Jack Magarrell and Janet Hook for the various articles drawn upon in this study.

mentioned above, can be considered and discussed in the following sequence:

1. The analysis of the historical dimension of the law of philanthropy in America from its roots in the English system from about 1600 to its adaptation in America until about 1900 will be found in chapter 2.

2. A presentation of the current state of the law from about 1900 in the specific topic areas will be broken down and discussed in chapter 3.

3. A synthesis of chapter 2 and 3 will be found in the conclusions, discussion of emerging trends and recommendations of chapter 4.

A major premise running through this study is that society has historically exhibited an ambivalence towards charities and charitable giving. It is, therefore, helpful to consider this ambivalence, as seen in the historical development of the law of charity, in terms of a conceptual or theoretical model or framework. Such a model will be utilized in this study.

It should first be observed that there are occasional risks in using conceptual models to explain complex phenomena. First, there is a natural tendency to want to interpret all events or facts in terms of the model, even when they do not fit neatly into the scheme. Second, there may exist other possible models which provide alternative perspectives of the

same event. Third, there may exist (as in this case) some semantic difficulties in the definitions used to describe the model. Nonetheless, conceptual theories for understanding complex events are useful, if not essential, regardless of the problems just mentioned.

With this in mind, it is advanced that the law of charity can be understood in terms of 1) incentive/permissive and 2) limitation/restrictive dimensions. These dimensions can be perceived both in the principles and laws which have evolved and in the underlying rationale or sentiments which have given rise to those principles and laws.

As to how these dimensions are manifested, the law of charity can be divided into the law 1) as it applies to donors and 2) as it applies to charitable organizations.

For instance, it can be argued that with regard to the application of the law of charity to donors that the law has a primarily incentive dimension. This dimension may vary in degree, for example as to tax incentives, or in kind, as to charitable dispositions. Concurrently, it can be argued that with regard to the application of the law of charity to charitable organizations that the law

has a primarily restrictive dimension. This dimension also varies in degree, for example as to types of charitable solicitations regulations--licensing as opposed to registration.

It can also be argued that particular principles may have both incentive and limitation dimensions. For instance, there may be tax incentives for the donor, e.g. charitable deductions, but there may also be a limit to the extent of those incentives, e.g. ceiling limitations. However, this should be viewed as a limit to the incentive rather than a limitation on giving.

Furthermore, given statutes, regulations and judicial holdings may have concurrent effects on the donor and the charitable organization. As an example, a particular policy, such as a charitable solicitation act, may be viewed on the one hand as a restriction on the charity, but it may actually be providing an incentive for donors who may, as a result of the regulations, have greater confidence about the reputation of the charity.

Each specific topic in the study will be analyzed on the levels of state and federal law and in terms of statutes, regulations and cases.

Pertinent mandates will be identified and, where possible, related to any underlying political, economic, social and other historical elements which have been responsible for the emergence of these mandates. Particular attention will be paid to the law in Pennsylvania.

Significance of the Study

An analysis of the questions, asked by this investigation, in terms of the specific topic areas indicated in the scope of the study section, will show the extent to which public policy has created an impact on giving by individuals to institutions of higher education. It is expected that the information produced will be a basis for raising the awareness of college and university administrators about this subject in higher education finance.

Chapter 2

ENGLISH AND AMERICAN POLICY BEFORE 1900

The roots of the American law of charity have their origin in England. Anyone who wishes to understand the current impact of public policy on giving by individuals to institutions of higher education should first examine the history of the law of charity in two periods--first, from the sixteenth through eighteenth centuries in England, and second, during the nineteenth century in America, where the prior English law was adopted, modified and expanded.

As might be expected, the development of the general law of charity has had specific impacts on giving to higher education. At the same time, it will be observed that attitudes about higher education have shaped specific aspects of the law.

Generally, as the remainder of this study will reveal, an ambivalent attitude by society towards charity has persisted in both England and America. This ambivalence is evident in the fact that at any one time social policies will exhibit a spectrum of attitudes towards charity which will range from being highly supportive or permissive to highly restrictive.

(It also seems that there are times in which elements of either permissiveness or restrictiveness seem to be predominant.) Overall, it appears that there has been a dialectic process at work in the development of the law of charity from its roots in England to the present in America.

English Law From 1500 to 1800

Our survey of English law begins about 1500 with the examination of the role of the courts of chancery, or equity, in enforcing charitable devices. In 1600 Parliament established a major cornerstone of the English law of charity by passing the Statute of Charitable Uses (1601). Subsequently the courts of chancery continued to facilitate the preservation of charitable trusts by refining the cy pres doctrine. Eventually, the permissive trend favoring charities was limited by stricter construction by the courts and by Parliament's passage of the Mortmain Act in 1735.

Chancery Courts and Charitable Uses Before 1600

"Few areas of English law more vividly illustrate the influence of contemporary forces. . . social, economic and religious pressures on the development of substantive law, on such questions as the scope of the

privileges awarded by the Chancellor to the charitable gift,"[1] states Gareth Jones in the preface of his work on the English law of charity.

Historically, the device of legal trusteeship, as a means for establishing charitable gifts, developed in response to the enactment by feudal lords of restrictive acts which limited direct giving to charities and particularly the church. Because of the direct limitations testators began to convey gifts to individuals to hold their property in trust for charities.[2]

Howard S. Miller notes in the preface of his text that:

> The trust owed its peculiar character to the fact that England had separate courts of law and equity. Because ordinary courts of law refused to enforce charitable trusts, the Chancellor assumed the responsibility of enforcing duties upon trustees under his equity powers. Chancery courts balanced legal title against equitable rights, giving beneficiaries an interest in property donated for their use, and protecting them in the enjoyment of that interest.[3]

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[1]Gareth H. Jones, History of the Law of Charity 1532-1827 (Cambridge, England: Cambridge University Press, 1969), p. ix. Professor Jones' work facilitated the research process in this section.

[2]W. K. Jordan, Philanthropy in England 1480-1660 (London: George Allen & Unwin, Ltd., 1959), pp. 109-117.

[3]Howard S. Miller, The Legal Foundations of American Philanthropy 1776-1844 (Madison, Wis.: The State Historical Society of Wisconsin, 1961), pp. ix-x.

Luis Kutner has also noted:

> The equitable powers were first exercised by the Common Law Courts which, by the early fourteenth century, became more rigid. When injustices arose from the application of strict rules of law by the Common Law Courts resort was taken to Parliament or the King's Council for relief. Gradually these petitions were referred to the Chancellor, who was usually an ecclesiastic, and the Court of Chancery began to exercise equity jurisdiction, becoming an established court of the realm by 1422. This Court based its decisions on ethical principles, not legal precedents. Its procedures were more flexible than the Common Law Courts; and its freedom from fixed forms of action and its power to enforce a defendant's duties, not merely to uphold a plaintiff's rights, made it particularly suited to assuming jurisdiction over uses. As indicated, by the mid-fifteenth century the Chancellors were interfering to enforce on the trustee his duties and to protect the interest of the beneficiaries.[4]

During the period from 1480 to 1540 the generosity of donors was instrumental in reviving universities which had been in a state of decay.[5] Many donors, both before and after the reformation, were motivated by a desire to create a learned clergy.[6]

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[4]Luis Kutner, Legal Aspects of Charitable Trusts and Foundations (Chicago: Commerce Clearing House, Inc., 1970), p. 20; see Jones, op. cit., p. 19.

[5]Jordan, op. cit., pp. 279-280.

[6]This is evidenced, for instance, by the fact that the Calvinists directed enormous resources towards the founding of new schools in order to counter the evils they perceived in "popery." (Ibid., pp. 281-282.)

Donors increasingly relied upon the trust as a device for providing for education. Two problems, however, emerged; the first was substantive, that there were problems in determining whether the use or trust was "charitable", and the second was procedural, that the process for seeking the enforcement of such uses was not clearly available.

Prior to the reformation the ecclesiastical courts has supported bequests for "pious causes", but legacies for secular purposes had not received favored treatment. Increasingly it became necessary for the laity to turn to courts of chancery which intervened to help force executors to carry out secular charitable uses, trusts and legacies. Thus, with the reformation, there seems to be a major shift towards favorable treatment of such trusts and legacies as proper charitable uses.[7]

While a broader range of charitable uses began to be recognized and could be addressed through the courts of equity, a procedural problem began to emerge in a different form. Initially, the procedure for bringing a charitable use controversy to chancery was

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[7]Jones, op. cit., p. 10.

simple. Procedures for seeking relief in equity were minimal and no pleadings were required. After some time, however, procedural requirements at equity became increasingly technical and cumbersome. This fact, plus the existence of frequent abuses in the administration of charitable trusts, prompted Parliament to remedy the perceived existing deficiencies in the law of charity.

Statute of Charitable Uses, 1601

The need to provide greater supervision of charitable endowments prompted Parliament in 1597 to enact "An Acte to Reforme Deceits and Breaches of Trusts, Touching Lands Given to Charitable Uses."[8] This act with amendments served as the basis for a more comprehensive Statute of Charitable Uses in 1601.[9]

It is generally acknowledged that the 1601 act simplified and ordered the prior law of charity.[10] The preamble of the act, for instance, listed twenty-one

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[8] 39 Eliz. 1, c.6.

[9] 43 Eliz. 1, c.4.

[10] Jordan, op. cit., p. 114; Miller, op. cit., p. x; however, see Jones, op. cit., p. 23, n.1.

acceptable philanthropic purposes. Included among these were "schools of learning, free schools, and scholars in universities." Thus, gifts to institutions of higher education were specifically sanctioned as legitimate charitable objects.

The act established a procedure for investigating the misuse of charitable devices for giving. Thus, while higher education had been sanctioned as a legitimate object for charitable uses, donations or trusts to colleges and universities in general would be subject to investigations by the charity commissioners. A major exception to the commissioners' power to investigate was established in an exemption which was granted to several of the larger universities. The exemption portion of the act read as follows:

> Provided alwaies, That neither this Acte, nor any thinge therein conteined, shall in any wise extende . . . to any Colledge Hall or Howse of Learninge within the Universities of Oxforde or Cambridege, or to the Colledges of Westmynster Eaton or Winchester . . . neither to any Colledge Hospitall or Free Schools whiche have speciall Visitors of Governours or Overseers appointed them by their Founders.[11]

The underlying rationale for this special treatment by Parliament is not clearly revealed in the

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[11]As cited in Jones, op. cit., p. 37.

literature. The effect of the treatment does seem clear, namely that a few universities were to benefit doubly from the Statute of 1601--first, in being declared as legitimate objects of charity, and, second, in being declared as institutions to which charitable gifts could flow without investigation by the commissioners.

It should be noted that Sir Francis Moore, who had drafted the act, commented in his Reading that provisions to charities exempted from commissioners' inquiries were to be construed strictly.[12] A college, for instance, could claim the benefit of the exemption only "if both the property given to it and the employment of the trust were vested in the corporation." Further, only corporations in existence at the time of the statute's enactment did not fall within the commissioners' jurisdiction.[13]

Chancery Courts and Charitable Uses After 1600

While the Statute of Charitable Uses had

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[12]George Duke, Law of Charitable Uses (1676), as cited by Jones, op. cit., pp. 37-39.

[13]Ibid.

catalogued secular charitable objects, it became the task of the seventeenth century Chancellor to define the parameters of charitable uses. Numerous cases illustrate two strategies taken by the courts. The first involved sustaining imperfect charitable devices in order to prevent a gift from failing. The second entailed the application of the doctrine of cy pres, which permitted the alteration of the terms of a charitable trust under certain conditions. Some examples illustrate that the court of chancery considered higher education to be among the charitable objects to receive favorable treatment.

An example of the first strategy mentioned above occurred where heirs of a testator challenged a conveyance of land to St. John's College, Cambridge.[14] The College sought to have the conveyance sustained.

A man named Platt had conveyed land in his will to the College. His son argued that the conveyance was invalid at law because of an imperfection in the devise, namely that the corporation was not fully expressed. The Chancellor agreed, but stated that while void at law, the appointment was proper in equity; that

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[14] Platt v. St. John's College, Cambridge (1638), as cited in Jones, op. cit., p. 62.

"these defects in cases of charitable uses are made good by that statute [of charitable uses], by a benign and favorable interpretation there upon for maintenance of charity. . . ."[15]

The second strategy, which was employed by the English courts to support charitable devices, was the cy pres doctrine. The term cy pres, which is derived from the French, cy pres comme possible, means "as near as possible."

The concept of cy pres, which had its roots in Roman times, continued to evolve during the Middle Ages,[16] and in 1601 the legislative mandate of the Statute of Charitable Uses prepared the ground for further maturation of the doctrine.

The essence of cy pres is that, while generally a court will not alter the terms of a charitable trust, when literal compliance with the terms of the trust become impossible or impracticable, a court of equity will direct the administration of the trust "as near to"

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[15] Ibid.

[16] See, Joseph Willard. "Illustrations of the Origin of Cy Pres," Harvard Law Review, 8:65, 1894. It is claimed by Willard that clergymen from the continent brought the doctrine to England during the Middle Ages.

the intention of the testator as possible.[17] This judicial doctrine of cy pres should be distinguished from that of the king's prerogative power over charities. This latter power, executed by the Chancellor under the sign manual of the Crown, provided the means to carry into effect donations for which no definite charities were expressed or no trustees appointed.[18]

Jones comments that the maturity of the judicial cy pres doctrine by the early seventeenth century is evident in Sir Francis Bacon's decision in Emmanual College, Cambridge v. English (1617),[19] where a testator had established a bequest to purchase lands from which income was to be paid to support two fellows and six scholars at the College. However, at the time the amount designated for this support was too little to maintain even one fellowship. The College sought to have the provision altered to provide a scholarship fund. Sir Francis altered the bequest and is reported as saying:

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[17] 14 C.J.S. Charities §52, pp. 512-520 (1960).

[18] Ibid., §51, pp. 511-512 (1960).

[19] As cited in Jones, op. cit., pp. 74-75.

> That he did not intend to alter anything concerning the disposition of the legacy contrary to the will, except it were in that which was impossible to be performed, which might prove a hindrance and inconvenience to the college; and also that . . . he desired to tie himself to come as near as might be to the will and meaning of the testator in the ordering and disposing thereof.[19]

What can be perceived in the judicial attitude during most of the seventeenth century is a permissive attitude towards charitable bequests and gifts. Chancellors in equity extended themselves "to perfect the imperfect charitable gift and generously [apply] the cy-pres doctrine to prevent endowments from reverting into the uncharitable hands of the testator's heir or next of kin."[20]

What can be detected in the latter part of the seventeenth and through most of the eighteenth century is the growth of a countervailing trend towards a more restrictive attitude. Gareth Jones has identified some of the reasons why there may have been a change in sentiment:

> [It has been traditional] to represent the years 1680 to 1760 as the dark age of English philanthropy [Lecky, A History of England in the Eighteenth Century, II (London, 1898, 126 ff)]

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[19] Ibid.

[20] Jones, op. cit., p. 105.

> . . . where the poor were depicted as contentedly wallowing in their own, self-imposed degradation and where the charitable impulse was dismissed as unworthy of any responsible pater familias . . . [Furthermore, the] years between 1736 and 1750 have been said to mark a "low ebb of public decency, order and principle" [G.F.A. Best, Temporal Pillars (Cambridge, 1964), p. 94]. They saw the climax of an anti-clerical movement which had been gathering momentum . . . and which manifested itself in public insult of the church and calumny of the clergy. . . . The laity feared the wealth of the church; they feared that great ecclesiastical charities . . . would garner in all the land of the kingdom. . . .[21]

The change in the sentiment of the courts can be seen, for instance, in the fact that the principles governing the perfecting of imperfect gifts and altering of charitable trust provisions began to be strictly construed. Additionally, oral wills devising lands to charity, after the Statute of Frauds (1677), were not sustained under a rationale that certain transactions should be evidenced by writing as a means of preventing fraud, presumably fraud even with regard to charitable transactions.

Even prior to this more restrictive period, at a time when social policy had provided a conducive atmosphere for upholding imperfect charitable

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[21] Ibid., pp. 105-109; 134-138.

arrangements, certain common law principles had served to limit the power of the court of chancery to alter those arrangements. Professor Jones indicates that a number of limitations, including "remote possibilities, bare conditions, 'things that yield no profit' . . . could not be granted to charitable uses."[22]

During the predominantly restrictive period from about 1680 to 1750, the courts reinforced the notion that other principles, as embodiments of social policy, should take precedence over the Statute of Charitable Uses. A primary example can be observed in the application of the rule against perpetuities, which had matured as a common law principle during the seventeenth century.[23] The rule restricted the power of an individual to limit or condition the vesting of title to a time in the remote future. Public policy dictated that property should not be unalienable, that is out of the stream of commerce, for a period beyond twenty-one years, plus nine months. The validity of a future

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[22]Ibid., p. 70, citing Duke, op. cit.

[23]See, 70 C.J.S. Perpetuities §2(c), pp. 567-577. (1951); see this chapter note 78 and chapter 3, note 148 and accompanying texts infra.

interest, therefore, depended on its remoteness and the contingency of its occurring. An example of the strict application of the rule is illustrative.

In Gwyn v. Parker,[24] the Chancellor refused to sustain an intervivos (between the living) appointment of a remainder interest to charity where the remainder followed a devise in tail. Jones indicates the Chancellor as stating, "'the remainder *[is]* void as much as a remainder after a fee', he declared. '*[T]*he mischief of perpetuity is still the same and greater, for all men would so settle their lands if they might.'"

A number of cases involving colleges and universities reflect the restrictive sentiment of the period. In a situation involving an imperfect gift, the court in Attorney-General v. Barnes[25] held that a devise of land to Sidney Sussex College at Cambridge was void because the will devising the land was void. The appointment to the College failed because the attestation requirements of the Wills Act of 1540 had not been met.

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[24](1678), as reported by Jones, op. cit., p. 71.

[25]2 Vern. 597, Prec. Ch. 270, Eq. Cas. Abr. 97, pl. 7 (1708); compare chapter 3, note 38 and accompanying text.

Likewise, a strict attitude can be perceived in Attorney-General v. Lady Downing,[26] where the court refused to perfect a defect in a devise of property to Downing College. The defect resided in the fact that the College had not received its articles of incorporation at the time that its remainder interest was to take effect.

Regarding the application of cy pres during the latter part of the seventeenth century, it seems that the attitude of flexibility present in the Emmanuel College case above was not present in Attorney-General v. The Lady Margaret and Regius Professors of Divinity in the University of Cambridge,[27] where the terms of the trust at issue had provided for the election of a lecturer in divinity. The University argued that the trust stipulations concerning the qualifications of the lecturer and the duties he was to perform were onerous. With the consent of the heir-at-law the University sought to have the trust's terms made more reasonable. However, the court rejected their request to vary the trust stating that "they [the university]

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[26] Ambl. 571 (1769).

[27] 1 Vern. 55 (1682).

should be held to the letter of the charity."[28]

The judicial shift from a permissive to a restrictive policy, which coincided with an increase in anticlerical sentiment, may also have resulted because of certain perceived abuses by charities in general. This latter fact did cause a corresponding shift in attitude in Parliament because of concern over the social implications of death-bed gifts to charity.

The Mortmain Act, 1736

Over the period of several centuries the feudal lords had attempted to control the accumulation of property by the church through the passage of mortmain, or "dead hand", statutes. The first of these "enacted to meet the evil of land falling into the dead hand, *[and]* designed to protect the feudal rights of the mesne lords," was incorporated into the Magna Charta.[29] It was a different evil which Parliament sought to remedy in 1736, namely the disinheritance of heirs-at-law by testators. What factors were influential

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[28] Ibid., as cited in Jones, op. cit., p. 75.

[29] Jones, op. cit., p. 112; 9 Hen. 3, c.36 (1224); see also A. Scott, The Law of Trusts (3d ed.; St. Paul: American Law Institute Publishers, 1967), IV, § 362.1.

in the passage of this act? Based on his research, Gareth Jones indicates a partial answer:

> The legal evidence, at least, suggests that an influential segment of the community, the judiciary and legal profession, remained suspicious of the worth of charity and resentful of the death-bed gift which disinherited the testator's heir-at-law and next-of-kin.[30]

William Cobbett suggests that the Mortmain Act resulted from a number of incidents of "injudicious charitable gifts" which had caused considerable suffering by the heirs.[31] He makes reference to a particularly flagrant incident where a Mr. Mitchell (possibly Michel) had left a considerable estate to Queen's College, Oxford.

Whatever the catalyst, Parliament passed the Mortmain Statute in 1736.[32] Its effect was to make void <u>all</u> charitable gifts made either by devise or deed twelve months before the death of the donor. While the general effect on colleges and universities was to limit a valuable source of support, not all schools were to suffer from the restriction:

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[30] Jones, op. cit., p. 106.

[31] William Cobbett, <u>The Parliamentary History of England</u> (London, 1811), 9:1110, as cited by Jones, op. cit., p. 109, n.3; Jones feels that the catalyst for the passage of the act is not clear.

[32] 9 Geo. 2, c. 36.

> Petitions for exemption were presented from the universities and colleges of Oxford and Cambridge, and from Eton, Westminister and Winchester; these were subsequently granted. These petitioners were said to be the only public foundations "either useful or necessary in this Kingdom."[33]

The Mortmain Statute created many problems for the courts. First, it created considerable litigation, and second, it posed a variety of problems in interpretation, which made the application of the principles to cases difficult.[34]

The English body of the law of charity with its ambivalent aspects would largely be adopted but then modified in America. The next section will consider that development up to 1900. Particular emphasis will be placed on the development in Pennsylvania.

American Law from 1800 to 1900

Philanthropy in colonial America flourished partly as a result of the tradition of charity which

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[33]Jones, op. cit., p. 111, citing William Cobbett, op. cit., p. 1156.

[34]See, for instance, Attorney-General v. Whorwood, 1 Ves. Sen. 534, 536 (1750); Ves. Sen. Supp. 236, 240 (1756) (the court had difficulty in determining if the devise to establish a fellowship with unusual duties was academic; on rehearing the trust was declared to be wholly void as being inconsistent with college regulations).

had been transplanted from England but more so because of the immediacy of the social needs in the new land. From the very beginning of the American experience the law of charity seemed to exhibit a more permissive approach to providing for social needs, for instance in the favorable interpretation of charitable schemes even when they were imperfectly drawn.[35]

It was not long before the courts and the legislatures in the new land had to face questions as to what extent the American law of charity should follow the principles of the English system and to what extent should the needs of America govern the formulation of the law of charity. Initially, a more permissive sentiment towards charity seemed to be predominant, but from 1800 to 1900 variations--between permissiveness and restrictiveness--can be observed in the law of various states and even within the law of a particular state.

Professor Howard S. Miller has characterized the process of the formulation of the American law of charity as follows:

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[35]Howard S. Miller, op. cit., p. ix. Much of the initial content of American law section in this chapter has been drawn from Professor Miller's excellent research and analysis. Miller is to be credited with using the permissive/restrictive notion which has been adopted in this study.

> America charity law has been an organic expression of American social life, conditioned by it, yet in turn conditioning it. Complex social forces, not syllogisms or rules of precedent, have determined its content and spirit. By defining the ways in which philanthropic individuals could convey their property, to whom, and for what purposes, the law of philanthropy has helped shape the character of American society.[36]

Before previewing more specifically the subjects to be presented in this section, a brief comment should be made as to the importance of private giving for the development of institutions of higher education in early America.

Arnaud C. Marts has commented that ten of today's major colleges and universities founded before the revolution were established through private philanthropy. These schools include: Harvard, William and Mary, St. John's at Annapolis, Yale, University of Pennsylvania, Princeton, Columbia, Brown, Rutgers and Dartmouth. Most schools established in the nineteenth century had private origins.[37] Most of these schools continue to receive considerable support

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[36] Ibid., p. xiii.

[37] Arnaud C. Marts, Philanthropy's Role in Civilization (New York: Harper & Brothers, Publishers, 1953), p. 30.

from private philanthropy.

As with the discussion of the English law of charity above, the American charity law of the nineteenth century will be presented in a roughly chronological fashion. The discussion will begin with early colonial and state policy, as revealed by legislation and constitutional provisions. The emergence of an ambivalence in the public policy will be demonstrated in several major United States Supreme Court decisions in 1819 and 1844. The next focus will be on state court treatment of the cy pres doctrine. Following this will be a brief examination of the rule against perpetuities in the mid-nineteenth century and then the legislative enactment of cy pres and mortmain acts in Pennsylvania in 1855. Lastly, we will consider the tangential involvement of the federal government with the Land Grant Act of 1862.

Colonial Legislation and State Constitutions

The Puritans in New England and the Quakers in Pennsylvania were instrumental in establishing a philanthropic tradition in America. Under the Quakers' influence the Pennsylvania Assembly in 1712 passed an act to allow societies such as the Quakers to receive

and hold gifts for churches, schools, and hospitals.[38] Because of the ex post facto nature of the statute, the Crown vetoed the act. It was not until 1731, after several unsuccessful revision attempts, that the Pennsylvania Assembly was able to enact an acceptable version of the 1712 act.[39] Essentially, the new version confirmed the "legality of gifts for charitable purposes."[40]

In order to counteract some of the legal uncertainty which characterized the early American law of charity, states like Massachusetts and Pennsylvania incorporated provisions which would encourage charity and education. For instance, both the 1776 and 1790 versions of the Pennsylvania State Constitution contained sections which promoted the founding of charitable organizations and guaranteed property rights for those charities.[41] In 1791 the Pennsylvania Assembly passed legislation which would facilitate the incorporation

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[38]Statutes at Large of Pennsylvania, Chap. 178; James T. Mitchell, Henry Flanders, et al., comps., Statutes at Large of Pennsylvania (18 vols., n. p., 1896-1915), 2:424-425.

[39]Ibid., Chap. 320; Mitchell and Flanders, Statutes at Large of Pennsylvania, 4:208-209.

[40]Miller, op. cit., p. 6.

[41]Ibid., pp. 15-16.

of charitable, literary or religious societies.[42]

Vermont followed Pennsylvania's example by incorporating a similar provision into its constitution in 1777 (modeled after Pennsylvania 1776 version). Massachusetts and New Hampshire, likewise, wrote constitutional provisions favoring charitable uses. Rhode Island and Connecticut had colonial statutes, favoring charitable uses, which had remained in force, and New York passed a statute favoring charitable uses in 1784. On the other side, Virginia's legislature in 1806 erected a statutory barrier to gifts to religious organizations and also refused to act on charters of incorporation made by all religious groups and most secular groups. In addition, a variety of court decisions in both Virginia and Maryland reflected a definite anti-charity posture. By the 1830's the restrictive "Virginia Doctrine" was firmly in place. The influence of this doctrine would reach beyond the boundaries of the state, even to the United States Supreme Court.[43]

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[42]Mitchell and Flanders, op. cit., Statutes at Large of Pennsylvania, 14:50.

[43]Miller, op. cit., pp. 16-20; 25-28.

The United States Supreme Court and Emerging Policy

By 1819 most states followed either a permissive policy, like Pennsylvania, or a restrictive policy, like Virginia. In that year there were two major cases before the Supreme Court of the United States which would have an impact on giving to institutions of higher education and on the further development of charity law.

The famous case of Trustees of Dartmouth College v. Woodward[44] and the lesser known Philadelphia Baptist Association v. Hart's Executors[45] would reflect an uncertainty in Chief Justice John Marshall's and the Supreme Court's conception of the proper application of the law of charity.[46]

In Dartmouth College Marshall seemed favorably disposed to educational philanthropy. The case held in essence that a New Hampshire statute passed in 1816 to reorganize the College under state control violated the United States constitutional provision which prohibited state impairment of contracts. The contract in this

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[44] 4 Wheaton 518, 4 L. Ed. 629 (1819).

[45] 4 Wheaton 1, 4 L. Ed. 499 (1819).

[46] Miller, op. cit., p. 24.

instance was the original charter of incorporation.

Part of Marshall's opinion directly addressed what he felt should be the government's attitude towards philanthropy to private higher education. He maintained that it "must be disposed rather to encourage than to discountenance" donations to educational institutions.[47] He stated that New Hampshire should not be allowed to vary the charter because, apart from the constitutional violation, the effect would be to frustrate philanthropic motivations. At one point he commented on the motivation for educational donations:

> It requires no very critical examination of the human mind to enable us to determine, that one great inducement to these gifts is the conviction felt by the giver, that the disposition he makes of them is immutable . . . All such gifts are made in the pleasing, perhaps delusive hope, that the charity will flow forever in the channel which the givers have marked out for it.[48]

On the face of it the language seems to reflect a permissive or supportive attitude towards charity and to gifts to higher education. It is, therefore, somewhat puzzling and difficult to mesh Marshall's attitude in this case with his decision in Philadelphia Baptist

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[47] Trustees of Dartmouth College v. Woodward, 4 Wheaton 518, 647, 4 L. Ed. 629, 661 (1819).

[48] Ibid.

Association (hereafter designated as Hart).

Silas Hart, a Virginian, had left a bequest to the Baptist Association for the purpose of educating Baptist youths for the ministry. His executors, however, refused to turn over the bequest. In the suit which followed (and which reached the United States Supreme Court almost twenty-five years after Hart's death) the basic arguments by the executors were that 1) the Association was unincorporated at Hart's death, 2) as a charity, its purpose was vaguely defined, and 3) Virginia had repudiated the Elizabethan Statute of Charitable Uses.[49] Therefore, reasoned the executors, the bequest should fail.

The Association argued that chancery courts in England had sustained uncertain bequests long before the Statute of 1601 and that under the Supreme Court's equity powers, it could sustain the trust.

Marshall, with Justice Joseph Story concurring, accepted the executor's arguments and held that the bequest should fail. He based his holding on the notion that in charity cases charitable purposes were to be judged by the Elizabethan Statute of Charitable

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[49] 4 Wheaton at 6-7.

Uses. He rejected the Association's argument that the courts of chancery in England had upheld defective charitable bequests prior to the Statute.[50]

What followed, rather than a unification in the law, was a continuing split in the attitudes of state courts on the scope of valid charitable uses. Some followed the Hart rationale; others attempted to attack it. Virginia and Maryland followed a restrictive policy while New York and Pennsylvania maintained a permissive policy. A major challenge to the Hart holding and its underlying rationale "that the Statute of Charitable Uses was the fountainhead of philanthropy"[51] would be launched in a series of Pennsylvania and New York state court decisions.

In brief, the decisions which provided the basis for the ultimate reversal of the Hart precedent were as follows:

1) Whitman v. Lex,[52] where the Pennsylvania Supreme

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[50] 4 Wheaton at 38, 4 L. Ed. at 506.

[51] Miller, op. cit., p. 29.

[52] 17 Serg. & Rawl. 88 (Pa. 1827). Note that while Pennsylvania courts favored charitable uses at this time, "The Pennsylvania legislature, a long-time advocate of a permissive policy, began to balk at incorporation petitions from charitable associations. In both 1831 and 1832 the legislative committee on corporations refused either to renew or to grant charters to missionary societies, church congregations, library companies, and charity schools and hospitals." (Miller, op. cit., p. 19).

Court upheld an uncertain bequest for the poor and for the education of Lutheran ministers on the basis that the court possessed equitable power to do so, independent of any English statute.

2) McCartee v. The Orphan Asylum,[53] where the New York Supreme Court upheld a residuary bequest to the Society on the basis that "from the times of highest antiquity, and long before the Statute of Elizabeth, . . . the equity powers of the court were applied . . . to cases of charitable uses."

3) Magill v. Brown,[54] where the United States District Court for the Eastern District of Pennsylvania, persuaded by arguments that charity policy should be based on social conditions in America, upheld bequests to unincorporated Quaker societies.[55]

In Magill, Henry Baldwin, the presiding judge who was eventually appointed to the United State Supreme Court, demonstrated (via thorough research) that the twenty-one acceptable uses of the Elizabethan Statute were only suggestive and that an almost endless number of uses had been upheld by the English chancery courts prior to 1600.

In spite of the power of Baldwin's arguments, contrary decisions persisted in the years after Magill;

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[53] 9 Cow. 473 (N.Y. 1827).

[54] Federal Case No. 8952, 408-409 (E. D. Pa. 1833).

[55] Professor Howard S. Miller analyzes these cases in greater detail in his book, op. cit., pp. 29-35.

the restrictive-permissive dichotomy would persist for another ten years. A number of courts refused to budge from a restrictive view simply on the weight of the Hart precedent. The debate over charitable uses became resolved to a considerable extent in 1844 with the landmark Girard Will Case.[56]

When Stephen Girard died in 1831, he had accumulated a sizable fortune. His will directed that a large portion of his estate be established in trust by the City of Philadelphia for the purpose of establishing a college for poor white orphan boys. Girard's heirs challenged the will on several grounds. When the case reached the United States Supreme Court, three major issues were presented: first, whether Philadelphia was capable of receiving a bequest to erect a college; second, whether the proposed uses were charitable uses which were valid under the law of Pennsylvania; and third, whether, if void, the fund

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[56] Vidal v. Girard's Executors, 43 U.S. (2 How.) 127, 11 L. Ed. 205 (1844). See, Perin v. Carey, 65 U.S. (24 How.) 465 (1860) (under Ohio law a devise in trust to the City of Cincinnati to establish two colleges for the education of orphan boys and girls was held to be valid).

should go to the city or to the heirs of Girard.[57]

Horace Binney, who represented the City, argued that the city charter of 1702 and a special act of the legislature had permitted the City of Philadelphia to receive and execute such trusts. On the second issue Binney presented a comprehensive analysis of the origins of charitable uses and of the role of equity in defining the law of charity.

Daniel Webster, who represented Girard's heirs, focused his attack on the "anti-Christian" aspects of the educational plan for the college, i.e. that the exclusion of ministers from the college was against the public policy of the state.

Binney's more careful analysis prevailed. Justice Joseph Story, who had sided with Marshall in the Hart decision, presented the opinion of the court. The decision, which was unanimous, held that the will and the charitable devise to establish the college were valid. Story determined that:

> [T]here is nothing in the devise establishing the college, or in the regulations and restrictions contained therein, which are inconsistent with the Christian religion, or are opposed to any known policy of the state of Pennsylvania.[58]

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[57] 43 U.S. (2 How.) at 186.

[58] Ibid. at 201.

Regarding the charitable uses issue, the court stated:

> [A]s to the validity of the trusts for the erection of the college, . . . the trusts are of an eleemosynary nature, and charitable uses in a judicial sense, [of that] we entertain no doubt. Not only are charities for the maintenance of the relief of the poor, sick, and impotent, charities in the sense of the common law, but also donations given for the establishment of colleges, schools, and seminaries of learning, . . . [59]

In a specific sense, the opinion endorsed the validity of bequests and devises for institutions of higher education, but in a more general sense the court embraced a more permissive law of charity.

With regard to the court's prior position in the Hart case, Story stated that:

> Upon a thorough examination of all the authorities and all the lights, (certainly in no small degree shadowy, obscure, and flickering,) the court [in Hart] came to the conclusion that, at the common law, no donation to charity could be enforced in chancery, . . . [60]

His opinion continued with a concession that additional evidence had revealed cases in the English courts of chancery, prior to the Statute of Charitable Uses, where equity had entertained jurisdiction over

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[59] Ibid. at 191-192.

[60] Ibid. at 193.

charities. Story stated then that:

> Whatever doubts, therefore, might properly be entertained upon the subject when [Hart] was before the court, . . . those doubts are entirely removed by the late and more satisfactory sources of information to which we have alluded.[61]

Certainly, the significance of the decision is underscored by Professor Miller's observation that the outcome must have been a handsome victory for Associate Justice Henry Baldwin, who had rendered the decision in Magill. Furthermore, "For American philanthropy, it was a pledge of support from the highest court in the land."[62] However, in spite of the victory on the charitable uses issue, it should be observed that the restrictive policy sentiment was not dead but would continue to emerge periodically in different forms.

It should also be observed that the will of Stephen Girard would create additional litigation during the next hundred and twenty years. A discussion of the issues raised in the several cases will be deferred.[63]

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[61] Ibid., at 196. Girard College opened in 1848.

[62] Miller, op. cit., p. 39.

[63] See this chapter, note 74 and chapter 3, notes 108, 154 and 320 et seq. and accompanying texts infra.

The State Courts and the Cy Pres Doctrine

According to Edith L. Fisch,[64] the application of the cy pres doctrine in America was delayed because:

> Until the middle of the nineteenth century a number of states rejected charitable trusts and hence . . . the need to apply the doctrine was rarely felt. Also the failure to distinguish between prerogative and judicial cy pres together with the belief that the doctrine was an aspect of the absolute right of kings, and hence undemocratic . . . created extreme judicial hostility to the doctrine.

The distinction between judicial and prerogative cy pres stems from the source of their sanction. The first was purely judicial in origin, whereas, the second evolved as an ultra-judicial function at equity to give effect to indefinite charities on behalf of the sovereign. Prerogative cy pres "has never been recognized as belonging to courts of equity in the United States."[65]

Fisch's research indicates that "of the fifteen

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[64] Edith L. Fisch, Doris J. Freed, and Ester R. Schachter, Charities and Charitable Foundations (Pomona, N.Y.: Lond Publications, 1974), p. 416; Edith Fisch, The Cy Pres Doctrine in the United States (New York: Matthew Bender & Co., 1950), p. 115, n.1.

[65] 14 C.J.S. Charities §51, pp. 511-512. See note 18 and accompanying text, supra.

states which by 1860 had occasion to consider the cy pres doctrine, the courts of ten states had either condemned or repudiated the doctrine."[66]

In Pennsylvania the early legal sentiment, as has been mentioned, was predominantly in favor of charitable purposes.[67] However, some Pennsylvania judges were distrustful of the cy pres doctrine. For instance, the Pennsylvania Supreme Court in Methodist Church v. Remington[68] decided that equitable powers of the court would not be exercised to sustain a charitable trust if some aspect of the public policy would be breached by the action. In this case the trust was established for a "foreign [religious] society", i.e. one not purely local in origin, and therefore one which was not within the parameters of a valid charitable purpose under Pennsylvania law.

