AMERICAN CHARITABLE BEQUEST TRANSFERS ACROSS THE CENTURIES: EMPIRICAL FINDINGS AND IMPLICATIONS FOR POLICY AND PRACTICE

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I. INTRODUCTION

Information about charitable bequest[1] transfers is more limited than information about other types of charitable giving.[2] In his book on charitable giving statistics, Charles Clotfelter, after pointing out that total annual charitable bequests almost always exceeded total corporate contributions, noted, "In contrast to the numerous econometric analyses of individual and corporate contributions, there has been only a limited amount of empirical work to explain charitable bequests. This may have more to do with the limited amount of appropriate data than with any assessment of the relative importance of bequests."[3] Unlike individual or corporate contributions, a donor can make a charitable bequest transfer only once at death.[4] Thus, although estate plans or estate planning intentions can be measured at multiple times during life,[5] the measurement of actual post-mortem charitable transfers is generally limited to two sources of data—estate tax returns and probate records.[6] Although limited and sometimes scattered in obscure locations, research findings on American charitable bequest transfers have been gradually accumulating for more than a century, reaching a point where a comprehensive assembly and summary of these findings can provide useful

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1. Following the common practice in both I.R.S. and academic publications on this topic, the term "charitable bequest" in this article references all forms of estate transfers to nonprofit organizations, rather than being limited to gifts by will of personal property; *See, e.g.*, Martha Britton Eller, *Charitable Bequests: Evidence from Federal Estate Tax Returns*, 21 STAT. INCOME BULL. 174 (Spring, 2001), https://www.irs.gov/pub/irs-soi/95escbar.pdf; David Joulfaian, *Estate Taxes and Charitable Bequests by the Wealthy*, 53 NAT'L TAX J. 743 (2000); *contra Bequest*, BLACK'S LAW DICTIONARY (10th ed. 2014).

2. CHARLES T. CLOTFELTER, *FEDERAL TAX POLICY AND CHARITABLE GIVING* 222 (1985).

3. *Id.*

4. *Charitable Bequest*, BLACK'S LAW DICTIONARY (10th ed. 2014).

5. *See, e.g.*, Russell N. James III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & COMMUNITY PROP. L.J., 1, 15–26 (2015).

6. *See infra* Parts II–III; For exceptions to this generalization using decedent data from the Health and Retirement Study, *see* James, *supra* note 5, at 27–29; Russell N. James III, *The Myth of the Coming Charitable Estate Windfall*, 39 THE AM. REV. OF PUB. ADMIN. 661, 669 (2009); Russell N. James, *Wills, Trusts, and Charitable Estate Planning: An Analysis of Document Effectiveness Using Panel Data*, 20 J. OF FIN. COUNSELING AND PLAN. 3, 8 (2009); Russell N. James III & Christopher Baker, *Targeting Wealthy Donors: The Dichotomous Relationship of Housing Wealth with Current and Bequest Giving*, 17 INT'L J. OF NONPROFIT AND VOLUNTARY SECTOR MARKETING 25 (2012); Russell N. James III & Christopher Baker, *The Timing of Final Charitable Bequest Decisions*, 20 INT'L J. OF NONPROFIT AND VOLUNTARY SECTOR MARKETING 277, 278 (2015); *see also*, I.R.S., *SOI Tax Stats – Split-Interest Trust Statistics*, https://www.irs.gov/statistics/soi-tax-stats-split-interest-trust-statistics [perma.cc/2G5A-EASM] (last visited Mar. 9, 2020) (providing separate data on trusts, such as charitable remainder trusts, which may transfer to charity, at the death of the donors or other persons, or after a set period of years).

insights.[7]

This article comprehensively reviews and summarizes results from past empirical analyses of charitable estate transfers using U.S. tax and probate records.[8] Additionally, it presents several new analyses of this data.[9] Understanding this history of empirical realities in charitable estate transfers provides insights that can guide estate planning practice and provide appropriate context for policy discussions.[10] The final section outlines some of these implications for policy, such as in estate taxation, private foundations, mortmain statutes, and IRS Form 990 nonprofit tax returns, as well as implications for practice, such as in client demographics and psychology.[11]

II. FINDINGS FROM U. S. PROBATE RECORDS

A. History and Limitations

U.S. probate records have been used extensively by historical researchers; these records include family characteristics and property inventories revealing standards of living, wealth, prices, lifestyles, and frequency of ownership of particular items of property such as guns, books, and musical instruments across the centuries.[12] Empirical analyses of charitable bequests have occasionally arisen during the course of such

7. *See infra* Parts II–IV.

8. *See infra* Parts II–III (including, *inter alia*, a review of all sources returned by the search phrases "charitable bequest" and "charitable estate" in Google Scholar, LexisNexis Academic (Law Review and Journal Articles), EconLit, https://www.irs.gov/statistics, and Web of Science Core Collection as well as books, articles, theses, dissertations, and papers cited within and citing to these sources. Because this review focuses on the empirical analysis of actual *post-mortem transfers* it does not include research from surveys, experiments, and the like that contain no *post-mortem transfer* data); *see, e.g.*, Russell N. James III, *Creating Understanding and Interest in Charitable Financial Planning and Estate Planning: An Experimental Test of Introductory Phrases*, 17 J. OF PERSONAL FIN. 9 (2018); Russell N. James III, *Describing Complex Charitable Giving Instruments: Experimental Tests of Technical Finance Terms and Tax Benefits*, 28 NONPROFIT MANAGEMENT & LEADERSHIP 437 (2018); Jennifer Lehman & Russell N. James III, *The Charitable Bequest Gap Among African-Americans: Exploring Charitable, Religious, and Family Estate Planning Attitudes*, 17 J. OF PERSONAL FIN. 43 (2018).

9. *See infra* Parts II–III.

10. *See infra* Part IV.

11. *Id.*

12. *See, e.g.*, Michael Fleming, *An 'Old Violl' and 'Other Lumber': Musical Remains in Provincial, Non-Noble England c. 1580–1660*, 58 THE GALPIN SOC'Y J. 89 (2005); James Lindgren & Justin L. Heather, *Counting Guns in Early America*, 43 WM. & MARY L. REV. 1777 (2001); Gloria L. Main, *Inequality in Early America: The Evidence from Probate Records of Massachusetts and Maryland*, 7 THE J. OF INTERDISCIPLINARY HIST. 559 (1977); Gloria L. Main, *Many Things Forgotten: The Use of Probate Records in "Arming America"*, 59 THE WILLIAM AND MARY Q. 211, 211–16 (2002); Gloria L. Main, *Personal Wealth in Colonial America: Explorations in the Use of Probate Records from Maryland and Massachusetts, 1650 to 1720*, 34 THE J. OF ECON. HIST. 289 (1974); Gloria L. Main, *Probate Records as a Source for Early American History*, 32 THE WILLIAM AND MARY Q., A MAGAZINE OF EARLY AM. HIST. 89, 9093 (1975); Carole Shammas, *Constructing a Wealth Distribution from Probate Records, 9* THE J. OF INTERDISCIPLINARY HIST. 297 (1978).

historical investigations,[13] or in investigations of more recent records by researchers from other fields such as psychology, economics, and law.[14]

Probate records can include information not available on estate tax returns, such as the date of will execution,[15] testator's religion,[16] and the presence of disinherited offspring.[17] Probate records also include estates of all sizes, rather than just the wealthiest estates filing estate tax returns.[18] Additionally, probate records, although often cumbersome to collect and analyze, are available to any researcher, not just those with access to confidential federal estate tax returns.[19]