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[66]Edith L. Fisch, The Cy Pres Doctrine in the United States (New York: Matthew Bender & Co., 1950), p. 115, n.1; the ten states condemning cy pres were: Alabama, Connecticut, Georgia, Iowa, New York, North Carolina, Pennsylvania, South Carolina, Tennessee, and Virginia. Reluctance to apply the doctrine, according to Fisch, was based in a confusion between judicial and prerogative cy pres and a concern about violating the separation of powers concept.

[67]See, e.g., Whitman v. Lex, 17 Serg. & Rawl. 88 (Pa. 1827), which is discussed at note 52 and accompanying text, supra.

[68]1 Watts 218 (Pa. 1832).

Chief Justice John Gibson, as dictum, condemned the cy pres doctrine:

> The original trust, though void, was not a superstitious one; nor if it were, would the property, as in England, revert to the state for the purpose of being appropriated in eodem genere, as no court here possesses the specific powers necessary to give effect to the principle of cy pres, even were the principle itself not too grossly revolting to the public sense of justice to be tolerated in a country where there is no ecclesiastical establishment.[69]

Almost twenty years later Pennsylvania Supreme Court Justice Thomas S. Bell in Wright v. Linn[70] commented on the state's policy concerning the judicial determination of charitable uses. In the context of that comment he mentioned the status of cy pres in 1850. He stated, "*[W]*e have adopted not only the principles that properly emanate from *[*the English Statute of Charitable Uses*]* but, with perhaps the single exception of cy pres, those which by an exceedingly literal construction, the English courts have engrafted upon it."

At about the same time a similar sentiment was expressed in a Massachusetts case. While Pennsylvania

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[69] Ibid. at 226; this seems to be a notable example of a court's confusion of judicial cy pres with the prerogative cy pres doctrine.

[70] 9 Pa. 433, 435 (1848).

courts did not recognize cy pres at this time, Massachusetts did, but was, however, reluctant to apply it. In Harvard College v. Society for Promoting Theological Education[71] a trust fund had been established by several individuals for theological education at Harvard College and at its affiliated divinity school. The College trustees claimed that because of diverse educational goals in theology between the College and the divinity school the funds could not be conveniently managed. They sought to vary the trust by setting up an independent board to manage the divinity school fund. However, the court refused their request on the ground that the cy pres doctrine could not be used to vary a trust solely on the ground of expediency. It stated:

> A contrary decision would furnish a precedent dangerous to the perpetuity and sacredness of all our great charities, leaving the question of the management and supervision of our public charities to the subject of change with every fluctuation of popular opinion as to what may be the more expedient and useful mode of administering them.[72]

In the face of an unsupportive judicial attitude in Pennsylvania the legislature decided in 1855

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[71] 3 Gray 280 (Mass. 1855).

[72] Ibid. at 301.

to enact legislation which mandated the judicial application of the cy pres doctrine.[73] A change in judicial attitude did eventually follow the enactment, but it is not clear whether the act was the catalyst for the change or whether the acceptance of the doctrine also resulted from a clarified understanding of the concept by the judiciary, i.e. of the distinction between prerogative and judicial cy pres.

It is evident that the low opinion of the doctrine shown by Chief Justice Gibson in Methodist Church in 1832 was not shared in 1863 by Chief Justice Walter Lowerie in the case of City of Philadelphia v. The Heirs of Stephen Girard.[74]

In this subsequent attack on Stephen Girard's Will, the Girard heirs brought an action in ejectment against the City of Philadelphia to recover twenty tracts of coal lands. The rents from these lands were being partly applied to purposes of Girard College. As part of their action, the heirs objected to the mode of administering the property and its accumulations.

The specific fault of the trust, they claimed,

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[73] See note 83 and accompanying text infra.

[74] 45 Pa. 9 (1863).

was that it violated the rule against perpetuities by requiring that "the real estate shall never be alienated, and that the principal of the personal estate shall be a permanent fund for ever [sic], and shall be increased continually by any surplus income that may annually arise."[75]

The Pennsylvania Supreme Court held that:

> [A] present gift to a charity is never a perpetuity, though intended to be inalienable . . . that whatever restraints are put upon the alienation of the property, they do not transgress the rule [against perpetuities], because they have no relation to the vesting of the estate or interest.[76]

In answering the argument of the heirs as to the mode of administering the trust, the court expounded at length on the doctrine of cy pres. Chief Justice Lowerie stated:

> Possibly some of the directions given for the management of this charity are very unreasonable and even impracticable; but this does not annul the gift. The rule of equity on this subject seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity, for equity will substitute

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[75] Ibid. at 26.

[76] Ibid. at 26-27. For additional discussion of the rule against perpetuities as applied to charities, see note 23 supra and note 78 infra and accompanying texts; see also chapter 3, note 146 and accompanying text infra.

> another mode, so that the substantial intention shall not depend on the insufficiency of the formal intention . . .[It is] a reasonable doctrine, by which a well-defined charity, or one where the means of definition are given, may be enforced in favour of the general intent . . . with as close approximation to that scheme as reasonably practicable; and so, of course, it must be enforced.[77]

A more extensive discussion of specific cy pres doctrine issues will be deferred until later because the twentieth century cases more clearly illustrate the range of implications of the doctrine for colleges and universities. The major issues which may arise are:

1. Whether a valid charitable trust exists?

2. To what degree are there circumstances of impossibility or impracticability of literal compliance with the trust?

3. And whether there exists a general charitable intent within which a variation of the specific intent may be permitted?

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[77] Ibid. at 27-28 (dictum). Note that the cy pres doctrine has also been equated with the doctrine of approximation. Actually, as the City of Philadelphia opinion states, the latter concept is even broader. The doctrine of approximation "is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence" (at 28). Defined elsewhere, the doctrine of approximation is "in the nature of a judicial construction of the trust as intended by the grantor when considered in the light of changed conditions, . . ." (14 C.J.S. Charities §50, p. 511 (1960)).

Pennsylvania's Rule Against Perpetuities

The English common law rule against perpetuities was adopted in America by its courts. The rule has been stated that "no interest is good . . . unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[78] The purpose of the rule is to prohibit the unreasonable restraint on the alienation of property.

The Pennsylvania legislature, and a number of other states, codified the rule. Some statutes have entailed modifications of the rule. The Pennsylvania version in 1853[79] is an example which addresses itself to the disposition of property and accumulations:

> That no person or persons shall, after the passing of this act, by any deed, will, or otherwise, settle or dispose of any real or

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[78] 70 C.J.S. Perpetuities §3, p. 577 (1951); see chapter 3, note 147 et seq. and accompanying text infra.

[79] Act of April 18, 1853 Pa. Laws 503, §9 (subsequent versions of the rule were: Act of May 25, 1939 Pa. Laws 201, §1; Act of April 24, 1947 Pa. Laws 100, §6; Act of Feb. 17, 1956 Pa. Laws 1073, §§2, 3; Act of June 30, 1972 Pa. Laws 508, §2 (20 PA. CON. STAT. ANN. §6106 (Purdon)) (the state passed a more generalized rule against perpetuities later--Act of May 26, 1891 Pa. Laws 119, §1; (the current version--20 PA. CON. STAT. ANN. §6104) (Purdon).

personal property, so and in such manner that the rents, issues, interest, or profits thereof, shall be wholly or partially accumulated for any longer term than the life or lives of any such grantor or grantors, settler or settlers, [sic] or testator, and the term of twenty-one years from the death of any such grantor, settler, or testator . . . and in every case where any accumulation shall be directed otherwise . . . such direction shall be null and void in so far as it shall exceed the limits of this act.

A major exception to the operation of the rule was provided by the act:

> Provided, that any donation, bequest, or devise, for any literary, scientific, charitable, or religious purpose, shall not come within the prohibition of this section. . .[80]

Corpus Juris Secundum describes the relationship of the rule against perpetuities to charitable dispositions as follows:

> Trusts for charitable uses commencing in praesenti or within the period of the rule against perpetuities are not obnoxious to the rule, although they may continue forever and beneficial interests may arise under them at a remote time, as long as the property given in trust vests in the trustee immediately or within

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[80]See McHugh's Estate, 11 C.C. 205, 1 Dist. 154, 29 W.N.C. 575 (1892), reversed on another point, 152 Pa. 442, 25 A 875 (1893) (a gift to charity was not within the 1853 act). But cf. Rogers' Estate, 18 Phila. 99, 43 L.I. 292 (1886) (section 9 gave no new equalities to charitable gifts which were still open to operation of the rule against perpetuities as to the requirement that the gift vest within the period.)

the period prescribed by the rule, . . .[81]

The application of this interpretation of the rule against perpetuities is clearly present in the City of Philadelphia case discussed in the last section.

Pennsylvania's Cy Pres/Mortmain Act, 1855

The continuing ambivalence of public policy on charities is nowhere illustrated so clearly as in "An Act Relating to Corporations and to Estates Held for Corporate, Religious and Charitable Uses."[82] Contained within the same Pennsylvania act are provisions which on one hand protect charitable trusts and on the other, either directly or indirectly limit charitable dispositions.

The provisions of greatest importance for this

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[81] 70 C.J.S. Perpetuities §30, pp. 613-614; see chapter 3, note 150 and accompanying text infra.

[82] Act of April 26, 1855 Pa. Laws 328 (the current status of the various sections of the act are described in the notes below).

study are sections 10[83] and 11.[84] Other relevant sections of the act will be discussed briefly.

A search of the legislative history of this act sheds little light on the motives for its passage.[85] The bill was strongly opposed by Roman Catholics as is evident from the fact that remonstrances to the bill from various Catholic groups were read on seven different occasions.[86] Their objection was mainly directed to section 6, which regulated titles to real

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[83]Ibid., §10 (subsequent versions of this section were: Act of May 26, 1876 Pa. Laws 211, §1; Act of July 7, 1885 Pa. Laws 259, §1; Act of May 9, 1889 Pa. Laws 173, §1; Act of May 23, 1895 Pa. Laws 114, [in essence re-enacting the 1855 law]; Act of April 24, 1947 Pa. Laws 100, §10; and Act of June 30, 1972 Pa. Laws 508, §2 (20 PA. CON. STAT. ANN. §6110) (Purdon). New York passed a similar act in 1893--the Tilden Act (Personal Property Law, §12)--codifying the cy pres doctrine in langauge similar to the Pennsylvania Act, section 10.

[84]Ibid., §11 (20 PA. CON. STAT. ANN. §2507(1)) (Purdon) (repealed as amended, 1976 Pa. Laws 55, No. 135, §8).

[85]Commonwealth of Pennsylvania, Journal of the Senate (Harrisburg: A. Boyd Hamilton, State Printer, 1855); Commonwealth of Pennsylvania, Legislative Record (Harrisburg: _____, 1855).

[86]Commonwealth of Pennsylvania, Journal of the Senate, ibid., pp. 177, 248, 382, 393, 419, 438 and 515.

estate held by ecclesiastics. There were few amendments and only one was significant. On April 5, 1855, an amendment to eliminate the escheat provision from section 10 lost by a margin of 4 votes.[87]

The Senate passed the remaining sections with no objection and the House approved the entire bill without any changes on April 24, 1855.[88] The bill was signed into law by the governor two days later.

Section 10,[89] which is a statutory mandate for the judicial application of the cy pres doctrine, reads in part as follows:

> That no disposition of property hereafter made for any religious, charitable, literary, or scientific use, shall fail for want of a trustee, or by reason of the objects being indefinite, uncertain, or ceasing, . . . but it shall be the duty of any orphans' court, or court having equity jurisdiction in the proper county to supply a trustee, and by its decrees to carry into effect the intent of the donor or testator, so far as the same can be ascertained, and carried into effect consistently with law or equity; . . . if the objects of the trust be not ascertainable, or have ceased to exist, or such disposition be in excess of the annual value permitted by law, or in perpetuity, such disposition, so far as exceeding the power of the courts to determine the same by the rules of law or equity, shall be

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[87] Ibid., pp. 655-656 (yeas--13; nays--16).

[88] Ibid., p. 836.

[89] Act of April 26, 1855 Pa. Laws 328, §10.

> taken to have been made subject to be further regulated and disposed of by the legislature of this commonwealth, in manner as nearly in conformity with the intent of the donor or testator . . . as practicable or otherwise, to accrue to the public treasury for the public use.

Juxtaposed with the permissive legislative endorsement of judicial cy pres are several restrictive sections. Section 11,[90] which is a Mortmain Statute, reads in part as follows:

> That no estate, real or personal, shall hereafter be bequeathed, devised, or conveyed to any body politic, or to any person in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and, at the time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto; shall be void and go to the residuary legatee or devisee next of kin, or heirs, according to law. . . .

Several states, like Pennsylvania, passed acts patterned after or similar to the Georgian Statute of Mortmain.[91] The Pennsylvania provision differed

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[90] Act of April 26, 1855 Pa. Laws 328, §11.

[91] Statute of Mortmain, 9 Geo. 2, c. 36 (1736). See note 29 and accompanying text, supra; New York passed a Mortmain Statute in 1829 which stated that "no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter, or by statute, to take by devise." (B.F. Butler and J.C. Spencer, comps., The Revised Statutes of the State of New York, as Altered by the Legislature (2d ed.; Albany, 1836), 3:627.

from the English statute in two major ways. First, the time period for a valid charitable bequest made prior to the donor's death was one month in Pennsylvania versus one year in England. Second, the English statute provided a limited exemption for several major institutions of higher education, whereas, the Pennsylvania act provided no exemptions.

The rationale of mortmain has been explained variously; for instance, one authority has summarized the rationale as follows:

> The motive behind these statutes is not hostility to charity but rather a desire to prevent undue influence upon the testator and to protect his family against unwise generosity. The statutes are intended to require gifts to charity to be made with proper deliberation and at a time when the testator is in at least reasonably competent physical condition. They seek to retain for the close relatives of the testator a fair share of his estate against the claims of charity.[92]

In Pennsylvania the rationale, stated in a twentieth century case, was as follows:

> The basic purpose of the 30 day requirement was and is to prevent a testator during his last illness from being importuned or otherwise

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[92]George T. Bogert, The Law of Trusts and Trustees, (rev. 2d ed.; St. Paul, Minn.: West Publishing Co., 1977), §326, p. 566; see William J. Bowe and Douglas H. Parker, Page on the Law of Wills (Cincinnati: The W. H. Anderson Co., 1960), I, §3.16, p. 108.

> influenced, by hope of reward or fear of punishment in the hereafter, to leave his estate in whole or in part to charity or to the church.[93]

While it is not clear from the traditional expositions of the mortmain rationale whether death-bed gifts to institutions would be motivated by concerns about the hereafter; hypothetically, such gifts could be motivated by a dying donor's desire to be memorialized. Such a motive would arguably be considered as falling under the above rationale.

In any case the mortmain provision of section 11 seems to have escaped any major attacks during the nineteenth century. The Pennsylvania Supreme Court commented as dictum in 1880 that the statute was constitutional.[94] Justice James Sterrett stated in Rhymer's Appeal that:

> While the propriety of legislation which thus limits the right of giving for religious or charitable purposes may sometimes have been questioned, it has never been doubted that the act is constitutional, . . .

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[93] McGuigen Estate, 388 Pa. 475, 478, 131 A. 2d 124, 126 (1957) (Bell, J.) (dictum).

[94] 93 Pa. 142, 146 (1880) (residuary bequest to church was charitable and therefore within the prohibition of the Act).

The validity of this Mortmain Statute remained unshaken for over one hundred years.[95]

Other pertinent sections of the 1855 Act included section 4,[96] which stated in part:

> That it shall not be lawful for any unincorporated literary, religious or charitable society . . . to acquire and hold . . . real or personal property that in the aggregate is of a greater yearly value than if incorporated it would be allowed to hold under the general laws of this commonwealth. . . .

And section 8[97] which stated in part:

> That any literary, religious, charitable or beneficial society, congregation, association, or corporation having capacity to take and hold real and personal estate within this commonwealth, may acquire and hold the same to the extent in the aggregate of the clear annual value of five thousand dollars, and to no greater extent, without an express legislative sanction; . . .

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[95]See chapter 3, note 135 and accompanying text, infra.

[96]Act of April 26, 1855 Pa. Laws 328, §4 (current version at 10 PA. CON. STAT. ANN. §31) (Purdon).

[97]Ibid., §8 (subsequent acts: Act of April 22, 1889 Pa. Laws 42, §1; Act of March 13, 1929 Pa. Laws 21, §1; Act of May 5, 1933 Pa. Laws 289, art. xi, §1102 (repealed section in part as to nonprofit corporations) (current section at 10 PA. CON. STAT. ANN. §§33-35. (Purdon)); Act of _____, 1966 Pa. Laws 1406, §26 (repealed section in part as to foreign nonprofit corporations); see West's Appeal, 64 Pa. 186 (1870).

And section 12[98] which stated in part:

> That to avert the evil of an indefinite increase of property in mortmain and perpetuity, it shall not be lawful for any religious, charitable, literary, or scientific society, association, or corporation, present or future, to accumulate income into capital or invested estate, so as that the clear annual value thereof, as regards future acquisitions with those now held, shall exceed the limitation hereinbefore contained, . . .

Taken together, these three sections serve to limit the amount of property, real and personal, and income, which could be acquired or held, or accumulated, by a charitable organization. These sections are "mortmain" in nature because they are similar in spirit to the earlier English mortmain acts passed by the feudal lords to limit the growth of the wealth and power of the clergy. The current status of these provisions will be discussed later.[99]

The effect of these three sections can be interpreted as limiting the amounts of gifts which could be received by a charity. For instance, legislative approval would be required, if a gift exceeded the $5000 limit.[100] By reference to section

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[98]Ibid., §12 (current section at 10 PA. CONS. STAT. ANN. §32) (Purdon).

[99]See chapter 3, note 135, and accompanying text, infra.

[100]Act of April 26, 1855 Pa. Laws 328, §8.

10 one can observe what the section indicates might occur to such a gift under certain circumstances. It is stated that:

> [I]f the objects of the trust be not ascertainable . . . or such disposition be in excess of the annual value permitted by law . . . such disposition, so far as exceeding the power of the courts to determine the same by the rules of law or equity, shall be taken to have been made subject to be further regulated and disposed of by the legislature . . . (emphasis supplied)[101]

If under these circumstances the legislature were unable to dispose of the property within the guidelines of the general intent of the donor, the property would either be directed to the heirs or would escheat to the Commonwealth.[102] This provision, therefore, reveals another dimension of the restrictive policy contained in the Act, namely that under certain circumstances the legislature had the power to divert a charitable gift from its originally intended object to the state treasury.

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[101]Ibid., §10 (subsequent repeal of the escheat provision as it relates to nonprofit corporations at 1933 Pa. Laws, 289, art. xi, §1102) (current version at 27 PA. CON. STAT. ANN. §162) (Purdon).

[102]Ibid.

State Law and Charitable Trustees

According to Lawrence M. Friedman,[103] a number of jurisdictions in the early nineteenth century had rigid regulations, which controlled the conduct of trustees, charitable and otherwise, with regard to investment of trust funds. Typically, the rules indicated that trustees could invest only in such things as first mortgages on land or in government bonds.

A major case, which illustrates one jurisdiction's reversal of the stricter investment standards of the time, occurred in Massachusetts in 1830. The case, Harvard College v. Amory,[104] established the "prudent investor" or "prudent man" rule for investment by charitable trustees.

In Harvard College the deceased, John McLean, had established a charitable remainder trust of $50,000 with one half of the charitable remainder going to a hospital and one half to Harvard to endow the support of a professor of ancient and modern history.

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[103]Lawrence M. Friedman, A History of American Law (New York: Simon and Schuster, 1973), p. 223.

[104]26 Mass. (9 Pick.) 446 (1830).

McLean directed that the trustees were to lend the funds on sufficient security or to invest it in productive stocks "either in the public funds, bank shares or other stock, according to their best judgment and discretion." The trustees had purchased some insurance stocks, whose market value later declined.

The remaindermen challenged the investment policy of the trustee, Amory. Judge Putnam upheld the discretion that had been given to the charitable trustee and held that the standard of conduct for a charitable trustee should be:

> *[H]*e shall conduct himself faithfully and exercise a sound discretion. He is to observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of the capital to be invested.[105]

Judge Putnam determined that the trustees had met the standard. According to Kutner, a majority of states in the nineteenth century had not adopted either the stricter legal list standard or the prudent

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[105]Ibid. at 461.

investor rule.[106]

In Pennsylvania, the state constitution had codified the restrictive philosophy on trust investment discretion. The Pennsylvania Constitution of 1873 prohibited the legislature from authorizing any trust fund investments "in the bonds or stocks of any private corporation."[107] Luis Kutner attributes the existence of provisions like this 1873 constitutional prohibition and the statutory legal lists (of "safe" trust investments) to a protective attitude which had developed in response to the collapse of banks and emergence of financial scandals after the Civil War.[108]

Most of the preceding text has discussed the development of public policy directly having an impact on some aspect of giving from individuals to

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[106]Kutner, op. cit., p. 235, also notes that the majority of states followed neither rule because at that time most of the formal trust arrangements were to be found predominantly in the eastern states.

[107]Pa. Const. 1873, art. III, sec. 22. Similar provisions appeared in Alabama (1875), Colorado (1876), Montana (1889) and Wyoming (1889). (Lawrence M. Friedman, The History of American Law, op. cit., p. 369).

[108]Kutner, op. cit., p. 234.

institutions of higher education. The next subsection discusses an act which had a more indirect, but potentially greater, impact on philanthropy to colleges and universities.

Congress and the Land Grant Act

During the first hundred years of the history of the United States, the field of higher education was "neglected by the federal government and very poorly supported by the states."[109] Financial resources for founding and support of colleges and universities were drawn almost totally from private individuals. This situation persisted until the Civil War.

In 1862 Congress passed, and President Lincoln signed, "An Act Donating Public Lands to the Several States and Territories Which May Provide Colleges for the Benefit of Agriculture and the Mechanical Arts."[110] The Act provided that the federal government would offer land, or equivalent scrip value, to a state

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[109]Robert H. Bremner, American Philanthropy (Chicago: The University of Chicago Press, 1960), p. 51.

[110]Land Grant Act, ch. 130, 12 Stat. 503 (1862) (current version at 7 U.S.C. §301 (1976)).

which would establish and maintain a state college. This combination of federal and state aid was designed to stimulate the growth of state systems of higher education.

According to Arnaud Marts,[111] there had been concern at the time that the private sector colleges would be hurt by this act, "that philanthropy would no longer give to higher education, which would look thereafter to the public treasuries."[112]

These fears were apparently unfounded at the time. However, this act foreshadowed the ability of the federal government with its growing power through its public policy to influence giving by individuals to charity.[113]

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[111]Arnaud C. Marts, The Generosity of Americans (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1966), pp. 112-113.

[112]Arnaud Marts does not reveal the source for his conclusion. This researcher's reading of the extensive congressional debates over the Land Grant Act did not reveal any such sentiment.

[113]While government spending, as it affects giving by individuals to institutions of higher education, is a matter of public policy, the topic does not fall neatly into the original scope of the study. Nonetheless, Appendix B presents some information on the current debate of the issue.

Chapter Summary

In summary, this chapter has traced the development of the Anglo-American law of charity from 1500 to 1900. A distinct ambivalence in public sentiment and policy towards charity is seen to exist throughout that span. The presence of permissive and restrictive doctrine can be perceived to have had both direct and indirect effects on giving by individuals to charity and specifically to higher education.

The following chapters will focus on the current law and its impact on giving to colleges and universities. Chapter 3 will examine the incentive/permissive and limitation/restrictive dimensions with regard to the current law. Chapter 4 will attempt to synthesize the concepts and information presented in chapters 2 and 3 and then to make some conclusions about subsequent changes in public policy in light of their historical evolution.

Chapter 3

PERMISSIVE AND RESTRICTIVE POLICY AFTER 1900

The last chapter provided an historical background for understanding the current state of public policy regarding gifts from individuals to institutions of higher education. The focus of this chapter will be on the development of current law and policy. In contrast to the previous chapter, where the approach was primarily chronological, the approach in this chapter will be primarily topical in the light of any relevant historical evolution.

The sequence of topics, as listed in the scope of the study section in chapter 1,[1] will be modified slightly to permit a more convenient mode of analysis. The permissive/restrictive or incentive/limitation dimensions of the tax law, for instance, are more easily understood when discussed in the same context. Therefore, incentive and limitation aspects of each topic will both be presented in the various sections.

Because the last chapter focused on the issue of charitable uses, the inquiry of this chapter will

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[1]See Chapter 1, Scope of the Study.

commence with a general consideration of public policy, charitable uses and educational purposes. This will provide a transition to the other major topics which are the focus of this study. Second, an update of the law of charitable dispositions, including trusts, bequests, mortmain and cy pres etc., in terms of permissive and restrictive implications will be set forth. Third, the scheme of charitable incentives and limitations for gifts from individuals to institutions of higher education namely through federal and state tax policy will be demonstrated. Fourth, a consideration of the law relating to incorporation, recognition and regulation of charitable organizations will be introduced and then specifically discussed with reference to the incentive and limitation aspects of the rules governing charitable gift solicitation and the administration of private donor funds.

The Law of Charitable Uses and Educational Purposes

In the past in both England and America the process of determining what constitutes a valid charitable purpose has entailed both legislative and judicial input. Chapter 2 has discussed the Elizabethan Statute of Charitable Uses (1601) and

the role of the chancery courts in elaborating what constitutes a valid charitable use.

While the common law courts today seem to play a predominant role in defining valid charitable uses, some statutory guidelines do exist. For example, the Internal Revenue Code provisions on charitable deductions and on tax exempt status are in essence defining charitable uses for tax purposes. This aspect of charitable uses will be examined in a later section.

Because American society has recognized the value of education in advancing civilization, both nineteenth and twentieth century courts have endorsed charitable uses for educational purposes. Fisch, Freed and Schacter have noted that while it has not been possible to fashion a comprehensive definition of education for charitable purposes,[2] in the "context of charity law the term education is accorded a broad meaning and no limit [is] imposed on the methods by which it can be advanced."[3]

During the latter half of the nineteenth

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[2]Edith L. Fisch, Doris J. Freed and Ester R. Schacter, [hereafter cited as Fisch, et al.], Charities and Charitable Foundations (Pomona, N.Y.: Lond Publications, 1974), p. 262.

[3]Ibid., p. 266.

century educational purposes were broadly upheld by the Pennsylvania courts.[4] The major conclusion which can be drawn from the case law of the period is that a "gift in furtherance of education by the building of structures for educational purposes, or the

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[4]Vidal v. Girard's Executors, 43 U.S. (2 How.) 127 (1844) (donations for the establishment of colleges, schools and seminaries of learning are charities in the sense of the common law); Wright v. Linn 9 Pa. 433 (1848) (conveyance of land to erect a school house is upheld); Newell's Appeal, 24 Pa. 197 (1855) (devise in trust to trustees of theological seminary to create a scholarship fund is upheld); Price v. Maxwell, 28 Pa. 23 (1857) (devise in trust to boarding school to create an endowment income to increase salaries of teachers is upheld); Stallman's Appeal, 38 Pa. 200 (1861) (conveyance of lots to trustees for the use of neighborhood in general for an English Protestant school is to be applied to the expenses of education); Miller v. Porter, 53 Pa. 292 (1866) (bequest to establish college, purchase lot, erect building, purchase library books was a charitable use, but violative of the state mortmain statute); Appeal of Curran, 4 Penny. 331 (Pa. 1884) (devise in trust to create a foundation, the annual income of which was to be used "to promote the higher education of females in an institution adapted for that purpose," is a trust for a charitable purpose); Northampton County v. Lafayette College, 128 Pa. 132, 18 A. 516 (1889) (buildings owned by college and occupied by faculty and employees are embraced in the exemption from taxation granted to colleges by the Act of May 14, 1874, P.L. 158); Lennig's Estate, 154 Pa. 209, 25 A. 1049 (1893) (charitable trust for the University of Pennsylvania is not void under the Act of May 9, 1889, P.L. 173 even though it transgresses the Rule Against Perpetuities); Haverford College v. Rhoads, 6 Pa. Super. 71 (1896) (a college is a charity if conducted in a way beneficial to the public at large. Whether a particular college is a public charity is a question of fact, and the test is that it is not confined to privileged individuals, but is open to the public at large).

establishment of scholarships, or the endowment of chairs is a charity."[5] A continued acceptance of this notion can be perceived in many states, including Pennsylvania, in twentieth century cases. A number of examples illustrate the current society's broad endorsement of private support through charitable gifts to institutions of higher education.

Valid educational purposes have included: a gift of land,[6] the erection of a building,[7] the support or maintenance of the physical plant, equipment or facilities,[8] the creation of an endowment,[9] and the establishment of a professorship or chair.[10]

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[5]"Charities" §12, Vale Pennsylvania Digest (St. Paul, Minn.: West Publishing Co., 1966), 7A:633.

[6]See, for example, President and Fellows of Harvard College v. Jewett, 11 F. 2d 119 (6th Cir. 1925).

[7]See, for example, Fulton v. Trustees of Boston College, 361 N.E. 2d 1297 (Mass. 1977).

[8]See, for example, Simmons v. Fidelity National Bank & Trust, 64 F. 2d 602 (8th Cir. 1933).

[9]See, for example, Colbert v. Speer, 200 U.S. 130 (1906); see note 16.

[10]See, for example, Attorney General v. President and Fellows of Harvard University, 350 Mass. 125, 213 N.E. 2d 840 (1966) (professor to manage arboretum); Litcher v. Trust Co. of New Jersey, 18 N.J. Super 101, 86 A. 2d 601 (1952) (chair of public speaking); In re Robinson's Estate, 248 Wis. 203, 21 N.W. 2d 391 (1946) (professorship of American History).

A considerable variety of student aid type uses have been sustained. Courts have upheld outright gifts to students,[11] scholarships,[12] and loans,[13] the establishment of prizes[14] and lectures.[15] Courts have also held that grants for research are educational in nature and thus charitable.[16]

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[11]See, for example, In re Yule's Estate, 57 Cal. App. 652, 135 P. 2d 386 (1943); in re Wright's Estate, 284 Pa. 334, 131 A. 188 (1925).

[12]See, for example, Bok v. McCaughn, 42 F. 2d 616 (3rd Cir. 1930); In re McKee's Estate, 378 Pa. 607, 108 A. 2d 214 (1954); In re McClain's Estate, 435 Pa. 408, 257 A. 2d 245 (1969).

[13]See, for example, Noble v. Oklahoma Tax Commissioner, 560 P. 2d 185 (OK. 1977); Champlin v. Powers, 80 R.I. 30, 90 A. 2d 787 (1952).

[14]See, for example, Ashmore v. Newman, 350 Ill. 64, 183 N.E. 1 (1932) (for highest ranking graduate of a named high school).

[15]See, for example, Richardson v. Essex Institute, 208 Mass. 311, 94 N.E. 262 (1911) (free lectures in botany).

[16]See, for example, Colbert v. Speer, 200 U.S. 130 (1906) (endowment to university for research in colonial history of Maryland); Matter of Frasch, 245 N.Y. 174, 156 N.E. 656 (1927) (gift for research in agricultural chemistry).

The Law of Charitable Dispositions and Incentives For and Limitations on Gifts to Institutions of Higher Education

Private donor gifts can be categorized as intervivos or testamentary. The first type of gift becomes effective during the life of the donor; the second type at his or her death. The gift can be outright, either absolutely or subject to conditions. A gift can be made in trust for the institution, again either during the donor's life or effectively at his or her death. Gifts can be designated for particular purposes; they may be restricted or unrestricted, and designated for either current operating expenses, capital projects or for endowment. Furthermore a donor can transfer property to the institution in return for guaranteed life income in the form of an annuity trust, unitrust, pooled income fund or gift annuity. Gifts can come in different forms, e.g. cash, real property, art objects, life insurance, stocks and bonds, and so on. As in the nineteenth century, the law of charitable dispositions in the twentieth century exhibits both permissive and restrictive dimensions. This duality will be examined in the following subsections.

Validity of Charitable Gifts in General

Naturally, the validity of a gift must be examined in the light of the laws of the state in which a transaction takes place. Much of the law relating to gifts to higher education is found in the common law. There appears to be a certain amount of uniformity among the various jurisdictions in the judicial development of the law of charity. For instance, there is relative uniformity on the major elements of a gift. These are--donative intent, execution (or delivery) and acceptance. In general all elements must be present for a gift to be valid.[17]

There must be a clear intention by the donor to make the gift. This intention need not be expressed in any particular form. Thus, in the case of a delivery of a memorandum and other acts, courts have presumed these to constitute an expression of intention.[18]

Likewise, to be effective the gift must be fully executed, i.e. the intention must be carried

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[17] 38 C.J.S. Gifts §10, p. 786 (1943).

[18] See, for example, Hebrew University Association v. Nye, 148 Conn. 223, 169 A. 2d 641 (1961).

out via a complete delivery. The delivery may be either actual, constructive, or symbolic.[19] Delivery is a necessary element of a completely executed gift. The "sufficiency" of the delivery test must be applied to determine whether a gift has been executed. This is determined by an examination of the facts of the situation and surrounding circumstances.[20] Actual manual delivery may not be required in all cases. Symbolic delivery may be made under circumstances that dictate that constructive delivery is sufficient. Thus, if real property is involved, the delivery of the deed may be deemed sufficient. Likewise, "where a gift is evidenced by a writing executed by the donor, delivery of the writing is a sufficient delivery to support the gift."[21]

The third necessary element of valid gift is the unmistakeable unconditioned acceptance of the gift by the donee. This acceptance can be either

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[19]See, for example, University of Vermont v. Wilbur's Estate, 105 Vt. 147, 163 A. 572 (1933).

[20]See, for example, Hebrew University Association v. Nye, note 18 supra.

[21]38 C.J.S. Gifts §22, pp. 801-803 (1943).

expressed or implied from the circumstances. It should be observed that the college or university governing board is at liberty to reject a proposed donation for any reason, if the board finds the donation unacceptable.[22]

One particular method of giving, the charitable trust, deserves special examination. The charitable trust is a device which differs from an outright or absolute gift. While some history of the charitable trust was given in chapter 2,[23] a closer analysis of current law will be of value.

Charitable Trusts

A trust is a flexible device which is often used by individuals as an estate planning tool. Generally, a trust can be established to accomplish a variety of financial objectives. In its bare essentials a trust arrangement involves the transfer of assets by a trustor or settlor to a second party, a trustee, to be held by the trustee for the benefit

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[22]14 C.J.S. Colleges and Universities §12, p. 1342 (1939).

[23]See chapter 2, note 5 and accompanying text, supra.

of another, the beneficiary. The trustee, who holds equitable title to the property, may be an individual, such as an attorney or a friend, or a corporation such as a bank. A donor can set up an intervivos or testamentary trust with almost any individual or organization, including a charity, as the beneficiary. A variety of forms for charitable trust arrangements are ultimately possible.

Private trusts are generally established for a limited number of definite beneficiaries, whereas, the charitable trust is public in nature and is established for the benefit of an indefinite set of beneficiaries. A charitable trust is defined by the Restatement of the Law of Trusts (Second) as follows:

> A charitable trust is a fiduciary relationship with respect to property arising as a result of a manifestation of an intention to create it, and subjecting the person by whom the property is held to equitable duties to deal with the property for a charitable purpose.[24]

Charitable trust must meet certain basic criteria in order to be considered valid. In general these requirements include:

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[24] Restatement of the Law of Trusts (Second) (St. Paul, Minn.: American Law Institute Publishers, 1959), §348, p. 210.

1. the existence of a settlor;

2. an intention to create a trust;

3. the delivery of the trust res;

4. a charitable purpose;

5. indefinite beneficiaries;

6. miscellaneous other requirements.[25]

Let us examine these requirements individually.

The settlor must be a person who is qualified to create a trust. As in contract law, a trust like a contract may be invalid when the settlor is disqualified from creating the trust due to infancy, mental incompetency, or bankruptcy.[26]

The settlor must have manifested an intention to create a trust.[27] Where the intention to create a trust is unclear, the court will have to ascertain

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[25]Edith Fisch, et al., op. cit., p. 173.

[26]Ibid. at 174.

[27]See, for example, Knights of Equity Memorial Scholarship Committee v. University of Detroit, 359 Mich. 235, 102 N.W. 2d 463 (1960) (a charitable trust, and not a contract, was established by an agreement to create a scholarship); Lefkowitz v. Cornell University, 316 N.Y.S. 2d 264 (App. Div. 1970), aff'd, 322 N.Y.S. 2d 717 (N.Y. 1971) (no intention to create charitable trust); In re Thompson's Estate, 127 A.446 (Pa. 1925) (intention to create charitable trust existed in the will); In re White's Estate, 340 Pa. 92, 16 A. 2d 394 (1940) (no intention to create charitable trust existed in the will).

his or her intention from the "four corners of the instrument, from the circumstances surrounding the testator at the time of execution and from putting one's self in the testator's arm chair."[28]

As with the outright gift, gifts in trust require some form of delivery. And, as with the outright gift, the delivery of the trust res may be either actual, constructive, or symbolic. An actual conveyance or transfer of the trust res may be by physical delivery of the thing or of a document representing the thing, e.g. a deed. Delivery and/or the declaration of the trust in a will or deed will usually cause a change of ownership.[29]

Another prerequisite is that the trust be for a charitable purpose.[30] As has been indicated, the

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[28]Luis Kutner, Legal Aspects of Charitable Trusts and Foundations (Chicago: Commerce Clearing House, Inc., 1970), p. 83; Kutner presents a thorough and scholarly treatise on the law of charitable trusts.

[29]See, for example, Hebrew University Association v. Nye, 148 Conn. 223, 169 A. 2d 641 (1961) (charitable trust not established because of absence of delivery); Robb v. Washington and Jefferson College, 185 N.Y. 485, 78 N.E. 359 (1906) (settlor's declaration to set aside securities to hold them in trust for college constituted delivery).

[30]See, for example, Bok v. McCaughn, 42 F. 2d 616 (3rd Cir. 1930) (alternative discretionary application of trust proceeds by trustees for scholarships at several institutions qualified as a charitable purpose).

American society, courts and legislatures in general, have been favorably disposed to charitable dispositions to or for the use of education.[31]

Fisch, Freed and Schacter have commented on the requirement of indefiniteness of beneficiaries:

> Unlike a private trust which requires definite beneficiaries, indefiniteness of beneficiaries is not only characteristic of, but is an essential element of a charity. . . In the sense that the community or society constitutes the real and ultimate beneficiary, all dispositions for a charitable purpose have indefinite beneficiaries.[32]

The test of indefiniteness, as supplied by the courts, according to Fisch, Freed and Schacter, does not require that every beneficiary be unidentified at all times, but that some of the beneficiaries are to be unknown and unidentified at some time.[33] Therefore, when the existence, delivery and acceptance of the trust res has been shown, the charitable trust may be upheld, even with an element of indefiniteness.[34]

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[31]See note 2 and accompanying text supra.

[32]Fisch, et al., op. cit., pp. 319-320.

[33]Ibid.

[34]See, for example, In re Wright's Estate, 284 Pa. 334, 131 A. 188 (1925) (educational trust with power in trustee to use income for a limited period for non-charitable purpose upheld even though discretion was vested in trustee).

In addition to these basic prerequisites some states may have established additional requirements. For instance, Statute of Frauds provisions in most states require that the proof of a trust includes some form of writing. In Pennsylvania the law provides:

> All declarations or creations of trusts . . . shall be manifested by writing, signed by the party holding the title thereof, or by his last will in writing, or else to be void . . . [except as to trusts which have arisen by implication or construction of law].[35]

Thus, in some states like Pennsylvania and New York, the requirements of the Statute of Frauds may not be applied in circumstances where the court has imposed a constructive trust. A leading example can be seen in a New York case, Trustees of Amherst College v. Ritch.[36]

In that case the court imposed a constructive trust for the benefit of twenty colleges where two of three persons had promised the testator that if

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[35] 33 PA. CONS. STAT. ANN. §2 (Purdon).

[36] 151 N.Y. 282, 45 N.E. 876 (1897); cf. Isoleri's Estate, 20 D.&.C. 535 (Pa. Orph. 1934) (secret trust for charitable legatees is avoided because of failure of gift because of death of testator within 30 days, alternate bequest is to flow to residuary beneficiary); the case law in Pennsylvania while not exactly on point is clear in general that the state Statute of Frauds does not apply to constructive trusts.

he made them the residuary legatees of his estate, they would convert the residuary of his estate into cash and distribute it among the twenty schools. The court decided that the secret trust bound all three of the legatees.

The requirements of the Statute of Wills may, likewise, affect the validity of testamentary charitble trusts. If the will is invalid, gifts under it will fail. Most states, like Pennsylvania, have a Statute of Wills.[37]

Generally, a will must be drawn up in conformity with the formal statutory requisites, e.g. as to execution and attestation. Some states require that the will be typed and each page attached in proper order, and that it be witnessed in a particular manner. Generally, if any of the statutory requirements are violated, the will and any charitable testamentary trusts within will fail.

Attestation, for example, is the process of witnessing the testator's signing of the will. There are certain procedural formalities which must be

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[37] 20 PA. CONS. STAT. ANN. §101 et seq. (Purdon).

followed in the ceremony of signing. The rationale for such a procedure is to remove any uncertainty as to the execution of the will and to safeguard the testator against fraud.[38]

Let us now focus more sharply on a variety of specific issues which may develop in connection with charitable trusts to higher education. The first of these is seen in the question of whether a charitable gift is absolute or in trust. Generally in resolving the question, courts will look to the intention of the donor. The donor's intention, which will be controlling in the resolution of the matter, must be

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[38]One Arkansas Supreme Court case, Anthony v. College of the Ozarks 207 Ark. 212, 180 S.W. 2d 321 (1944), while not involving a testamentary trust, does illustrate the permissive attitude of one court in applying the attestation requirements of that state's statute to a will which contained a devise of property to a college. In the suit by a niece who contested the validity of the will, the court decided that under the facts there had been sufficient acknowledgment of the signature by a witness even though the testator had not signed the will in the witness' presence nor had he told the witness that it had been signed. The court in upholding the will and therefore the charitable devise reasoned that without proof to the contrary (because the testator had told the witness it was his will) there would be a presumption that the will would not have been presented to the witness without the signature; compare chapter 2, note 25 and accompanying text supra.

ascertained from the wording of the instrument in the context of the circumstances under which the instrument was drawn. An example is illustrative.

In the Nebraska case of Hobbs v. Board of Education of Northern Baptist Convention[39] the state supreme court faced the question of whether monies in the Grand Island College endowment fund constituted a charitable trust, or whether full ownership rested in the college and was therefore subject to claims of its creditors. The court looked to the instrument creating the endowment to determine the intention of the grantor (in this case the American Baptist Education Society) as to whether the fund should be subject to the "exigencies or peril of mismanagement" by the institution, or subject only to control of the trustees. The intention, it was determined, in this instance was to create a trust fund which was to remain inviolate, and that "subsequent contributions to the fund were made with special reference to the original donations

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[39]126 Neb. 416, 253 N.W. 627 (1934); see Trustees of Cumberland University v. Caldwell, 203 Ala. 590, 84 So. 846 (1919) (charitable nature of the beneficiary does not operate to make settlor's expressed purpose and design any less a trust).

of the education society."[40]

In the Hobbs case the court determined that the donative instrument was a charitable trust rather than an absolute gift. In Nugent v. Saint Dunstan's College of Sacred Music,[41] the Rhode Island Supreme Court, citing Hobbs as authority, found that donors to a 1952 fund drive intended to make absolute gifts to the college for its general purposes. The court's finding of specific intent to benefit the college only and no other institution served to defeat an attempt to apply cy pres for the benefit of another institution. If a charitable trust were intended, then the court could have applied the cy pres doctrine; however, the court commented,as dicta, that even if the fund were a charitable trust, there was sufficient specificity to have precluded a finding of general charitable intent, a prerequisite for the application of cy pres.[42]

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[40]253 N.W. at 631.

[41]324 A. 2d 654, 656 (R.I. 1974); see Trustees of St. Charles College v. Carroll, 88 A. 277 (Md. 1913) (grant by deed to trustees of land for certain purposes, identical with those for which the corporation did not create a trust, but was an absolute conveyance).

[42]See discussion of cy pres at note 92 and accompanying text infra.

Another dimension to the trust versus absolute gift issue emerges in the concept that technically a trust involves the separation of legal and equitable title to the corpus or principal of the trust. There are situations, however, where the institution of higher education has been named as trustee and beneficiary of a trust. This designation creates an interesting legal issue. If maximum discretion is vested in the trustees, does a trust in fact exist? Some courts have classified the arrangement as an absolute gift based on the interpretation that where legal and equitable title merge, there is no trust.[43]

Normally, when a gift is made in trust it is required that the college or university hold the property as a trustee, not as its own; and therefore, the institution must carry out the instructions of the trust's creator. This distinction is important for another reason, because if there is no trust in fact, it is a gift and the institution may arguably do what it wishes with the property.

Another issue of importance regards the problem of whether the terms of the trust are sufficiently

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[43]See 14 C.J.S. Charities §45, p. 498, n.98 (1939).

certain. A charitable trust must be definite as to its subject matter. Generally, however, courts are reluctant to declare charitable trust void for uncertainty.

For instance, in cases involving a question as to the amount of a trust (or gift), courts have not held them void when the amount is readily calculated.

In a later nineteenth century case, Field v. Drew Theological Seminary,[44] a reference in a trust to a "sum of money [to be set aside] sufficient to carry out the intention" of providing Christian education for two young men was capable of determination because "the expense of keeping them in the seminary for the allotted time is approximately known; and it is a matter of easy calculation."[45]

The subject matter or purpose of the charitable trust may, likewise, be at issue. Thus, a second issue in Field regarded the validity of the scholarship trust as to whether it was legitimately for a charitable purpose. The plaintiffs argued that the benefits of the fund went to the students rather than to the

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[44]41 F. 371, 374 (C.C. Del. 1890).

[45]Ibid. at 375.

institution and that the trust purpose, providing for the education of young men for the ministry, was not a valid public purpose. The court did not agree and ruled that the trust was valid and that it was not necessary to show that any benefits came to the institution. This reasoning again illustrates how broadly courts have construed charitable purposes in cases involving education.[46]

Trusts established for the purpose of loaning funds to students have likewise been upheld. These loan funds have been sustained even though they benefit only a limited number of persons and even when they have contained onerous provisions which have required, for instance, that the student work in spare time and during vacation and not keep a car or marry during college.[47]

Other issues may emerge with respect to

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[46]See In re Yule's Estate, 57 Cal. App. 2d 652, 135 P. 2d 386 (Dist. Ct. App. 1943) (upheld scholarship fund as a gift for a charitable purpose); In re McClain's Estate, 435 Pa. 408, 257 A. 2d 245 (1969) (a bequest for scholarships is for the advancement of education and hence a "charitable purpose"); In re McNair's Estate, 74 S.D. 369, 53 N.W. 2d 210 (1952) (upheld scholarship fund as not violating the rule against perpetuities).

[47]Champlin v. Powers, 90 A. 2d 787 (R.I. 1952).

conditions in charitable trusts. Trust instruments, as has been indicated, usually contain some guidelines on the administration of the trust. Restrictions or conditions must be followed by those who are charged with administrating the trust. A more complete discussion of conditional gifts will follow,[48] but some mention of the effect of conditions in trusts is appropriate here.

The importance of complying with conditional provisions is best demonstrated in the example of a testamentary trust with a condition subsequent. Such a condition in a trust may state that on the occurrence of a certain event, the trust will fail and the corpus of the trust is to revert to the settlor or to his estate or heirs.

In a Pennsylvania case, Patterson's Estate,[49] for example, a trust fund had been established for the benefit of Ursinus College with the provision that in

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[48]See notes 54 and 91 and accompanying texts infra.

[49]333 Pa. 92, 3 A.2d 320 (1939); see Annot. "Validity, Interpretation, and Application of Provisions of Will Making Devise or Bequest to or in Trust for Religious or Educational Body Depending upon Adherence to Particular Body of Principles or Dogmas, or Ecclesiastical Connection", 120 A.L.R. 971 (1939); see note 57 infra.

the event that the college failed to teach Evangelical Reformed Church principles, the trust was to revert to the estate and be equally divided among the settlor's heirs. The heirs brought an action to have the court declare that the condition had occurred. On appeal the state supreme court held that the heirs had failed to sustain the burden of proof as to the non-compliance of the college with the terms of the trust. It based its decision on the fact that there had been no proof of a change in attitude by the college towards Evangelical Reformed principles. Furthermore, the college still employed a chaplain and held daily chapel services.

One last matter of importance in this area concerns the supervision of charitable trusts. In addition to the statutory and common law principles, previously mentioned, which govern the validity of charitable trusts, some states have enacted laws which direct some form of state supervision of charitable trusts.

Luis Kutner has observed:

> [B]ecause charitable trusts are by definition intended to benefit the general public, however indirectly, they should be subject to some form of public supervision . . . The need for legislation specifically designed to protect and enforce

> charitable trusts has long been recognized by both commentators and the Commission of Uniform State Laws which drafted the Uniform Supervision of Charitable Trusts Act in 1954 . . . [However, because this act has proved unacceptable, most states have instead] a wide variety of legislation relating to charitable trusts and foundations.[50]

Kutner also commented:

> Some states have recently [late 1960's] adopted rather effective Charitable Trust Acts, while others have . . . nothing more than a collection of isolated statutes, administrative regulations, and dated court decisions . . . [or] have provided virtually no state control over the administration of charitable trusts.[51]

Pennsylvania is among the states with no codified charitable trust regulation statutes. It does have a Charitable Instruments Act,[52] but it is not a charitable trust statute of the kind discussed by Kutner. This act provides for state enforcement of the distribution of income by a charitable foundation, and which parallels the requirements of the Internal Revenue Code, section 4942.

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[50]Kutner, op. cit., pp. 349-50; as of 1981 only four states--California, Illinois, Michigan, and Oregon--have adopted the Uniform Supervision of Trustees for Charitable Purposes Act since it was proposed in 1954; see note 295 and accompanying text infra.

[51]Ibid., p. 350.

[52]10 PA. CONS. STAT. ANN. §201 et seq. (Purdon).

Those states which do have charitable trust supervision acts, typically, provide for some form of the following types of regulation:

1. that charitable trusts be registered with the state, perhaps with a designated state bureau, within a particular period of time from its creation;
2. that charitable trustees make regular financial reports to a designated state agency;
3. enforcement procedures and sanctions.[53]

Conditional Gifts

It is estimated that only a third of voluntary support donated to higher education has been made available on an unrestricted basis.[54] Most donors apparently feel that a gift should be used for particular purposes or under certain stipulations. As a result, conditional gifts have created certain problems and duties for colleges and universities.

As mentioned before, the governing board of the institution may reject a proposed donation when in its opinion the gift's terms are unacceptable. If,

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[53]Kutner, op. cit., pp. 350-353.

[54]John J. Corson, The Governance of Colleges and Universities (New York: McGraw-Hill, 1975), pp. 34-35.

however, it decides to accept the gift, it must do so on the terms prescribed.[55] Furthermore, when such conditions are accepted, there is a binding obligation which is enforceable through the courts.[56]

There seem to be some limitations as to what conditions courts will enforce against an institution. It can be argued that if the conditions are unreasonable, impossible to perform, illegal or against public policy that they should not be enforced.

Another factor which should be considered is that conditions will be strictly construed in situations where failure to comply with them will work a forfeiture. Courts, for instance, will not uphold a provision which seems to create a conditional estate where it can determine a contrary intention by looking at the entirety of the instrument.[57]

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[55]See, for example, St. Charles College v. Carroll, 121 Md. 464, 88 A. 277 (1913); see note 41 supra.

[56]See, for example, Curtis and Barker v. Central University of Iowa, 188 Iowa 300, 176 N.W. 330 (1920) (court of equity ordered forfeiture of donation where university failed to comply with condition that it maintain its campus in a particular location).

[57]See, for example, Wilbur v. University of Vermont, 129 Vt. 33, 270 A. 2d 889 (1970) (college's violation of charitable trust provision requiring limited enrollment should not cause forfeiture and revision of trust corpus where donor's dominant intention was to aid students); see notes 49 supra. and 64 infra. and accompanying texts.

It also appears that courts will look carefully to the words of the document to determine if the gift is clearly intended to be conditional. Generally, a statement as to the general purpose or use to which a gift is to be applied is not sufficient to make a gift a conditional one. Thus, conditions will be given a reasonable construction in the light of the surrounding circumstances. The determining or guiding factor must be the intention of the donor as seen in the instrument and in the circumstances giving rise to the document. Where a donation to a school is specifically conditioned, as to the use of the funds, the conditions must be followed. Where, on the other hand, a fund is established generally for a school, funds may be spent for any purpose for which the organization was established, namely educational purposes.[58]

There exists a major difference between conditions related to the vesting of title and conditions attached to a gift which is considered vested. An important guiding principle is that the vesting of

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[58]See, for example, Lyme High School Association v. Alling, 113 Conn. 200, 154 A. 439 (1931) (nothing in the terms of the will could be construed as conditioning the use of a general fund for a private high school).

title in a gift intervivos must be immediate and absolute. If the vesting of the title is conditional, the gift has not been fully executed.[59] In such instances the condition must be completed or complied with before title can vest. On the other hand if there is a condition accompanying the gift which is not inconsistent with the vesting of title, the condition will not render the gift invalid.

One clarification of the difference between conditions precedent and subsequent has been delineated as follows:

> A condition precedent is one which must happen or be performed . . . before the estate to which it is annexed can vest or be enlarged . . . A "condition precedent" is one that is to be performed before the agreement becomes effective, and which calls for the happening of some event or the performance of some act . . . A condition subsequent is one annexed to an estate already vested, by the performance of which such estate is kept and continued, and by the failure or non-performance of which it is defeated; or it is a condition referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party, if he chooses to avail himself of the condition.[60]

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[59] See, for example, University of Vermont v. Wilbur's Estate, 105 Vt. 147, 163 A. 572 (1933); see note 65 infra.; see also Truax v. Southwestern College, 214 Kan. 873, 522 P. 2d 412 (1974).

[60] Black's Law Dictionary, p. 366 (4th ed. 1968).

In summary, the first type of condition requires the happening of an event for a right to vest. The second situation is the reverse; when an event occurs a right is divested, e.g. such as in the failure to perform a condition subsequent.

As has been indicated, there can be potential legal problems for colleges or universities with either type of condition. For instance, with regard to condition precedents, where the condition is to occur in the future, the gift may fail. Typically, if no time for performance of the condition is stated, the condition must be performed within a reasonable time which may be long or short in some cases. The court will determine what is a reasonable time based on the circumstances of each case.[61]

Naturally, if the condition to be performed is current, then it must be complied with immediately in in order to make the gift binding. For instance, in

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[61]See, for example, Massachusetts Institute of Technology v. Attorney General, 235 Mass. 288, 126 N.E. 521 (1920) (court looked at purpose of testator, as well as economic and political circumstances of the time to determine reasonable time); Pierce v. Brown University, 21 R.I. 392, 43 A. 878 (1899) (leniency by testatrix as to fulfillment of a condition subsequent by the university during her life indicated that court should also extend period of time before declaring a forfeiture).

Grant University v. Fruit's Estate[62] it was held that when the university had not complied with a condition to create a scholarship in the donor's name, the promise to create an endowment was not binding. The university was not entitled to recover payment on its claim against the estate of the deceased donor.

As to conditions subsequent, a donor may limit his gift to a particular purpose in such a way that if the institution breaches the condition created by such a limitation, the donation will be forfeited.[63] However, because conditions subsequent, especially those applicable to charities, are not favored by courts, namely because it would be against the public's interest to do so, the intention of the donor to create such a condition must be clearly expressed.[64] However, conditions subsequent may be upheld; the mere fact that the vested gift could be defeated on the occurrence of an event does not make the condition invalid. In one case, a donor who had made a substantial gift to a

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[62] 117 Wis. 260, 94 N.W. 42 (1903).

[63] See, for example, St. Charles College v. Carroll, 121 Md. 464, 88 A. 277 (1913); but cf. Patterson's Estate, 333 Pa. 92, 3 A. 2d 320 (1939) (condition subsequent not proven) which is discussed at note 49 and accompanying text supra.

[64] See, for example, Wilbur v. University of Vermont, 129 Vt. 33, 270 A. 2d 889 (1970); see note 57 supra.

university had specified several major conditions which had to be fulfilled in a certain period; the court, after fully scrutinizing the facts, determined that each condition had been fulfilled and thus the gift was not subject to defeasance.[65] It seems from the principles cited by the court that it stood ready to enforce the conditions if the facts had required it.

Subscriptions

Most colleges and universities have special campaigns, annual or capital, in which pledges or subscriptions are solicited. Subscriptions or subscription contracts have a special legal status. Such pledges are considered contractual or quasi contractual in nature and are often enforceable.

A subscription is defined as a "contract by which one engages to contribute a sum of money for a designated purpose gratuitously, as in the case of subscribing to a charity."[66]

There are four basic requisites which the courts have established for a valid subscription.

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[65] University of Vermont v. Wilbur's Estate, 105 Vt. 147, 163 A. 572 (1933); see note 59 supra.

[66] 83 C.J.S. Subscriptions §1, p. 731 (1953).

It must be executed, i.e. signed. The subscription must have been delivered. Such delivery can be either actual or constructive. The subscription has to be supported by consideration and it must be accepted. Issues may arise with regard to any of these elements.

"Subscriptions need not be in writing, but may be oral."[67] In either case the party seeking to enforce the subscription must produce evidence to indicate that there has been an executed transaction.

One must analyze several factors which relate to the form and contents of subscriptions. While the intention to be obligated must be definitely shown, no particular form must be followed. A promise to pay "at my convenience" was held enforceable in American University v. Todd[68] because the promise was in effect one to pay when the subscriber was able.

Some factors bearing on the definiteness required are--a stated date, a dollar amount and a designated payee. Courts do not require a date, but they do require a stated dollar amount. And while a

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[67] Ibid., however, Statute of Frauds requirements may be relevant to the transaction depending, for instance, on the amount of the subscription or other factors stipulated in the statute.

[68] 1 A. 2d 595 (Del. 1938).

payee should normally be stated on the subscription, it has been held sufficient that there only be an acceptance by the party for whom the pledge was intended.[69] (As to rules on delivery, see Validity of Charitable Gifts . . . supra.)

Of the four elements some of the most interesting cases have arisen on the element of consideration. Consideration has been generally defined as the inducement of a contract and usually entails a benefit to the promisor and/or detriment to the promisee.[70] In general courts have considered a subscription to be unenforceable in the absence of consideration.[71] However, a variety of theories have been used to establish the existence of consideration (or its equivalent) in suits to enforce a charitable subscription. Consideration has been established on the basis of: 1) promissory estoppel, 2) mutual promises of subscribers, 3) mutual promises of subscriber and beneficiary and

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[69] See, for example, Dillard University v. Local Union 1419, 247 La. 342, 144 So. 2d 710 (1962), app. after remand, 169 So. 2d 221, application den., 247 La. 342, 170 So. 2d 864 (1965).

[70] Black's Law Dictionary, p. 377 (4th rev. ed. 1968); see glossary.

[71] See, for example, First Trust & Savings Bank of Pasadena v. Coe College, 47 P. 2d 481 (1935); Simpson Centenary College v. Tuttle, 71 Iowa 596, 33 N.W. 74 (1887).

4) public benefit. Some examples will demonstrate the rationale of each.

As to the first theory, the courts have applied the doctrine of promissory estoppel where the promisee charity has assumed the performance of some duty, done work, incurred liability or expended money in reliance on the promise of the subscriber. The first reported state case in which the theory of promissory estoppel was applied to an institution of higher education was University of Vermont v. Buell in 1829.[72]

In essence, estoppel is a device applied in the absence of genuine consideration. Because of the reliance (to its detriment) by the promisee charity on the promise of the promisor, the courts have held that the promisor is estopped from avoiding payment of the subscription.

In the Pennsylvania case of Trustees of University of Pennsylvania v. Coxe's Executors[73] the state

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[72] 2 Vt. 48 (1829); see First Trust & Savings Bank of Pasadena v. Coe College, 47 P. 2d 481 (1935); Missouri Wesleyan College v. Shulte, 346 Mo. 628, 142 S.W. 2d 644 (1940); Keuka College v. Ray, 167 N.Y. 961, 60 N.E. 325 (1901).

[73] 277 Pa. 512, 121 A. 314 (1923); accord: Utz' Estate, 20 Pa. Fidiciary 517, 84 York 108 (Pa. C.P. 1970).

supreme court held that where the university had relied on a promise to pay a subscription to the treasurer to build a museum and had incurred expenses and obligations for that purpose, there was good consideration. The court held that the subscription was a valid and binding contract enforceable even against the estate of the subscriber.

A second theory of consideration is, likewise, suggested by the court in Trustees of University of Pennsylvania which cites the earlier Pennsylvania case of Converse's Estate[74] as additional authority for enforcing the subscription. The Converse case presents a second theory of consideration based on the rationale that the mutual promises of the subscribers will support a finding of consideration. Thus, where other subscriptions had been secured on the faith of the defendent's promise, the court enforced a pledge towards the endowment funds of Park College.

Not all jurisdictions have accepted this theory. Some courts have held that mutual promises of subscribers do not constitute a consideration as between the

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[74]240 Pa. 458, 461, 87 A. 849, 850 (1913); see Rutherford College v. Payne, 209 N.C. 792, 184 S.E. 827 (1936).

subscriber and the beneficiary because the beneficiary has promised nothing.[75]

A third theory is based on a rationale that consideration is created by the mutual promises, either expressed or implied, of the subscriber and the beneficiary. In Allegeheny College v. National Chautauqua County Bank[76] and in similar cases the courts have held that by accepting the subscription, the institution promises in essence to carry out the purpose under which the subscription had been presented.

A fourth theory can be derived from the latter mutual benefit theory, that consideration is based on the existence of a public benefit. When the organization provides a benefit to the public as a whole, it provides it to the promisor as well. It is this so-called benefit to the promisor that is the basis for declaring that consideration is provided by the institution.

In spite of the variety of theories under which an institution may seek to enforce a subscription, there

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[75]See, for example, American University v. Todd, 1 A. 2d 595, (Del. Super. Ct. 1938); Irwin v. Lombard University, 46 N.E. 63 (Ohio 1897).

[76]246 N.Y. 369, 159 N.E. 173 (1927).

are occasions where consideration has been deemed to fail. For instance in the case of Cotner College v. Estate of Hester[77] a subscription note had been executed for the benefit of the college, which had been conducting a program of Christian education. Eventually, the college was closed; the faculty was discharged, and the program abandoned. When the college reestablished itself elsewhere with a smaller quarters and different program, it was determined that there had been a failure of consideration which relieved the maker of a subscription note from further obligation.[78]

Another case of alleged failure of consideration was examined by the Pennsylvania Supreme Court in Carson Estate.[79] Where a private school had solicited subscriptions for the construction of a new building, the defendant subscriber had promised to pay a fixed

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[77]155 Neb. 279, 51 N.W. 2d 612 (1952); but compare, Coil v. Pittsburgh Female College, 40 Pa. 439 (1861) (subscriber might have raised failure of consideration, but did not).

[78]But compare, Central University of Kentucky v. Walter's Executors, 122 Ky. 65, 90 S.W. 1066 (1906) (consolidation of school with another and movement to another location did not relieve subscriber of duty to fulfill pledge).

[79]349 Pa. 529, 37 A. 2d 488 (1944).

amount when the construction of the building was commenced. Promotional literature described the proposed "memorial building" as a three-story brick structure. The court ruled that consideration in this case had failed and the promise to pay was unenforceable because the school instead of erecting the proposed new brick structure, had repaired a preexisting wooden structure and had named it the "memorial building." The subscription contract was deemed by the court to be only executory.[80]

Failure of consideration can be seen in a different situation, where a false subscription was made to induce the pledges of others.[81] In contract law, fraud vitiates the basis for the mutual assent of the parties and, therefore, for the basis of consideration. The false representation in these circumstances rendered the subscriptions void.

As with other types of gifts, conditions may be attached to a subscription. In Garard v. Monongahela College,[82] a subscription to make annual installments

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[80]Note that because the transaction was characterized as contractual rather than donative, the cy pres doctrine could not be applied.

[81]Middlebury College v. Bemis, 1 Vt. 189 (1828).

[82]114 Pa. 337, 6 A. 701 (1886).

to the college endowment was held to be unenforceable because the college had failed to secure $50,000 of initial endowment monies. The instrument had stipulated that the Board of Trustees was required to certify that the $50,000 had been obtained. No payment was due until the condition was fulfilled.[83]

On the issue of acceptance of the subscription, it was held in Helfenstein's Estate[84] that a promissory note by a donor to pay $4000 to a theological seminary for a library fund was unenforceable where the professor who had received the note had not notified the trustees of the note until after the death of the donor.

Charitable Bequests

A charitable bequest under a donor's will is the most frequent form of a deferred gift to an institution.[85] As with intervivos gifts, a testamentary

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[83] Accord: Estate of Matthew Baird, 13 Phila. 241, 36 L.I. 226, 7 W.N.C. 439 (Pa. C.P. 1879) (a subscription toward the establishment of a college, reciting that an effort is being made to establish the college, cannot be enforced, where it appears that the enterprise has not been completed or on account of the complete failure of the project).

[84] 77 Pa. 328 (1875).

[85] Other forms of deferred gifts include annuity trusts, unitrusts, gift annuities and pooled income fund gifts. See note 207 and accompanying text infra.

gift may be absolute or contingent, i.e. with limitations on its use. An individual may leave cash, real estate, works of art or other property. If the gift is in cash, the will may designate a fixed dollar amount or a proportion of the estate or residuary bequest (after other specific bequests or devises have been paid). A charitable bequest may also be left in trust. Bequests may be made for a variety of educational purposes, e.g. scholarships, endowment, current operating expenses, and so on.

The first matter which will be raised with regard to a charitable bequest is whether the will is valid. A will can be attacked on various grounds. Several of these were discussed earlier.[86] But presuming that a charitable bequest has been made pursuant to a valid will, the provision may encounter other challenges. For instance, a number of cases have arisen because of the uncertainty or ambiguity of provisions in a will.

A survey of the cases makes it clear that the courts have indulged many legal presumptions in favor of the validity of charitable devises or bequests.

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[86] See note 37 and accompanying text supra.

Thus, charitable bequests have been declared valid even though the object is imperfectly designated. Courts have declared them valid when the institution can be determined with reasonable certainty from the words of the will and surrounding circumstances.[87] Courts have applied this rule even though the institution is misnamed.

One limitation observed in such situations is that the rules of evidence will be followed by the courts. This means, for instance, that parol evidence, i.e. oral or written evidence extrinsic to the will, will be admitted to identify the testator's intention, e.g. to identify the intended educational institution, only when the language used in the will is not clear.[88]

One other matter of importance with regard to charitable bequests, that of the effect of conditions or restrictions created by the testator in his or her will, has been discussed in other contexts above.[89]

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[87] See generally 95 C.J.S. Wills §§687-688 (1957); see Georgetown College v. Webb, 313 Ky. 25, 230 S.W. 2d 84 (1950); see also Besore's Estate, 20 D. & C. 2d 506, 75 Montg. 494 (Pa. C.P. 1959).

[88] See generally 95 C.J.S. Wills § 634 et seq. (1957).

[89] See notes 48 and 54 and accompanying text supra.

If such provisions are clearly expressed, they will be given effect by the courts.

Again, conditions subsequent will be strictly construed, and even where they are clearly expressed in the will, courts will not enforce them to provide for a reversion following a breach of the condition if the contingency for reversion has not been clearly designated.[90] Another important factor regarding conditions subsequent is that the existence of such a condition will not prevent the charitable interest in the estate from vesting on the death of the testator.[91]

Cy Pres Applied[92]

The Restatement of the Law of Trusts (Second)[93] has defined the application of the cy pres doctrine as follows:

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[90]See Bell v. Carthage College, 103 Ill. App. 2d 289, 243 N.E. 2d 23 (1968).

[91]See, for example, University of Texas v. Gaines, 359 S.W. 2d 514 (Tex. Civ. App. 1962).

[92]See Chapter 2, Note 16 and accompanying text supra.

[93](St. Paul, Minn.: American Law Institute Publishers, 1959), §399.

> If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.

The Pennsylvania Law Encyclopedia[94] has provided an alternative definition:

> Generally, unless otherwise provided by the conveyor, indefiniteness, impossibility or impracticability of the conveyor's purpose will not necessarily preclude a court from ordering a distribution of the conveyor's estate for a charitable purpose in a manner which, as nearly as possible, will fulfill the conveyor's charitable intention.

These definitions present the major elements which must be considered in the application of the cy pres doctrine. Under the common law, courts will ask several basic questions in the process of examining whether it should apply the doctrine; those questions are:

1. whether the instrument is a valid charitable trust;

2. whether the terms create a degree of impossibility or impracticability of carrying out the specific purpose of the trust;

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[94] (Philadelphia: George T. Bisel Co., 1980), 7:107, §44.

3. and, whether the trust exhibits a general charitable intent.[95]

The same common law elements may have been codified through statutory enactment. In which case, the courts will be examining the same questions if the state has a statute. However, in some circumstances the statutes do vary somewhat from the common law doctrine. Pennsylvania's current cy pres statute, as revised in 1972, reads in part:

> Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impractical of fulfillment, . . . the court may, . . . order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, whether his charitable intention be general or specific.[96]

Notice that the statute, unlike the common law doctrine of cy pres, which is illustrated by the Restatement definition above, has an additional permissive element. Namely, it does not require the the existence of a general charitable intent for the

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[95]Edith L. Fisch, The Cy Pres Doctrine in the United States (New York: Matthew Bender & Co., 1950), p. 128.

[96]20 PA. CONS. STAT. ANN. §6110 (Purdon); compare the current version to the 1855 version discussed at Chapter 2, note 88 and accompanying text supra.

for the doctrine to be applied. Some state statutes do not mention the general intent element at all. Naturally, if no statute exists, case law will govern what elements must be shown. It should be noted that according to Fisch, Freed and Schacter, as of 1980, 34 jurisdictions have affirmed and applied the cy pres doctrine.[97]

If the court is bound to find all of the traditional conditions for applying the doctrine, it will first examine the trust document to determine the settlor's dominant purpose.[98] This purpose must be ascertained primarily from the four corners of the document, but it may also be discovered through extrinsic evidence when the intention is not otherwise clear.

Second, once the dominant purpose of the settlor has been established, the court must determine whether impossibility or impracticability of carrying out the settlor's specific intent exists.

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[97]Edith Fisch, et al., op. cit., p. 421 (updated by 1980 pocket part); the states include: Alabama, Arkansas, California, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin.

[98]Kutner, op. cit., pp. 33-47.

Third, if the court finds the second prerequisite has been met, then it must establish whether the dominant purpose of the settlor exhibits a general charitable intent which will permit a specific alternative application of that charitable intention. With regard to this element Luis Kutner makes several observations about the issue of establishing general intent:

> The modern tendency has been to decide each case on its own facts without observing any rules of thumb regarding intent. The reason for the intent requirement is that the court is theoretically enforcing the actual and expressed intent of the settlor and that the selection of a secondary charitable objective is not because the court thinks such a result desirable, but rather because the donor actually desired it. But it is evident that this intent requirement is largely fictional.[99]

This analysis may partly explain why states like Pennsylvania have eliminated the general intent element from the cy pres statute.

Kutner states further that, "The public interest is a particularly potent factor which influences the court,"[100] and that the "courts will go to great lengths

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[99] Ibid. at 39.

[100] Ibid. at 43 (emphasis supplied by Kutner); Kutner indicates that this is illustrated by cases like Howard Savings Institute v. Peep, 34 N.J. 494, 170 A. 2d 39 (1961), which is discussed at notes 118 and 344 and accompanying texts infra.

to find a general charitable objective."[101]

The cy pres doctrine in its application to twentieth century cases presents a range of subissues. Higher education cases serve to illustrate those subissues.

While cy pres appears to be a predominantly permissive aspect of the law of trusts, it contains a restrictive dimension. The cy pres doctrine is not a carte blanche which will permit the alteration of any charitable scheme. Limitations to its application can be perceived in the opinions of many of the cases which will be discussed.

A threshold question in any petition to apply cy pres is whether the instrument in question constitutes a valid charitable trust. If it does not, then the cy pres doctrine is not to be applied. There have been some difficulties in making this determination as is demonstrated by an Alabama case, Baxley v. Birmingham Trust National Bank.[102] The majority and dissenting opinions by the Alabama Supreme Court illustrate that jurists differ in their views on the proper attitude of the law towards charitable uses.

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[101] Ibid. at 46.

[102] 334 So. 2d 848 (Ala. 1976).

In Baxley a widow had been granted a power of appointment, i.e. to designate a beneficiary, under her husband's will. The lady attempted to exercise that power by establishing an educational foundation. The attempt to exercise the power, however, was incomplete. After she died, the court was petitioned to apply cy pres in order to perfect the transaction. The court, however, strictly applied the rules of private trusts to the situation and denied the application of cy pres. It stated the existence of a valid charitable trust was a prerequisite to the application of the doctrine. In its opinion the arrangement did not constitute a valid charitable trust.

Justice Alva H. Maddox, in a strong dissenting opinion,[103] argued:

> (1) The intent of the testator is always the polestar in the construction of wills, and (2) Charitable uses are favored, and the construction of all instruments where they are concerned is liberal in their behalf.

Justice Maddox cited Russell v. Allen[104] in which the United States Supreme Court established the proposition that "trusts for public charitable purpose are upheld under circumstances under which private trusts

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[103] Ibid. at 854.

[104] Ibid. at 855; 107 U.S. 163, 167 (1882).

would fail." Justice Maddox argued further:

> If we are dealing with a private trust, as opposed to a charitable one, I would agree with the majority opinion 100%. However, here, I would look to the extrinsic materials to answer this question . . . If so, the law is clear that if a charitable use was intended, the testator's wishes will be carried out.[105]

In another case, Reeser's Estate,[106] a trust for "the education of some reliable boy, a member of the First Presbyterian Church of Reading, Pennsylvania" for the profession of medicine . . . was determined to be a valid charitable trust, and not a private trust, since the beneficiary was not named, i.e. was not definite. The opinion stated that, "A trust for the promotion of education is not charitable if the beneficiaries are limited to the members of a class so small that the relief of the class is not of benefit to the community."

Because no award had been made due to the strictly specified limitations of the trust, the trustees had sought permission to make an award to a reliable Presbyterian girl who sought to study medicine. The

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[105] 344 So. 2d at 855.

[106] 1 D. & C. 2d 731, 47 Berks 51 (Pa. Orph. 1954) citing A.L.I. Restatement of the Law of Trusts (1st ed.), §375.

court granted the alteration under cy pres to permit the award to be made to the girl.

Typically, a petition for an application of the doctrine will be made in a situation where a charity or the charitable trustees feel that there has been a change of circumstances which makes it impossible or impracticable to carry out the provisions of a testamentary charitable trust. A court must, therefore, determine whether there exists a condition of impossibility or impracticability of literal compliance with the terms of the trust. Mere inconvenience in the administration of the trust will not constitute grounds which will satisfy this condition.

The Pennsylvania Supreme Court decided in McKee Estate[107] that where the testator had directed the establishment of an interracial naval college where insufficient funding had made the immediate establishment of the college impossible, and where no other institution appeared to claim the fund, scholarships could be awarded to White and Black orphan boys seeking a similar education.