However, probate records may substantially understate estate wealth as compared with tax returns, due in part to the exclusion of non-probate assets such as life insurance proceeds.[20] Because probate records in the U.S. are stored locally, typically at the county level, most probate research focuses on a narrow geographic region such as a single city or a few counties, thereby making estimations of national circumstances more difficult.[21] In contrast,

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13. *See* Lawrence M. Friedman, *Patterns of Testation in the 19th Century: A Study of Essex County (New Jersey) Wills*, 8 AM. J. LEGAL HIST. 34, 47 (1964); Joyce Diane Goodfriend, TOO GREAT A MIXTURE OF NATIONS: THE DEVELOPMENT OF NEW YORK CITY SOCIETY IN THE SEVENTEENTH CENTURY 234–39 (1975) (unpublished Ph.D. Dissertation, UCLA) (on file with the Walter C. Koerner Library, University of British Columbia); Cary S. Kart & Carol Engler, *Family Relations of Aged Colonial Jews: A Testamentary Analysis*, 5 AGEING AND SOC'Y 289, 295 (1985); Kenneth A. Lockridge, LITERACY IN COLONIAL NEW ENGLAND: AN ENQUIRY IN THE SOC. CONTEXT OF LITERACY IN THE EARLY MOD. WEST 33–36, 84–87, 94–97 (1974); David E. Narrett, INHERITANCE AND FAM. LIFE IN COLONIAL NEW YORK CITY 192–97, 212–13 (1992); Carole Shammas, Marylynn Salmon, & Michel Dahlin, INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 48, 105, 181–83 (1987); Marvin B. Sussman, et al., THE FAM. AND INHERITANCE 113–18 (1970).

14. Thomas Barthold & Robert Plotnick, *Estate Taxation and Other Determinants of Charitable Bequests*, 37 NAT'L TAX J. 225 (1984); Sylvia Kathleen Bennett, *THE ECONOMICS OF BEQUEST PATTERNS*, (1990) (Ph.D. Dissertation, Rice University); Steuart Henderson Britt, *The Significance of the Last Will and Testament*, 8 THE J. OF SOC. PSYCHOL. 347 (1937); Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303, 1305–15 (1969); Michael J. Brunetti, *The Estate Tax and Charitable Bequests: Elasticity Estimates Using Probate Records*, 58 NAT'L TAX J. 165 (2005); John E. Dexter Jr., ESTATE TAX RATES AND CHARITABLE BEQUESTS: A REGRESSION MODEL ANALYSIS OF ESTATE DISTRIBUTIONS (2014) (Ph.D. Dissertation, Northcentral University); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission, at Death*, 30 U. CHI. L. REV. 241, 254 (1963); Lawrence M. Friedman, et al., *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1463 (2007); Steven A. Hanke, et al., *A Two-State Analysis of Estate Taxes and Charitable Bequests from the Most Generous Decedents*, 28 ADVANCES IN ACCT. 38, (2012); Kristine S. Knaplund, *Becoming Charitable: Predicting and Encouraging Charitable Bequests in Wills*, 77 U. PITT. L. REV. 1 (2015); Paul Leonard Menchik, *A Study of Inheritance and Death Taxation: A Microeconometric Approach* 49–124 (1976) (Ph.D. Dissertation, University of Pennsylvania); John R. Price, *The Transmission of Wealth, at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 317 (1975); T.P. Schwartz, *Testamentary Behavior: Issues and Evidence About Individuality, Altruism and Social Influences*, 34 THE SOC. Q. 337, 343–45 (1993).

15. *See, e.g.*, Brunetti, *supra* note 14, at 170.

16. *See, e.g.*, Barthold & Plotnick, *supra* note 14, at 228.

17. *See, e.g.*, Narrett, *supra* note 13, at 133 ("Her own will left [daughter] Katherine the insulting amount of nine pence. . .").

18. *See* Hanke, et al., *supra* note 14, at 39.

19. *See id.*

20. David Joulfaian, *Charitable Bequests and Estate Taxes*, 44 NAT'L TAX J. 169, 171 (1991).

21. *See* Hanke, et al., *supra* note 14, at 44–45.

studies in other countries have been able to analyze national or nationally-representative samples of probate records. [22]

B. Findings Across 380 Years

1. 17th and 18th Century Wills

Among all 1,656 wills filed in Manhattan from 1638 to 1755 (with the first recorded under Dutch rule in the New Amsterdam court registers from 1638–1664),[23] ninety-five decedents (5.7%) left charitable bequests.[24] About two-thirds of these donors (43 of 69 males and 17 of 26 females) were childless.[25]

A separate investigation of all wills from New York City residents filed during 1675–1725 found twenty-six including a charitable bequest.[26] Among these, all but three charitable bequests were designated exclusively for the testator's own ethnic group, usually for the poor of a particular ethnically-identified church or of a particular nationality.[27] Two of the three exceptions still designated gifts for the testator's own ethnic group, but also included gifts for others.[28] The third was a Scottish mariner who left a gift to the poor of the Dutch Reformed church of New York City.[29] However, he had married a Dutch woman and was also a member of the Dutch Reformed church.[30]

This overwhelming tendency to limit charitable bequests for the exclusive benefit of the testator's own ethnic group was not as common for lifetime donations.[31] An analysis of donors giving to the construction of new church buildings in 1688 and 1711 "suggests that supra-ethnic charitable giving was common in New York City."[32] However, "at the solemn moment when one composed one's last will and testament, the press of ethnic loyalty was still supreme."[33]

In the years following 1725, this tendency to focus exclusively among one's own ethnicity in charitable bequests gradually faded among French and Dutch decedents—whose charitable beneficiaries shifted away from French Huguenot and Dutch Reformed churches, and towards the dominant Anglican institutions—but remained strong among more recent immigrant

22. *See* Anthony B. Atkinson, et al., *Charitable Bequests and Wealth, at Death*, 127 ECON. J. F1, F1 (2017); James & Baker, *supra* note 6, at 278 (2015).
23. Narrett, *supra* note 13, at 8.
24. *Id.* at 192.
25. *Id.*
26. Goodfriend, *supra* note 13, at 234.
27. *Id.* at 236.
28. *Id.* at 235.
29. *Id.*
30. *Id.*
31. *Id.* at 237.
32. *Id.*
33. *Id.* at 240.

groups such as the German and Jewish communities.[34] In all wills filed up to 1755 among all ethnic or religious groups, Jews were the most likely to leave a charitable bequest.[35] Correspondingly, another study of forty-one wills that "likely constitutes the entire population of wills made by Jews and recorded in New York in the 18th century" reported that, "about one-third of the testators made some bequest to the synagogue while several others contributed to 'the poor of the Jewish nation'."[36]

In addition to this ethnic focus, charitable bequests in Manhattan from 1675–1725 were almost exclusively local, limited to beneficiaries within New York City.[37] A rare exception to this exclusively local giving was a testator who specified bequests for the poor in his birthplace in England, as well as for the "Poor English" of New York City.[38] Mirroring this, a sample of wills from New England in 1650–1795 found that among 253 bequests to charitable causes, 89% were limited to causes within the decedent's village.[39] Similarly, among twenty-two bequests to charitable causes in a sample of wills from Virginia in 1630–1797, 91% were limited to causes within the decedent's village.[40]

In Bucks County, Pennsylvania, (near Philadelphia) a sample of 387 wills from 1685–1756 showed 5% including charity (3.7% and 11.7% among decedents with and without children, respectively), a sample of 352 wills from 1791–1801 showed 6.5% including charity (4.0% and 15.4% among decedents with and without children, respectively), and a sample of 351 wills from 1891-1893, showed 7.1% including charity (2.3% and 15.5% among decedents with and without children, respectively).[41] Overall in these Bucks County wills, childless decedents constituted 24.5% of all testators, but 58.2% of all charitable testators.[42]

2. 19th Century Wills

In the 1890s data from Bucks County, the propensity to leave a charitable bequest was not substantially greater among wills from the top one-fifth wealthiest testate estates, where 8% included charity, as compared to 7.1% among all testate estates.[43] Another 1890s sample of 327 wills from Los Angeles County showed that the share including charity was actually lower among the top one-third wealthiest testate estates, where it was 7.0%,

34. Narrett, *supra* note 13, at 193–97.
35. *Id.* at 196.
36. Kart & Engler, *supra* note 13.
37. Goodfriend, *supra* note 13, at 236; *see cf.*, Narrett, *supra* note 13*,* at 195 ("Several widows focused their attention on the needy members of their own sex.").
38. *See* Goodfriend, *supra* note 13.
39. *See* Lockridge, *supra* note 13, at 34.
40. *See id.* at 84.
41. Shammas, et al., *supra* note 13, at 105 (Childless share from Author, based on this data).
42. *See id.* at 105.
43. *Id.* at 181.

than it was for all testate estates, at 8.0%.[44] These statistics occurred prior to the imposition of the federal estate tax in 1916, and prior to the removal of the California and Pennsylvania mortmain statutes in 1971 and 1976.[45] In comparison, a 1979 sample of 350 wills from Bucks County recorded 12.9% with charitable bequests, including 32.8% of wills from taxable estates—roughly the top one-fifth wealthiest estates in the county.[46] Similarly, a 1980 sample of 495 wills from Los Angeles showed that 10.1% had charitable bequests, including 15.9% of wills from taxable estates—roughly the top one-fourth wealthiest estates in the county.[47] Among wills excluded from the wealthiest groups above—and not subject to estate tax in either period—no dramatic changes in charitable propensity occurred, remaining between 7–8% for both countries in the same timeframe.[48]

A sample of 150 nineteenth century wills from Essex County, New Jersey, recorded that 5.3% included charity (1 of 30 from 1850, 5 of 60 from 1875, and 2 of 60 from 1900).[49] An examination of 191 wills probated in New York County among prominent testators with obituary notices in *The New York Times* from 1880–1885 found that 16 (8.4%) made provisions for charity.[50]

An examination of all 210 wills from Los Angeles County in 1893 and 1894 found that 17 (8.1%) included charitable bequests.[51] A comparison sample of 172 wills from St. Louis, Missouri in 1893 and 1894 found 27 (15.7%) with charitable bequests.[52] These two samples show that testators who were female or unmarried were more likely to leave a charitable bequest, and that most charitable decedents were childless.[53] While 37% of charitable wills in St. Louis were executed within one month of death, only 24% of wills without a charitable gift were.[54] The timing holds particular significance because, at that time these charitable wills would have been voided by the California mortmain statute, partially explaining the difference in charitable bequest propensity between Los Angeles and St. Louis.[55]

Taken together, the two samples from 1893–1894 reveal that residual gifts of all or a share of the entire estate were more likely to face restrictions and go to non-religious charities.[56] There were 10 such residual charitable bequests with 70% being restricted gifts, including 40% with extended

44. *Id.*
45. *See* Revenue Act of 1916, Pub. L. No. 64-271, § 39 Stat. 756; RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 9.7 cmt. c (2003).
46. *See* Shammas et al., *supra* note 13*,* at 181.
47. *Id.*
48. *Id.*
49. Friedman, *supra* note 13, at 47.
50. Britt, *supra* note 14, at 351.
51. Knaplund, *supra* note 14, at 23–24.
52. *Id.* at 24–25.
53. *Id.* at 27.
54. *See id.* at 6, 24, 36.
55. *Id.* at 36.
56. *Id.* at 23–25 (ignoring contingent gifts, gifts in German marks, and gifts for masses); John W. Curran, *Trusts for Masses*, 7 NOTRE DAME LAW. 42 (1931).

restrictions and 80% going to non-religious charities.[57] Greater cash gifts and real estate gifts were also more likely to be restricted.[58] There were twelve cash gifts exceeding $1,000 and real estate gifts with 58% as restricted gifts including 33% with extended restrictions and 17% going to non-religious charities.[59] Lesser cash gifts tended to be unrestricted gifts to religious institutions.[60] There were sixty-three cash gifts of $1,000 or less with 14% being restricted gifts, 3% with extended restrictions and 17% going to non-religious charities.[61]

3. 20th and 21st Century Wills

Two separate studies conducted extensive analyses of charitable bequests in a sample of 1,050 large Connecticut estates—roughly the top 0.5% of wealth—from select years in the 1930s and 1940s.[62] In this wealthy sample, 346 estates included a charitable bequest.[63] Wills with a stated religious affiliation gave more to charity—especially to religious organizations.[64] This increase in charitable transfers among the religiously affiliated was driven by an increase in the propensity to leave a charitable bequest, not by an increase in the size of the donations among those leaving gifts.[65] It made no statistically significant difference whether the stated religious affiliation was Protestant, Catholic, or Jewish.[66] The charitable size increased with the size of the estate, as did the propensity to leave any charitable gift.[67] However, charitable transfers to religious organizations did not increase with wealth as much as did transfers to other types of charities.[68] Charitable bequest size increased with decedent age, although age information was available for less than half of the donors.[69] Those who were wealthier, female, childless, or stated a religious affiliation were more likely to disperse their charitable bequests to a greater variety of charitable causes.[70]

In this wealthy Connecticut sample, those referencing a surviving spouse or child in the will left significantly less to charity.[71] On average, decedents with children held 43.7% more wealth, but childless decedents still averaged more than five times more money to charity.[72] In a regression

57. *See* Knaplund, *supra* note 14, at 23–25, n.154–60.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. Menchik, *supra* note 14; Barthold & Plotnick, *supra* note 14, at 236 n.3.
63. Menchik, *supra* note 14, at 97.
64. Barthold & Plotnick, *supra* note 14, at 231.
65. *Id.* at 104–07, 117.
66. *See id.*, at 119, 117, 104, 124; Barthold & Plotnick, *supra* note 14, at 228.
67. Barthold & Plotnick, *supra* note 14, at 228; Menchik, *supra* note 14, at 117.
68. Barthold & Plotnick, *supra* note 14, at 231.
69. Menchik, *supra* note 14, at 100.
70. Barthold & Plotnick, *supra* note 14, at 234.
71. *Id.* at 228.
72. Menchik, *supra* note 14, at 107.

estimating the probability of leaving any charitable bequest, the author noted that the impact of the variable number representing children "swamped all others."[73] The impact on the amount left to charity was primarily driven by the first child, as the presence of additional children had an increasingly lesser impact.[74]