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[107] 378 Pa. 607, 108 A. 2d 214 (1954); see note 153 and accompanying text infra.

Three years later in subsequent Girard's Will litigation[108] the same court determined among other things that impossibility of performance had not been shown to permit the application of the doctrine to alter Girard College admissions requirements. The City of Philadelphia and two Black applicants for admission to Girard College had sought to have the word "white" omitted from the trust instrument established by Girard's will. However, the supreme court of the state did not agree that compliance with the terms was impossible. It felt that the literal terms of the trust could be carried out just as it had for a hundred years--that there was no shortage of poor white male orphans.

Another example of the denial of a petition to apply cy pres due to the absence of a showing of impossibility or impracticability is seen in Connecticut

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[108]Girard Will Case, 386 Pa. 548, 569, 127 A. 2d 287, 297 (1957). For additional developments in the Girard's Will litigation, see In re Girard College Trusteeship, 391 Pa. 434, 138 A. 2d 844 (1956), cert. den. sub. nom., Pennsylvania v. Board of Directors of City Trusts, 357 U.S. 570 (1958) (removal of city trustees and substitution of individual trustees constituted state action); Pennsylvania v. Brown, 270 F. Supp. 782 (D. Pa. 1967), aff'd, 392 F. 2d 120 (3rd Cir. 1968), cert. den., 391 U.S. 921 (1968) (such an action was not violative of the Fourteenth Amendment). See also the discussion of these cases at note 321 and accompanying text infra.

College v. United States.[109] In that case it was held that where the testatrix had bequeathed $300,000 in trust to the United States to build a dormitory for not less than that amount, the plan did not become impossible or impracticable to justify the application of the doctrine to provide a wing instead of a separate building.

The United States had claimed the amount was insufficient to build a separate building. After examining the instrument, the court concluded that the testatrix had clearly intended that the United States was to supplement the amount of the gift if it were too small to construct the separate building.[110]

There are other issues regarding the determination of a donor's intention. In many instances courts have permitted the application of cy pres when there has been an ineffective designation of a donee or where the designated donee is nonexistent. Some samples are illustrative.

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[109]276 F. 2d 491 (4th Cir. 1960).

[110]See Plechner v. Widener College, 569 F. 2d 1250 (3rd Cir. 1977) (doctrine not applicable because of absence of impossibility; law school's board of trustees were already empowered to establish an affiliation with another school by the certificate of incorporation and need not consult a court of equity to do so).

For instance, because colleges and universities occasionally go out of business, it is quite possible that the school as a charitable donee will not exist. The Medical School of Maine, for example, had been under the control of Bowdoin College, but was eventually discontinued. Bowdoin continued to maintain a pre-medical program. In the light of these circumstances Bowdoin College sought an alteration of a bequest to the medical school under the cy pres doctrine.[111]

While it is not clear from the facts whether the medical school had ceased as a corporate entity, the court proceeded with an examination of the donative instrument to determine whether the donor had intended to benefit only the medical school itself or rather the purpose for which the school existed. The Supreme Judicial Court of Maine held that it was clear from the will that the testatrix intended the latter. Accordingly, it ordered that cy pres was to apply and the donor's charitable purpose be carried out by Bowdoin College

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[111] Snow v. President and Trustees of Bowdoin College, 133 Me. 195, 175 A. 268 (1934). "When a school decides to go out of business, it may not, on its own, decide on an alternate charitable purpose for a trust. Only the courts have the power to make such an alteration, e.g. under cy pres. (See the Wilson College Case, sub nom. Zehner v. Alexander, discussed at note 293 infra.)

through its premedical program.[112]

Curran's Estate[113] entailed the judicial award, pursuant to a cy pres decree, of income from a trust to Wilson College, which is located 156 miles from Philadelphia, under circumstances where higher education institutions located "in or adjacent to Philadelphia" had not met the stipulations of the testamentary trust. The Pennsylvania Supreme Court found that several other institutions, while within the geographic area, fell short of what the testator desired and intended, namely, that the institution be an accredited college for women having church oversight and a broad liberal arts course of study. The evidence disclosed that Wilson had those characteristics

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[112]Compare, Simmons v. Parsons College, 256 N.W. 2d 225 (Iowa 1977) (trusts established for students of college had failed due to college's bankruptcy and that testator's heirs at law were entitled to take the trust property which would otherwise have gone to the college as trustee); Matter of Estate of Coleman, 584 P. 2d 1255 (Kan. 1978) (evidence supported determination that Presbyterian College other than that to which the bequest was made, which sought to be substituted for the closed college as beneficiary under cy pres, had failed to establish testator's general charitable intent).

[113]310 Pa. 434, 165 A. 842 (1933). Accord: Barclay Estate, 18 D. & C. 2d 489 (Pa. Orph. 1959).

while the Philadelphia claimants did not.[114]

In a later case,[115] the Pennsylvania Supreme Court faced the issue of whether a corporate merger of a hospital with another hospital had frustrated the charitable purpose of a trust to permit a gift over under cy pres to a college. The trust instrument had provided that:

> If at any time an event occurs which would necessitate the application of the doctrine of cy pres to this trust fund . . . then upon the occurrence of such event, [the] Trustee shall pay the entire net income to the Trustees of Kenyon College. (Emphasis supplied by the court.)

The trustees of the University of Pennsylvania had appealed a lower court decree which had made the alternative award to Kenyon. The orphan's court had reasoned that because Woman's Hospital, the primary beneficiary, had merged with the University's Hospital, the charitable donee no longer existed. The state supreme court reversed this application of cy pres.

The opinion by Justice Herbert Cohen stated:

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[114] See Kramph's Estate, 228 Pa. 455, 462; 77 A. 814, 816 (1910) (general charitable intent to establish a university in the immediate vicinity of Philadelphia did not require that the school be within the city limits).

[115] Bodine Trust, 429 Pa. 260, 239 A. 2d 315 (1968).

> [T]he consummation of a merger per se in no way affects or frustrates the charitable purposes of a trust fund and does not generate an event which would necessitate the application of cy pres . . . [Under Pennsylvania law, the] only situation in which funds would not inure to the benefit of the surviving corporation (and not as a result of cy pres) is if the settlor clearly manifested an intent to the contrary.[116]

Justice Cohen continued:

> Kenyon College would acquire the trust funds only if an event occurred necessitating the application of cy pres. The fact that Woman's Hospital has merged with University Hospital is not the type of event which, standing alone, necessitates the application of cy pres . . . [I]n the event University Hospital fails to perpetuate the charitable purposes of the settlor, such failure will be an event necessitating the application of cy pres and will serve to invoke the gift-over of the trust funds to Kenyon College.[117] (Emphasis supplied by the court.)

There may be circumstances where the institution may refuse or be unable to take a gift because of

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[116] 429 Pa. at 263-264, 239 A. 2d at 316-317. But compare, Montclair National Bank & Trust Co. v. Seton Hall College of Medicine, 96 N.J. Super. 428, 233 A. 2d 195 (1967) (cy pres held inapplicable where the corporation ceased to function after death of donor but before distribution of estate was completed because the gift vested on the testator's death).

[117] 429 Pa. at 264-265, 239 Pa. A.2d at 317. See In re Jolson's Estate, 114 N.Y.S. 2d 135 (Sur. Ct. 1952) (where beneficiary college had no separate corporate existence, the legacy is payable to its corporate parent for the use and benefit of the subordinate branch and for the particular charitable use stated by the testator).

certain restrictions in the gift. A court may be asked to invoke cy pres to permit the gift to pass. A leading example may be seen in Howard Savings Institution v. Peep.[118]

A testamentary scholarship trust had been established by an alumnus of Amherst College. The trust was to provide "a scholarship loan fund for deserving American born, Protestant, Gentile boys of good moral repute, not given to gambling, smoking, drinking or similar acts." The Amherst College charter, however, provided that "no student shall be refused admission to, or denied any of the privileges, honors, or degrees of said college, on account of the religious opinions he may entertain." Amherst refused to accept the funds because in order to administer the fund it would have to violate its charter.

A New Jersey chancery court applied cy pres and ordered that the words "Protestant" and "Gentile" be removed from the will provision and the funds turned

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[118]61 N.J. Super. 119, 160 A. 2d 177 (1960); aff'd, 34 N.J. 494, 170 A. 2d 39 (1961); see note 344 and accompanying text infra. "Another gift to Amherst with discriminatory ramifications is described at note 330 infra."

over to the college. The state supreme court affirmed.[119]

Still other circumstances may require the application of cy pres. For instance when there exists either a deficiency or a surplus of funds for carrying out the testator's purpose, a court may have

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[119]Accord: Weaver Trust, 43 D. & C. 2d 245 (Pa. C.P. 1967) (testamentary trust to provide funds to Protestant white students would not be carried out because criterion of race was against policy of the college; trustees could seek alteration of trust); Treen Trust, 29 Fiduciary 458 (Pa. C.P. 1979) (testamentary trust to provide college scholarships for "deserving white Christian young men" ordered to be altered because of refusal of beneficiary schools to accept funds with the restriction).

to alter the terms of the trust.[120]

There have been a considerable number of cases on the issue of the existence of a general charitable intent. Two relatively recent Massachusetts cases illustrate how its highest court handled the issue.

In Wesley United Methodist Church v. Harvard College[121] a testator had established an undergraduate

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[120] See, for example, Wesley United Methodist Church v. Harvard College, 316 N.E. 2d 620, 622 (Mass. 1974) (increases in tuition justify revision of $500 annual awards to permit larger awards to be made in the trustees' discretion) (see note 21 and accompanying text infra); Snow v. President and Trustees of Bowdoin College, 133 Me. 195, 175 A. 268 (1934) (court orders accumulation of income until endowment reaches sufficient size to carry out purpose of trust) (see note 111 and accompanying text supra); McKee Estate, 378 Pa. 607, 108 A. 2d 214 (1953) (fund for establishing interracial naval school insufficient for purpose is to be retained for a period of time sufficient to permit completion of study as to whether (along with other gifts) the testator's primary plan is possible) (see note 107 and accompanying text supra); In re Lower Dublin Academy, 8 W.N.C. 564 (Pa. C.P. 1880) (where a surplus of funds exists the court may authorize trustees to expend a surplus for a similar purpose); Brooke Estate, 45 D. & C. 2d 670 (Pa. Orph. 1968) (residue of estate insufficient to establish chair of orthopedic surgery and because of absence of other fund to which gift can be added, the funds will at the request of the college be added to other funds for the building of a hospital building devoted to orthopedic medicine); Ogontz School Trust, 67 D. & C. 2d 402 (Pa. C.P. 1974) (court refused deviation of surplus scholarship funds to buy books on ground that the lack of demand for scholarship money may be temporary).

[121] 316 N.E. 2d 620 (Mass. 1974).

scholarship trust fund for the benefit of one worthy male church member to attend Harvard. After many years no scholarships had been given. The trustees sought application of cy pres to permit grants for both men and women for graduate as well as undergraduate education. The probate court granted the petition and the state supreme court affirmed. The high court declared that even though the fund theoretically could be applied according to its original stated terms, this did not preclude the application of the doctrine. Furthermore, the existence of a narrow circumscribed class for whom the testator wished to benefit does not preclude a finding of a broader general intent.

Similarly in Fulton v. Trustees of Boston College[122] the same court found a general charitable intent in a testamentary trust which was not to become effective until the year 2000. However, the court ruled that the trust for the benefit of Boston College should not be altered at this stage and that the application of cy pres would be premature because the failure of the charitable purpose of the trust, while

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[122] 361 N.E. 2d 1297 (Mass. 1977).

possible, had not yet occurred. As to the general intent element, the court stated that it could be inferred in this case from several factors -- the existence of bequests to six other charities,[123] the absence of language restricting the fund to a particular institution,[124] and the absence of any indication that the testator failed to foresee that changed circumstances might dictate the need for an adjustment to the trust consistent with his intent.[125]

The last factor was cited as an important policy consideration in another case, Trustees of Dartmouth College v. City of Quincy, where it was stated that:

> A donor who brings into existence a charitable institution must recognize that most institutions are likely to change with time, that they will become sterile if they remain static, and that they must be adaptable to new public considerations and unpredictable economic circumstances.[126]

Thus, public policy again seems to have had an apparent

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[123] 361 N.E. 2d 1298.

[124] 361 N.E. 2d 1299.

[125] Ibid.

[126] 258 N.E. 2d 745, 753 (Mass. 1970) (language of charitable trust establishing a school for females born in the town of Quincy was interpreted as having reference only to the use of the testator's gift and did not preclude the use of the facilities by non-Quincy females who paid full tuition); see especially n.9 at 753.

influence on the interpretation of gift instruments by a court.

All of these cases have illustrated the primarily permissive nature of the cy pres doctrine. In the last eighty years it has been frequently invoked in order to benefit institutions of higher education. But in considering requests to apply cy pres, courts have had to weigh the charity's interest against the rights of the testators, settlors and heirs at law. While the doctrine has been liberally applied, limitations to that application have emerged.

In Lehigh University v. Hower[127] President Judge Thomas Baldridge of the Pennsylvania Superior Court underscored the limitation dimension:

> A court may vary specific instructions given by a testator in his will in order to accomplish the ultimate end which he had in view, provided such a departure does not impair the interest of any beneficiary or violate the testator's primary purpose.

Another limitation exists in the extent to which appellate courts may substitute their judgment with regard to lower court cy pres determinations. As to the nature of higher court reviews of the

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[127] 46 A. 2d 516, 521 (Pa. 1946), citing Kramph's Estate, see note 114 supra.

application of cy pres, Justice John Bell of the Pennsylvania Supreme Court stated:

> [T]he test is not what we would have decided if we had been sitting as a trial Court--the test is whether the lower court has mistaken or misapplied the law or committed a manifest abuse of discretion.[128]

As to a different issue, the matter of standing to petition for the application of cy pres, an added public policy dimension can be noted in the Pennsylvania cy pres statute. The pertinent section[129] states that a trustee or any interested person may make application to the court. In the same fashion, the Attorney General of the Commonwealth, as the representative of the public interest, may apply to have a court alter a charitable trust.

Another similar but distinct doctrine which has been applied to charitable trusts is the doctrine of approximation, which is a rule of judicial construction of the trust as it would have been intended by the grantor in the light of changed conditions.[130]

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[128] In re Estate of Glase, 384 Pa. 118, 120, 119 A. 2d 294, 295 (1956).

[129] 20 PA. CONS. STAT. ANN. §6110 (Purdon); concerning the enforcement of cy pres, see generally, 14 C.J.S. Charities, §58 et seq. (1939).

[130] See chapter 2, note 77, supra.

A third doctrine which is distinguishable from cy pres or approximation is the doctrine of deviation. One twentieth century description of this doctrine can be found in the Restatement of Trusts:

> The court will direct or permit the trustee of a charitable trust to deviate from a term of the trust if it appears to the court that compliance is impossible or illegal or that owing to circumstances not known to the settlor and not anticipated by him compliance would defeat or substantially impair the accomplishment of the purpose of the trust.[131]

Fisch, Freed and Schachter explain the distinction between cy pres and deviation concepts by saying that the doctrine of deviation is:

> [A]nalogous to, but not as extensive as the cy pres doctrine which permits a change in charitable purpose, the doctrine of deviation allows a court to authorize departures from the administrative provisions of a charitable disposition . . . Unlike the cy pres doctrine, deviation can be invoked absent a general charitable intent.[132]

The doctrine of deviation, however, does not permit a change in charitable purpose.

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[131]Restatement of the Law of Trusts (Second), op. cit., §381; see George T. Bogert, Law of Trusts and Trustees (rev. 2d ed.; St. Paul, Minn.: West Publishing Co., 1980), §561, p. 225 et seq.

[132]Fisch, et al., op. cit., p. 547; see note 346 and accompanying text infra.

One example of a court's liberal application of the doctrine of deviation to a higher education case was the case of Fenn College v. Nance,[133] where the college was permitted to transfer its facilities to a newly created state university. As part of the transfer, its charitable funds were transformed into an educational foundation which would support educational endeavors.

The court made a distinction as to its use of the deviation doctrine, versus cy pres, as a means for changing the administration of the existing charitable purpose. It determined that the deviation concept should be applied in view of the altered corporate existence of the institution in order to permit it to carry out its educational purpose. The rights of the college donors, claimed the court, were not invaded by the administrative alteration.[134]

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[133]210 N.E. 2d 418 (Ohio C.P. 1965).

[134]This case might be viewed as an extremely permissive decision. It can be argued that this court was quite liberal in designating the changes which led to the petition as administrative in order to obviate the need for having to satisfy the prerequisites for granting a change under cy pres.

Mortmain Applied

The nineteenth century restrictive sentiment to limit the privilege of deathbed dispositions to charity as seen in the Mortmain Statutes was to be reversed in the twentieth century as many states either legislatively repealed those statutes or judicially sustained constitutional challenges to their validity. The judicial challenges to mortmain have been based on either equal protection or due process grounds.

For instance, a primary example of the equal protection attack occurred in the Pennsylvania case of In re Estate of Cavill.[135] In Cavill the state supreme court held that the state statute,[136] which invalidated bequests to religious or charitable

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[135] 329 A. 2d 503 (Pa. 1974) (while a due process attack was raised, the court only addressed the equal protection argument); see Lorraine S. Tabakin, "In Re Estate of Cavill: Death of Pennsylvania's Mortmain Statute," University of Pittsburgh Law Review, 37: 169-179, 1975; see also "Mortmain Statutes: Questions of Constitutionality," Notre Dame Law Review, 52:638-652, 1976; see further, Heilig Trust, 29 Pa. Fiduciary 265 (1979) (unconstitutionality of thirty-day rule will not be applied retroactively to defeat rights of assignee for value where assignment was made in reliance on the operation of the Mortmain Statute).

[136] PA. STAT. ANN. tit. 20, §2507 (1) (repealed) (Purdon); PA. STAT. ANN. tit. 20, §6118 (1) (repealed) (Purdon); see chapter 2, note 90 et seq. supra.

organizations made within thirty days of the testator's death, denied charitable donors and charitable beneficiaries the equal protection of the law. The court made its holding based on a rationale that the United States Constitution's fourteenth amendment does not permit states the power to legislate different treatment accorded to persons placed by the statute into different classes on the bases of criteria unrelated to the statutory purpose.[137] As part of its attack on the statute the court stated:

> Clearly, the statutory classification bears only the most tenuous relation to the legislative purposes. The statute strikes down the charitable gifts of one in the best of health at the time of the execution of his will and regardless of age if he chances to die in an accident 29 days later. On the other hand, it leaves untouched the charitable bequests of another, aged and suffering from a terminal disease, who survives the execution of his will by 31 days. Such a combination of results can only be characterized as arbitrary.[138]

Following the court's decision, the Pennsylvania legislature repealed both of the Mortmain sections of the code.[139]

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[137] 329 A. 2d 503, 505 (Pa. 1974).

[138] Ibid. at 505-506.

[139] PA. STAT. ANN. tit. 20, §2507 (1) (repealed) (Purdon); PA. STAT. ANN. tit. 20, §6118 (repealed) (Purdon).

According to Fisch, Freed and Schacter, as of 1980 only seven states had retained Mortmain Statutes.[140] A number of the jurisdictions which have retained Mortmain have sustained the statutes in the face of attacks on their constitutionality.[141] The rationale for protecting these statutes has been stated as follows:

> The right to receive or dispose of property by last will and testament is not an inherent right, nor is it one that is guaranteed by the fundamental law. Nowhere in the Federal Constitution is there any attempt to treat the matter of disposition of property by will, . . . [T]he right of the testamentary disposition of property does not emanate from the organic law . . . but is . . . derived solely from statute without constitutional limitation.[142]

One law review article has suggested that statutes like those of New York[143] and Iowa[144] "are

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[140] Fisch, et al., op. cit., p. 81 (and 1980 pocket part p. 12). These include: Florida, Georgia, Idaho, Iowa, Mississippi, New York and Ohio.

[141] See Taylor v. Payne, 17 So. 2d 615 (Fla. 1944); In re Kruger's Will, 257 N.Y.S. 2d 232 (App. Div. 1965).

[142] Taylor v. Payne, 17 So. 2d 615, 617 (Fla. 1944).

[143] N.Y. ESTATES, POWERS AND TRUSTS LAW §5-3.3 (McKinney 1967) (states that a person may dispose of their entire estate to charity, but if the testator's surviving heirs contest, it shall be valid only to the extent of one half of the estate).

[144] IOWA PROB. CODE tit. 46, §633.266 (1964) (provides that charitable devises in excess of one fourth of the estate are voidable at the election of the heirs).

sufficently narrow and reasonably related to their purpose to meet the equal protection standard, and could provide models for those jurisdictions that wish to preserve charitable restrictions."[145]

Rule Against Perpetuities[146]

"The rule against perpetuities is a technical rule of law designed to limit the period during which the vesting of a future interest may be postponed to lives in being plus twenty-one years."[147] The rationale of the rule, as has been discussed in the last chapter,[148] is to prevent property from being removed from commerce because its title will not vest absolutely for a long or indeterminant period of time.

The common law rule is in effect in most states except as it has been modified by statute. States such

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[145]Tabakin, op. cit., p. 171.

[146]See generally, Clinton J. Najarian, "Charitable Giving and the Rule Against Perpetuities," Dickinson Law Review, 70:455-479, 1966.

[147]Pennsylvania Law Encyclopedia, op. cit., 14:116, §131 et seq., 1959.

[148]See chapter 2, notes 23 and 78 and accompanying text supra.

as Pennsylvania have codified the rule.[149] The application of the rule to charitable trusts involves several issues.

The rule as it has been applied to charities was delineated in one law review article, as follows:

> Although it is occasionally stated that charitable trusts and foundations are exempted from the operation of the Rule Against Perpetuities, that statement is both erroneous and misleading. It is erroneous because a contingent future gift for charity must be so created that it will vest, if it vests at all, within the perpetuities period (save that a gift over from one charity to another charity on a contingency that may be resolved remotely is good under the Rule). The statement is misleading because it implies that the Rule Against Perpetuities is a Rule against the duration of trusts, whereas the Rule in modern form is a rule against remoteness of vesting. Nonetheless, it is probably true that the judiciary has created an "exemption" for charitable gifts in the sense that the blackletter perpetuities law is not applied as harshly in the context of the charitable gift as it is in the context of the family gift, but in that connection it is only candid to admit that the trend of the law generally has been to relax the requirements of the Rule irrespective of context.[150]

This commentary seems to underscore a generally

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[149] 20 PA. CONS. STAT. ANN. §6104 (Purdon).

[150] Robert J. Lynn, "Perpetuities: The Duration of Charitable Trusts and Foundations," U.C.L.A. Law Review, 13:1074, at 1097, 1966; see chapter 2, note 81 and accompanying text supra.

permissive attitude held by the judiciary in its application of the rule to charitable causes in modern times.

Looking more specifically as to how this policy has manifested in Pennsylvania, the state legislature in 1889 had endorsed the concept of the exemption of charitable dispositions from the rule against perpetuities.[151] This provision, which was retained until 1947, read in part, "No disposition of property heretofore or hereafter made for [a] . . . charitable use shall fail . . . by reason . . . [of] being given in perpetuity."

As to the attitude of the Pennsylvania judiciary during the early twentieth century, the courts in a couple of charitable trust cases seemed to be inclined to strictly construe the rules as to the vesting of the particular interests.[152] Later, however,

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[151]Act of May 9, 1889 Pub. L. 173, §1 (repealed by Act of April 24, 1947 Pub. L. 100, §20).

[152]See, for example, Penrose's Estate, 257 Pa. 231, 101 A. 319 (1917) (gift over to charitable use, which might vest after 21 years after life in being at creation of interest, violated the rule and was void); Ledwith v. Hurst, 284 Pa. 94, 130 A. 315 (1925) (even though permitted under 1889 Act, a charitable bequest in perpetuity cannot be created by a gift over, following prior attempted disposition of the same property wherein the rule of perpetuities had been violated).

in 1954 the state supreme court seemed to endorse a more permissive rationale in interpreting a charitable trust as vesting on the death of a testator even though possession and enjoyment of the estate was to be deferred until much later.[153]

As to the situation in Pennsylvania today, a recent lower court decision reflects a continued ambivalence towards the issue. The case of Herrick Trust[154] illustrates the process of balancing that courts engage in when attempting to resolve the interest in promoting a charitable bequest as against the need to prevent indefinite vesting of title.

In the Herrick case, which once again involved Stephen Girard's will, a charitable trust for scholarships, which was to be administered with recipient preferences being given to the testator's descendants and descendants of Girard College graduates, was challenged as violating the rule against perpetuities.

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[153] McKee Estate, 378 Pa. 607, 108 A. 2d 214, 232 (1954); see note 170 and accompanying text supra.; but cf. In re Scholler's Estate, 403 Pa. 97, 169 A. 2d 554 (1961) (rule against perpetuities had no application to charitable trust).

[154] 30 Pa. Fiduciary 211 (Pa. C.P. 1979); see chapter 2, note 56 et seq. and accompanying text supra.; see also this chapter, note 320 and accompanying text infra.

The court held that as to the part of the trust favoring the descendants of graduates, the trust was valid because this part of the trust was not deemed to violate the rule. Under the doctrine of severability the whole trust did not fail -- just only that part which violated the rule.

One method for avoiding the problem of remote vesting has been employed repeatedly by courts from the late nineteenth century to the present. The doctrine of cy pres has been applied to prevent charitable trusts from failing due to a remote vesting problem. It has been applied for instance when a condition precedent, e.g. the existence of a charitable donee, for the vesting of an interest is absent. Under such circumstances the gift has been construed under cy pres as being one to "charity in the abstract," which is unconditional and not subject to the rule.[155]

A leading example of a court's rationale for applying cy pres to a perpetuity is expressed in Snow v. President and Trustees of Bowdoin College[156] where

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[155]See, for example, Franklin v. Hastings, 253 Ill. 46, 50, 97 N.E. 265, 267 (1911); Codman v. Brigham, 187 Mass. 309, 312, 72 N.E. 1008, 1009 (1905).

[156]133 Me. 195, 175 A. 268 (1934); see note 111 and accompanying text supra.

the Supreme Judicial Court of Maine stated:

> As [charitable trusts] are not subject to ordinary rules against perpetuities and may continue indefinitely, special problems arise with respect to their administration. However wise a testator may be, it is impossible for him to foresee all the vicissitudes, which may affect the object of his bounty through the passage of time and the happenings of chance . . . The rule has been many times expressed by this court that a fund for a charity will be administered cy pres, where there is a failure of the specific gift and a general charitable intent disclosed in the instrument creating the trust.[157]

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[157]175 A. at 270-271

Luis Kutner has commented on the use of cy pres to obviate the rule against perpetuities:

> The application of the doctrine of cy pres to avoid the Rule Against Perpetuities has been criticized as use of "distorted reasoning" in attributing "indiscriminate philanthropy" to the donor and that "it would be more in accord with reason and consistency simply to hold the rule against remoteness inapplicable to charitable trusts" as justified by public policy. However, it has been noted that generally speaking cy pres may be invoked only when a valid gift fails. If a gift contravenes the Rule Against Perpetuities it is totally void so that there is nothing on which the cy pres doctrine may operate. But there are exceptions to this presupposition of a valid gift.[158]

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[158]Kutner, op. cit., p. 97. See Comment, "Remoteness of Vesting and the Charitable Trust," Fordham Law Review, 31:782, at 785, 1963; W.B. Leach, "Perpetuities: Cy Pres on the March," Vanderbilt Law Review, 17:1381, 1964; "Trusts and Estates--Charitable Trusts--Application of Rule Against Perpetuities and Doctrine of Cy Pres," Ohio State Law Journal, 37:685-704, 1976.

Regarding the exceptions to the "presupposition" stated by Kutner at the end of the quotation, he cites McClean for the proposition:

> Assuming that there is a rule that cy pres presupposes a valid gift, there are then some cases which must be regarded as exceptions to the rule. Formerly, when gifts, basically charitable in nature, were void as superstititous uses, the cy pres doctrine was applied; this was however an exercise of prerogative rather than of judicial cy pres, and in any event is, in modern times, a rather anomalous principle. Of more immediate import are gifts to charitable institutions, which never existed, or having once existed, cease to do so before the testator's death. In such circumstances non-charitable gifts

158 (Cont'd.)

would lapse. However, if the charitable institution never existed, the gift will almost invariably be applied cy pres. Where the gift is to a once existing but now defunct institution, some decisions suggest that the ordinary rules of lapse should apply, but the weight of authority admits of cy pres. In these two types of cases cy pres operates to "save" gifts which never vest because the institutions are not in existence to receive them; why should it not also operate in favor of charity where vesting is postponed for too long a period? The cy pres doctrine is also invoked to deal with income of an already vested charitable gift when that income has been the subject of an illegal discretion for accumulation; and this is done even where a statute provides for another disposition of such income. If the courts are prepared to rescue charity from such illegal directions in the face of contrary legislative provision, why should they not do likewise with respect to the Rule Against Perpetuities?

It may be argued therefore that if the courts have in the past, or are now prepared to apply cy pres to void or lapse gifts, or vested gifts to which illegal directions are attached, they should by analogy apply the doctrine when a gift contravenes the Rule Against Perpetuities. It would, of course, be easy to refute these analogies. The lapse of gifts to charities is a different type of invalidity from the illegality of a gift violating the rule; and the application of cy pres to income illegally accumulated only occurs if the gift is initially valid. In the end the question is one of whether the traditional favoritism for charity can overcome the strength of the perpetuity rule. Moreover, there is the added consideration that so to extend the scope of the doctrine may in effect result in its application to all illegal gifts, thus demolishing the alleged prima facie rule. (Kutner, loc. cit., quoting McClean, "Charitable Trusts, The Rule Against Perpetuities, Accumulations and Cy-Pres," University of British Columbia Law Review, 1:729; 756-758, 1964,)

Legislatures have responded in some states by establishing statutory guidelines for trust income accumulations. In the last chapter there was some discussion of the 1853 Pennsylvania Act which limited the amounts of trust income accumulations.[159] The current Pennsylvania statute[160] allows for accumulations beyond the period allowed by the common law rule against perpetuities; in addition it does not have an amount limitation (the 1853 Act did). The section, however, has been construed as requiring a rule of reasonableness.[161]

Whether a particular accumulation is reasonable will be arguable in the context of the specific circumstances. Usually, a court will have to determine whether the provisions are in the best public interest, or are void as against public policy. And once again, the court will engage in a process of balancing--weighing the interest that adequate sums be amassed in order to carry out the donor's wishes against the

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[159] See chapter 2, note 79 and accompanying text supra.

[160] 20 PA. CONS. STAT. ANN. §6106 (Purdon).

[161] In re James' Estate, 414 Pa. 80, 199 A. 2d 275 (1964); see note 165 and accompanying text infra.

interest that funds which have been directed to charity should be used by charity.[162] Depending on the statutory or judicial parameters, a court can under its equity powers, either sustain, terminate, eliminate or modify a trust accumulation. A few examples are illustrative as to how courts have ruled in specific cases as to permissible amounts of accumulation or time for accumulation.

As to the amount permitted to be accumulated, the Pennsylvania Supreme Court in a late nineteenth century case sustained a charitable trust which had ordered that capital be accumulated to the extent of $500,000 for the purpose of establishing a foundation for female higher education. The court sustained the provision for accumulations on the basis of the ninth section of the Act of April 18, 1853, but stated that the amounts of accumulations were subject to limitation because of the tenth section of the Act of April 26, 1855 (Pub. L. 328) which clearly gave the legislature the right to direct the amounts in excess of permitted charitable accumulations either in conformity with the

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[162]Fisch, et al., op. cit., pp. 123-126.

wishes of the testator or directly into the public treasury.[163]

Under the current Pennsylvania statute, as was indicated above, there is no amount limitation, and arguably under a rule of reason in times of inflation, a rather substantial accumulation would be permitted to stand.

As to the length of time over which an accumulation would be permitted, a test or rule of reasonableness is evident in the case law. In Massachusetts, for example, the state's highest court upheld an accumulation providing for distribution only when the income was sufficient for the trust purpose or at least not until 25 years after the death of the donor.[164] On the other hand a 1964 Pennsylvania Supreme Court decision struck down a 400-year income accumulation.[165]

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[163] Curran's Appeal, 4 Penny. 331 (Pa. 1884); see note 4 supra.; but cf. Snow v. President and Trustees of Bowdoin College, 133 Me. 195, 175 A. 268 (1934) (upholding an accumulation up to $50,000) (see discussion of case above at note 111 and accompanying text).

[164] Trustees of Dartmouth College v. City of Quincy, 331 Mass. 219, 118 N.E. 2d 89 (1954).

[165] In re James' Estate, 414 Pa. 80, 199 A. 2d 275 (1964).

And more recently the same court invalidated a trust provision which directed that income be accumulated for 500 to 1000 years with only a small fraction of the income going to charity.[166]

The Law of Taxation and Incentives For and Limitations on Gifts to Institutions of Higher Education

Individuals are motivated to give to charity for different reasons. A variety of social, cultural, moral, religious, psychological and economic factors figure in that motivation. The interplay of these factors may be responsible for a deep-rooted tradition of charitable giving in America.

In colonial times charitable giving was practiced by the Quakers and Puritans, whose charity was based primarily on a religious motive. This motive continued to influence giving throughout the nineteenth century, and is also observable in the early part of the twentieth century where it was ostensibly endorsed by people like John Davidson Rockefeller, I.

Rockefeller has been quoted as saying, "God

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[166]Trusts of Holdeen, 403 A. 2d 978 (Pa. 1979).

gave me my money," and (to paraphrase John Wesley's sermon on The Use of Money), "A man should make all he can and give away all he can."[167] The religious motive for giving continues to play an important role in charitable giving today.

Andrew Carnegie, a contemporary of Rockefeller, stated in his famous essay, The Gospel of Wealth (1889), a different philanthropic philosophy. Rather than perceiving philanthropy as a religious duty, he is reputed as seeing philanthropy as a social obligation. One writer has commented that, "Echoing the theories of social Darwinism, he saw his riches--and trusteeship--as having devolved not from Providence but rather from nature which had selected him as one of the fittest in the struggle for survival to amass and redistribute in the public interest."[168]

Religious and social motives seem to have provided some major incentives for giving by rich and poor alike throughout the twentieth century. With regard to education, people like Carnegie, who

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[167]As quoted in Carl Bahol, Charity, U.S.A. (New York: Times Books, 1979), p. 27; Bahol defines the religious motive in terms of the "doctrine of stewardship."

[168]Ibid. pp. 26-27.

possessed little formal training, donated generously to colleges and universities because of a feeling for the general social worth of institutions of higher learning.

Colleges and universities have been successful in increasing the level of voluntary support over the years because "the discovery of new knowledge and its application to the ills and problems of society--are purposes that receive general social approbation."[169]

Another major incentive for individuals' giving to higher education has been that of gratitude. Alumni have been supportive because:

> A college is much more than a temporary dwelling place for a few months or a few years. It partakes of the characteristics of a clan or club or enlarged family within which a "sense of belonging" developes . . . Sentiments of loyalty, gratitude, nostalgia, felt in diverse degrees by each former student, tend to grow with the passing years and to become fused into somewhat hazy but very pleasant impressions of college days.[170]

Personal motives, social, religious, or other, for giving to higher education or other charity have

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[169]John J. Corson, The Governance of Colleges and Universities (New York: McGraw-Hill Book Co., 1975), pp. 79-80.

[170]M.M. Chambers, Higher Education: Who Pays? Who Gains? (Danville, Ill.: The Interstate Printers & Publishers, Inc., 1968), pp. 135-136.

received support in public policy which had provided additional economic incentives for giving--mainly through special tax advantages. The nature of these special tax treatments has had both permissive and restrictive dimensions, which are illustrated in the following two subsections, federal tax treatment and state tax treatment.

Federal Tax Treatment

The first federal income tax law was passed by Congress in 1862 but was not actually used to collect taxes and was therefore eliminated after the Civil War. Attempts to reintroduce income taxation during the 1870's were unsuccessful, but in 1894 a bill was passed which provided for the taxation of income over $4000 at the rate of two percent.[171] This provision failed to pass judicial scrutiny and was struck down in Pollack v. Farmers' Loan and Trust Co.[172] The United States Supreme Court held that the income tax was a "direct tax" and, therefore, violative of the Constitution, article 1, section 2, which required

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[171]Act of August 27, 1894, sec. 27, 28 Stat. 553.

[172]157 U.S. 429 (1895); 158 U.S. 601 (1895).

that direct taxes be apportioned among the States by population.

To rectify the constitutional objection, Congress and the States adopted and ratified the sixteenth amendment in 1913. That amendment states:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

In that same year Congress successfully enacted another income tax law, which provided for taxation of individual income at a graduate rate, e.g. one percent to $20,000 etc.[173] The act had not provided for any charitable deduction, but in 1917 the law was amended to provide for a deduction for charitable purposes.[174] This provision permitted an individual to deduct up to 15 percent of his taxable net income. Edith Fisch, Doris Freed and Esther Schacter have commented:

> While probably regarded by many congressmen as a temporary measure that would be eliminated

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[173]Act of October 3, 1913, ch. 16, Pub. L. No. 16, §1, 38 Stat. 166.

[174]Act of March 3, 1917, ch. 159, §1201 (2), Pub. L. No. 377, §399, 39 Stat. 1000.

after the high wartime tax rates were reduced, this did not prove to be true and the deduction was not only retained but has been extended and liberalized over the years.[175]

Some of the modifications and additions to the charitable deduction have been as follows:

1. The Individual Income Tax Act of 1944, increased the allowance for contributions by substituting adjusted gross income for net income as the basis for computing the 15 percent limitation.[176]

2. In 1952 the Internal Revenue Code of 1939, §23 (o) was amended to increase the 15 percent limit to 20 percent.[177]

3. The Internal Revenue Code of 1954 increased the 20 percent limitation to 30 percent for deductions to certain public charities.[178]

4. In 1969 the Code was further amended to increase the percentage limitation to 50 percent for certain public charities.[179]

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[175]Fisch, et al., Charities and Charitable Foundations (Pomona, N.Y.: Lond Publications, 1974), p. 624; see Rabin, "Charitable Trusts and Charitable Deductions," New York University Law Review, 41:912, 1966.