One study has been cited as contradicting the others using estate tax data to find a significant effect of tax price on charitable bequests, because it identified a significant effect in only one of the regressions.[75] However, there are two problems with relying on this unexpected finding: first, this analysis relies in large part on changes in Connecticut inheritance tax rates, where rates varied across three categories based upon the inheritor's relationship to the decedent.[76] However, the regression models used only a single category of inheritance tax rates, ignoring the actual tax price variation and thus necessarily using an imprecise estimation of actual tax price.[77] Second, another analysis of the same dataset identified that the lack of significance was due to issues of multicollinearity in the data.[78] In its alternate specification addressing this multicollinearity problem, and incorporating all three levels of inheritance tax, this analysis did reveal significant effects from tax price in this sample.[79] Nevertheless, it reported relatively small elasticities ranging from negative .22 to negative .43.[80]

In a probate sample including ten charitable wills from 1950s Cook County, Illinois, ten of them "appeared in estates in which brothers and sisters were the closest relatives of the deceased."[81] In a sample of all 187 wills probated in Washtenaw County, Michigan in 1963, among 54 testators leaving a spouse and children, 2 included "relatively small bequests" to charity; among 67 testators leaving children but no spouse, 9 included "small bequests" to charity; among 13 testators leaving a spouse but no children, 1 left a large charitable bequest; and among 53 testators with no spouse or children, 11 included charitable bequests.[82] Among the 10 wills gifting more than 10% of the estate to charity, 7 were from decedents leaving no spouse or children.[83]

In a sample of 342 wills from San Bernardino County, California among decedents that died in 1964, 27 included a provision for charity.[84] In a sample of 422 wills from Cuyahoga County, Ohio from 1964 to 1965, 25 estates

73. *Id.* at 123.
74. *Id.* at 105.
75. *See* Barthold & Plotnick, *supra* note 14, at 231.
76. *See id.* at 226.
77. *See id.* at 236 n.4 (The unreported results using an alternative effective rate would not have addressed this issue as these still used a single tax rate to represent a three-tier actual tax price).
78. Menchik, *supra* note 14, at 102–03.
79. *Id.* at 97–98, 104–09.
80. *See id.*; *see also infra* Section III.C.
81. Dunham, *supra* note 14, at 254.
82. Browder, *supra* note 14, at 1308–12.
83. *Id.* at 1315.
84. Friedman et al., *supra* note 14, at 1463.

made charitable bequests.[85] Compared with all 422 testate decedents, the charitable decedents were less likely to have offspring (44.0% vs. 88.5% for non-donors) and also died at an older average age (78.7 years vs. 69.6 years for non-donors).[86] Most of these charitable bequests were gifts to religious organizations (16), with others going to education (4), healthcare (3), or other nonprofits in the community (4).[87] In a sample of decedents who died in King County, Washington in 1969, "four (6.78%) of the 59 decedents with testate proceedings made substantial charitable gifts at death."[88]

An analysis of 618 probate records in Harris County, Texas from the 1970s and 1980s displayed 84 with charitable bequests.[89] Charitable bequests were highly responsive to tax price and were "treasury efficient," meaning that the increase in transfers to charities resulting from the charitable deduction exceeded the lost estate tax revenue to the treasury.[90] Both the propensity to make charitable bequests and the share of estates left to charity increased with wealth.[91] However, the share of charitable bequests given to religious organizations fell as wealth rose.[92] Charitable bequests fell dramatically in wills that cited children or a spouse and in wills left by decedents younger than 65.[93]

In a sample of all 5,688 probate records filed in San Francisco, California from 1980 to 1982, 13.8% of decedents included a bequest to charity, with an average gift size of $118,495.[94] In comparison to non-donors, decedents who made a charitable bequest had larger average gross estates ($536,053 vs. $254,650), were less likely to be married (13.3% vs. 24.7%), or male (37.3% vs. 46.4%), had fewer children (0.47 average vs. 1.19 average), and were more likely to have had records in the probate file indicating a religious funeral service (61.3% vs. 11.9%).[95] The (typically smaller) estates that did not file a federal tax return in comparison to those that did file, were less likely to leave a gift to charity (10.3% vs. 18.3%), averaged smaller transfers to charity in dollars ($2,694 vs. $33,884) and as a share of gross estates (2.8% vs. 6.2%) and net worth (3.2% vs. 9.3%).[96] This study showed that charitable bequests among estate tax filers were responsive to tax-price–similar to other estimates using estate tax returns.[97] However, tax-price responsiveness was much greater among non-wealthy estates that did not file a federal estate tax return, but were nonetheless subject to state

85. Sussman et al., *supra* note 13, at 114.
86. *Id.* at 117.
87. *Id.*
88. Price, *supra* note 14.
89. Bennett, *supra* note 14, at 114.
90. *Id.* at ii–iii.
91. *Id.* at 114.
92. *Id.* at 117.
93. *Id.* at 119.
94. Brunetti, *supra* note 14, at 170, 172.
95. *Id.* at 172.
96. *Id.* at 173.
97. *Id.* at 166.

inheritance taxes.[98] Additionally, tax-price responsiveness was greater when measuring tax prices on the date of will signing rather than the date of death.[99] A sample of all 319 wills filed in Providence, Rhode Island in 1985 revealed 34 containing "altruism" gifts, including charity or people other than friends and family, mostly amounting to less than one percent of the estate, but with the largest charitable transfer coming from a childless widow.[100]

An examination of all 286 charitable estates filed 2000–2005 in one Virginia county, and in two Louisiana parishes, along with 614 samples from non-charitable testate estates, showed large variation between charitable decedents and non-charitable decedents.[101] On average, charitable decedents had larger gross estates ($1,053,250 vs. $724,657), fewer children (0.61 vs. 2.05), were older (83.5 years vs. 79.2 years), and were less likely to be male (33.9% vs. 48.5%) or married (7.7% vs. 42.0%).[102] Those who were never married (i.e., excluding married, divorced, or widowed) constituted 32.2% of charitable decedents but only 6.5% of non-charitable decedents.[103] Analysis revealed that these charitable bequests were responsive to tax prices but were not treasury efficient among the most generous decedents.[104]

Finally, one dissertation analyzed estates exceeding $500,000 for decedents dying between 2000 to 2010 in three Michigan counties, totaling 169 estates.[105] In this sample, 20.8% of female decedents left a charitable bequest compared to 8.2% of male decedents.[106] Those without descendants were more likely to leave a charitable bequest,[107] and those with fewer descendants left significantly more money to charity.[108]

III. FINDINGS FROM U. S. TAX RECORDS

A. History and Limitations

The modern federal estate tax, beginning in 1916, provided tax deductions on charitable gifts left by decedents who died in or after 1918.[109] The estate tax deduction applied retroactively through legislation which passed in February of 1919.[110] The earliest statistics on charitable bequest transfers from U.S. estate tax returns appeared in the annual Internal Revenue Service (IRS) Statistics of Income report published in 1922 which shows

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98. *Id.*
99. *Id.*
100. Schwartz, *supra* note 14.
101. Hanke et al., *supra* note 14, at 42.
102. *Id.* at 44.
103. *Id.*
104. *Id.* at 38.
105. Dexter, *supra* note 14, at 61.
106. Author, based on data from *id.* at 76.
107. Dexter, *supra* note 14, at 88.
108. *Id.* at 77.
109. Revenue Act of 1916, Pub. L. No. 64–271, 39 Stat. 756.
110. Revenue Act of 1918, Pub. L. No. 65–254, 40 Stat. 1057, 1098, 1152.

charitable bequest amounts, categorized by net estate size, for combined estate tax returns filed in 1916–1921.[111] These statistics were then reported yearly in subsequent annual Statistics of Income publications for returns filed during the 1920s[112] and 1930s.[113] Additionally, categories for gross estate size were added for returns filed in and after 1938[114] as well as separate reporting of gifts among four charitable organization types for returns filed in 1939 and later.[115] This reporting continued on an annual basis in the 1940s,[116] with the exception of returns filed in 1946, which were not reported.[117]

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111. I.R.S., STATISTICS OF INCOME 41 (1922), https://www.irs.gov/pub/irs-soi/20soirepar.pdf [perma.cc/98AW-VEP9]; *see also* Frank J. Doty, *Estate Tax Repeal: Historical Data Indicate Philanthropy May Suffer*, 99 Tax Notes 283, (Apr. 2003) (referencing individual year data for decedents dying in 1917–1921 from the Treasury Department archives).