[176]Act of May 29, 1944, ch. 210, §8 (b), Pub. L. No. 315, §10 (a), 58 Stat. 231.

[177]Act of July 8, 1952, ch. 588, §4 (a), Pub. L. No. 465, 66 Stat. 442.

[178]Act of August 16, 1954, ch. 736, §170 (b)(1)(A), Pub. L. No. 591, §1 (a-d), 68A Stat. 3.

[179]I.R.C. §170 (b)(1)(A); [the Economic Recovery Tax Act of 1981, which was recently passed, will not be considered in the body of the text, but is referred to in Appendix E; see chapter 4, note 37, infra.]

The current charitable deduction section in part provides the following:

> (a) Allowance of deduction.--
> (1) General rule.--There shall be allowed as a deduction any charitable contribution . . . payment of which is made within the taxable year . . .
>
> (b) Percentage limitations.--
> (1) Individuals.-- . . .
> (A) General rule.--Any charitable contribution to-- . . .
> (ii) an educational organization which normally maintains a regular faculty and curriculum and normally has a regularly enrolled body of pupils or students in attendance at the place where its educational activities are regularly carried on, . . .
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> shall be allowed to the extent that the aggregate of such contributions does not exceed 50 percent of the taxpayer's contribution base for the taxable year.[180]

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[180] I.R.C. §170. It should be noted that in addition to the statutory parameter for the determination of charitable deductions, the I.R.S. has a comprehensive set of regulations (26 C.F.R. §1.170) which explains and interprets the Code. For instance, in defining eligible charitable institutions for whom gifts may be deducted, the regulations, among other criteria, indicates that the term educational organizations includes "institutions such as primary, secondary, preparatory, or high schools, and colleges and universities." (26 C.F.R. §1.170A-9) Further application, interpretation and clarification of the charitable deduction provisions are obtained through judicial and quasi-judicial determinations made through revenue rulings (see the Cumulative Bulletin (Washington, D.C.: United States Treasury), the Tax Courts and other courts on appeal).

The rationale for the change to the 50 percent limitation was described in the House Report on the Tax Reform Act of 1969:

> In order to strengthen the incentive effect of the charitable contributions deduction for taxpayers generally, your committee has increased the present 30-percent limitation to 50-percent . . . It is believed that the increase in limitation will benefit taxpayers who donate substantial portions of their income to charity and for whom the incentive effect of the deduction is strong--primarily taxpayers in the middle- and upper-income ranges.[181]

Besides the 50 percent limitation on gifts from income, the Internal Revenue Code provides for a 30 percent limitation on donations of most appreciated long-term capital gain property given to eligible charities.[182] Before the Tax Reform Act of 1969, donors could take a deduction on the fair market value of property contributed to eligible charities without having to pay tax on the appreciated portion of the property. Now, a donor, while not taxed on the amount of the appreciation, is not permitted to deduct the full fair market value contributed.[183]

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[181] House of Representatives Report No. 91-413, reprinted in [1969] United States Code Congressional & Administrative News, p. 1645, at 1697.

[182] I.R.C. §170 (b)(1)(C).

[183] I.R.C. §170 (e)(1)(A).

While the charitable deduction is basically a manifestation of permissive public policy, in that the government is providing an economic incentive or motive for philanthropy, the ceiling limitations on the donation of income or property arguably is a limitation to that incentive. Although the legislative history[184] is not clear, it seems that a major reason for incorporating the ceilings into the charitable deduction was to limit the amount of tax revenues diverted from the public sector to charity.[185]

Besides the ceiling limitations, another limitation on the donor's privilege to obtain a charitable deduction for a gift to a particular organization exists in the fact that the deduction

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[184]For a fairly complete analysis of I.R.C. §170 as contained in House Report No. 1337, Senate Report No. 1622, and Conference Report No. 2543, which were presented during the passage of the Internal Revenue Code of 1954, see pp. 4189, 4843, 5280, 5289 of the 1954 United States Code Congressional and Administrative News (St. Paul, Minn.: West Publishing Co., 1954). Notes on subsequent legislative history of §170 can be found at 26 U.S.C.A. §170.

[185]For a discussion of the diversion of revenues tax-expenditure issue, see chapter 4, note 41 and accompanying text infra.

will be permitted, as has been indicated, only if the organization is a charity within the definition of the term in the Code. "To establish its exempt status and thus qualify for deduction contributions by its donors, an organization must apply for [and be granted] exemption [by] the service."[186]

Apart from the tax exempt status criteria, which will be detailed below,[187] a charity is classified as one which qualifies a donation for deduction when a "charitable contribution" is made to or for the use of "a corporation, trust or community chest, fund or foundation-- . . . (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . ."[188]

Seemingly, the parameters for what can qualify as a charitable organization are quite broad, and while most colleges and universities should fall

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[186]Arthur Andersen & Co., Tax Economics of Charitable Giving (Chicago: Arthur Andersen & Co., 1979), p. 4; C.F.R. 1.501 (a)-1(a)(2); this also could be viewed as a restriction on the charity.

[187]See note 241 and accompanying text infra.

[188]I.R.C. §170 (c)(2).

within the guidelines of Section 170 (c)(2), there may be situations where a deduction will be disallowed. A few examples will illustrate some problems.

In 1971 a class action suit by Blacks in Mississippi was successful in enjoining Treasury officials from granting charitable deductions to individuals for donations made to private schools which racially discriminated against Blacks. In Green v. Connally[189] a federal district court determined that federal tax exemptions and deductions are not to be allowed, if a private school's activities contravene federal public policy against segregation. A central aspect of that federal public policy, which forbids governmental support for segregated education in either public or private schools is Title VI of the Civil Rights Act of 1964.[190] Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination

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[189] 330 F. Supp. 1150 (D.D.C. 1970), aff'd sub. nom., Coit v. Green, 404 U.S. 997 (1971); see notes 253 and 336 and accompanying texts infra.; I.R.C. section 170 (c)(2) must be read in conjunction with I.R.C. section 501 (c)(3).

[190] 330 F. Supp. at 1163.

under any program or activity receiving Federal financial assistance.[191]

Apart from public policy grounds as seen in Green, a charitable deduction may not be allowed on technical grounds (which are policy grounds in a different sense). For instance, the deduction may not be allowed where it is not clear that the benefit of the gift will be directed to the institution.

In Phinney v. Dougherty,[192] a gift to a University of Texas fraternity fund to benefit its members was not permitted a deduction because the fraternity was not organized and operated exclusively for educational purposes. A revenue ruling[193] issued several years later stipulated that the payment of scholarship funds are contributions to or for the use of colleges or universities and are deductible where they meet the requirement that the contribution be to or for the use of the institution rather than for a particular individual and the institution has full control of the use of the donated funds.

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[191] 42 U.S.C. §2000d.

[192] 307 F. 2d 357 (5th Cir. 1962).

[193] Rev. Rul. 484, 1968-2 C.B. 105.

By contrast to the Phinney case, the I.R.S. in another situation decided to permit a deduction for a gift to a college where the gift was for the purpose of constructing a fraternity house.[194] In this instance the title to the house was to be held by the college, and thus, the gift was clearly one made to the college. The deduction was permitted.

In addition to the charitable income tax deduction, the tax law allows charitable deductions for estate and gift tax purposes. The first federal estate tax was passed in 1916,[195] but it was not until 1918 that the charitable gift exemption was incorporated into the law.[196] In support of this provision Senator Boies Penrose, a Pennsylvanian and the senior Republican on the Senate Finance Committee, had stated:

> In this country educational and charitable institutions carry on in a large measure what essentially is public work. That our educational and charitable institutions have been largely

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[194]Rev. Rul. 367, 1960-2 C.B. 73.

[195]Act of September 8, 1916, ch. 463, tit. II, Pub. L. No. 271, 39 Stat. 777. Generally, as to what constitutes death taxes--an "estate tax" is a tax on the privilege of giving, whereas an "inheritance tax" is a tax on the privilege of receiving from an estate.

[196]Revenue Act of 1918, ch. 18, art. IV, §403 (a)(3), 40 Stat. 1057, 1098.

> founded and maintained by individual gift and bequest has been widely commented upon by publicists in every land. In this respect we differ much from older countries where State appropriations have largely aided this work. That in the United States they have been built by private enterprise furnishes a peculiar illustration of the qualities in American civilization which have made our country great. Contributors to these institutions have been remarkably loyal but under war conditions and with the high rates of income tax they could hardly have been expected to have done as well as in times of peace. The provision of the committee inheritance tax amendment [to the House version] exempting from tax transfers to the government or for any religious, charitable, or scientific purpose is to be commended particularly.[197]

In 1926 the estate tax law[198] was reorganized to form what is the essence of today's estate tax law. The deduction for charitable bequests enacted in 1918 has remained relatively intact since then.[199]

In 1924 Congress enacted the first gift

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[197] Congressional Record 550 (1918), as cited by Norman S. Fink "Taxation and Philanthropy--A 1976 Perspective," Journal of College and University Law, 3(1):1, at p. 6, 1975.

[198] Act of February 20, 1926, ch. 27, tit. III, Pub. L. No. 20, §300, 44 Stat. 69 (current version at I.R.C. 2001 et seq.).

[199] I.R.C. §2055. In computing the amount of a deduction to a qualifying charity, a deduction will be allowed on the fair market value of the bequest; see §§2055 (a) and 2055 (d).

tax.[200] The purpose of the provision was to tax intervivos or lifetime gifts. Like the estate tax the gift tax has remained relatively unchanged since its inception.[201] Since 1976 the estate and gift tax provisions and rate structure have been linked through a unified tax rate schedule[202] which in essence equalizes the tax liability on total amount of gifts given during life and at death.

The Internal Revenue Code allows a deduction from the gross value of the estate for the amounts of bequests, legacies, devises or transfers made "to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. . ."[203] Thus, the obvious limitation to the estate tax exemption is that it must be for one of these charitable purposes. In the same fashion and with

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[200]Act of June 2, 1924, ch. 234, §319 et seq., Pub. L. No. 176, 43 Stat. 313.

[201]I.R.C. §2501.

[202]I.R.C. §2001 (estate tax) and §2501 (gift tax). Intervivos gifts made prior to the 1976 Tax Reform Act were taxed at a lesser rate.

[203]I.R.C. §2055 (a)(2).

the same limitations, charitable gifts made during a donor's lifetime are exempted from the gift tax.[204] It should be noted that conditional charitable gifts, either testamentary or intervivos may not qualify for a deduction. A donor may wish, for instance, to preserve certain property interests for his family in conjunction with a charitable gift. The gift under such circumstances may be construed as being conditional in nature, but whether a conditional gift qualifies for an exemption depends on the specific terms of the gift interpreted in the light of the estate or gift tax law.

The major case on the issue of the deductibility of conditional gifts to charity came before the United States Supreme Court in 1955 in Commissioner of Internal Revenue v. Estate of Sternberger.[205] The essential test as stated in that case is that if it is unlikely that the condition will occur, that the charity will receive the gift, the deduction will not be allowed.[206] The court held that the existing Code

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[204] I.R.C. §2522.

[205] 348 U.S. 187 (1955).

[206] 348 U.S. at 190; see Ithaca Trust Co. v. United States, 272 U.S. 151 (1929).

provisions and regulations permitted the I.R.S. to allow estate tax deduction only where enjoyment of conditional gift to charity is assured, or when the possibility of the occurrence which will deprive the charity is so remote as to be negligible. This was not the case where the gift to the charity was to take effect only if decedent's childless 27-year-old daughter died without descendents surviving her and her mother.

Another related giving method, which has been affected directly by federal tax policy, is that of the so-called life income gift. The idea of a life income (also called deferred) gift to an institution is not new. Some typical devices have emerged over time in conjunction with estate or trust planning.[207]

A life income arrangement, like a charitable remainder trust, is one in which the donor creates a trust which will pay income for life to the donor (and/or to the spouse) and at the death of the

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[207]Richard L. Desmond, "The Federal Tax History of Life Income Gifts to Higher Education" (Doctoral dissertation, University of Michigan, 1965). Dissertation Abstracts International, 1965, 27:492 (University Microfilm No. 66-06, 593).

lifetime beneficiary(s) the remainder or corpus of the trust passes to the charitable institution. In such an arrangement the charity may or may not have been appointed trustee, although, because many schools are actively promoting life income gift agreements with their constituencies, they have been designated as trustees. In any case important income, estate and gift tax implications are attached to life income gifts.

Major limitations to the types of life income gift arrangements which would be eligible for a charitable deduction were instituted with the passage of the Tax Reform Act of 1969.[208] A charitable deduction for such a gift to a college or university will be disallowed if the instrument creating the gift does not follow prescribed restrictions as to the form and content for permissible arrangements.

The current section 170[209] of the Internal Revenue Code provides that no deduction will be allowed for the value of a remainder interest which

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[208] Act of December 20, 1969, Pub. L. 91-172, §1 (a), 83 Stat. 487 (amending 26 U.S.C. §§170, 663-669).

[209] I.R.C. §§170 (f)(2)(A).

is transferred in trust unless the trust qualifies as:

1. a charitable remainder annuity trust (where an individual donor creates an irrevocable charitable remainder and receives a sum certain to be paid annually during life);[210]

2. a charitable remainder unitrust (where an individual donor creates an irrevocable charitable remainder and receives a fixed percentage of the net fair market value of the assets annually during life);[211]

3. or a pooled income fund (where a group of donors create irrevocable charitable remainders in which the transferred property is commingled and from which a life income interest is distributed according to proportional shares of the total pool).[212]

A fourth major type of life income arrangement is seen in the charitable gift annuity. This form of annuity differs from the annuity trust in that it is not a trust, but rather is a contract annuity. Part of the transfer to the institution constitutes a payment for an annuity; the other part is a charitable gift. Charitable gift annuities also qualify for

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[210] I.R.C. §664 (d)(1).

[211] I.R.C. §664 (d)(2).

[212] I.R.C. §642 (c)(3).

special tax treatment under the Code.[213]

The influence of the charitable income, estate and gift tax deductions on individual philanthropy seems almost self evident. A somewhat less obvious but perhaps equally important deduction which has an influence on giving to colleges and universities is the standard deduction. Before leaving the subject of federal taxation some analysis of the influence of the standard deduction on charitable giving is merited.

Since 1939 taxpayers have been permitted the option of deducting a single dollar amount of their gross income before computing their taxable income.[214] This traditional method for determining the standard deduction, however, was altered in 1977.[215] The new

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[213] 26 C.F.R. §1.170A-1 (d)(1); because all of these major types of life income gifts are subject to the technical requirements of the Code and because the use of them has financial and estate planning implications, many colleges and universities have added deferred giving specialists to their development staff to assist donors and their attorneys in drawing up an arrangement. (Institutions have also enlisted the help of attorneys with tax and estate planning expertise to provide guidance in their deferred giving programs.)

[214] 26 U.S.C. §23 (aa) (1939 Code) (repealed).

[215] 26 U.S.C. §§141-142 (repealed by 91 Stat. 133).

standard deduction has been designated in terms of a "zero bracket amount."[216]

Under the zero bracket concept each taxpayer receives the benefit of a zero bracket amount (as of 1980--$2300 for single person returns and $3400 for joint returns). The election to itemize can be made when the traditional itemized deductions (e.g. medical interest, charitable, etc.), when totaled, exceed the zero bracket amount.[217] The larger of either the zero bracket amount or total itemized deductions is then to be subtracted from adjusted gross income to determine the amount of taxable income.

It has been suggested that those who take the standard deduction have no tax incentive for making charitable contributions because no charitable deduction is available to them.[218] Charities have been concerned because the number of people choosing

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[216] I.R.C. §63 (d).

[217] [1980] U.S. Master Tax Guide (Chicago: Commerce Clearing House, Inc., 1979), §126, pp. 64-65.

[218] Commission on Private Philanthropy and Public Needs, Giving in America: Towards a Stronger Voluntary Sector (Washington, D.C.: Commission on Private Philanthropy and Public Needs, 1975), p. 113.

the standard deduction has increased over the years as a result of increments in the amount of the standard deduction.

From 1944 to 1970 the number of individuals taking the standard deduction grew from 18 percent of all taxpayers to 48 percent and from 1970 to 1975 the percentage increased to 65 percent.[219] The implications of this increase for giving to colleges and universities seems clear. The increase in the standard deduction may have had the effect of decreasing the total potential amount of gifts to colleges and universities from those who previously would have itemized their deductions.

State Tax Treatment

Some states, like Pennsylvania, have personal income tax laws.[220] In Pennsylvania, the Personal

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[219]Ibid., pp. 113-114.

[220]72 PA. CONS. STAT. ANN. §301 et seq. (Purdon) (there is a seeming inconsistency in Purdon's codification because 72 PA. CONS. STAT. ANN. §402 et seq. appears to be in effect. On closer investigation one will find that §3402 et seq. should have been removed when 72 PA. CONS. STAT. ANN. §7301 et seq. (Purdon) was enacted in 1971.)

As to the 1971 Act, its section III was ruled unconstitutional in Amidon v. Kane, 44 Pa. 38, 279 A. 2d 53 (1971), as violating the uniformity of taxation clause of the state constitution, art. 8, §1. The Act was subsequently revised to form the current §301 et seq. (Act of August 31, 1971 Pub. L. 362, No. 93).)

Income Tax Act imposes a two and two tenths percent tax on a person's income.[221] Classes of income subject to the tax are defined by the Act.[222]

The current law in Pennsylvania does not provide for an income tax charitable deduction. Under the law prior to 1971, a deduction was available, but only to a circumscribed set of donors. The pertinent statutory section read:

> In case any taxpayer in any tax year, shall give or contribute, and has given or contributed in each of the ten preceding calendar years, ninety per centum or more of his net income in each year to any corporation or trust, . . . organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, . . . [with some further limitations] such net income so given or contributed shall not be subject to any tax under the provisions of this act.[223] (Emphasis supplied.)

It seems unlikely that very many individuals would have qualified or would have had a tax incentive to be qualified for the Pennsylvania state charitable income tax deduction. Someone who had been giving away 90 percent of his or her income for ten years

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[221] 72 PA. CONS. STAT. ANN. §302 (Purdon)(the rate changes to two percent after December 31, 1981).

[222] 72 PA. CONS. STAT. ANN. §7303 (Purdon).

[223] 72 PA. CONS. STAT. ANN. §3402-311 (Purdon) (which is supposedly repealed, see note 220 supra).

would otherwise be giving at a rate, because of federal ceiling limitations, where no additional tax advantage would accrue above the 50 percent level.

With regard to state death taxes, Pennsylvania has a two-tiered inheritance tax structure which imposes a tax[224] based on the classes of individuals (by degree of relationship) receiving devises or bequests from an estate.[225] Under the Act the transfer of property to or for the use of charities is totally exempted from the state inheritance tax.[226] (This exemption parallels the total federal estate tax charitable deduction.) Included among the charities which qualify as organizations for which contribution deductions will be permitted are corporations and unincorporated associations organized and operated exclusively for educational purposes.[227]

As to any income generated by estates or trusts, beneficiaries of such income are taxed under

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[224] 72 PA. CONS. STAT. ANN. §2485-201 (Purdon).

[225] 72 PA. CONS. STAT. ANN. §§2485-403 and 2485-404 (Purdon).

[226] 72 PA. CONS. STAT. ANN. §2285-302 (1) (Purdon).

[227] Ibid.

current state law.[228A] However, it was determined in the case of Commonwealth v. Phoebe W. Haas Charitable Trust[228B] that a charitable trust is exempt, under the state Personal Income Tax Regulation 301 (C.1)2, from paying income tax if the trust is operated exclusively for a charitable purpose (and if net earnings do not inure in whole, or in part to the benefit of any private individual).

In summary, the subsection on federal tax policy has demonstrated the presence of various permissive and restrictive influences. While tax incentives have been incorporated to encourage donors' support of charities, those incentives have been curtailed by limitations on the amounts and methods of voluntary support which will receive favorable treatment.[229] The subsection on state tax treatment indicates that state policy, in the case of

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[228A]72 PA. CONS. STAT. ANN. §7305 (Purdon).

[228B]72 PA. CONS. STAT. ANN. §7305 (Purdon).

[229]Other aspects of federal tax policy, as they have a more direct impact on the charitable organization, will be discussed in the section on charitable organizations, this chapter at note 242 and accompanying text, infra.

Pennsylvania, has some but a noticeably lesser impact on charitable giving by individuals to colleges and universities.

The Law of Charitable Organizations and Incentives for and Limitations on Gifts to Institutions of Higher Education

A trend towards greater regulation of the formation and maintenance of charitable organizations has emerged during the period from 1900 to the present. This section will focus on several aspects of public policy which have a direct impact on the formation, maintenance and recognition of colleges and universities as charitable entities and thus on their ability to attract gifts from individuals.

The section will include a consideration of state rules governing the incorporation of charities and the right of charities to obtain and to hold property. Further, there will be an examination of how federal regulations, primarily through the tax exemption rules, affect the recognition of charitable status. In subsequent subsections, other aspects of public policy regulation of charitable organizations will be presented, namely, the regulation of charitable gift solicitation and private donor fund administration.

State Incorporation of Charities

Permissive and restrictive elements can be perceived concurrently in state rules and regulations respecting the incorporation of charitable organizations. In order to obtain the advantages of incorporation status, the institution is required to comply with a variety of mandates. The primary value of incorporation status for a charity is that it enables it to take and hold property in the name of the charity.

In Pennsylvania the "Corporation Not-for-profit Code"[230] permits a college or university to seek incorporation.[231] But an organization seeking that status may not submit a corporate name containing the word "college" or "university" or "seminary", to imply it is an educational institution, unless it has first submitted proper certification from the State Board of Education.[232]

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[230] 15 PA. CONS. STAT. ANN. §7101 et seq. (Purdon).

[231] 15 PA. CONS. STAT. ANN. §7311 (Purdon).

[232] 15 PA. CONS. STAT. ANN. §7313 (c)(1) (Purdon).

A college or university which has been granted corporate status has the power to acquire or hold personal or real property.[233] It also has the authority to take and hold trust property[234] and to invest trust funds.[235] In addition the Code both permits and regulates the use of common trust funds by charities.[236] The Code also regulates bequests and gifts to not-for-profit corporations which have changed their purposes.[237]

In conjunction with the power of a charity in Pennsylvania to hold property, one must consider another statute. The Pennsylvania Charities Code, among other things, establishes limits to the amount

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[233] 15 PA. CONS. STAT. ANN. §7502 (a)(4) (Purdon).

[234] 15 PA. CONS. STAT. ANN. §7549 (Purdon).

[235] 15 PA. CONS. STAT. ANN. §7550 (Purdon) (subject to the Fiduciaries Investment Act, 20 PA. CONS. STAT. ANN. §7301 et seq. (Purdon)); §7551 permits the transfer of trust assets to an institutional trustee (see discussion at note 318 and accompanying text infra.)

[236] 15 PA. CONS. STAT. ANN. §7581 (Purdon).

[237] 15 PA. CONS. STAT. ANN. §§7552 and 7559 (Purdon); see notes 111 supra and 293 infra.

of property which may be held by a charity.[238] Sections 31 and 33 of Title 10 of Pennsylvania's Charities and Welfare Code had limited the right of unincorporated charitable societies to hold property in excess of the yearly amount of $350,000 [calculated at the rate at which such lots could be rented or at the interest of the price at which they would sell for cash] without a court decree. The limitations of these sections were repealed respectively for incorporated charitable societies as to section 31 in 1933[239] and to section 33 in 1966.[240] Accordingly, nonprofit charitable corporations in Pennsylvania today may take and hold property without limit.

More specific state regulations of charitable activities will be discussed in the sections below on the solicitation and administration of charitable

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[238] 10 PA. CONS. STAT. ANN. §31 et seq. (Purdon).

[239] Act of May 5, 1933 Pub. L. 289, art. XI, §1102 (current version at 10 PA. CONS. STAT. ANN. §31 (Purdon).

[240] Act of January 18, 1966 Pub. L. 1406, §26 (g) (current version at 10 PA. CONS. STAT. ANN. §33 (Purdon).

funds.[241]

Tax Exemption and Charitable Recognition

Once again it is interesting to perceive the theme of the dual permissive/restrictive nature of public policy regarding gifts to higher education and other charities in the federal tax exemption regulations. The privilege of tax exemption has been characterized by Edward S. Newman as a "double-edged sword".[242] Newman elaborates on this notion:

> Administered honestly and with integrity, a philanthropic program can be a boon to society and a taxpayer's salvation. But for these very reasons, the privilege of tax exemption is perhaps the most effective mechanism for regulating philanthropic organizations. The fear that departure from the straight and narrow path that has led to exemption may result in revocation of exemption is the strongest deterrent factor against mismanagement of faulty administration of a charitable trust or foundation.[243]

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[241]See notes 266 and 291 and accompanying text infra.

[242]Edwin S. Newman, Law of Philanthropy (Dobbs Ferry, N.Y.: Oceana Publications, 1955), p. 48; see Bruce R. Hopkins and John H. Meyers, The Law of Tax Exempt Organizations (Washington, D.C.: Lerner Law Book Co., Inc., 1975).

[243]Ibid.

Newman continues:

> There is less danger that a trust or foundation will deviate from its non-profit undertakings, or will degenerate into a "sleeping trust" through accumulating assets without expending them on the purpose of the charitable trust or foundation, if the result of such conduct will spell the end of the exemption privilege. Similarly, philanthropic organizations which take their appeals for funds to the public will be deterred from activity not in the public interest or in violation of the exemption privilege, since they are aware that such conduct would result in loss of exemption. If exemption is revoked, the individual taxpayer who has made a contribution can no longer claim a tax deduction based on his contribution. He will no longer contribute, and without contributions, the organization is unable to operate.[244]

As Newman points out, exemption status is important for the charity because without it, its ability to secure donations is restricted.[245] Several factors must be considered here: 1) the basis for obtaining exempt status; 2) the process for obtaining and maintaining that status; 3) the rationale for revoking that status; and 4) the attending rationale for disallowing charitable deductions for gifts made to nonexempt organizations.

A brief discussion of these factors will

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[244] Ibid.

[245] See 26 C.F.R. §1.501 (a)-1 (a)(2).

clarify the importance of tax exempt status for philanthropic support. As to the first factor, the basis for obtaining tax exempt status, Section 501 of the Internal Revenue Code[246] permits the granting of exemption status to:

> Corporations, and any community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, . . . or educational purposes, . . . [under certain stipulations regarding net earnings, attempts to influence legislation, and political activities].

Internal Revenue Service regulations pursuant to section 501 define "educational" broadly and give the example of an:

> organization, such as a . . . college . . . which has a regularly scheduled curriculum, a regular faculty, and a regularly enrolled body of students in attendance at a place where the educational activities are regularly carried on.[247]

The process of obtaining tax exempt status requires that the organization submit an application.[248]

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[246] I.R.C. §501 (c)(3).

[247] 26 C.F.R. §1.501 (c)(3)-1(d)(3)(ii) [example (1)].

[248] 26 C.F.R. §1.501 (a)-1(a); I.R.S. Form 1023 (application for recognition of exemption).

The application, which is in the form of a questionnaire, is designed to reveal the nature of the organization's activities, including its sources of funding. Unless the organization meets the criteria of section 501 and its regulations, it will not be considered "charitable" for the purposes of exemption.

In order to maintain exempt status, exempt organizations are required, with few exceptions, to file annual information returns with the I.R.S.[249] The charity must, among other things, report amounts of contributions received: directly from the public, through professional fundraisers, as allotments from fundraising organizations, as well as from other sources. It requires specification as to fundraising events, namely as to the type of activity, amounts of receipts and expenses. Based on the reexamination of the information returns, a decision will be made by the I.R.S. as to whether to continue the charity's

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[249] I.R.C. §6033 (returns by exempt organizations)(educational organizations receiving gross receipts of less than $5000 are exempted under §6033 (a)(2)(A)(ii) and (a)(2)(c)(iii)); other colleges and universities must file I.R.S. Form 990A.

exemption.

The ability of the federal government to regulate a charity is nowhere so clearly shown than through the exercise of its power to revoke tax exempt status. Concurrently, the exercise of its power to deny charitable contributions is a potent secondary threat which can be effective in controlling charity practices.

The source for this power to revoke charitable exemptions and deductions for certain violations of federal public policy was clearly revealed in a series of cases and revenue rules and procedures during the 1970's. The first of these developments came in the case of Green v. Kennedy.[250]

The case was instituted as a class action by Black students and parents in 1969. They sought to enjoin the I.R.S. from granting tax exempt status to some private schools in Mississippi which had been discriminating against Blacks in admissions. The federal district court granted a preliminary injunction, but deferred a hearing on the merits of the case until later when a request for permanent relief

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[250] 309 F. Supp 1127 (D.D.C. 1970).

would be examined.

This occurred in Green v. Connally[251] where the plaintiffs sought declaratory relief and a permanent injunction on the issues of 1) whether private schools practicing racial discrimination are entitled to tax exemption, as is provided by the Internal Revenue Code for charitable educational institutions, and 2) whether persons making gifts to such schools are entitled to the deductions provided in the case of gifts to charitable, educational institutions.

The court's response to both questions was that they were not entitled, and, accordingly it granted injunctive relief to the plaintiffs. Its holding, which was incorporated into the carefully reasoned opinion of Judge Harold Leventhal, was based on a number of powerful premises.

First, under the common law charitable trusts and uses have been awarded special treatments but what has been defined as charitable in the first instance has been subject to change. On this point the opinion states:

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[251] 330 F. Supp 1157 (D.D.C. 1970); see notes 189 supra and 336 infra and accompanying texts.

> Changes in the courts' conceptions of what is charitable are wrought by changes in moral and ethical precepts generally held, or by changes in relative values assigned to different and sometimes competing and even conflicting interests of society.[252]

Furthermore, the court added that charitable uses are subject to the requirement that they not be illegal or contrary to public policy.

Second, this common law rationale of what is charitable should be applied when interpreting the Internal Revenue Code. Thus:

> A general and well-established principle that the Congressional intent in providing tax deductions and exemptions is not construed to be applicable to activities that are either illegal or contrary to public policy.[253]

Judge Leventhal continued:

> The individual philanthropist cannot be indulged in his own vagaries as to what is charitable; he must conform to some kind of norm, else he cannot obtain subsidy or tax exemption.[254]

Third, there is a declared federal public policy against support for racially segregated education. This policy can be seen in several sources of law--the

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[252] 330 F. Supp. at 1159.

[253] Ibid. at 1161.

[254] Ibid. at 1163.

fourteenth amendment to the United States Constitution, the Civil Rights Act of 1964[255] and landmark Supreme Court decisions such as Brown v. Board of Education.[256]

Judge Leventhal, after discussing the basis for federal policy against support for racially segregated education,[257] then concluded:

> The Internal Revenue Code provisions on charitable exemptions and deductions must be construed to avoid frustrations of Federal policy. Under the conditions of today they can no longer be construed so as to provide to private schools operating on a racially discriminatory premise the support of the exemptions and deductions which Federal tax law affords to charitable organizations and their sponsors.[258]

In granting declaratory relief, the court referred specifically to the Code:

> Section 501 (c)(3) of the Internal Revenue Code of 1954 does not provide a tax exemption for, and Section 170 (a)-(c) of the Code, does not provide a deduction for a contribution to,

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[255] 42 U.S.C. §2000 (d) (text of act cited at note 329 and accompanying text infra.

[256] 347 U.S. 483 (1954) ("separate but equal" segregated public school education violates equal protection clause of the fourteenth amendment).

[257] 330 F. Supp. at 1163-64.

[258] Ibid. at 1164.

> any organization that is operated for educational purposes unless the school involved has a racially nondiscriminatory policy as to students.[259]

Subsequently, the decision was appealed to the United States Supreme Court under the name Coit v. Green.[260] In a per curiam decision, the high court affirmed the district court's determinations.

During the Green case litigation, the I.R.S. announced that it would no longer allow tax-exempt status and deductability of contributions to any private schools which practiced racial discrimination. After Green this I.R.S. announcement was formalized in a series of revenue rules and procedures.[261] Thus, public policy on the issue was further strengthened.

The strength of the Green rationale and the validity of the I.R.S. revenue rules and procedures were reexamined in another more recent case, Bob Jones University v. United States.[262]

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[259] Ibid. at 1179.

[260] 404 U.S. 997 (1971).

[261] See Rev. Rul. 71-447, 1971-2 C.B. 230; Rev. Proc. 72-54, 1972-2 C.B. 834; the 1972 procedures were superseded in 1975 by Rev. Proc. 75-50, 1975-2 C.B. 587; see also Rev. Rule 75-231, 1975-1 C.B. 158 (non-discrimination requirement for church operated schools).

[262] 639 F. 2d 147 (4th Cir. 1981).

Bob Jones University is a religious educational institution with a Protestant-fundamentalist orientation. Historically, Bob Jones University has had a long series of troubles with the I.R.S. concerning its racial policies. In this case the I.R.S. had decided to revoke the university's tax exempt status because of the school's policy against interracial dating. The university claimed that its policy was based on a religious rationale and that the I.R.S. decision violated the first amendment religious clauses. The court ruled, however, that there was no constitutional violation under these circumstances.

In coming to its decision the Fourth Circuit Court embraced the Green rationale and held that the university was subject to Revenue Procedure 75-50, 1975-2 Cum. Bull. 158. (This procedure provides that in order to qualify for an I.R.C. 501 (c)(3) exemption, a private school must be able to demonstrate that all of its programs and facilities are operated in a nondiscriminatory manner.)

The court's opinion quoted the legislative history of section 501 (c)(3) as reflecting the exemption's basis in public policy:

> The exemption from taxation of money and property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriation from other public funds, and by the benefits resulting from the promotion of the general welfare.[263] (emphasis supplied by court)

The court then declared that the I.R.S. had interpreted 501 (c)(3) in a manner which reflected its purpose and history and that it had the statutory authority to deny tax exempt status.

As to Bob Jones University's claim that the I.R.S. action was an unconstitutional violation of its first amendment rights of freedom of religion, the court stated that there was no violation.[264] It based this part of its holding on a couple factors. First, the school was not being required to abandon its right to teach nonmiscegenation--only its policy against interracial dating. Second, the government's policy was reasonable and based on compelling public interests. (As of September 1981 the Bob Jones University case was pending an appeal to the United States Supreme

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[263] H.R. Rep. No. 1820, 75th Cong. 3d Sess. 19(1939), as cited by the court at 151.

[264] 639 F. 2d at 151.

Court).

The rationale of Green, which supports the application of the Internal Revenue Code in this manner, could potentially be extended to provide sanctions with respect to other federal nondiscrimination policy--as to sex, age, handicap, etc.

While this section so far has examined the regulation of charitable organizations in a general sense, i.e. as to their formation and recognition,[265] the next two subsections will look at more specific aspects of charitable organization activities--the solicitation of gifts and administration of private donor funds.

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[265]As with the federal law, state law on charitable tax deduction status implies recognition of the organization as a charity and has a concomitant impact on giving by individuals to institutions of higher education.

For example, under the Pennsylvania state law, testamentary transfers of property to or for the use of any "corporation, unincorporated association or society organized and operated exclusively for religious, charitable, scientific, literary or educational purposes" are exempt from inheritance tax (72 PA. CONS. STAT. ANN. §2485-302 (Purdon)). A testator may be encouraged by the fact that a gift to a recognized college or university will not be diminished by any death tax.

Restrictions on Charitable Gift Solicitation

While charitable gift solicitation has been traditionally permitted in our society, solicitations have become increasingly subject to regulation under the police power of the government. Local, state, and federal protection has been mandated to protect the public from instances of fraud, deceit and other abuses in the solicitation and use of charitable funds.

Generally, as with other police power provisions, the charitable solicitation regulations must be reasonably related and designed to deal with the evil for which they were enacted. In testing the reasonableness of the regulations, the courts will weigh the relative advantages and disadvantages of the restrictions created by the regulations.

State Regulation

During the last thirty years there has been a dramatic increase in the number of states which have passed charitable gift solicitation statutes. According to Fisch, Freed and Schacter there are roughly thirty states which have such statutes.[266]

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[266]Fisch, et al., op. cit., p. 576.

In the opinion of Fisch, Freed and Schacter, two factors have been responsible for the proliferation of these statutes. First, the amounts of monies raised by charity have increased enormously over the years. Second, corresponding to the increase in funds being raised are increases in charitable solicitation abuses, for instance, in "charity rackets".[267] States have felt it necessary to provide closer supervision of the charity industry with respect to gift solicitation.

Two surveys of charitable gift solicitation statutes[268] indicate the existence of three basic types of regulation--licensing, registration and reporting. In general, licensing statutes, requiring the issuance of state authorization to solicit gifts, typically are the most powerful because they more closely regulate the activity and give officials the

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[267] See "Charitable Solicitation Acts--An Attempt to Curb Charity Cheats," DePaul Law Review, 16:472, _____.

[268] Fisch, et al., op. cit., pp. 578-583 and 1980 pocket p. 101; Bruce Hopkins, "Regulations of Interstate Charitable Solicitations: Implications for Colleges and Universities," Journal of College and University Law, 2(4):289-305, 1975.

broadest discretion in assessing a charity's eligibility to ask for gifts. Registration statutes usually only require the recording or enrollment of the name of the fundraiser(s) and/or charity. Reporting statutes involve filing of an official statement by the organization on its activities and finances. Within all three types, a range of variations are observable. A closer examination of each type will illustrate some of the variations.

States with licensing statutes include Iowa, Kansas, Maine and North Dakota.[269] North Dakota also requires that charities register. Twenty states in all have a registration requirement.[270]

Both licensing and registration statutes vary in detail: as to who must be licensed or registered (the charity? the professional fund raiser?); when licensing or registration must occur, i.e. time prior to solicitation; the duration of the right to solicit;

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[269] Fisch, et al., op. cit., p. 578.

[270] Ibid., p. 579; the states include: Arkansas, Connecticut, Florida, Georgia, Hawaii, Massachusetts, Maryland, Minnesota, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Virginia, West Virginia, Wisconsin.

and exemptions to licensing or registration requirements.

On the matter of exemptions, exemptions may be permitted on different bases. They may be granted where dollar amounts to be collected will not exceed a certain amount, or exceed a certain number of contributors, or involve a certain type of organization.

Bruce Hopkins surveyed state statutes in 1975[271] and updated that survey in 1980,[272] as to the law regarding exemptions for educational institutions. Hopkins indicates that "only 4 states exempt accredited educational institutions from the entirety of their charitable solicitation acts."[273] He continues that, "The far more common practice is to exempt accredited educational institutions from the registration or

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[271]Bruce Hopkins, "Regulations of Interstate Charitable Solicitations: Implications for Colleges and Universities," Journal of College and University Law, 2(4):289, 1975; Hopkins also discusses municipal regulations on solicitation at 306-309.

[272]Bruce Hopkins, preliminary draft of updated survey, supplied by Hopkins, February 22, 1980, p. 3.

[273]Ibid.; Hawaii, North Dakota (institutions of higher education only), Oregon, and South Dakota.

licensing requirements. Sixteen states have adopted this approach."[274]

Hopkins indicates that "[n]ine states, either as an alternative or in addition [sic] to the foregoing approach, exempt from the registration or licensing requirements educational institutions that confine their solicitations to their 'constituency.'"[275]

Foreign charities, i.e. those in other states, must register in about 40 percent of the states requiring charitable registration.[276] This means that schools having a broad "constituency," alumni, friends, etc., may have to comply with registration requirements in a number of states. However, colleges and universities, seeking to solicit funds in another state, may be exempted from registration in that state where the statute of that state provides an exemption from registration for its own schools.

As a specific example of a registration statute,

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[274]Ibid.; the states include: Connecticut, Illinois, Kansas, Maine, Maryland, Michigan, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee (fee examption only), Virginia, and West Virginia.

[275]Ibid., p. 4; the states include: George, Illinois, Kansas, New Jersey, New York, North Carolina, Ohio, Virginia, and Wisconsin.

[276]Fisch, et al., op. cit., p. 588.

the Pennsylvania "Solicitation of Charitable Funds Act"[277] contains the following provision:

> Every charitable organization which intends to solicit contributions within this Commonwealth, or have funds solicited on its behalf, shall, prior to any solicitation, file a registration statement with [the Department of State] . . . [such registration] shall be good for one year.

The provision requires refiling for subsequent years in which the charity solicits funds. Each application requires extensive information about the charity's officers, personnel, and solicitation activities.

A 1972 amendment to the act indicates the serious posture of the Commonwealth with regard to the execution of the requirements of the statute:

> It is the intention of the Legislature that this shall not be a mere registry statute but an act intended not only to require proper registration of charitable organizations,

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[277] 10 PA. CONS. STAT. ANN. §§160-3 (Purdon). Pennsylvania formerly had a licensing statute, 1925 Pa. Laws 644. Before its alteration in 1963 (1963 Pa. Laws 628) the act survived two attacks on its constitutionality--Commonwealth v. Everett, 111 Pa. Super. 302, 170 A. 720 (1934) (act not an unconstitutional denial of due process); Commonwealth v. McDermott, 296 Pa. 299, 145 A. 858 (1929)(act did not contravene constitutional equal protection or prohibition against local or special legislation); see Louis D. Apothaker, "Sweet Charity . . . as Amended--a Review of Pennsylvania's Charitable Solicitation Law," Pennsylvania Bar Association Quarterly, 45:369-392, 1974.

> professional fund-raisers and professional solicitors but also to regulate the soliciting of money and property by or on behalf of charitable organizations, professional fund-raisers, professional solicitors and to require proper accounting for the use and distribution of said funds.[278]

In essence while only a registration statute Pennsylvania's act has retained the "licensing" function, because another 1972 amendment to the act provides:

> The Secretary . . . shall examine each initial application of charitable organizations for the right to solicit funds and each renewal . . . and if found to be in conformity with the requirements of this act and all relevant rules and regulations it shall be approved for registration.[279]

The act further details when the state may deny registration. It may, for instance, if the activities to be financed with the funds are incompatible with the health, safety or welfare of the citizens of the state,[280] or if a solicitation would be a fraud upon the public.[281]

The statute contains other provisions which

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[278] 10 PA. CONS. STAT. ANN. §160-1.1 (Purdon).

[279] 10 PA. CONS. STAT. ANN. §160-3 (a.1) (Purdon).

[280] 10 PA. CONS. STAT. ANN. §160-3 (f)(6) (Purdon).

[281] 10 PA. CONS. STAT. ANN. §160-3 (f)(3) (Purdon).

limit the permissible types of solicitation[282] and provisions concerning enforcement and penalties for violations of the act. While the act as a whole serves as an example of the restrictive dimension of the law of charity, it exempts colleges and universities from its provisions. (It does provide for an alternative registration procedure.)

The section entitled "certain persons and organizations exempt from registration"[283] establishes a limited exemption from registration for colleges and universities:

> The following charitable organizations shall not be required to file an annual registration statement with the department: (1) Educational institutions, the curriculum of which in whole or in part are registered or approved by the State Council of Education of the Commonwealth of Pennsylvania, . . . Provided, that such educational institutions simultaneously file with the Commission on Charitable Organizations duplicates of such annual fiscal reports as are filed with the Department of Public Instruction of the Commonwealth of Pennsylvania.

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[282] 10 PA. CONS. STAT. ANN. §160-6 (Purdon) (limitations on amount of payments for solicitation and fund raising activities); 10 PA. CONS. STAT. ANN. §160-7 (Purdon)(limitations on activities of charitable organizations); §160-12 (prohibited acts).

[283] 10 PA. CONS. STAT. ANN. §160-4 (a)(1) (Purdon).

Thus, colleges and universities, in lieu of registration, must annually provide certain information to the Department. Some of the information duplicates what would normally be provided in the registration application.

The third aspect of regulation of charitable gift solicitation by states is seen in reporting requirements. Financial reports are required by the majority of regulatory statutes. As might be expected, the information required for reporting will vary by statute. At one extreme, some states have mandated the maintenance of detailed books.[284] Pennsylvania's registration statute requires a yearly financial report to include: a copy of a balance sheet and an income and expense statement and complete information as to the fund raising activities during the year.[285]

Enforcement and sanction provisions typically accompany regulatory statutes and may establish a graduated series of fines and/or imprisonment or both

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[284] Fisch, et al., op. cit., pp. 587-588.

[285] 10 PA. CONS. STAT. ANN. §160-3 (a)(6) (Purdon).

with more severe sanctions for repeat offenders.[286]

One last matter related to the solicitation of gifts by colleges and universities concerns state regulations regarding the practice of law. Development officers, for instance, may find themselves in a position of advocating certain tax or estate planning related advantages for the donor in making a gift to the institution. Does this constitute the practice of law?

Some aspects of charitable giving involve considerable legal ramifications. (This study is a testimony to that proposition.) Because certain types of gifts, such as a charitable annuity trust, entail both tax and estate planning implications, it is part of the role of a professional fund raiser to give sufficient information upon which the donor can make an informed decision. The problem implicit in this type of situation is that the fund raiser may

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[286]See, for example, 10 PA. CONS. STAT. ANN. §160-14 (Purdon); note that other state laws may come into play with regard to the regulation of charitable gift solicitations; among these are laws prohibiting fraudulent practices, regulating the offering of securities, i.e. blue sky laws, and offering of gift annuities, i.e. insurance statutes. (Hopkins, op. cit., p. 291.)

be potentially guilty of practicing law without a license. (The delicate nature of the problem is compounded by the fact that institutional counsel should ethically not be giving advice to the donor because of potential claims of conflict of interest).

Conviction for the unlawful practice of law in some states usually subjects a person to fine and/or imprisonment. What constitutes the practice of law is necessarily defined by statutory and case law. Accordingly educational fundraisers should have their institutional legal counsel check the pertinent state law. It is professionally good practice to urge prospective donors to consult with their own counsel before undertaking an arrangement which may contain legal consequences.

At present state law plays the major role in the regulation of charitable gift solicitation. The federal government has played a lesser role to date, but because of interstate transactional implications, it may assume a greater role in the future.

Federal Regulation

Both Fisch, Freed and Schacter and Hopkins have commented on the potential for federal regulation of interstate charitable gift solicitation. Fisch,

Freed and Schacter have stated:

> Until Congress closes the field to state action by comprehensive legislation of charitable solicitation the states are not precluded from exercising their police powers in matters which might affect interstate commerce.[287]

Bruce Hopkins' article in 1975[288] suggests that there has been a growing sentiment for the federal interstate regulation of charitable solicitation. He cites a number of bills which were pending at the time of his article, but which were not enacted.[289] While these and subsequent attempts to produce greater federal involvement have failed, this does not preclude the emergence of a dominant federal role in the future.

One potential area for that involvement would be with regard to postal regulations. For

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[287] Fisch, et al., op. cit., p. 591.

[288] Bruce R. Hopkins, "Regulations of Interstate Charitable Solicitations: Implications for Colleges and Universities," Journal of College and University Law, 2(4):289 and 311-313, 1975.

[289] Viz., "Truth in Contributions Act", S. 1153, H.R. 4689, 94th Cong., 1st Sess. (March 12, 1975) sponsored by Sen. Walter Mondale and Rep. Joseph Karth; The Van Deerlin Bill, H.R. 1123, 94th Cong., 1st Sess. (January 14, 1975)(truth in giving protection); The Rees Bill, H.R. 5269, 94th Cong., 1st Sess. (March 20, 1975) (requiring certain information be furnished with charitable solicitations sent through the mail).

example, charitable organizations have been exempted under the law from certain restrictions regarding the mailing of unordered merchandise.[290] Charities have been permitted to solicit contribution via the mail with the use of certain "inducements" for giving (e.g. Easter seals). This exemption could be challenged.

Other requirements with respect to the use of the mails could be instituted. In 1977 Charles Wilson introduced H.R. Bill 41 to amend 39 U.S.C. to require certain information be given in connection with the solicitations of charitable contributions by mail. The bill was not enacted. If abuses become more flagrantly apparent to the public, such a bill could become law.

The last major aspect of the influence of current law and public policy on giving by individuals to institutions of higher education which will be discussed in this final section concerns the administration of private donor funds.

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[290] 39 U.S.C. §3009.

Regulation of the Administration of Private Donor Funds

Public policy influence on the administration of private donor funds is quite comprehensive. This influence can be seen on both the state and federal levels.

On the state level a considerable number of equitable and common law principles apply to the supervision of trusts and trust funds. A major manifestation of this fact is seen in the power of courts of equity to intervene in the administration of charitable trusts. Apart from the traditional judicial powers in this area, a variety of statutory mandates have emerged to govern different aspects of fund administration.

On the federal level, additional statutes and administrative regulations have, either directly or indirectly, influenced the process of administering private donor funds. This section will detail these different influences.

State Law and Charitable Trustees

The essence of any trust, charitable or otherwise, is a relationship of confidence which has

been established to accomplish a particular purpose. Trust relationships entail fiduciary duties which include a particular standard of conduct with regard to the trust property. Charitable trustees by law have been charged with a number of duties which have been summarized as follows:

> When the trustees (fiduciaries) of charitable trusts use the funds entrusted to them for the purposes for which they were donated, they are fulfilling their duty to the public at large, the ultimate beneficiary of these funds. It is a duty of loyalty and has as its corollary the rule that the fiduciary may not profit from the relationship at the expense of the beneficiary.[291]

Luis Kutner has classified the duties of charitable trustees[292] as follows:

1. the duty of loyalty;

2. the duty not to delegate to others the doing of acts which the trustee can reasonably be required to perform;

3. the duty to render clear and accurate accounts with respect to the administration of the trust and to furnish to the beneficiaries . . . accurate information as to the administration of the trust;

4. the duty to make an accounting in regard to a charitable trust . . . includes an obligation to periodically report to the public on the activities of the trust. . . .

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[291] Kutner, op. cit., p. 197.

[292] Ibid., pp. 186-188.

5. the duty to exercise reasonable care and skill;

6. the duty to see that the funds committed to the trustee's care are used for the purposes intended;

7. the duty to keep the trust property separate from the trustee's individual property, use care in selecting a bank . . . and properly earmark the deposit;

8. the [possible][293] duty to assure that the trustee's action does not jeopardize the tax-exempt status of the trust.

The sources of authority of charitable trustee duties vary from state to state. The law of each state must be consulted to determine specific requirements, but there does seem to be a considerable amount of uniformity among the states. One aspect of that uniformity can be perceived in the fact that a number of states have adopted uniform acts which codify the law as to the duties of charitable trustees.

Apart from the need to delineate the duties of charitable trustees, there has been a corresponding need to outline the powers of those trustees. It

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[293]Kutner comments that this concept could be considered as implicit within the notion of fiduciary duties even though it was not judicially mandated at the time of his analysis; see note 351 and accompanying text infra; as to the duty to use funds for intended purposes, item 6, see Zehner v. Alexander, 3 Frank. 27 (Pa. Orph. Ct. 1979) (trustees enjoined from closing college because statute required court approval for changing charitable trust purpose); see note 111 supra.

seems self evident that trustees must be granted sufficient discretion to carry out their duties and must be granted adequate authority to feel secure in their role.

Naturally, a charitable trust instrument should outline the trustee's authority. As a general rule, in the exercise of their fiduciary discretion, the trustees and their actions will not be interfered with or overturned by the courts except where there has been an abuse of discretion.

Where the powers of a trustee have not been clearly delineated in a trust instrument, rules of equity have traditionally detailed those powers. Some states have enacted statutes which outline what a charitable trustee may do.

Pennsylvania, for instance, has had a fairly comprehensive statute which details the powers and duties of charitable trustees.[294] Nonetheless, because of the need for more uniform treatment of charitable trust law, there has been some sentiment for consistency in the codification of that law. One attempt to provide that consistency is seen in

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[294] 20 PA. CONS. STAT. ANN. §7131 et seq. (Purdon).

the Uniform Trustee's Powers Act which was drafted in 1964 by the National Conference of Commissioners on Uniform State Laws.[295]

With this background in mind it will be worthwhile to examine more specific aspects of the duties and powers of charitable trustees. Let us first consider their major duties.

One primary responsibility of the trustee is to administer and invest the funds which make up the corpus of the trust. Some of the most significant problems, for an institution of higher education serving as a charitable trustee, have arisen in connection with investment decisions.

In the nineteenth century there were two major investment standards for investment decisions by charitable trustees, the prudent investor rule

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[295]Uniform Trustees' Powers Act, Annual Conference, 1964. As of 1981, the Act has been adopted in eleven states: Florida, Idaho, Kansas, Kentucky, Maine, Mississippi, Montana, New Hampshire, Oregon, Utah and Wyoming; see note 50 supra regarding the Uniform Supervision of Trustees for Charitable Purposes Act which has been adopted by only four states. For a history of prior attempts to establish a Uniform Trust Administration Act, see Kutner, op. cit., pp. 189-190; and regarding the Uniform Trusts Act, see loc. cit., p. 199; and as to the Uniform Common Trust Fund Act, see loc. cit., p. 200.

and the stricter legal list concept. The prudent investor rule, introduced in the last chapter,[296] was permissive in that it gave a broader investment discretion to the trustee in contrast to the legal lists, statutorily determined types of safe investments which could be made by charitable trustees.

According to Kutner, during most of the first half of the twentieth century, the more restrictive legal list concept predominated, but that from about 1940 on a more permissive attitude seemed to evolve.[297] Thus, the principle of the prudent investor rule, as elaborated in 1830 in Harvard v. Amory[298] has only become generally accepted in the last several decades.[299]

It should be observed that the legal lists[300] were of two basic types, mandatory or permissive.

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[296] See chapter 2, note 104 and accompanying text supra.

[297] Kutner, op. cit., pp. 233-237.

[298] 9 Mass. (Pick.) 446 (1830); see chapter 2, note 104 and accompanying text supra.

[299] Kutner, op. cit., p. 234.

[300] Pennsylvania had such a statute--20 P.S. §§821.1 to 821.22 (repealed)(replaced by 20 PA. CONS. STAT. ANN. §7301 et seq. which is discussed at note 304 and accompanying text infra).

In either case, after 1940 a number of states began to modify or repeal the statutory legal lists. Simultaneously, many states began to judicially adopt the Harvard College case rationale.

Luis Kutner attributes a change in judicial attitude, to permit more flexible discretion on the part of charitable trustees, to the influence of inflation.[301] Common stocks while not producing much income did increase in value and had become a much more desirable type of investment in times of inflation. It may also be that because of the regulation of securities through S.E.C. regulations and state blue sky laws, common stocks were no longer perceived as being quite as speculative.

One evidence of the increased acceptability of the prudent man rationale as the legal standard to measure charitable trustee investment behavior is seen in the fact that this rule has been adopted by the Restatement of the Law of Trusts:

> In the making of investments of trust funds the trustee is under a duty to the beneficiary . . . to make such investments and only such investments as a prudent man would make of his own property having in

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[301] Kutner, op. cit., p. 236.

> view the preservation of the estate and the amount and regularity of the income to be derived; . . .[302]

Various states, such as Pennsylvania, have enacted statutory versions of the prudent investor rule. The Pennsylvania version permits directors of non-profit corporations including educational institutions to invest "in such investment as in the honest exercise of their judgment they may, after investigation, determine to be safe and proper investments, and to retain any investments heretofore so made."[303]

Furthermore, the same fiduciary guidelines are provided elsewhere in the Pennsylvania law. The prudent man rule, as incorporated into the Decedents, Estates and Fiduciaries Code in 1972, is as follows:

> Any investment shall be an authorized investment if purchased or retained in the exercise of that degree of judgment and care, under the circumstances then prevailing, which men of prudence, discretion and intelligence exercise in the management of their own

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[302] Restatement of the Law of Trusts (Second), §227, p. 529, 1959.

[303] 15 PA. CONS. STAT. ANN. §7306 (Purdon). As to the investment of trust funds generally by non-profit corporations in Pennsylvania see 15 PA. CONS. STAT. ANN. §7550 (Purdon).

affairs, not in regard to speculation, but in regard to the permanent disposition of their funds.[304]

The prudent man rule seems to permit a greater amount of discretion in investment decisions by charitable trustees than the previous legal list statute which had severely limited the types of proper investment.

Apart from the issue of trustee discretion in making particular types of investments there are a number of other investment-related issues. The absence of guidelines as to trustee discretion on these issues has been troublesome for many charitable trustees. For instance, the law had been silent on the degree to which institutional fund management could be delegated.[305] Also, there were few guidelines as to whether capital gains from institutional funds should be spent or reinvested.

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[304] 20 PA. CONS. STAT. ANN. §7302 (Purdon). See John T. Stewart, Jr., "Legal Investments and the Prudent Man in Pennsylvania," Temple Law Quarterly, 37:121, 1964.

[305] This issue is discussed with regard to the Uniform Management of Institutional Funds Act at note 308 (section 5 of the Act) and with regard to Pennsylvania law at note 316 and accompanying text(s) infra.

The latter issue has prompted a major study by the Ford Foundation. The study, conducted in 1969, investigated the specific problem of whether under existing law "capital gains of endowment must be treated as principal," or as income.[306] The authors of the study, William Cary and Craig Bright, examined the terms of typical donative instruments which make up endowment funds and found that few instruments designated how capital gains were to be treated by educational institutions which served as trustees of such funds. Were the capital gains to be considered principal and, therefore, to be added to the endowment, or could they be considered income, and therefore, spendable?

Cary and Bright, who are lawyers, had concluded after their initial study that under the existing law there were no major mandates which required educational institutions to treat realized

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[306]William L. Cary and Craig B. Bright, The Law and the Lore of Endowment Funds (New York: The Ford Foundation, 1969), p. 7.

gains of endowment funds as principal.[307] What kind of policy should the society develop in response to the problem?

One answer or solution to the capital gains issue was developed partly as a result of Cary and Bright's research. In 1972 the National Conference of Commissioners on Uniform State Laws drafted the Uniform Management of Institutional Funds Act.[308] This act was designed to provide a solution to the capital gains issue and other trustee discretion

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[307]William L. Cary and Craig B. Bright, The Developing Law of Endowment Funds: "The Law and the Lore" Revisited (New York: The Ford Foundation, 1974), p. 2; for a critique of the initial Cary and Bright study (1969) see Thomas E. Blackwell, "A Critique of the Law and the Lore of Endowment Funds," The College Counsel, 5(1):272, 1970 (that there is no substantial authority under existing law to support their view that capital gains can be spent out of unrestricted endowment without court action).

[308]National Conference of Commissioners on Uniform State Laws, Annual Conference, August 4-11, 1972. Craig B. Bright served on the advisory committee which assisted in the drafting of the act. The prefatory note to the act cites the 1969 study of Cary and Bright; the need for a uniform act was mentioned as early as 1960 in a law review article which stated that, "the managers of corporate charity are still, at this late date, without adequate guides for conduct. The development of these standards is of some urgency". (Kenneth Karst, "The Efficiency of the Charitable Dollar: An unfilled State Responsibility," The Harvard Law Review, 73:435 (1960).)

related problems. The other discretion related issues addressed by the act include matters of institutional fund investment authority, delegation of investment management and the release of restrictions on an investment.

The portions of the act which are most pertinent to the institution's investment policy are:

> Section 2. [Appropriation of Appreciation.] The governing board may appropriate for expenditure for the uses and purposes for which an endowment fund is established so much of the net appreciation, realized and unrealized, in the fair value of the assets of an endowment fund . . . as is prudent under the standard established by Section 6. . . .[309]
>
> Section 4. [Investment Authority.] . . . [T]he governing board . . . may: (1) invest and reinvest an institutional fund in any real or personal property deemed advisable by the governing board . . . (4) invest all or any part of an institutional fund in any other pooled or common fund available for investment, . . .
>
> Section 5. [Delegation of Investment Management.] Except as otherwise provided by the applicable gift instrument . . . the governing board may (1) delegate to its committees, officers or employees, [etc.] . . . the authority to act in place of the board in investment and reinvestment of institutional funds, (2) contract with independent investment advisors, [etc.] . . . .

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[309]Section 3 states that section 2 does not apply if the donor states that the net appreciation should not be expended.

> Section 6. [Standard of Conduct.] . . . [M]embers of a governing board shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision. . . .[310]
>
> Section 7. [Release of Restrictions on Use or Investment.] (a) With the written consent of the donor, the governing board may release, in whole or in part, a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund. (b) If written consent of the donor cannot be obtained by reason of his death, disability, [etc.] . . . the governing board may apply in the name of the institution to the [appropriate] court for the release of a restriction imposed by the applicable gift instrument on the use or investment of an institutional fund . . . If the court finds that the restriction is obsolete, inappropriate, or impracticable, it may by order release the restriction in whole or in part. . . . (d) This section does not limit the application of the doctrine of cy pres. . . .

Howard S. Ende, Associate University Counsel, Princeton University, has commented that:

> Section 7 (b) dealing with the Institution's ability to obtain a release from a restriction on utilization of funds is of great importance to institutions of higher education and has not

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[310]The prefatory note to the act suggests, "The standard of care is that of a director of a business corporation--which seems more appropriate than the traditional Prudent Man Rule applicable to private trustees." Thus, institutions are held to a stricter standard under this rule, but not nearly as strict as that of the legal list concept.

yet been tested extensively in court.[311]

As of 1981, the Uniform Act has been enacted in 26 jurisdictions.[312] Pennsylvania has not passed the act, but New Jersey did in 1975.[313] So far there appears to have been only a few cases which have involved the Uniform Act.

One significant judicial interpretation occurred in New Hampshire in 1973.[314] The issue in that instance was whether the Uniform Act could be applied to preexisting endowment funds. The Supreme Court of New Hampshire affirmed the constitutionality of such an application in an advisory opinion to the State Senate.

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[311]Letter from Howard S. Ende to Charles T. Bargerstock (April 21, 1980); see Williams College v. Attorney General, 375 N.E. 2d 1225 (Mass. 1978) (Attorney General assented to college's request for release of requirement that certain funds be managed separately from its endowment funds).

[312]The states include: California, Colorado, Connecticut, Delaware, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, Tennessee, Vermont, Virginia, Washington and Wisconsin. The District of Columbia has also enacted the provision.

[313]15 N.J. STAT. ANN. §§18-15 et seq. (West).

[314]Opinion of the Justices, 306 A. 2d 55 (N.H. 1973).

In Pennsylvania the matter of retention or distribution of endowment fund capital gains seems to be covered by "The Corporations Not-for-profit Act".[315] The power of an incorporated college or university to invest trust funds is granted generally by the Act.[316] Section 7550 (c) describes the guidelines for determination of income. It states the following:

> Allocation to income of realized capital gains in a common trust fund may be made in accordance with the provisions [of this section] without regard to whether the capital gains in question were realized before or after any particular trust or fund became a part of such common trust fund. . . .[317]

Thus, one can perceive a permissive dimension to both the Uniform Management of Institutional Funds Act and the Pennsylvania Not-for-profit Act. Both permit a college or university the discretion of directing capital gains from institutional investment

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[315] 15 PA. CONS. STAT. ANN. §7101 et seq. (Purdon).

[316] 15 PA. CONS. STAT. ANN. §7550 (Purdon).

[317] 15 PA. CONS. STAT. ANN. §7550 (c)(3) (Purdon). For Pennsylvania private trust cases supporting the proposition of distribution of capital gains as income see Waterhouse's Estate, 308 Pa. 422, 429, 162 A. 295, 296 (1932) and Catherwood Trust, 405 Pa. 61, 173 A. 2d 86 (1961) (overruling Crawford's Estate, 362 Pa. 458, 67 A. 2d 124 (1949)).

funds to either income or to capital.

With regard to the Pennsylvania law on the discretion of charitable trustees to delegate investment management, one statute permits nonprofit corporations to transfer endowment funds to a corporate trustee, i.e. a bank or trust company having a principal office within the state, for the purpose of having the trustee invest and reinvest those funds.[318]

Cary and Bright have provided an excellent analysis of the delegation issue in their 1974 study. They concluded that:

> even in the absence of statutory sanction . . . we believe that courts should and will uphold the delegation of investment decisions to an external manager, assuming once again that the directors continue to exercise overall supervision.
>
> Our conclusion remains the same regardless of whether trust principles or principles of corporate law are applied. . . .
>
> Regardless of whether the delegate is within or without the corporate structure, the courts will be more likely to uphold delegation if the directors can demonstrate that they have

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[318] 15 PA. CONS. STAT. ANN. §7551 (Purdon).

taken appropriate steps to monitor and supervise the investment process.[319]

Federal and State Law and Restrictive Gifts

Frequently, gifts made to institutions of higher education will have restrictions attached to them. For instance, a donor may designate that a scholarship fund be established for the benefit of a specifically designated type of student. When the designation is racial, sexual, or religious, the institution may encounter legal problems in the administration of the fund.

Whenever a charitable trust, e.g. as an endowed scholarship fund, is administered by a public trustee, i.e. for a public institution of higher education or by an agency of the government, such administration may be considered state action. If a trust instrument discriminates arbitrarily on the basis of race or creed against any person, there is

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[319]William L. Cary and Craig B. Bright, The Developing Law of Endowment Funds: "The Law and the Lore" Revisited (New York: The Ford Foundation, 1974), pp. 48-49; for another excellent discussion of specific problems encountered by trustees in the private sector of higher education, see John W. Wheeler, "Fiduciary Responsibility of Trustees in Relation to the Financing of Private Institutions of Higher Education," Journal of College and University Law, 2(3): 210-235, 1975.

potentially a violation of the fourteenth amendment to the United States Constitution.

A leading case,[320] which illustrates the problems inherent in such restrictions, arose in Pennsylvania. The will of Stephen Girard, which had resulted in the landmark decision of Vidal v. Girard's Executors in 1844,[321] again presented an issue which would reach the United States Supreme Court.

The will of Stephen Girard, which created Girard College, restricted admission to the school to "poor white male orphan children". When two Black male children were denied admission, suit was instituted in the Orphans' Court by the Mayor of the city and the Attorney General of the state.

The plaintiffs argued that the will's restriction was violative of the Pennsylvania State and federal public policy. They sought the alteration of the will's provision under cy pres; however, the court refused their petition. The court held that the City of Philadelphia was not performing a

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[320] Pennsylvania v. Board of Directors of City Trusts, 353 U.S. 230 (1957).

[321] 43 U.S. (2 How.) 127 (1844); see chapter 2, note 56 and accompanying text supra.

governmental function in administering the trust; there was, therefore, no illegality of purpose; and because there was no shortage of white applicants, there was no failure of purpose. The Pennsylvania Supreme Court affirmed.[322]

On appeal the United States Supreme Court reversed and remanded the case[323] holding that where the City acted as trustees of Girard College it was acting as an agent of the State and its refusal to admit the Black children was discriminatory and violative of the fourteenth amendment.

On remand the Orphans' Court appointed private trustees, as substitutes for the public trustees, so that the terms of the will could be followed without violating the Constitution. This action was challenged in an appeal to the Pennsylvania Supreme Court,[324] which upheld the lower court. The

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[322]Girard Will Case, 386 Pa. 548, 127 A. 2d 287 (1956).

[323]Pennsylvania v. Board of Directors of City Trust, 353 U.S. 230 (1957).

[324]Girard College Trusteeship, 391 Pa. 434, 138 A. 2d 844 (1958).

United States Supreme Court denied certiorari.[325]

It should be observed that this was not the end of the matter. The Third Circuit Court of Appeals ruled that the denial of certiorari by the high court was not definitive on the issue of whether the action of the Orphan's Court was correct in substituting individual trustees to carry out the racially exclusive admissions policy.[326] Thus, in Pennsylvania v.

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[325]257 U.S. 570 (1958). For further analysis, see Elias Clark, "Charitable Trusts, the Fourteenth Amendment and the Will of Stephen Girard," Yale Law Journal, 66:976, 1957.

[326]392 F. 2d 120, 123 (3rd Cir. 1968); see 88 S. Ct 1811 (1968) (certiorari denied). As to how the Third Circuit Court was able to get jurisdiction, the opinion indicates:

> The present litigation was instituted in the United States District Court for the Eastern District of Pennsylvania. The trial judge originally passed solely upon the question of whether Girard College was within the jurisdiction of the Pennsylvania Public Accommodations Act of June 11, 1935, P.L. 297, as amended by the Act of June 24, 1939, P.L. 872. The Court held it was within Sections (a) and (c) of the Act and not within the proviso of Section (d). This Court reversed that finding and returned the suit to the District Court for trial on the merits of Count 1 of the complaint which charges that "The refusal of the trustees of Girard College to admit applicants without regard to race violates the Constitution of the United States of America and applicable Federal statutes". (at 123)

Brown the Third Circuit Court maintained that the Federal Supreme Court had often ruled that there is no inference which can permissibly be made from the denial of an application of certiorari. The Circuit Court could, therefore, review the Pennsylvania Supreme Court ruling on the constitutionality of the trustee substitution.

Pursuant to its review the court held that the substitution of individual trustees to carry out the racial exclusion after the decision of Pennsylvania v. Board of Directors of City Trust[327] was unconstitutional state action--that the "move of the state court in disposing of the City Trustees and installing its own appointees [was] an obvious involvement of the State".[328]

Apart from constitutional prohibitions against administering discriminatory trusts by public

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[327] See note 323 and accompanying text supra (holding that the restriction as to whites was unconstitutional).

[328] 392 F. 2d at 125. In arriving at its decision the court relied inter alia on the Supreme Court's landmark decisions in Shelley v. Kraemer, 334 U.S. 1 (1948) (judicial enforcement of restrictive real estate agreements violated equal protection clause of fourteenth amendment) and Evans v. Newton, 382 U.S. 296 (1966) (court reversed appointment of private trustees to carry out a racial restriction in a will as to use of park donated to city).

institutions under the Pennsylvania v. Brown rationale, other federal mandates, namely statutes and regulations, have the effect of regulating the administration of restrictive trust provisions by both public and private institutions of higher education.

Both public and private colleges and universities receive federal funds through a variety of direct and indirect grants and contracts. Title VI of the Civil Rights Act of 1964 has been the mainstay of a federal policy which states in essence that institutions receiving federal funds are not to discriminate in the funded activities. The federal agencies in their enforcement capacity possess the sanction of funding cutoff for noncompliance with federal public policy.

Title VI of the Civil Rights Act of 1964,[329] reads:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

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[329] 42 U.S.C. §2000d.

The relevant administrative rules[330] pursuant to Title VI are administered by the Department of Education. They provide:

> (b) Specific discriminatory actions prohibited. (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:
>
> (i) Deny an individual any service, financial aid, or other benefit provided under the program;
>
> (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;
>
> (iii) Subject an individual to . . . separate treatment in any manner related to the receipt of any . . . financial aid, . . . under the program;
>
> (iv) Restrict an individual in any way in the enjoyment of any advantage . . . enjoyed by others receiving . . . financial aid, . . . under the program;
>
> (v) Treat an individual differently from others in determining whether he satisfies . . . condition[s] which individuals must meet in order to be provided . . . financial aid, . . . under the program; . . .

A second major statute of relevance is Title

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[330] 45 C.F.R. §80.3 (b). For an example of a gift involving potential violations of Title VI and VII, see Dudley Clendinen, "Gift to Amherst College Requiring Black Professor Stirs Debate," New York Times, p. A-16, September 14, 1981 (potential charge that chair in the natural sciences, to be awarded to a Black on the first selection, discriminates against all scientists who are not Black).

IX of the Education Amendments of 1972[331] which states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, [with several exceptions] . . .

The pertinent Department of Education regulations[332] specify in greater detail the specific acts of sexual discrimination which are prohibited in programs receiving federal aid.

Title VI regulations strictly ban the administration of race and color restrictions in 45 C.F.R. §80.3 (b). Title IX regulations, however, are seemingly not as comprehensive. For instance, the regulations state:

> (a) General. Except as provided in paragraphs (b) . . . in providing financial assistance to any of its students, a recipient shall not: (1) On the basis of sex, provide different amount [sic] or types of such assistance, limit eligibility for such assistance . . . or otherwise discriminate; . . .
>
> (b) Financial aid established by certain legal instruments. (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign

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[331] 20 U.S.C. §1681 et seq.

[332] 45 C.F.R. §86.

> wills, trusts, bequests, or similar legal instruments . . . which requires that awards be made to members of a particular sex specified therein; Provided, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.[333]

Jeffrey H. Orleans and Elizabeth D. Johnson have commented on these exemptions to Title IX and its regulations. They feel that the exemptions should be interpreted strictly:

> Title IX is broad remedial legislation. Its legislative history narrowly circumscribes its exemptions, and those exemptions do not imply lenient treatment for sex-restricted donated financial aid. Indeed, just the opposite is true, for denial of endowed scholarship assistance to women vitiates the educational opportunities federal funding is designed to provide and Title IX is designed to guarantee, and does so surely as racial restrictions do. Sex-based scholarships are no more acceptable than race-based ones; . . .[334]

The Department of Education is the primary enforcement agency with regard to charges of administration of restrictive scholarships, but another major method for dealing with Title VI and IX violations is provided through the federal tax law, specifically

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[333] 45 C.F.R. §86.37 (a)-(b).

[334] Jeffrey H. Orleans and Elizabeth D. Johnson, "Nondiscrimination Doesn't Have to Not Work: Restricted Scholarships, H.E.W., and I.R.S.," Journal of Law & Education, 7(4):500-501, 1978.

in the option of the I.R.S. to revoke tax exempt status for violation of public policy. This proposition was discussed earlier.[335]

It is worth repeating that in its affirmation[336] of the district court decision of Green v. Connally[337] the Supreme Court appears to be supporting I.R.S. prohibitions of racial discrimination in financial assistance to students. The opinion of the district court stands for the notion that, "[T]here is a declared federal public policy against support for racial discrimination in education which overrides any assertation of value in practicing private racial discrimination."[338]

In 1975 the I.R.S. established the following procedural notice:

> As a general rule, all scholarship or other comparable benefits procurable for use at any given school must be offered on a non-discriminatory basis [for the school to retain its 501 (c)(3) exemption]. . . . Financial assistance programs favoring members of one or more racial groups that

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[335] See note 250 and accompanying text supra.

[336] Coit v. Green, 404 U.S. 997 (1971); see notes 189 and 253 and accompanying text(s) supra.

[337] 330 F. Supp. 1150 (D.D.C. 1971).

[338] Ibid. at 1163.

> that do not significantly derogate from the school's racially nondiscriminatory policy will not adversely affect the school's exempt status.[339]

Orleans and Johnson comment that this provision seems to imply that, "Under certain circumstances universities may be tax-exempt even while administering racially-restricted scholarship programs, and thus donors may establish such programs and receive tax deductions for doing so."[340] In view of the Green v. Connally rationale, the question remains as to how a court will interprete the provision.

Orleans and Johnson criticize what they perceive to be an inconsistency among the various regulations both in terms of their substance and in terms of agency commitments to enforcement.[341]

If the federal government takes steps to tighten the regulations and their enforcement, what becomes of charitable trusts and restrictive scholarship funds established by private donor gifts? What steps may be taken by charitable trustees to bring a

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[339] Rev. Proc. 75-50, 1975-3 C.B. 587; see note 254 supra.

[340] Orleans and Johnson, op. cit., p. 502.

[341] Ibid., pp. 505-506.

provision into line with prevailing policy?