112. I.R.S., STATISTICS OF INCOME 27–31 (1923), https://www.irs.gov/pub/irs-soi/21soirepar.pdf [perma.cc/56EM-ZXRT]; I.R.S., STATISTICS OF INCOME 58–63 (1924), https://www.irs.gov/pub/irs-soi/22soirepar.pdf [perma.cc/RK5F-J8NN]; I.R.S., STATISTICS OF INCOME 37–41 (1925), https://www.irs.gov/pub/irs-soi/23soirepar.pdf [perma.cc/BU7J-FG42]; I.R.S., STATISTICS OF INCOME 79–83 (1926), https://www.irs.gov/pub/irs-soi/24soirepar.pdf [perma.cc/5TR6-AUKQ]; I.R.S., STATISTICS OF INCOME 73–77 (1927), https://www.irs.gov/pub/irs-soi/25soirepar.pdf [perma.cc/FH5G-UNXL]; I.R.S., STATISTICS OF INCOME 53–57 (1928), https://www.irs.gov/pub/irs-soi/26soirepar.pdf [perma.cc/DS8Q-M962]; I.R.S., STATISTICS OF INCOME FOR 1927 49–53 (1929), https://www.irs.gov/pub/irs-soi/27soirepar.pdf [perma.cc/BXR4-H8M6]; I.R.S., STATISTICS OF INCOME FOR 1928 54–58 (1930), https://www.irs.gov/pub/irs-soi/28soirepar.pdf [perma.cc/M6K5-RNNT].

113. I.R.S., STATISTICS OF INCOME FOR 1929 46–50 (1931), https://www.irs.gov/pub/irs-soi/29soirepar.pdf [perma.cc/A3BL-L3UF]; I.R.S., STATISTICS OF INCOME FOR 1930 54–58 (1932), https://www.irs.gov/pub/irs-soi/ 30soirepar.pdf [perma.cc/5WL4-7LNE]; I.R.S., STATISTICS OF INCOME FOR 1931 50–52 (1933), https://www.irs.gov/pub/irs-soi/ 31soirepar.pdf [perma.cc/CJF3-TDAT]; I.R.S., STATISTICS OF INCOME FOR 1932, 52–54 (1934), https://www.irs.gov/pub/irs-soi/ 32soirepar.pdf [perma.cc/P9NR-PY8T]; I.R.S., STATISTICS OF INCOME FOR 1933, 52–54 (1935), https://www.irs.gov/pub/irs-soi/ 33soirepar.pdf [perma.cc/PU8C-MPU2]; I.R.S., STATISTICS OF INCOME FOR 1934, 36–43 (1936), https://www.irs.gov/pub/irs-soi/34soireppt1ar.pd [perma.cc/M29K-UPZS]f; I.R.S., STATISTICS OF INCOME FOR 1935, 46–55 (1938), https://www.irs.gov/pub/irs-soi/35soireppt1ar.pdf [perma.cc/PWA3-GBQ2]; I.R.S., STATISTICS OF INCOME FOR 1936, 48–59 (1938), https://www.irs.gov/pub/irs-soi/36soireppt1ar.pdf [perma.cc/L89K-JB3S]; I.R.S., STATISTICS OF INCOME FOR 1937, 52–91 (1940), https://www.irs.gov/pub/irs-soi/37soireppt1ar.pdf [perma.cc/85G4-UP99]; I.R.S., STATISTICS OF INCOME FOR 1938, 220–47 (1941), https://www. irs.gov/pub/irs-soi/38soireppt1ar.pdf [perma.cc/3LN8-MCEF] [hereinafter I.R.S. 1941].

114. I.R.S., STATISTICS OF INCOME FOR 1937, 52–91 (1940), https://www.irs.gov/pub/irs-soi/37soireppt1ar.pdf [perma.cc/Y47C-YAFP].

115. I.R.S., STATISTICS OF INCOME FOR 1938, 220–47 (1941), https://www.irs.gov/pub/irs-soi/38soireppt1ar.pdf [perma.cc/5NKC-3AZT].

116. I.R.S., STATISTICS OF INCOME FOR 1939, 250–69 (1942), https://www.irs.gov/pub/irs-soi/39soireppt1ar.pdf [perma.cc/9THB-KLNA] [hereinafter I.R.S. 1942]; I.R.S., STATISTICS OF INCOME FOR 1940, 200–19 (1943), https://www.irs.gov/pub/irs-soi/40soireppt1ar.pdf [perma.cc/CTQ7-QQE3] [hereinafter I.R.S. 1943]; I.R.S., STATISTICS OF INCOME FOR 1941, 246–65 (1944), https://www.irs.gov/pub/irs-soi/41soireppt1ar.pdf [perma.cc/UW5R-UPKU]; I.R.S., STATISTICS OF INCOME FOR 1942, 281–89 (1945), https://www.irs.gov/pub/irs-soi/42soireppt1ar.pdf [perma.cc/VL55-JGHF] [hereinafter I.R.S. 1945]; I.R.S., STATISTICS OF INCOME FOR 1943, 302–19 (1950), https://www.irs.gov/pub/irs-soi/43soireppt1ar.pdf [perma.cc/9FUS-QK5J]; I.R.S., STATISTICS OF INCOME FOR 1944, 304–23 (1950), https://www.irs.gov/pub/irs-soi/44soireppt1ar.pdf [perma.cc/6RQQ-KA5S]; I.R.S., STATISTICS OF INCOME FOR 1946, 354–63 (1953), https://www.irs.gov/pub/irs-soi/46soireppt1ar.pdf [perma.cc/MDW6-SZUW]; I.R.S., STATISTICS OF INCOME FOR 1947, 372–87 (1953), https://www.irs.gov/pub/irs-soi/47soireppt1ar.pdf [perma.cc/M5T2-3GSS]; I.R.S., STATISTICS OF INCOME FOR 1948, 344–49 (1953), https://www.irs.gov/pub/irs-soi/48soireppt1ar.pdf [perma.cc/AS4N-DYC4].

117. I.R.S., STATISTICS OF INCOME FOR 1945 (1951), https://www.irs.gov/pub/irs-soi/45soireppt1ar.pdf [perma.cc/SH9A-94WL].