There exist some judicial remedies which have been used successfully to correct restrictive trust instruments. Courts have used the rules of judicial construction or interpretation to vitiate the effect of gift restrictions. Likewise, the cy pres doctrine provides a major means of modifying provisions which are impracticable or impossible to administrate because of their illegality (as violating public policy).

An example of the first of these two strategies can be seen in Ebitz v. Pioneer National Bank.[342] In that case several female law students had applied for financial aid from a scholarship fund which was to "aid and assist worthy and ambitious young men to acquire a legal education." Using judicial rules of interpretation the court decided that in the context of the complete document the term "young men" was to be construed in its generic sense to include women. The Massachusetts Supreme Court affirmed this construction by the lower court.

As to the second strategy reference, should be made to a case discussed earlier.[343] Howard Savings

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[342] 361 N.E. 2d 225, 226 (Mass. 1977).

[343] See note 199 and accompanying text supra.

Institute of Newark v. Peep[344] illustrates the use of cy pres to alter a testamentary trust provision. In Peep a donor had established a bequest of $50,000 to Amherst College in trust "to be used as a scholarship loan fund for deserving American born, Protestant, Gentile boys of good moral repute, not given to gambling, smoking, drinking, or other similar acts." The Amherst charter provided that "no student shall be refused admission to, or denied any of the privileges, honors, or degrees of said College, on account of the religious opinions he may entertain." The Trustees refused to accept the trust fund unless the Protestant Gentile restriction was eliminated. The plaintiff executor instituted an action in equity to have the words excluded from the provision. The New Jersey Supreme Court affirmed the court of equity's application of cy pres to alter the terms of the trust.

Besides the Peep case, there have been other instances where the cy pres doctrine has been used to eliminate a restrictive provision. In Dunbar v.

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[344] 34 N.J. 494, 170 A. 2d 39 (1961); cf. Evans v. Abney, 396 U.S. 435 (1970), aff'g., 224 Ga. 826, 165 S.E. 2d 160 (1968) (cy pres not applicable to remove racial restriction absent general charitable intent).

Board of Trustees of George W. Clayton College[345] it was held that evidence supported a finding that in view of changing conditions, the charitable intent of a testator who had established a college in 1899 for white male orphans would best be served by extending admission to children regardless of color.

Likewise, the doctrine of deviation, which was discussed earlier,[346] has been used to eliminate restrictive provisions. In Coffee v. William Marsh Rice University[347] the University had sought to secure an interpretation of the original trust instruments creating Rice University to determine whether in the exercise of their free discretion they could accept qualified students without regard to color. The original trust indenture established that the endowment should be used to instruct white

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[345] 170 Colo. 327, 461 P. 2d 28 (1969). The court cited Pennsylvania v. Brown, 373 F. 2d 771 (3rd Cir. 1968) as support for disallowing state enforcement of racial restrictions; see also In re Will of Potter, 275 A. 2d 574 (Del. Ch. 1970).

[346] See note 131 and accompanying text supra.

[347] 408 S.W. 2d 269 (Tex. Civ. App. 1966). See Bank of Delaware v. Buckson, 255 A. 2d 710 (Del. Ch. 1969) (racial restriction eliminated by doctrine of deviation where court declined to make a definitive ruling as to the presence of state action).

inhabitants of Texas. The court considered evidence which indicated that the fund could be administered consistent with the settlor's original intent by permitting the trustees the discretion of deviating from the terms of the trust to permit the acceptance of qualified applicants without regard to color.[348]

I.R.S. and Fund Administration

In conjunction with the power to allow a donor a charitable deduction or revoke an institution's tax exempt status, the Internal Revenue Service plays another potentially important role in the regulation of the administration of private donor funds by institutions of higher education. It does so via the requirements for filing of returns and information by tax exempt institutions and charitable fiduciaries.

In the section on federal regulation of charitable organizations through the tax exemption process, there was some mention of Form 990 returns which are designed to allow the I.R.S. to scrutinize the nature of the charity's activities. One purpose of this return is to provide information which can assist the I.R.S. to determine if there are violations

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[348]The court conceivably could have used cy pres, and did discuss it at 285, but chose to achieve a new purpose through varying the terms of administration versus altering the specific charitable purpose.

of Sections 503[349] and 681,[350] which prohibit self dealing.

Luis Kutner characterized such dealings and the I.R.S.'s method of handling them as follows:

> [C]ertain transactions between an exempt organization or charitable trust and its creator, a substantial contributor, a family member of such creator or contributor . . . [are suspect]. These transactions, all of which involve clear breaches of trust, are the lending of income of corpus without adequate security and a reasonable rate of interest, [etc.] . . . But the Congress rather than forcing the fiduciary who had acceded to such breaches of trust to make restitution for his wrongs, chose to impose the primary penalty upon the organization or trust by denying it exemption from income taxes[351]. . . But certain

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[349] I.R.C. §503 (c).

[350] I.R.C. §681 (b)(2).

[351] Kutner states that the trustee may have a legal duty not to do anything which might endanger tax exempt status; see note 293 and accompanying text supra. While the organization or trust suffers the penalty of removal of tax exempt status for the wrongs of the fiduciary, there are possible remedies against the fiduciary. The right to remove the fiduciary may be provided by the donative instrument, the common law, at equity or state statute. (90 C.J.S. Trusts §§230 et seq., p. 188 (1960).) Pennsylvania's statute provides for removal or discharge of trustees (20 PA. CONS. STAT. ANN. §7121 (Purdon)). Monetary recovery may exist in some circumstances; for instance, a surcharge has been assessed where a trustee has been wanting in common prudence in the management of a trust fund (see, for example, In re Hart's Estate, 203 Pa. 408, 53 A. 364 (Pa. 1902)); some discussion of the assessment of a surcharge of an executor for the negligent administration of tax responsibilities can be found in Richard W. McConaghy's article in the Temple Law Quarterly, 45:42, 1971.

> organizations, such as religious organizations, educational organizations with a regular faculty and an enrolled student body, . . . are excluded from the prohibited transaction provisions on the theory that they were "not believed likely to become involved" in such transactions.[352]

Observe that while the law is permissive as to institutions of higher education which serve as charitable trustees, other charitable trustees who are charged with administering educational trusts must abide by the prohibitions against self dealing.

Luis Kutner has noted that Representative Wright Patman found that the I.R.S. had been lax in its enforcement of the self dealing provisions.[353] The problem, it seemed to him, was one of both policy and implementation. Patman felt that there were deficiences in the Code and regulations which needed to be strengthed. Also, he felt that the I.R.S., because of manpower limitations, should be setting

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[352]Kutner, op. cit., pp. 201-202; S. Rep. 2375, 81st Cong., 2nd Sess., p. 212; cf. Hauser, "Tax Problems of Foundations: Another Subpart F in the Making?," Taxes, 43:793, 1965.

[353]Ibid., p. 202; Tax-Exempt Foundations and Charitable Trusts: Their Impact on Our Economy, Chairman's Report to the Select Committee on Small Business, House of Representatives, 87th Cong. 1962, 2nd Installment, 88th Congress, 1963, Third Installment, 88th Congress, 1964; See Appendix D, note 4.

enforcement priorities.

One final aspect of federal regulation of the administration of private donor funds relates to other I.R.S. filing requirements. In addition to Form 990, Return of Organization Exempt from Income Tax, additional specific tax or information returns must be filed with regard to certain types of trusts.

Revenue Procedure 73-29 has indicated the types of returns which must be filed with these trusts. A matrix of the particular filing requirements for various arrangements is presented in Appendix C. These filing requirements seem to exhibit another restrictive dimension to the law of charity. The restrictive element is seen in the accountability that is being established for charitable transactions with tax ramifications. Apart from the burden of accounting which must be met by the individual donors on these transactions, the tax information and accountability requirement may have some influence on the ability of some institutions to seek out certain types of gifts because of the so-called technicality and complexity of the types of gifts involved and the added burden entailed in preparing annual returns.

Chapter Summary

In summary this chapter has described the current state of public policy with regard to its influence on gifts from individuals to institutions of higher education. It has described the development of the law of charity, specifically as to higher education, in terms of a permissive/restrictive theme with regard to: charitable uses, charitable dispositions, tax incentives and limitations for giving, charitable organizations, charitable gift solicitation and private donor fund administration.

The next chapter will attempt to summarize and synthesize the policies and concepts presented in chapters two and three. In this fashion, a clearer picture of the current state and trends of public policy in influencing gifts by individuals to institutions of higher education may be shown. Additional comments on emerging trends and recent developments will be made.

Chapter 4

CONCLUSIONS AND RECOMMENDATIONS

This chapter will be a synthesis of the important aspects of the last two chapters. Its approach will be to identify the existence of possible trends in the law of charity in terms of their influence on giving by individuals to institutions of higher education. Some special attention will be devoted to recent developments. These occurrences will reflect the ever present permissive and restrictive elements which have been responsible for shaping the law of charity.

Chapter 4 will be presented in the same topical sequence as chapter 3. The discussion will include a series of specific conclusions about the law on charitable uses for educational purposes in the twentieth century, incentives for and limitations on charitable dispositions, tax incentives for and limitations on charitable giving, and the law regulating charitable organizations--specifically as to charitable gift solicitation and private donor fund administration.

The chapter will conclude with: 1) a short summary of major conclusions about the study, 2) a description of the significance of the study, and 3) some recommendations for further study.

It should be observed that the conclusions the discussion which follow are subject to several caveats. First, the law and public policy is a complex phenomenon and is not subject to predictability in a scientific sense. Second, the law is replete with examples of ambivalence and ambiguity on specific issues, (for example, different jurisdictions have held differently on the same or similar issues). Third, the permissive/restrictive dichotomy, as has been hypothesized, pervades the law of charity and that both elements may be present simultaneously at any given period of time on any particular issue. Nonetheless, the study has provided the basis for for some clear insights into the evolving public policy. With these factors in mind one can make some conclusions and perhaps even speculate on the direction of the law of charity.

The Law of Charitable Uses and Educational Purposes

During the early nineteenth century, as has been indicated in chapter 2, considerable ambivalence seems to have existed among the states as to what were permissible charitable uses. In 1844 with Vidal v. Girard's Executors[1] the United States Supreme Court endorsed a more permissive attitude on charitable uses. After Vidal and for the rest of the century, more courts seemed to exhibit a more favorable attitude towards charity by permitting a broader range of charitable uses. The analysis early in chapter 3, specifically as to educational purposes, seems to support this conclusion.[2] And while the courts have drawn guidelines and parameters as to the extent of the permissible charitable uses,[3] broad support for educational purposes has continued into the twentieth century. There seems to be no reason to suppose that this judicial support will not continue.

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[1] 43 U.S. (2 How.) 127 (1844); see chapter 2, note 56 and accompanying text supra.

[2] See chapter 3, note 4 and accompanying text supra.

[3] See chapter 3, Charitable Dispositions section.

Fisch, Freed and Schacter's comment on this point is worth repeating that, "In the context of charity law the term education is accorded broad meaning and no limit [is] imposed on the methods by which it can be advanced."[4]

Luis Kutner has also commented, specifically as to charitable trusts, on what we might expect from the courts and legislatures in the future.

> The rules regarding the establishment and functioning of trusts must be constantly re-evaluated and adapted to changing situations. The charitable trust cannot be considered in an isolated context for it is interwoven into the broad stream of society and subject to the political, economic and social forces which move ceaselessly foward. Thus conceptions as to what is for the public benefit is subject to change.[5]

This comment can be extended generally to all charitable uses and to the concept of the evolving law of charity. It is seen for instance in the policy regarding charitable dispositions, i.e. rules governing how gifts to charity can be made.

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[4]Edith Fisch, Doris Freed and Ester Schacter, Charities and Charitable Foundations (Pomona, N.Y.: Lond Publications, 1974), p. 266; see chapter 3, note 2 and accompanying text supra.

[5]Luis Kutner, Legal Aspects of Charitable Trusts and Foundations (Chicago: Commerce Clearing House, Inc., 1970), p. 94.

The Law of Charitable Dispositions and Incentives For and Limitations on Gifts to Institutions of Higher Education

The major impression about societal sentiment concerning the right of donors to make charitable dispositions is that over the centuries such dispositions have been highly favored. This conclusion must be tempered by the realization that at certain times the sentiment has been more or less supportive than at others. Furthermore, even the most permissive periods of time can be viewed as having specific limitations or restrictions on how or on the extent to which a donor may dispense his property to charities. The courts, for instance, have favored charitable dispositions but have also weighed the interests of the charity along with the interests of the donor, his or her heirs and the public at large.

An example of this weighing process is seen in the courts' protection of the donor on the matter of whether a gift to a charity has been fully executed. Rules as to what constitutes a complete charitable gift will be applied under those circumstances.[6]

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[6]See chapter 2, note 78 and accompanying text supra.

In the same fashion rules concerning the nature and validity of charitable trusts have evolved and been applied in the interpretation of such instruments.[7]

With regard to the attitude we might expect from legislatures and courts, as to the law of charitable trusts, Luis Kutner has made the following keen observation which bears repetition:

> The rules regarding the establishment and functioning of trusts must be constantly re-evaluated and adapted to changing situations. The charitable trust cannot be considered in an isolated context for it is interwoven into the broad stream of society and subject to political, economic and social forces which move ceaselessly forward. Thus conceptions as to what is for the public benefit is subject to change.[8]

On the subject of conditional gifts and trusts, over the span of time covered by the study one can perceive a distinctly restrictive tenor in the law as it relates to the charitable recipient.[9] For instance a major guideline to which courts adhere is that they should try to ascertain the donor's intention in construing charitable gift

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[7]See chapter 3, note 24 et seq. and accompanying text supra.

[8]Kutner, op. cit., p. 94.

[9]See chapter 3, note 55 et seq. and accompanying text supra.

conditions. That is, courts have usually required that charities follow conditions stated in trusts or gifts; this is arguably an incentive for donors. Note, however, that where colleges and universities have been the object of conditional trusts (in some of the cases presented in this study), courts have not been as prone to construe the conditions in such a way to create a forfeiture of the gifts.[10]

A restriction on the donor which is in support of charity is witnessed in the extent to which courts have enforced charitable subscriptions.[11] Judicial support is most clearly demonstrated in the fact that courts have utilized four theories of consideration to uphold and enforce charitable subscriptions in favor of colleges and universities and other charities.[12]

As to testamentary charitable dispositions a number of observations can be made. Charitable

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[10]See chapter 3, note 57 and accompanying text supra.

[11]See chapter 3, note 66 et seq. and accompanying text supra.

[12]See chapter 3, note 72 and accompanying text supra.

bequests have always and will continue to be circumscribed by rules regarding the validity and interpretation of wills, bequests and devises.[13] Rules of evidence, for instance as to parol evidence, will be strictly followed.[14] On the other hand courts have and are likely to continue to indulge many legal presumptions in favor of the validity of charitable devises and bequests.[15]

One major permissive legal concept or device which has been used to support charitable testamentary trusts has been that of cy pres. Chapter 2 discusses the origin of the doctrine[16] and chapter 3 details its application during the last eighty years.[17] The majority of cases presented in this study seem to indicate a permissive application of the doctrine,

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[13]See chapter 3, note 86 and accompanying text supra.

[14]See chapter 3, note 88 and accompanying text supra.

[15]See chapter 3, note 87 and accompanying text supra.

[16]See chapter 2, notes 16 and 64 and accompanying texts supra.

[17]See chapter 3, note 93 et seq. and accompanying text supra.

especially in the last 120 years. The existence of cy pres statutes, in Pennsylvania for about the same length of time, indicates legislative endorsement of the cy pres concept and underscores a generally favorable attitude by the public to protect charitable trusts from failing due to changed circumstances. However, it should be remembered that the courts will follow specific parameters in the application of cy pres and related doctrines--approximation[18] and deviation.[19]

Regarding the Mortmain Statutes, which were passed in a number of jurisdictions during the nineteenth century,[20] a distinct reversal of the restrictive sentiment embodied in such statutes occurred during the twentieth century. As chapter 3 has indicated, Mortmain Statutes in many states have been either judically abrogated[21] or legislatively

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[18]See chapter 2, note 77 supra.

[19]See chapter 3, note 131 et seq. and accompanying text supra.

[20]See chapter 2, note 89 and accompanying text supra.

[21]See chapter 3, note 135 and accompanying text supra.

repealed.[22] A qualifying comment about the trend reversal is that a minority of jurisdictions have upheld statutes regulating deathbed dispositions in the face of attacks on their constitutionality.[23] Also, one commentator has proposed that states which wish to regulate deathbed dispositions may be able to draft Mortmain Statutes in a sufficiently narrow form which could survive constitutional challenges.[24] A strong sentiment for restoring Mortmain Statutes has not surfaced at present.

With respect to the rule against perpetuities and its application to charitable dispositions[25] it is fairly clear that "the judiciary has created an 'exemption' for charitable gifts in the sense that the blackletter perpetuities law is not applied as harshly in the context of the charitable gift".[26]

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[22]See chapter 3, note 139 and accompanying text supra.

[23]See chapter 3, note 142 and accompanying text supra.

[24]See chapter 3, note 145 and accompanying text supra.

[25]See chapter 3, note 146 et seq. and accompanying text supra.

[26]See chapter 3, note 150 and accompanying text supra.

Evidence of this liberal application is specifically presented in the discussion of the use of the cy pres doctrine as a means for obviating the effects of the rule against perpetuities.[27]

Nevertheless, a rule of reasonableness has served as a limitation. This fact seems to be indicated by a number of cases where the courts have upheld the societal interest in preventing the remote vesting of title[28] and indefinite accumulations, as to time or amounts of trust income.[29]

The Law of Taxation and Incentives for and Limitations on Gifts to Institutions of Higher Education

Chapter 2 discussed, inter alia, how charitable uses were highly favored in both the English and American tradition up through the nineteenth century. Chapter 3 began with a consideration of a twentieth century phenomenon, the Internal Revenue Code. It

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[27]See, for example, chapter 3, note 156 and accompanying text supra.

[28]See chapter 3, note 154 and accompanying text supra.

[29]See chapter 3, note 166 and accompanying text supra.

also examined how public policy through the Code provided for increasing support of charity through tax incentives for giving, mainly through a charitable income tax deduction.

This policy incentive for charitable giving increased progressively from the inception of the charitable income tax deduction in 1917. The increasing incentive over time was accomplished through gradually decreasing the limitation on the percentage of a taxpayer's income which could be donated to charity in any taxable year.[30]

The most recent indicator of a more permissive attitude in public policy in providing incentives for charitable giving can be seen in the introduction of legislation early in 1981 which would permit those who take the income tax standard deduction to also deduct charitable contributions.[31] Proposals for this

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[30]See chapter 3, note 174 et seq. and accompanying text supra.

[31]H.R. 501, 97th Cong., First Sess. (1981), introducted by Representatives Barber B. Conable, Jr., Republican of New York, and Richard A. Gephardt, Democrat of Missouri; a similar bill was introduced in the Senate--S. 170, 97th Cong., First Sess. (1981), by Senators Daniel P. Moynihan, Democrat of New York and Robert Packwood, Republican of Oregon. (An earlier attempt to introduce such legislation occurred in 1979 with the Fisher-Conable Bill (H.R. 1785) and the Moynihan-Packwood bill (S. 219).)

additional incentive have come in two forms in the past.

The non-itemizer charitable deduction and the so-called "double deduction" concepts had their roots at least as early as 1975.[32] The Commission on Private Philanthropy and Public Needs, otherwise known as the Filer Commission, recommended the consideration of these concepts pursuant to its finding that there was a need to broaden the base of philanthropy in America.[33] The first form would permit the taxpayer to take a charitable deduction even though he/she did not itemize deductions on his/her tax return.[34] H.R. 501 and S. 170 of the 97th Congress, first session, encompass this recommendation. The "double deduction" recommendation on the other hand would permit families with certain income levels to double the amount of a charitable contribution deduction.[35]

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[32]Commission on Private Philanthropy and Public Needs, [hereafter cited as the Filer Commission], Giving in America (1975), p. 135.

[33]See note 69 et seq. and accompanying text infra.

[34]Filer Commission, op. cit., p. 138; see note 37 infra.

[35]Ibid., p. 141.

According to the Independent Sector, a coalition of charitable organizations,[36] the legislative proposal to permit non-itemizers to take the charitable income tax deduction would cost the government approximately $ 2.2 billion in lost revenue. However, it is also estimated that the change would increase giving to charitable organizations by $ 5.7 billion each year with the greatest share going to colleges and universities.[37]

The major supporting attitude for the continuation and/or expansion of the charitable deduction has been typically contained in the words of legislators like Senator Edward M. Kennedy, who in 1976 stated:

> There is broad support in Congress to maintain the existing tax incentives for contributions to our churches, schools and other charitable institutions. There is growing support for additional

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[36]Discussed at note 71 and accompanying text infra.

[37]As reported in "Incentives to Charitable Giving Introduced in Congress", Chronicle of Higher Education, 21(22):13, February 9, 1981.

[The non-itemizer charitable deduction was enacted as part of the Economic Recovery Tax Act of 1981, Pub. L. No. 97-121 (to be codified as I.R.C. §170 (i) on August 13, 1981. Some aspects of the deduction and other ramifications of the Act are discussed briefly in Appendix E; see chapter 3, note 179, supra.]

> means to help these vital institutions meet their goals. There is no support for eliminating the features in the tax laws that have worked so well in helping our private charities to carry on their important social work, especially at this time when governments at every level, state and local, are cutting social spending programs to the bone.[38]

The sentiment expressed by Edward Kennedy has not been universally shared by others. The major attacks on the charitable deduction, for instance, have been embodied in various arguments.

One argument has been that charitable giving is no different than other kinds of personal outlays. Paul R. McDaniel of the Boston College Law School summarizes that argument when he states:

> Most economists and social psychologists take the "scientific" view that charitable contributions are not simply individual sacrifices for the public good, but are actually consumption spending . . . In making a charitable gift, the individual is seen as purchasing status, the perpetuation of his social values, or on a less mercenary level, the satisfaction resulting from doing a "good deed" . . . And one can inquire as to whether the deduction operates equitably as an incentive system to induce this form of consumption.[39]

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[38]Letter to the editor of Boston Globe, February 7, 1976, as quoted in Norman S. Fink, "Taxation and Philanthropy--A 1976 Perspective," Journal of College and University Law, 3(1):5, 1975.

[39]As quoted in Filer Commission, op. cit., p. 107.

The Filer Commission report presents a second argument that has been forwarded, namely that the charitable deduction is inequitable:

> When seen as a form of government subsidy or expenditure, the charitable deduction, like other personal income tax deductions, is open to charges of inequity because of a pattern that is, in effect, the inverse of the progressive structure of the income tax. The higher a person's income the higher the rate of taxation under the income tax and therefore the more the government foregoes--or "spends" in the tax-expenditure view--for any portion of such income not taxed. In other words, the government adds proportionately more of the subsidy to a high-income taxpayer's giving and proportionately less to the low-income taxpayer's contribution.[40]

The third argument, mentioned in passing in the last quotation, is the tax-expenditure argument which states that revenue is diverted through the charitable deduction formula from the public coffers. In essence the argument states that all tax immunities constitute governmental subsidy to charitable activity and that taxpayers should not be permitted the power of determining where tax dollars should be directed.[41]

One commentator has provided additional insights into the seeming disenchantment of some in

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[40]Ibid., p. 108.

[41]Ibid., pp. 109-111.

our society with the charitable deduction. Alan Pifer in the 1972 Carnegie Corporation report states:

> Why has the charitable deduction suddenly become subject to doubt after so many years of public acceptance? There are probably two explanations. At the obvious level, there is the disenchantment of a growing body of citizens with the entire tax system because of its regressiveness and hence inequity toward lower income taxpayers. Given this situation and the fact that the great majority of low and moderate income taypayers now make use of the standard deduction on their income tax forms, and are encouraged by government to do so, a special deduction for charitable giving is bound to seem to many taxpayers, like a "loophole" designed principally to benefit the rich. The fact that the tax "savings" involved in charitable gifts stimulated by the charitable deduction go to the recipient institutions and not into the pockets of the donors is easily misunderstood.
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> At a deeper level, however, it is possible that public attitudes, not just toward the charitable deduction, but toward charity itself, may have undergone a transformation. The time-honored concept of private benevolence for the public good, one widely respected in this country, may command less universal respect today than heretofore. To some Americans, charity has apparently become uncoupled from the notion of public benefit and tied to the idea of private advantage and privilege. To others, it is increasingly seen as anachronistic and even offensive in a society where the concept of citizens' rights to governmentally provided services is constantly expanding.[42]

Some sentiment seems to exist for the proposition that a viable private sector in higher education

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[42]As cited in Fink, op. cit., p. 9.

can be supported by the government through means other than tax incentives for philanthropy to colleges and universities. Emil M. Sunley has reviewed some of these proposed methods and additional arguments for the consideration of such methods.[43] He cites the traditional inequality argument[44] and the tax-expenditure argument.[45] To these he adds another, namely that the better-off colleges and universities receive a disportionate share of the charitable gift pie, whereas those facing closure benefit little from the existing scheme.[46]

To see if those who have made these arguments have a meritorious case, Sunley reviewed the empirical

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[43]Emil M. Sunley, Jr., "Federal and State Tax Policies," chapter 6 in Public Policy and Private Higher Education (Washington, D.C.: Brookings Institution, 1978), p. 281 at 309-318; a strong sentiment has been expressed by some regarding the use of such methods to support private higher education. Kingman Brewster, when President at Yale stated that, "If all support for university teaching and research were to come from the government--if there were no sources of unprogrammed, non-political funds to bolster the controversial; to encourage the heterodox; to question the inherited assumptions--then progress would be stultified by conformity to the design of some one man or one group or one generation." (Carl Bahol, Charity USA (New York: Times Books, 1979), p. 453.)

[44]Ibid., p. 295.

[45]Ibid., p. 298.

[46]Ibid., p. 297.

research with regard to the various arguments. His research led him to conclude that "tax incentives are efficient in that they induce more additional giving than they cost in terms of forgone [sic] tax revenue."[47] He comments further that, "In short, policy makers are faced with a trade-off between the inequity of the present tax incentive and their efficiency in encouraging donations to higher education."[48]

A number of other individuals have responded, like Sunley, to attacks on the charitable tax incentive system. Like Sunley, these individuals have constructed counterarguments to the specific attacks. One such counterattack on the tax-expenditure argument has been made by Boris I. Bittker of the Yale Law School. Bittker questions the "income-definition" of those who have used the tax-expenditure argument:

> The concept of income is not settled, cannot be settled the way one can define water as H_2O or lay down the laws of gravity . . . Income is a political, economic, social concept which takes its meaning from the society in which the term is used . . . [T]here are many definitions of income . . . But at the very core of the only definition that has the benefit of a consensus, there is a concept of consumption . . . But 2,000 years of religious, philosophical and ethical views suggest that what one gives to

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[47]Ibid., p. 319.

[48]Ibid.

> charity can properly be viewed differently . . . If, as I think, we have a powerful sense of difference between giving to charity and spending in other respects, I see no reason at all why in defining income one shouldn't exclude those items like charitable contributions that our whole history tells us represent a special kind of use of one's funds.[49]

Sunley ultimately argues for the charitable deduction based on the social utility of charitable services. He states that the principle justification for tax incentives for charitable giving is simply that it encourages important social activities with the value to the society that the government would otherwise have to supply the service. Also, in the case of higher education, charitable dollars not only permit the survival of colleges and universities but also provide for a margin of excellence.[50]

Others, like Luis Kutner, have propounded the maintenance of tax incentives for charitable giving:

> Where a college is dependent upon a single source for funds, it will be compelled to pattern its programs so as to please that source, whether it be the legislature or a donor. To undertake innovating programs alternative sources of finance are needed. There is at present

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[49]As quoted in Filer Commission, op. cit., p. 110.

[50]Sunley, op. cit., pp. 294-295.

> only one way that enough money can be found for creative change and that is to have diversified pools of funds, out of reach of the routine urgencies, available primarily for innovation . . . An individual who has the financial means and wishes to benefit the community in a certain manner should be permitted to do so. Government appropriations necessarily must be based on meeting certain priority needs leaving other community needs, such as the establishment of a museum, unmet. The gap can be filled from private philanthropy.[51]

Based on the relative arguments as to the tax incentive system, what can be said about the future of public policy on governmental incentives for charitable giving? Joseph C. Beckham and Galen C. Godbey in a recent analysis have ventured the following answer that in view of the permissive/restrictive ambivalence of society:

> predicting the future of federal tax expenditure policy--whether generally or with specific reference to higher education--in the 1980s is rendered difficult at best due to [these] countervailing forces.[52]

In view of a major recent change in our

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[51]Kutner, op. cit., pp. 6-7. See Kingman Brewster's comment which is given in note 19 supra.

[52]Joseph C. Beckham and Galen C. Godbey, "Conceptualizing Federal Tax Policies Towards Higher Education in the 1980s: Balancing Social Equity and Political Realities," Journal of Education Finance, 5:428-451, at 449, Spring, 1980.

political scene this general uncertainty of prediction is complicated. Because President Ronald Reagan's administrative policies involve different economic, political and social assumptions about the role of government in society, major changes in the tax incentive system are emerging. It seems too early to determine the effect of those changes on charitable giving because of the lack of a full picture of the implementation of President Reagan's assumptions and correspondingly Congress' and the American public's response to them.

The Law on Charitable Organizations and Incentives for and Limitations on Gifts to Institutions of Higher Education

State regulations of charitable organizations, either of their formation or activities, prior to 1900 was minimal. The types and degree of regulation of these organizations have increased progressively, especially in the last several decades. The reason for the increase seems obvious. As fund raising has become big business, our society has perceived a need to protect itself from abuses in charitable activities. Accordingly, different types of controls have been instituted.

As mentioned, there are advantages for a charity which has received corporate recognition. There are, however, conditions attached to gaining and maintaining that status. Charitable incorporation statutes, for instance, have dictated that colleges and universities meet department of education criteria before they will be granted incorporation status.[53]

In addition to state criteria for the charitable organizational recognition, federal law imposes a variety of mandates which must be met in order to obtain and maintain tax exempt status, which is a prerequisite for attracting gifts which will be eligible for charitable income tax deductions.[54] The power to revoke these two privileges will continue to allow the government considerable power to regulate the activities of colleges and universities.[55] At the same time, the state tax law, while having a lesser impact (at

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[53]See, for example, chapter 3, note 232 and accompanying text supra.

[54]See chapter 3, note 242 et seq. and accompanying text supra.

[55]See, for example, chapter 3, note 258 et seq. and accompanying text supra.

least in the case of Pennsylvania) than the federal tax law, will also continue to have some influence on charitable giving to institutions of higher education.[56]

It should be mentioned that governmental investigations in the context of a mass-media-oriented society may serve both as the forum and device for mobilizing public opinion and inducing legislative change and executive implementation of public policy as to the regulation of charity.[57] Investigations may, therefore, become an increasingly important element in defining the emerging law of charity in the years ahead.

One of the most substantial areas for increases in government regulation of charities, particularly in the last thirty years, has occurred in the proliferation of state charitable gift solicitation mandates.[58] It seems likely that both the state and local governments will remain active

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[56] See chapter 3, note 265 and accompanying text supra.

[57] See, for example, chapter 3, note 250 and accompanying text supra.

[58] See chapter 3, note 266 and accompanying text supra.

in this regulation. What remains to be seen is whether and to what extent the federal government will become involved in the regulation of interstate charitable solicitation.

While attempts to establish a federal role, as to the regulation of gift solicitation, have to the present been unsuccessful, there continues to exist some sentiment for federal involvement. The Filer Commission in 1975, for instance, urged that "a system of federal regulation be established for interstate charitable solicitation. . . ."[59]

In addition the Filer Commission report states recommendations on the related matter of the financial accountability of tax exempt organizations. It suggests:

> That all larger tax-exempt charitable organizations except churches and church affiliates be required to prepare and make readily available detailed annual reports on their finances, programs and priorities.[60]

As a commentary on the coexistence of permissive and restrictive elements, it is worthwhile

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[59]Filer Commission, op. cit., p. 25. It also urged that "intrastate solicitations be more effectively regulated by state governments." (Ibid.)

[60]Ibid., p. 22.

to observe that while the Filer Commission has urged a more permissive attitude regarding incentives to giving, it has also advocated restrictive measures, e.g. as to accountability.

As with charitable gift solicitation, there has been a trend in the last several decades to increase the number and scope of the mandates regulating the administration of private donor funds. This increase in operative mandates does not need to be viewed as a totally restrictive trend because of the degree to which the law has permitted greater discretion on the part of charitable trustees in, for instance, investment decision making.[61]

The growth of statutory charitable trust administration law has been most significant because it has expanded, clarified and sometimes eclipsed the prior common law mandates. A number of the new statutory mandates, such as the Uniform Management of Institutional Funds Act,[62] have been widely accepted

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[61] See chapter 3, note 291 et seq. and accompanying text supra.

[62] See chapter 3, note 308 and accompanying text supra.

among the various jurisdictions.

While acts, such as the Uniform Management of Institutional Funds Act, have been designed to delimit the authority of charitable trustees, they have in effect often established a greater latitude for the charitable trustees in the performance of their duties. Luis Kutner has commented on this fact:

> The trend has been for an expansion of the powers of trustees, and state statutes have been enacted to grant to trustees greater powers than those traditionally conferred by equity courts . . . In the absence of legislation, a trustee has no power virtute officii; his only powers are those expressly or implicitly granted, and judicial reluctance to find implied powers stems from precedents laid down long ago at times when economic conditions, social organization [etc.] . . . differed from those of today . . . Therefore, attempts have been made . . . to confer powers upon trustees by legislation.[63] (Emphasis Kutner's.)

Furthermore, the trend away from the nineteenth century legal lists criteria for investments towards the more liberal prudent investor rule[64]

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[63] Kutner, op. cit., pp. 188-189.

[64] See chapter 3, note 297 and accompanying text supra.

or the ordinary business care standard[65] of the Uniform Management of Institutional Funds Act indicates a more permissive attitude. In contrast to permissivity (as to fund investment), one restrictive aspect (as to fund usage) should be mentioned.

In the future it is arguable that colleges and universities which receive and administer restrictive or discriminatory scholarship funds will face challenges to the application of those funds. Society has seemingly become less indulgent about the privilege of donors to designate gifts to a narrowly defined group of individuals. Chapter 3 discusses the important litigation on this issue[66] as well as the emergence of a variety of other mandates which can be used to attack restrictive or discriminatory scholarship funds. For instance, both Title VI and Title IX provisions and regulations prohibit the administration of financial aid in a discriminatory manner.[67]

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[65]See chapter 3, note 310 and accompanying text supra.

[66]See chapter 3, note 320 et seq. and accompanying text supra.

[67]See, for example, chapter 3, note 329 and accompanying text supra.

It does not appear likely in the context of the current sentiment about race, sex, religious or other forms of discrimination that courts will be as prone to give effect to restrictive and discriminatory gift provisions. Instead it is likely that at the request of colleges and universities that the rules of judicial interpretation[68] and doctrines like cy pres[69] will be increasingly utilized to alter restrictive charitable instrument provisions.

The extent to which federal regulatory pressure will be available to prevent the institutional administration of restrictive gifts is not clear. The administration of President Ronald Reagan seems to favor governmental debureaucratization with the result that there may be an elimination and/or unification of existing regulations and correspondingly a concomitant deemphasis of the federal involvement in enforcement.

Additional Emerging Trends

It seems apparent that charitable organizations have been concerned about their ability to effectively

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[68] See chapter 3, note 342 and accompanying text supra.

[69] See chapter 3, note 344 and accompanying text supra.

affect public policy. The law, however, has severely restricted their ability to influence change.

For instance, since 1934 organizations which "are eligible to receive tax-deductible gifts have been prohibited from devoting a 'substantial part' of their activities to 'attempting to influence legislation.'"[69] The Filer Commission decided that this restriction has unnecessarily inhibited the role of the voluntary sector and, therefore, has recommended:

> That nonprofit organizations, other than private foundations, be allowed the same freedom to attempt to influence legislation as are business corporations and trade associations, that toward this end Congress remove the current limitation on such activity by charitable groups eligible to receive tax-deductible gifts.[70]

While charities have been limited in their ability to influence legislation, this has not limited their effort to unite their energies for the purposes of improving communication among charitable groups, improving public awareness about the independent sector and instituting research to gain information

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[69] Filer Commission, op. cit., p. 25.

[70] Ibid., p. 26.

on charitable efforts. One major unification of charitable endeavors occurred in the late seventies when the National Council on Philanthropy (NCOP) and the Coalition of National Voluntary Organizations (CONVO) merged to form the Independent Sector (IS). Two member groups which are part of IS are the National Association of Independent Colleges and Universities and the Association of Governing Boards of Universities and Colleges.[71]

As part of its effort to educate the public and other constituencies the Independent Sector (IS) has disseminated information about legislation such as the Moynihan-Packwood bill.[72] IS has not limited its activities to propagandizing. IS has actively and successfully challenged the Internal Revenue Service guidelines which have restricted the

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[71]The discussion of IS is based on a letter and brochure sent to this researcher by Joseph M. Aguayo, Vice President for Development, Independent Sector, 1820 L. Street, N.W., Washington, D.C. 20036 on September 17, 1980 and from a June 1979 brochure of CONVO which detailed the earlier Moynihan-Packwood and Fisher-Conable bills.

[72]See note 36 and accompanying text supra.

publication of voting records of Congressmen by tax exempt groups.[73]

A more aggressive attitude in general on the part of charities to challenge government regulations in a number of instances has become more apparent during the early part of this decade.[74] One may ask whether these occurrences are signs of the emergence of public charities as an increasingly vocal and potent force in the formulation of public policy which affects them.

Whether these incidents in conjunction with the unification of charitable interests under the auspices of the Independent Sector will effectively influence the formulation of the law of charity remains to be seen. If the prohibition against the influencing

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[73] Jack Magarrell, "I.R.S. Changes Rule on Reporting of Voting Records," Chronicle of Higher Education, 21(9):15, October 20, 1980.

[74] See Anne C. Roark, "Chemical Society Fends Office Challenge to Tax Exemption, Wins I.R.S. Ruling," Chronicle of Higher Education, 21(16):11, December 8, 1980, (the American Chemical Society successfully diverts an I.R.S. challenge to its tax exempt status); David M. Alpern and Howard Fineman, "Churches, Politics and the Tax Man," Newsweek, p. 46, October 6, 1980, (church group actively supports political candidate in the face of I.R.S. prohibition against political activity).

of legislation by charities is removed from federal and state laws,[75] the potential for a strong unified effort to promote changes in public policy by charities may be realized and dramatic changes in that policy could result. On the other hand such power may not be readily granted; a resurgence of distrust for charities may effectively halt any chance for colleges and universities and other charities to gain power to influence legislation through lobbying.

Besides the efforts of IS to inform and mobilize opinion on public policy affecting charities, there have been significant efforts by private individuals to achieve the same result. A major example can be seen in the professional activities of Conrad Teitell of the Philanthropic Tax Institute.

Teitell, a lawyer and tax expert, and his organization have been in the business of promoting educational and charitable fund raising through tax and estate planning seminars, newsletters and other materials. These materials and programs have been designed to assist charities in their development

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[75] As has been recommended by the Filer Commission, see note 69 and accompanying text supra.

and fund raising programs.[76]

On several occasions Teitell has urged charities which receive his newsletter to write Congressmen and other government officials about pending legislation and to urge that particular action or recommendations be considered with regard to the same.[77]

While the power of charity may grow in the years ahead, one public policy dimension may serve to limit or check that growth. The instrumentality of governmental investigation, e.g. legislative hearings, may be an effective means of publicizing issues about the independent sector and a means of curbing abuses by that sector.[78]

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[76]For example, see Conrad Teitell, Outright Giving Techniques (Old Greenwich, Conn.: Philanthropic Tax Institute, 1976).

[77]Several Teitell newsletters during late 1977 and early 1978 contained urgent advice to college presidents to write government officials to urge careful consideration of pending changes in the standard deduction and how the changes would affect charitable contributions.

[78]Appendix D details the historical role of governmental investigations in shaping the law of charity. It is almost certain in the day of mass media and instantaneous communication that public policy in general, and specifically with regard to the law of charity, may be affected to an even greater extent than before by such investigations.

Summary

The preceding analysis has produced the following major conclusions:

1. The major legal principles which have influenced giving by individuals to institutions of higher education are found in the federal and state tax law, estate and trust law, law of charitable dispositions (e.g. law on wills and gifts) and in various regulatory legislation regarding gift solicitation and administration.

2. The major principles affecting giving to higher education have resulted from various political, economic and social factors which reflect a societal ambivalence towards charitable giving and charities. Accordingly, the law of charity can be viewed as having permissive and restrictive dimensions which have been evident throughout the development of the law from its roots in England to the present in America.

3. The study indicates that generally speaking, the incentive/permissive dimension of the law of charity emerges most frequently with regard to the law affecting the donor. In the same fashion, the limitation/restrictive dimension of the law of charity

emerges most frequently with regard to the law affecting charitable organizations.

4. The incentive/permissive dimension of the law of charity, as applied mainly to donors, has resulted from a strong cultural tradition of charitable giving in America. The twentieth century public policy seems to be dominated by this dimension, as is evident in the federal income tax incentives, e.g. the charitable deduction, and in the favorable judicial treatment of charitable gifts and trust arrangements, e.g. the cy pres doctrine.

5. The limitation/restrictive dimension of the law of charity, as applied mainly to charities, has its roots in a perceived need to control the power of charities or to limit certain practices by charities. The twentieth century has seen some erosion of the restrictive dimension in the abrogation of Mortmain Statutes in a number of states and in the restricted application by the courts of restrictive aspects such as the rule against perpetuities to charitable arrangements. However, some major limitations have persisted and new ones emerged since 1900.

6. Most states have adopted charitable gift

solicitation statutes which usually require some form of registration and reporting by the charity. Many statutes have provided total or limited exemptions for colleges and universities.

7. Most states have laws which regulate the administration of private donor funds. Guidelines typically delineate powers and duties of charities and charitable trustees with regard to fund investments and use. Some federal policy mandates have emerged which have served to limit the administration of scholarship funds which discriminate on the basis of race, religion or sex.

8. Emerging developments, reflecting a continued debate on the role of charity (including higher education) in society today, indicate that the law of charity is continuing and will continue, as it has historically, to change in response to changing societal needs.

Significance of Study

This study demonstrates the importance of the following propositions:

1. College and university administrators

need to have some awareness of how the law of charity affects educational fund raising, as an increasingly important aspect of financing higher education.

2. An awareness of the permissive and restrictive dimensions of the law of charity can assist educational fund raisers in their efforts to obtain support from private individuals.

3. In view of the importance of private philanthropy for the survival and degree of quality of higher education, college and university administrators may wish to devote more resources towards joining other charities in an effort to educate the public about the independent sector and to otherwise influence the formulation of public policy.

Recommendations for Further Study

The results of this study lead to the following five recommendations for further study:

1. That the study be expanded to consider a focus on the law of other states.

2. That the conceptual framework and analysis of the study be applied to business and corporate philanthropy to higher education.

3. That the conceptual framework and analysis

of the study be applied to the law regarding charitable foundations.[79]

4. That the conceptual framework and analysis of the study be applied to developments in the law of charity subsequent to this study.

5. That studies be performed on the effect of government spending on charitable giving habits by individuals to institutions of higher education.[80]

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[79]See Appendix A.

[80]See Appendix B.

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APPENDIX A

Charitable Foundations

The concept of the private foundation seems to have had its roots in the sixteenth century. At that time charitable gifts could be made to a religious corporation known as frankalmoign, which could hold the property under common law tenure.[1]

The modern charitable foundation has changed substantially from its sixteenth century predecessor. It has evolved into a variety of contemporary forms. For this reason it has been said that the foundation of today is not susceptible to one single precise definition. Edith Fisch, Doris Freed and Ester Schacter have indicated generally:

> A charity that uses the word foundation as part of its name is a charitable trust, charitable corporation, or charitable association and apart from tax consequences the answers to legal issues pertaining to charitable foundations is found in the law governing charitable trusts, corporations, or associations.

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[1]Luis Kutner, Legal Aspects of Charitable Trusts and Foundations (Chicago: Commerce Clearing House, Inc., 1970), p. 51; frank-almoigne has been defined as, "A spiritual tenure whereby religious corporations, aggregate or sole, held lands of the donor to them and their successors forever." (Black's Law Dictionary, rev. 4th ed., (St. Paul, Minn.: West Publishing Co., 1968), p. 787.)

> The word foundation does, however, have a meaning for tax purposes.[2]

Another commentator has defined the foundation as:

> a nongovernmental, nonprofit organization having a principle [sic] fund of its own, managed by its own trustees or directors, and established to maintain or aid social, educational, charitable, religious or other activities serving the common welfare.[3]

The specific nature and function of the individual foundation is defined in its charter. A range of possible organizations has arisen. Because of this diversity, the Internal Revenue Code does not directly define what a foundation is, but does so rather by exception, in determining whether the organization is eligible for tax exempt status as a foundation.[4] The Code states that a foundation is any organization exempt from income tax[5] other than:

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[2]Edith Fisch, Doris Freed and Ester Schacter, Charities and Charitable Foundations (Pomona, N.Y.: Lond Publications, 1974), p. 35.

[3]_____ Andrews, Philanthropic Giving (New York: Russell Sage Foundation, 1950), p. 43, as cited in Kutner, op. cit., p. 3.

[4]Tax Economics of Charitable Giving (Chicago: Arthur Andersen & Co., 1979), p. 81.

[5]Under I.R.C. §501 (c)(3).

- an organization to which contributions are deductible up to the 50 percent limit of the individual's contribution base, for instance, school, hospitals, churches or other publicly supported charities;

- an organization receiving more than 1/3 of its support from its members and the general public;

- an organization operated exclusively for the benefit of organizations described above;

- an organization operated exclusively for testing for public safety.[6]

The primary reasons why individuals have chosen to establish a foundation as a means for distributing their wealth are that it provides a convenient method for handling numerous requests that the very wealthy receive. It does so by inserting a legal entity as an intermediary between the donor and the charity. It serves as a means for retaining partial control over the property given while allowing for the enjoyment of some tax benefits.[7]

One classification of the types of foundations found in America has included the following:

> (1) large endowed funds, which make grants for education, research, etc., such as the Ford and Rockefeller Foundations, . . . (2) smaller

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[6] I.R.C. §509; see note 4, loc. cit.

[7] Edith Fisch, et al., op. cit., pp. 41-42.

> foundations which are primarily instruments for channeling the annual giving of their founders, during their lives, and of their families thereafter--sometimes called "family foundations"; . . . (4) fund raising organizations which solicit public contributions and then make contributions to worthy causes, such as cancer, polio, and heart funds; (5) community trust, which are organizations formed to give centralized administration to separate charitable funds--a pooling for investment and management purposes; (6) company foundations . . .[8]

Because of the increase and variety of abuses which allegedly exist in foundation practices, foundations have become increasingly subject to regulation. The Tax Reform Act of 1969 instituted a number of major reforms designed to limit certain types of transactions by foundations.

Among the practices sought to be controlled are self-dealing,[9] failure to properly distribute income for exempt purpose,[10] excessive holdings in unrelated businesses,[11] investments that jeopardize

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[8]Kenneth Karst, "The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility," Harvard Law Review, 73:433, 1960, as cited in Kutner, op. cit., p. 3.

[9]I.R.C. §4941.

[10]I.R.C. §4942.

[11]I.R.C. §4943.

tax exempt purpose,[12] and lobbying.[13] Severe penalties can be imposed on private foundations for violation of these prohibitions.[14]

There has been considerable concern in some quarters that the restrictions imposed by this law have had severe ramifications for endowed foundations. The high pay-out requirements, for instance, in inflationary times have dangerously weakened the financial stability of a number of foundations and has led the Charles Stewart Mott Foundation to study the problem.[15]

The report of the Foundation concludes that foundations are in fact "facing a severe erosion of the real value of their assets."[16] It recommends that while the "original intent of Congress with the payout requirement was sound . . . conditions have changed"[17] and that distribution of the larger

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[12] I.R.C. §4944.

[13] I.R.C. §4945.

[14] See note 4, loc. cit., Exhibit X, p. 120.

[15] Foundations: Scheduled for Extinction? (Flint, Mich.: Charles Stewart Mott Foundation, 1981).

[16] Ibid., p. 1.

[17] Ibid., p. 2.

of five percent or adjusted net asset value or income on their investments is unrealistic under current economic pressures. The study recommends that alternative methods for payout should be permitted by the government.

While the Charles Stewart Mott Foundation has a vested stake, which has influenced its position on the issue, it states a strong argument for the continued existence of (financially stable) charitable foundations:

> Foundations have often served as the social conscience of our society, working to improve the state of the underprivileged and the under-represented. Since the turn of the century, foundations have worked to improve the plight of decaying neighborhoods in our urban centers and have supported the work of historically black colleges and universities.
>
> Foundations have taken the initiative to become more involved in contemporary social issues, . . .
>
> . . . The nation needs the strength and depth provided by its large variety of institutions, each trying in its own way to make a constructive contribution to the nation's welfare.[18]

Foundations are likely to remain a viable method for some individuals to distribute their wealth for charitable causes. Colleges and

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[18]Ibid., p. 4.

universities have and will continue to seek help from this source of philanthropy.

APPENDIX B

Governmental Spending

Hypothetically, the nature and degree of government spending has some effect on whether, where and how a donor directs his or her gift.

In chapter 2 some comments were made on the concern by some individuals over the effect of the Land Grant Act of 1862 on giving to higher education.[1] There was a feeling, for instance, "that philanthropy would no longer give to higher education, which would look thereafter to the public treasuries."[2]

The fear that government spending inhibits private philanthropy has reemerged today. The main argument is that the government has progressively taken over roles formerly performed by philanthropic sources. Carl Bahol has commented in general that many of the formerly traditional functions of charity have been usurped by the government and speculates as to the potential effect of the trend:

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[1] See chapter 2, note 109 and accompanying text supra.

[2] Arnaud C. Marts, The Generosity of Americans (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1966), pp. 112-113.

> [I]f our government were eventually to assume full responsibility for the well-being, or at least the basic needs, of our people, what role would private philanthropy play in our national life? Should American society continue to encourage the formation and support of private organizations as a major means of satisfying our public needs? . . . The answers depend to some extent on the kind of society we want. They also depend on how private philanthropy reassesses its functions in terms of the changing needs of society.[3]

The opinion that government spending inhibits charitable giving is not universally shared. Some have argued the contrary with the result that a major debate on the issue again seems to be surfacing. The Chronicle of Higher Education reported a recent incident where that debate was waged:

> If Congress agrees to President Reagan's proposals to cut in half federal support for the National Foundation on the Arts and the Humanities, resources in the private sector may also dry up, say spokesmen for cultural institutions. . . .
>
> In proposing those cuts, the President said that the expansion of federal aid to the arts and humanities had reduced "the historic role of private individuals and corporate support" for those areas. . . .
>
> Attacking that assumption as "baseless," Rep. Paul Simon, Democrat of Illinois and chairman of the House Postsecondary panel, said that "far from supplanting private and corporate dollars, this federal money is a spur to private and corporate support that otherwise would not exist."
>
> James M. Banner, Jr., chairman of the

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[3]Carl Bahol, op. cit., p. 453.

> American Association for the Advancement of the Humanities, told the House panel that the proposed cuts would "cripple" the very programs that were designed to encourage private contributions--the endowments' "challenge grants," under which the agencies match money that arts and humanities projects raise from nonfederal sources.[4]

On the practical level the effect of increased spending by government on philanthropy, according to Dean Emeritus John J. Karakash of the College of Engineering and Physical Science at Lehigh University, has been to make it more difficult to obtain support from private individuals.[5]

The Dean explains that in his role as fund raiser for his College he had found that while Lehigh alumni have been very generous and supportive over the years, there seemed to be an attitude among them that support for scientific equipment should be obtained from the government, i.e. they did not wish to give to projects which in their perception could be funded from the presumably substantial and easily accessible

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[4]Janet Hook, "If Congress Cuts Arts and Humanities Budgets, Private Support Could Fall, Too, Critics Warn," The Chronicle of Higher Education, 22(2):14, March 2, 1981.

[5]Personal interview, November 11, 1980, Lehigh University, Bethlehem, Pa.

federal monies.

It is the opinion of this researcher that the truth lies somewhere between these two positions, i.e. in some instances government spending inhibits charitable giving and in others it stimulates it.

Exhibit IX

FILING REQUIREMENTS — REVENUE PROCEDURE 73-29

KIND OF TRUST	KIND OF RETURNS									
	990	Sch A (990)	990-PF	990-AR or "Annual Report"	990-T	1041	1041-A	1041-B	Sch PF (1041)	4720
Exempt charitable trusts that are not private foundations	yes[A]	yes[A]	no	no	yes[D]	no	no	no	no	no
Exempt charitable trusts that are private foundations	no	no	yes	yes[C]	yes[D]	no	no	no	no	yes[H]
§4947(a)(1) trusts	no	no	no	yes[B C]	no	yes	yes[F]	no	yes[B]	yes[H]
Charitable remainder trusts under §664	no	no	no	no	no	yes[E]	yes[F]	yes	yes	yes[H]
Pooled income funds under §642(C)	no	no	no	no	no	yes	yes[F G]	no	yes[G]	yes[H]
All other split-interest trusts described in §4947(a)(2)	no	no	no	no	no	yes	yes[F G]	no	yes[G]	yes[H]

A Excluding trusts whose gross receipts normally do not exceed $5,000 during the taxable year.
B But not if the trust is described in section 509(a)(1), (2), or (3).
C Excluding trusts having less than $5,000 of assets during the entire taxable year.
D But only if the trust has $1,000 or more of gross income from an unrelated trade or business.
E But only if there is unrelated business taxable income (as defined in section 512).
F But not if all net income is required to be distributed currently to beneficiaries.
G Only with respect to amounts transferred in trust after May 26, 1969.
H If there is liability for a Chapter 42 excise tax (excluding section 4940).

Tax Economics of Charitable Giving (Chicago: Arthur Andersen & Co., 1979), p. 119.

APPENDIX D

Governmental Investigation

An exposition of the impact of public policy on the organization and operation of charities would be incomplete without a discussion on the role of governmental investigation as an influence on giving to institutions of higher education.

Traditionally, legislative investigations have had two major effects. The most tangible effect is perceived in the formulation of new legislation to meet the perceived needs of the society. While the passage of legislation is the ultimate product of the investigative process, that process has another effect, namely as a catalyst in the formulation of public opinion. Thus, with the advent of mass media, legislative investigations have served to both inform the public and mobilize its reaction to produce change.

The same may be said for investigations by the executive branch. In this situation any resulting changes usually will be in the form of alterations of enforcement policy or as recommendations for implementation to the legislature. I.R.S. or Treasury investigations, for instance have strongly influenced Congressional policy making in the tax area.

It may be helpful to indicate a few important investigations, which have produced important changes in public policy and the law of charity. On the state level in New York, for instance, the Tompkins Act of 1954 (otherwise known as the Charities Registration Act)[1] resulted from investigations by the Tompkins-Rabin Committee of unethical fundraising. Among its inquiries the committee had sought information about racketeering in charities and about the proliferation of other charitable gift solicitation abuses.

In the federal sphere during 1952 and 1953 United States Congressional investigations by the (E.E.) Cox Committee and the B. Carroll Reece Committee explored the usages of tax exempt funds to foster aims and objectives of "subversive" and "unamerican" organizations.[2]

Somewhat later, during the sixties, United States Representative Wright Patman launched an investigation which coincided with Department of Treasury inquiries into certain charitable tax law

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[1]See Edwin S. Newman, Law of Philanthropy (New York: Oceana Publications, 1955), pp. 41-47.

[2]Ibid., pp. 10-11.

abuses. Together, these investigations have been described:

> as constituting the most comprehensive analysis of charitable organizations to date and should serve to warn the philanthropoid that though the disposition of property to charity through a charitable trust or corporation is, at inception, a private matter it is also a matter of public concern.[3]

The Patman and Treasury Reports and Hearings[4] suggested means whereby the federal government could supervise and curb charitable abuses. Patman accused the I.R.S. of being lax in checking the activities of tax exempt organizations. He urged stricter enforcement of existing regulations and the addition of Internal Revenue Code provisions to curb abuses.

These reports were very influential and resulted in the addition of a number of restrictive

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[3]Luis Kutner, Legal Aspects of Charitable Trusts and Foundations (Chicago: Commerce Clearing House, Inc., 1970), pp. 379-380, especially n.1-2.

[4]Chairman's Report to the Select Committee on Small Business, Tax-Exempt Foundations and Charitable Trusts: Their Impact on Our Economy, House of Representatives, 87th Congress, 1962; Subcommittee Chairman's Report to Subcommittee No. 1, Select Committee on Small Business, Tax-Exempt Foundations and Charitable Trusts: Their Impact on Our Economy, Second Installment, House of Representatives 88th Congress, 1963; Ibid. Third Installment, 1964; Tax-Exempt Foundations, Their Impact on Our Economy, Hearings Before Subcommittee No. 1 on Foundations, Select Committee on Small Business, House of Representatives, 88th Congress, 1964.

provisions onto the Tax Reform Act of 1969.[5] Fisch, Freed and Schacter have commented on the powerful nature of the provisions of this Act:

> The Tax Reform Act of 1969 . . . is probably the most important legislation with charitable administration and enforcement since the passage of the Statue of Charitable Uses in 1601. This statute . . . places the federal government in the position of supervisor and regulator of private philanthropic activities . . . [in order to] control abuse of the privileges accorded to charities and restore public trust in private foundations.[6]

It should be observed that there was considerable criticism of the Patman Report. It was claimed that it was inaccurate and antiphilanthropic. Furthermore, it was alleged that the Report was cynical and unfairly attributed the motive of tax avoidance as predominating over sincere motives of good will as a basis for charitable giving. Some critics, according to Luis Kutner, went so far as to declare that the Patman Report was a governmental attempt to discredit private philanthropy in order to take over all welfare

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[5]Kutner, op. cit., p. 380; Act of December 30, 1969 Pub. L. 91-172, 83 Stat. 487.

[6]Edith Fisch, Doris Freed and Ester Schacter, Charities and Charitable Foundations (Pomona, N.Y.: Lond Publications, 1974), p. v.

functions.[7]

The counterargument to these criticisms is that the report was not a criticism of charitable ends, but was rather an attack on the types of devices by which taxpayers were able to obtain tax free income.[8]

The potentiality for investigation of charitable activities will continue. Public criticism of charity will prompt future inquiries, and those inquiries may have the effect of further mobilizing public opinion.

Carl Bahol, in a recent evaluation of the state of charity in America, discusses the vulnerability of charity to investigations:

> Whereas it was once considered graceless and gauche to question those whose goals were, afterall, noble, during the past decade or so, the media, legislators, and various self-appointed watchdogs have not hesitated to probe one of our few remaining sacred cows.[9]

It seems fairly obvious that legislative or other investigations will serve as a means of limiting or checking the power of charity in the future and as a potentially effective means of attacking charitable abuses.

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[7]Kutner, op. cit., p. 386.

[8]Ibid., p. 70.

[9]Carl Bahol, Charity U.S.A. (New York: Times Books, 1979), p. 15.

APPENDIX E

The Economic Recovery Tax Act of 1981

The Economic Recovery Tax Act of 1981[1] contains two major provisions which have important implications for giving by individuals to institutions of higher education. The first, the nonitemizer deduction, serves as an additional incentive for charitable giving; the second, a reduced tax rate schedule, arguably produces a disincentive for charitable giving.

As has been mentioned in the text,[2] the effort to secure passage of the nonitemizer charitable deduction had been waged for over five years. Those efforts found success in the following amendment to I.R.C. §170:

> Taxpayers who do not itemize may deduct percentage of charitable contributions: 25% of $100 maximum for 1982 and 1983 or $25; 25% of $300 maximum for 1984 or $75; 50% of contributions without maximum for 1985; and 100% of contribution without maximum for 1986; provision expires after 1986.[3]

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[1]Pub. L. No. 97-121, ____ Stat.____ (1981).

[2]See chapter 3, note 179 and chapter 4, note 3 supra.

[3]Pub. L. No. 97-121, §115, ____ Stat. ____ (1981) to be codified in I.R.C. §170 (i) and becomes effective after December 31, 1981).

It will be noticed that a full deduction will not be phased in until 1986. Initially, two limits have been placed on the amount a nonitemizing taxpayer may deduct for a charitable contribution. The first is that a maximum dollar cap has been placed on the amount to which a deduction applies and the second is that only a percentage of that amount can be deducted.

The following schedule of changes[4] can better illustrate the effects of these limits in any particular year; note that the provision is to expire in 1987:

YEAR	PERCENTAGE	CAP	MAX. DEDUCTION
1982	25	$100	$25
1983	25	$100	$25
1984	25	$300	$75
1985	50	. . .	. . .
1986	100	. . .	. . .
1987	Provision Expires		

While this provision is designed to create a tax incentive for charitable giving to those who do

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[4]The Senate and House versions of the section were almost identical except that the Senate version did not provide for any cap in 1984 while the House version had placed a $100 cap. The Conference compromise was a $300 cap for 1984. (See, Conference Rep. H.R. No. 97-212, p. 201; see also [1981] U. S. Code Congressional & Administrative News, No. 6, pp. 377-378, August 1981.)

do not normally itemize deductions, i.e. especially those in the lower and middle income brackets, another provision has reportedly created a disincentive for those in the upper tax brackets. A public debate has emerged as to whether a disincentive has been created.

The tax cut measure provides for a cumulative across the board individual income tax rate reduction in every bracket. While the amount of reduction will vary, the most significant decreases are in the upper brackets. The effect of the reductions on taxation for those in the upper brackets is illustrated below:

TAX RATE SCHEDULES UNDER PRIOR LAW AND THE ECONOMIC RECOVERY ACT OF 1981 FOR 1982, 1983, AND 1984[5]
(JOINT RETURNS)

Taxable Income Bracket	Prior Law	1982	1983	1984 and subsequent years
		(in percentages)		
0 to $3,400	0	0	0	0
$3,400 to $5,500	14	12	11	11
$5,500 to $7,600	16	14	13	12
$7,600 to $11,900	18	16	15	14
$11,900 to $16,000	21	19	17	16
$16,000 to $20,200	24	22	19	18
$20,200 to $24,600	28	25	23	22
$24,600 to $29,900	32	29	26	25
$29,900 to $35,200	37	33	30	28
$35,200 to $45,800	43	39	35	33
$45,800 to $60,000	49	44	40	38
$60,000 to $85,600	54	49	44	42
$85,600 to $109,400	59	50	48	45
$109,400 to $162,400	64	50	50	49
$162,400 to $215,400	68	50	50	50
$215,400 and over	70	50	50	50

[5]Analysis of the Economic Recovery Act of 1981 (N.Y.: Matthew Bender Co., 1981), C-143.

The argument concerning the effect of the tax rate reductions on charitable giving is that the after-tax cost of gifts by those in the higher brackets will rise when they are placed in a lower bracket. To illustrate, if someone in the top bracket (70 percent) under 1981 law wishes to donate a million dollars in that year, the after-tax cost would be only $300,000. The tax savings for the same gift in 1982 will be considerably less when the top bracket is lowered to 50 percent. The same gift will cost $500,000 after taxes.

According to the Chronicle of Higher Education, studies of giving patterns have indicated that "individual contributions to colleges and universities come mostly from higher income groups."[6] It is arguable, therefore, that persons in the higher brackets will be less inclined to give larger amounts to institutions of higher education.

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[6]Jack Magarrell, "New Tax Law May Spur Small Gifts to Colleges but Discourage Big Ones," Chronicle of Higher Education, 23(1):19-20, September 2, 1981.

A study[7] by the Urban Institute, as reported in the Chronicle of Higher Education[8] and the New York Times,[9] indicates that colleges and universities could be most affected by the decrease in charitable giving which might result from the reduction in the tax rate.

The Urban Institute has projected a total drop of at least $18 billion in donations to charity for the period 1981 to 1984.[10] Not everyone agrees with this projection and has disputed its negative impact on charitable giving.

The most important response to the charge is reflected in a statement by Congressman Barber B. Conable Jr., who had been a co-sponsor of the nonitemizer deduction. The Congressman made the following statement

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[7]The study was conducted by Lester M. Salamon, director of the Urban Institute's Center for Public Management and Economic Development Research, and Charles T. Clotfelter, associate professor of public-policy studies and economics at Duke University.

[8]Jack Magarrell, "Colleges Could Be the Hardest Hit by Effects of New Tax Law on Gifts," Chronicle of Higher Education, 23(2):1, September 9, 1981.

[9]Kathleen Teltsch, "New Tax Law Is Said to Endanger Billions in Gifts to Private Groups," New York Times, p. A-1, August 28, 1981.

[10]Ibid.

to the House of Representatives:

> Mr. Speaker, I want to urge my colleagues not to fall into the trap of deploring the decline of incentives to give to charities implicit in a reduced tax rate. There is more to the American charitable movement than tax avoidance. Very high marginal tax rates do cause people to take refuge in public benefits of their own choosing, but very high marginal rates also give rise to the misconception that philanthropy is for the rich only. The next step is to believe that the charitable deduction is a loophole, and we were headed in that direction before passage of the 1981 Tax Act.
>
> There are many paradoxes in the interrelation of our public institutions, our semi-public institutions and our private incentives. Nobody should feel guilty about reducing the peoples' taxes because it also reduces the incidence of legitimate tax avoidance. This 1981 law includes valuable structural changes which the charitable movement earnestly desired, including an increase in the maximum of charitable contributions for corporations, greater flexibility in the payout requirements for foundations, and a phase-in of above-the-line charitable deductions for those also claiming the standard deduction. This last provision gives charitable tax benefits to lower income people which were available previously only to the 30 percent of the taxpayers who itemized their deductions, and it greatly expanded the numbers of people with tax incentives to give to charity.
>
> Carried to its illogical extreme, the argument that lower tax rates damage charity would also find detriment to the work of the International Rescue Committee in an end to the persecution which causes refugees.[11]

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[11] Congressional Record, 127(123):H6028-6029, September 9, 1981.

Others have reacted in a like fashion. Conrad Teitell, a tax expert on the charitable sector from the Philanthropic Tax Institute, indicated in his August 1981 newsletter, Taxwise Giving,[12] that:

> Another way to look at the tax cuts [is that while] tax incentives are important, people contribute to worthy institutions because they believe in their work and goals. Individuals will have increased disposable income and more assets. So, if a charitable institution can convince them of the worthiness of its cause, they will continue to contribute.
>
> If the past is helpful, [n]o dropoff in charitable giving occurred when the top income tax rate was reduced from 91 percent to 70 percent in 1969. Time will tell the effect on charitable giving when the top income tax rate drops from 70 percent to 50 percent in 1982.

Similar sentiments were expressed by Thomas McCance Jr., Managing Director of the Yale Alumni Fund, in a letter to the editor of the New York Times,[13] for example, that the:

> primary reasons for giving to a nonprofit institution is not based on tax considerations. Ties of allegiance and support are much deeper than the tax benefits engendered by such generosity.

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[12]Conrad Teitell and Sydney Prerau, editors, Taxwise Giving (Old Greenwich, Conn.: The Philantropic Tax Institute, August 1981), p. 1.

[13]Thomas McCance, Jr., "What the Tax Law Will Do for Charity," Letters to the Editor, New York Times, p. A-26, September 17, 1981.

It remains to be seen whether the tax cut will in fact produce a deleterious effect on charitable giving, and/or whether the nonitemizer provision will ultimately balance off any such effect.

The question can be raised as to whether there had been any awareness of the potential negative effect on charitable giving of the tax cut expressed in either the House or Senate hearings. The answer is unclear.

As of November 1, 1981, the transcripts of the hearings on the tax cut proposal, which were made in the Senate Finance Committee and the House Ways and Means Committee, were unpublished. As to inquiries by this researcher with strategic staff members, there was one reported instance of a discussion of the matter in the Senate Finance Committee.

John Colvin,[14] a staff member of Senator Robert Packwood, a sponsor of the nonitemizer deduction, recalls that the issue was raised in the Senate Committee hearings as an argument for the passage of the nonitemizer charitable deduction. Martha Phillips,[15] a staff member for

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[14]Per telephone conversation, October 14, 1981.

[15]Per telephone conversation, October 14, 1981.

the House Ways and Means Committee, did not recall the matter being raised at the House Committee hearings.

This researcher suspects, based on the seeming after-the-fact panic,[16] that it is likely that the issue of the effect of the tax cut on charitable giving was not given much attention, either by the charitable sector or legislators. In any case, the major economic arguments for the tax cut would certainly have overshadowed any arguments with regard to a negative effect on charity had the question been clearly raised in the debates.

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[16]See notes 7-9 supra.

GLOSSARY*

Accumulation - the adding of interest or income of a fund to principal pursuant to provisions of a will or deed, preventing its being expended. (38)

Action in Ejectment - a mixed action at common law to recover the possession of land and to obtain damages for the unlawful detention of its possession. (607)

Alienation - in real property law, the transfer of the property and possession of lands from one person to another. (96)

Approximation - an equitable doctrine of judicial construction of trust provisions, as intended by a grantor, when considered in the light of changed circumstances. (132) (Compare to cy pres and deviation.)

Attestation - the act of witnessing an instrument in writing, such as a will, at the request of the party making the same, and subscribing it as a witness. (163)

Caveat - Latin for let him beware; a caution. (281)

Chancery - equity; equitable jurisdiction; a court of equity. (293)

Charitable Remainder Trust - a trust arrangement, in several forms, whereby a charity is declared to be entitled to the trust res after the death of the life-time beneficiary. (1457) (Qualifying charitable remainder trusts are eligible for special tax treatment under the Internal Revenue Code.)

Charitable Uses or Purposes - originally those enumerated in the statute 43 Eliz. c4, and afterwards those which, by analogy, come within its spirit and purpose. (296)

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*Definitions are derived primarily from Black's Law Dictionary (rev. 4th ed.; St. Paul, Minn.: West Publishing Co., 1968). The page number of the definition is indicated in parentheses.

Common Law - case law; principles derived from decrees and judgments of the courts. (250, 5th ed.)

Conditions Precedent - ones which must happen or be performed before the estate to which it is annexed can vest or be enlarged. (366)

Conditions Subsequent - ones which are annexed to an estate already vested, by the performance of which such estate is kept and continued and by failure or non-performance, it is defeated. (366)

Consideration - the inducement of a contract; an act or forbearance, or the promise thereof; a benefit to the promisor and or a loss or detriment to the promissee. (377)

Corpus - Latin for body; the principal sum or capital as distinguished from interest or income. (310; 5th ed.)

Cy Pres - an equitable doctrine of judicial construction whereby the court directs that a charitable trust purpose be carried out as near as possible to the original intent of the testator when conditions of impracticability or impossibility preclude giving effect to the original intent. (464)

Defendant - the party against whom relief or recovery is sought in an action or suit. (507)

Deviation - an analogous doctrine to cy pres in which a court authorizes a departure from the administration of the provisions of a charitable trust. (See chapter 3, note 195.) (Compare to approximation.)

Dicta - judicial reasoning on matters not considered to be at issue and not part of holding; having no precedential value.

Endowment - a fund settled upon a public institution, charity, or college, etc. for its maintenance or use. (621)

Equity - a system of jurisprudence, or branch of remedial justice administered by certain tribunals, having their own set of well-settled rules, principles and remedies which are distinct from those in operation in common law courts, i.e. courts at law. (634)

Escheat - a reversion of property to the state in consequence of the lack of any individual competent to inherit. (640)

Estoppel - arises when a person by his/her own act is precluded, by the court, from denying the existence of a fact or facts. (648)

Executory - that which is yet to be executed or performed; that which remains to be carried into operation or effect. (512; 5th ed.)

Fiduciary - one who is in a position of trust; one who is a trustee; one having a duty to act primarily for the benefit of another. (753)

Inter Alia - among other things. (948)

Inter Vivos - between the living. (949)

Intestate - without making a will (956)

Mortmain - literally "dead hand"; refers to the privilege of a testator to control property from the grave; refers to alienation of property to a corporation, ecclesiastical or temporal. (1163)

Mortmain Acts - have had as their purpose the restriction of deathbed dispositions. (1163)

Per Curiam - a disposition of a case where the opinion is issued by the whole court rather than one judge; sometimes refers to disposition of a case without a written opinion. (1023, 5th ed.)

Plaintiff - one who brings an action. (1309)

Pooled Income Fund - a method of pooling life income gifts for the purpose of joint administration, investment and distribution of income; a qualifying gift to such a fund is eligible for certain tax benefits under the Internal Revenue Code.

Power of Appointment - may be conferred by deed or will upon another, the donee, to select or nominate the person who is to receive or enjoy an estate or income after the testator's or donee's death. (1334)

Res - the thing; an object or property; (a definition which has many meanings). (1469)

Rule Against Perpetuities - a principle that no interest in property is good unless it must vest, if at all, not later than 21 years, plus period of gestation, after some life or lives in being at the time of creation of the interest; a rule to prevent indefinite alienation of property. (1498)

Settlor - one who creates a trust; also called a trustor. (1539)

Statute of Frauds - provides that no suit or action shall be maintained as to certain classes of contracts or engagements in writing (e.g. a trust) unless there is a note or memorandum in writing signed by the party to be charged. (789)

Subscription - a written contract by which one engages to contribute a sum of money for a designated purpose, usually gratuitously, as in the case of subscribing to a charity. (1596)

Superstitious Use - land, rents, goods, etc. given to a priest to say prayers for souls of the dead. (1289; 5th ed.)

Testamentary - pertaining to a will. (1644)

Testator - one who makes or has made a testament or will; one who dies leaving a will. (1645)

Testatrix - a woman who makes a will or dies leaving a will. (1645)

Trust - a right of property, real or personal, held by one party for the benefit of another; a fiduciary relation with respect to property, subjecting person by whom the property is held to equitable duties. (1680)

Trust Indenture - a deed of trust to which two or more persons are party. (911)

Trustee - a person appointed, or required by law, to execute a trust. (1684)

Trustor - one who creates a trust; also called a settlor. (1685)

Use - a confidence reposed in another to dispose of the land according to the intention of him whose use it was granted; similar to but not totally analgous with a trust--the former regards principally the beneficial interest, the latter regards nominal ownership. (1710)

Vest - to give an immediate, fixed right of present or future endowment. (1734)

VITA

Charles Thomas Bargerstock was born on November 16, 1946 in Huntingdon, Pennsylvania to Charles and Ruth Bargerstock.

His education includes a Bachelor of Arts in History from Muhlenberg College in 1968 and a Juris Doctor from the University of Pittsburgh in 1973. At Muhlenberg Charles was a Dean's List student. During his graduate study in higher education administration at Lehigh University, he was awarded the Lehigh Alumni Association Fellowship.

While admitted to the Pennsylvania Bar after law school, Bargerstock has pursued a career in higher education. At Davis and Elkins College he served as an Assistant Director of Admissions and as an Associate Director of Development. At Lehigh University he worked as Business Manager and Assistant to the Dean of the School of Education. More recently he has been employed as Assistant to the Provost of the University.

During his sojourn at Lehigh, Bargerstock has taught undergraduate law courses and was appointed as an Adjunct Assistant Professor in the Department of Administration and Supervision and has taught graduate

courses in higher education administration. Among his published research is an article, "Two Current Legal Concerns in College Student Affairs: Alcohol Consumption and Psychiatric Separation," in the Journal of College Student Personnel and a monograph entitled The Law on Reduction-in-Force: A Summary of Legislation and Litigation. Both were co-authored with Dean Perry A. Zirkel of the School of Education at Lehigh.