Reporting appeared more sporadic for returns in the 1950s, with annual reports only for estate tax returns filed in 1950,[118] 1951,[119] 1954,[120] 1955,[121] and 1959.[122] Reports for returns in the 1960s were even less frequent, appearing only for estate tax returns filed in 1961,[123] 1963,[124] and 1966.[125] Results segregated by charitable organization type were absent from the report for returns filed in 1951 and such reporting ended after the report for returns filed in 1961.[126] The 1970s reports covered only returns filed in 1970,[127] 1973,[128] and 1977.[129] For returns in the 1980s, summary tables related to charitable bequests were published in the STATISTICS OF INCOME BULLETIN for returns filed in 1983,[130] and then for each year from 1986 forward.[131]

The 1990s data included reports for returns filed in each year,[132] as well as spreadsheets for returns filed in 1995 forward[133] and for decedents dying in 1992, 1995, and 1998.[134] Since 2000, special reports including charitable

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118. I.R.S., STATISTICS OF INCOME FOR 1949, 352–77 (1954), https://www.irs.gov/pub/irs-soi/49soireppt1ar.pdf [perma.cc/36XC-GKTM].

119. I.R.S., STATISTICS OF INCOME FOR 1950, 234–39 (1954), https://www.irs.gov/pub/irs-soi/50soireppt1ar.pdf [perma.cc/5FBL-Y4XC].

120. I.R.S., STATISTICS OF INCOME FOR 1953, 72–75 (1957), https://www.irs.gov/pub/irs-soi/53soireppt1ar.pdf [perma.cc/BU9W-GZHB].

121. I.R.S., STATISTICS OF INCOME 1954: FIDUCIARY, GIFT, AND ESTATE TAX RETURNS 15–20 (1957), https://www.irs.gov/pub/irs-soi/54esar.pdf [perma.cc/LL4J-Z3ZG].

122. I.R.S., STATISTICS OF INCOME 1958: FIDUCIARY, GIFT, AND ESTATE TAX RETURNS 57–60 (1961), https://www.irs.gov/pub/irs-soi/58fidgftesar.pdf [perma.cc/62UP-7CNV].

123. I.R.S., STATISTICS OF INCOME 1960: FIDUCIARY, GIFT, AND ESTATE TAX RETURNS 46–52 (1963), https://www.irs.gov/pub/irs-soi/60fidgftesar.pdf [perma.cc/7WT7-ZZFJ].

124. I.R.S., STATISTICS OF INCOME 1962: FIDUCIARY, GIFT, AND ESTATE TAX RETURNS 62–81 (1963), https://www.irs.gov/pub/irs-soi/62fidgftesar.pdf [perma.cc/Z2SB-CAUR].

125. I.R.S., STATISTICS OF INCOME 1965: FIDUCIARY, GIFT, AND ESTATE TAX RETURNS 73–77 (1967), https://www.irs.gov/pub/irs-soi/65fidgftesar.pdf [perma.cc/HB3G-GE58].

126. I.R.S., *supra* notes 119, 124.

127. I.R.S., STATISTICS OF INCOME 1969: ESTATE TAX RETURNS 14–18 (1972), https://www.irs.gov/pub/irs-soi/69esar.pdf [perma.cc/G3WT-UZPY].

128. I.R.S., STATISTICS OF INCOME 1972: ESTATE TAX RETURNS 12–16 (1974), https://www.irs.gov/pub/irs-soi/72esar.pdf [perma.cc/Y9RM-989F].

129. I.R.S., STATISTICS OF INCOME 1976: ESTATE TAX RETURNS 17–21 (1979), https://www.irs.gov/pub/irs-soi/76esar.pdf [perma.cc/XUL9-MBJP].

130. Mary F. Bentz, *Estate Tax Returns, 1983*, 4 STAT. INCOME BULL. 1, 10, (Fall, 1984), https://www.irs.gov/pub/irs-soi/83estreturns.pdf [perma.cc/MX8J-5FRC].

131. Barry W. Johnson, *Estate Tax Returns, 1986–1988,* 9 STAT. INCOME BULL. 27, 38–56 (Spring, 1990), https://www.irs.gov/pub/irs-soi/86-88estr.pdf [perma.cc/NE5J-ES8V] [hereinafter Johnson 1990]; Barry W. Johnson, *Estate Tax Returns, 1989–1991*, 12 STAT. INCOME BULL. 76, 78–80, 90–99 (Spring, 1993), https://www.irs.gov/pub/irs-soi/89-91estr.pdf [perma.cc/63F6-5ENH].

132. Martha Britton Eller, *Federal Taxation of Wealth Transfers, 1992–1995*, 16 STAT. INCOME BULL. 8, 17–20, 27–58 (Winter, 1997), https://www.irs.gov/pub/irs-soi/92-95fedtaxwt.pdf [perma.cc/2PTF-4UV4]; Johnson, *supra* note 131 (1993); Barry W. Johnson & Jacob M. Mikow, *Federal Estate Tax Returns, 1995–1997*, 19 STAT. INCOME BULL. 69, 80–82 (Summer, 1999), https://www.irs.gov/pub/irs-soi/97esart.pdf [perma.cc/5Q8D-WDTX]; Barry W. Johnson & Jacob M. Mikow, *Federal Estate Tax Returns, 1998–2000*, 21 STAT. INCOME BULL. 133, 142–45 (Spring, 2002), https://www.irs.gov/pub/irs-soi/00esart.pdf [perma.cc/KBX9-FX93].

133. I.R.S., *SOI Tax Stats – Estate Tax Statistics Filing Year Table 1*, https://www.irs.gov/ statistics/soi-tax-stats-estate-tax-statistics-filing-year-table-1 [perma.cc/4FZC-XXXF].

134. I.R.S., *SOI Tax Stats – Estate Tax Data, by Year of Death*, https://www.irs.gov/statistics/soi-tax-stats-estate-tax-statistics-year-of-death-table-1 [perma.cc/5XCC-49GP].

bequest information have appeared for decedents dying in 2001,[135] 2004,[136] and 2007.[137] Additionally, spreadsheets for decedents dying in 2001, 2004, 2007, 2009, 2011, and 2013 by gross estate categories,[138] and for state charitable bequest totals for returns filed in 2010 forward have been posted.[139]

Reports by type of recipient charitable organization reappeared, but using a new set of charitable categories, for returns filed by decedents in 1986.[140] Spreadsheets reporting charitable bequests by gender, marital status, and organization type were posted for decedents dying in 1989, 1992, 1995, 1998, and, with yet another new set of charitable categories, for decedents dying in 2001, 2004, 2007, 2009, 2011, and 2013.[141]

The initial due date for estate tax returns is nine months after death, but this can be automatically extended to fifteen months upon request.[142] Beyond this, additional year-long extensions can be requested for a "reasonable cause" on Form 4768, for up to a total of ten years.[143] Consequently, reports based on decedents' year of death can include returns filed in several subsequent years, and reports based on year of filing can include decedents dying in several previous years.[144]

Although some research articles discussed charitable bequest statistics from the annual tables in the 1930s[145] and 1940s,[146] the first statistical analysis of charitable bequests using data beyond that found in these annual tables appeared in 1950.[147] Later, the *Special Study of 1957 and 1959 Estate Taxation* resulted in statistical analysis of charitable bequests appearing in

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135. Martha Britton Eller, *Which Estates Are Affected by the Federal Estate Tax? An Examination of the Filing Population for Year-of-Death 2001*, 25 STAT. INCOME BULL. 192, 203 (Summer 2004) https://www.irs.gov/pub/irs-soi/11pwcompench1eestates.pdf [perma.cc/GA97-R72A].

136. Brian G. Raub, *Federal Estate Tax Returns Filed for 2004 Decedents*, 27 STAT. INCOME BULL. 115, 125–28 (Spring, 2008), https://www.irs.gov/pub/irs-soi/04esreturnbul.pdf [perma.cc/X92U-VLCZ].

137. Brian G. Raub & Joseph Newcomb, *Federal Estate Tax Returns Filed for 2007 Decedents*, 31 STAT. INCOME BULL. 182, 188–91 (Summer 2011), https://www.irs.gov/pub/irs-soi/11essumbul estatereturns.pdf [perma.cc/2FJZ-LV46].

138. I.R.S., *supra* note 134.

139. I.R.S., *SOI Tax Stats – Estate Tax Statistics Filing Year Table 3*, https://www.irs.gov/statistics /soi-tax-stats-estate-tax-statistics-filing-year-table-3 [perma.cc/5AUZ-EQPN].

140. Johnson, *supra* note 131, at 56 (1990).

141. I.R.S., *Estate Tax Returns Filed for Decedents Making Charitable Bequests*, https://www.irs. gov/statistics/soi-tax-stats-estate-tax-statistics-year-of-death-table-3 [perma.cc/64EW-JJBT].

142. *See* I.R.S., *Instructions for Form 706*, 2 (Aug. 2019), https://www.irs.gov/pub/irs-pdf/i706.pdf [perma.cc/H4UW-24FG]; DAVID JOULFAIAN, THE FEDERAL ESTATE TAX: HISTORY, LAW, AND ECONOMICS 36–37 (2019).

143. I.R.C. § 6161(a)(2) (West 2002); *see also* DAVID JOULFAIAN, THE FEDERAL ESTATE TAX: HISTORY, LAW, AND ECONOMICS 36–37 (2019); I.R.S., *Instructions for Form 4768*, 3 (Aug. 2012), https://www.irs.gov/ pub/irs-pdf/i4768.pdf [perma.cc/KR3U-FCCZ].

144. *Id.*

145. C. Lowell Harriss, *Philanthropy and Federal Tax Exemption*, 47 J. POL. ECON. 526 (1939).

146. C. Lowell Harriss, *Federal Estate Taxes and Philanthropic Bequests*, 57 J. POL. ECON. 337 (1949).

147. Joseph A. Pechman, *Analysis of Matched Estate and Gift Tax Returns*, 3 NAT'L TAX J. 153 (1950).

books,[148] academic journal articles,[149] and a dissertation.[150] Analyses of estate tax returns including information on charitable bequests in subsequent years have appeared in many books,[151] reports,[152] and academic journal articles.[153]

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148. CARL S. SHOUP, *FEDERAL ESTATE AND GIFT TAXES*, 60–65 (1966); William Vickrey, *One Economist's View of Philanthropy*, PHILANTHROPY AND PUB. POL'Y 31, (Frank Dickerson, ed., 1962).

149. Michael J. Boskin, *Estate Taxation and Charitable Bequests*, 5 J. PUB. ECON. 27 (1976); Stephen K. McNees, *Deductibility of Charitable Bequests*, 26 NAT'L TAX J. 79 (1973).

150. Jeffrey Michael Schaefer, *CHARITABLE TRANSFERS, AT DEATH UNDER THE FEDERAL ESTATE TAX*, (1966) (Ph.D. Dissertation, Columbia University).

151. Auten, et al., *Taxes and Philanthropy Among the Wealthy*, DOES ATLAS SHRUG, 392 (Joel B. Slemrod ed. 2000); CLOTFELTER, *supra* note 2; Barry W. Johnson & Martha Britton Eller, *Federal Taxation of Inheritance and Wealth Transfers*, INHERITANCE AND WEALTH IN AMERICA, 61 (1998), https://www.irs.gov/pub/irs-soi/1996-1997preprintar01.pdf [perma.cc/V45E-GVDY]; Joulfaian, *supra* note 142, at 76–82; David Joulfaian, *Charitable Giving in Life and, at Death*, RETHINKING ESTATE AND GIFT TAXATION, 350, (William G. Gale, et al., eds., 2001); Wojciech Kopczuk & Joel Slemrod, *The Impact of The Estate Tax on Wealth Accumulation and Avoidance Behavior*, RETHINKING EST. AND GIFT TAX'N 299–343, (2006) [hereinafter Kopczuk & Slemrod, *Wealth Accumulation and Avoidance Behavior*]; Wojciech Kopczuk & Joel Slemrod, *Tax Impacts on Wealth Accumulation and Transfers of the Rich*, DEATH AND DOLLARS: THE ROLE OF GIFTS AND BEQUESTS IN AMERICA 213 (2003) [hereinafter Kopczuk & Slemrod, *Tax Impacts*]; Eugene Steuerle, *Charitable Giving Patterns of the Wealthy*, *in* AMERICA'S WEALTHY AND THE FUTURE OF FOUNDATIONS 203 (Teresa Odendahl ed., 1987).

152. Jon Bakija, et al., NEW EVIDENCE ON THE EFFECTS OF TAXES ON CHARITABLE BEQUESTS (Jan. 2005), https://web.williams.edu/Economics/papers/BakijaGaleSlemrodJan05.pdf [perma.cc/FN5M-483V]; Jon M. Bakija & William G. Gale, *Effects of Estate Tax Reform on Charitable Giving* (July 2003), https://www.urban.org/sites/default/files/publication/58986/310810-Effects-of-Estate-Tax-Reform-on-Charitable-Giving.PDF [perma.cc/HMJ6-NW7F]; Eller, *supra* note 1; Martin Feldstein, *Charitable Bequests, Estate Taxation, and Intergenerational Wealth Transfers*, *in* RESEARCH PAPERS, VOL. III, 1485 (Treasury Dep't., 1977), https://ia800509. us.archive.org/30/items/ERIC_ED143605/ERIC_ED143605 .pdf [perma.cc/A7SL-W5W]; John S. Irons, *The Estate Tax and Charitable Giving: State-by-state Analysis* (Oct. 2003) http://d3n8a8pro7vhmx.cloudfront.net/ufe/ legacy_url/4278/OMBWatchState Report.pdf?1448066886 [perma.cc/QB4F-LAHZ]; Darien B. Jacobson, et al. *The Estate Tax: Ninety Years and Counting*, 27 STAT. INCOME BULL. 118 (Summer 2007), https://www.irs.gov/pub/irs-soi/ninetyestate.pdf [perma.cc/D6DX-KLXL]; David Joulfaian, *Basic Facts on Charitable Giving* (U.S. Dep't of Treasury, Office of Tax Analysis Paper 95, June 2005), https://www.treasury.gov/resource-center/tax-policy/tax-analysis/Documents/WP-95.pdf [perma.cc/TAA6-BW73] [hereinafter Joulfaian, *Basic Facts*]; David Joulfaian, *Estate Taxes and Charitable Bequests: Evidence from Two Tax Regimes* (U.S. Dep't of Treasury, Office of Tax Analysis, Paper 92, Mar. 2005), https://www.treasury.gov/resource -center/tax-policy/tax-analysis/Documents/WP-92.pdf [perma.cc/XM3G-WEH3] [hereinafter Joulfaian, *Evidence from Two Tax Regimes*]; David Joulfaian, *The Federal Estate and Gift Tax: Description, Profile of Taxpayers, and Economic Consequences* (U.S. Dep't of Treasury, Office of Tax Analysis, Paper 80, Dec. 1998), https://www.irs.gov/pub/irs-soi/11pwcompenaddestategift.pdf [perma.cc/DX52-2KDJ] [hereinafter Joulfaian, *Estate and Gift Tax*]; David Joulfaian, *The Pattern of Charitable Bequests and The Influence of Estate Taxation*, 92 PROCEEDINGS ANNUAL CONFERENCE ON TAXATION AND MINUTES OF THE ANNUAL MEETING OF THE NAT'L TAX ASS'N 28 (1999) [hereinafter Joulfaian, *The Pattern of Charitable Bequests*]; Robert McClelland, CHARITABLE BEQUESTS AND THE REPEAL OF THE ESTATE TAX (2004) (Congressional Budget Office, Technical Paper Working Series), https://www.cbo.gov/sites/ default/files/cbofiles/ftpdocs/56xx/doc5625/2004-8.pdf [perma.cc/NP3P-Q6NB]; Brian G. Raub*, A Look, at Estate Tax Returns Filed for Wealthy Decedents Since 2001*, 29 STAT. INCOME BULL. 302, 305–08 (2009), https://www.irs.gov/pub/irs-soi/09fallbuletreturn.pdf [perma.cc/B4UV-R5LX]; Patrick Rooney, et al., *Charitable Bequest Giving in the USA* (2014), https://scholarworks.iupui.edu/handle/1805/14225 [perma.cc/27RF-TWUU]; Jeffrey P. Rosenfeld, *Charitable Giving 1963–1990, (Selected Years),* COMPENDIUM OF FEDERAL ESTATE TAX AND PERSONAL WEALTH STUDIES, VOL. 1 (1994), https://www. irs.gov/pub/irs-soi/13pwcchartgive63.pdf [perma.cc/Y3YD-L83Z]; C. Eugene Steuerle, et al., *Patterns of Giving by the Wealthy* (2018) (Urban Institute) https://www.urban.org/sites/default/files/publication/ 99018/patterns_of_giving_by_the_wealthy_2.pdf [perma.cc/2UKV-VGVF].

153. Gerald Auten & David Joulfaian, *Charitable Contributions and Intergenerational Transfers*, 59 J. PUB. ECON. 55 (1996); Jon M. Bakija, et al*., Charitable Bequests and Taxes on Inheritances and Estates: Aggregate Evidence from across States and Time*, 93 AM. ECON. REV. 366 (2003); William Beranek, et al., *Charitable Donations and the Estate Tax: A Tale of Two Hypotheses*, 69 AM. J. ECON. AND SOC. 1054

Two important limitations influence estate tax data on charitable bequests.[154] First, estate tax returns are limited mostly to wealthy decedents.[155] Since 1916, estate tax exemption amounts have varied from a low of $40,000 (1935–1941)[156] to the present 2020 estate tax exemption equivalent of $11.58 million for an individual[157] and $23.16 million for a married couple.[158] Additionally, no estate tax was mandatory in 2010.[159] The lowest exemption in inflation-adjusted dollars occurred in 1976 at $60,000 nominal (equivalent to $271,631 in 2019 dollars).[160] Correspondingly, the share of all adult decedents whose estates filed estate tax returns has fluctuated over time, at approximately 1.1% in 1926, 5.3% in 1966, 10.5% in 1977, 5.1% in 1983,[161] but less than 0.5% in 2017.[162]

This restriction to the wealthiest estates is somewhat offset by the reality that charitable bequest transfers are mostly concentrated among the wealthy, much more so than current charitable giving.[163] Even in 2017, when only 2,902 estates with charitable transfers filed estate tax returns,[164] these estates still produced the majority (59%) of all bequest dollars transferred to charity in the country.[165]

Charitable bequest data is also problematic because total national charitable transfers are highly dependent on the presence or absence of a few large gifts from large estates.[166] For example, in 1982, the estate of J. Paul

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(2010); Boskin, *supra* note 149; Pamela Greene & Robert McClelland, *Taxes and Charitable Giving*, 54 NAT'L TAX J. 433 (2001); Barry W. Johnson & Jeffrey P. Rosenfeld, *Factors Affecting Charitable Giving: Inferences from Estate Tax Returns, 1986*, TRUSTS & ESTATES 29 (Aug. 1991), https://www.irs.gov/pub/irs-soi/13pwcfactorschargiv.pdf [perma.cc/2N42-G4P8]; Joulfaian, *supra* note 1; Joulfaian, *supra* note 20; David Joulfaian, *Choosing Between Gifts and Bequests: How Taxes Affect the Timing of Wealth Transfers*, 89 J. PUB. ECON. 2069 (2005); David Joulfaian, *On Estate Tax Repeal and Charitable Bequests*, 123 TAX NOTES 1221 (June 8, 2009 [hereinafter Joulfaian, *Tax Repeal*]); David Joulfaian & Kathleen McGarry, *Estate and Gift Tax Incentives and Inter Vivos Giving*, 57 NAT'L TAX J. 429 (2004); Wojciech Kopczuk, *Bequest and Tax Planning: Evidence from Estate Tax Returns*, 122 THE Q.J. ECON. 1801 (2007); Janet G. McCubbin & Jeffrey P. Rosenfeld, *Looking Deeper into the New IRS Data Base*, TRUSTS & ESTATES 50 (1989); John Peloza & Piers Steel, *The Price Elasticities of Charitable Contributions: A Meta-Analysis*, 24 J. PUB. POL'Y & MARKETING 260 (2005).

154. *See infra* notes 155–168 and accompanying text.

155. *See, e.g.*, Rev. Proc. 2018-57 § 3.41.

156. Darien B. Jacobson, et al. *The Estate Tax: Ninety Years and Counting*, 27 STAT. INCOME BULL. 118 (Summer 2007).

157. Rev. Proc. 2019-44 § 3.41.

158. 26 C.F.R. § 20.2010-2 (2015).

159. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 2210,115 Stat. 38, Title V.

160. Author's opinion, based on data from https://cpiinflationcalculator.com/.

161. Bentz, *supra* note 130, at 4.

162. Author's opinion, based on data from I.R.S., *Table 1. Estate Tax Returns Filed in 2017* B9 (Oct. 2018), https://www.irs.gov/pub/default_path_no_value/17es01fy.xls [perma.cc/R4MJ-UVA8] (showing 12,711 estate tax returns filed in 2017); Centers for Disease Control and Prevention, *Mortality in the United States, 2016*, at 4 https://www.cdc.gov/nchs/data/databriefs/db293.pdf [perma.cc/2TYC-6ME6] (last visited Mar. 9, 2020) (showing 2,744,248 resident deaths in 2016).

163. Auten, et al., *supra* note 151, at 392.

164. I.R.S., *supra* note 162, at BJ9.

165. *Id.*, at BK9 (showing $21.04 billion from estate tax returns); Giving USA, *See the Numbers – Giving USA 2018 Infographic*, https://givingusa.org/see-the-numbers-giving-usa-2018-infographic/ [perma.cc/4FWJ-SX8L] (showing $35.70 billion estimate for total bequest giving).

166. *See supra* Section II.B.1.

Getty accounted for one-quarter of national charitable bequests, but in the preceding two years, the five largest donors had accounted for only about 1% of all charitable bequests nationally.[167] Conversely, 72% of charitable decedents in 1986 left gifts of less than $250,000, but these combined to represent merely 5% of total dollars transferred to charity.[168]

B. Charitable Share of Estates

1. Data and Limitations Across 100 Years

As a demonstration of this history and these limitations, consider the difficulties in answering a superficially simple question: Typically, what share of estates go to charity? For combined estate tax returns filed in 1916–1921 (including the initial years when charitable bequests were not deductible) this averaged 3.0% of gross estate value.[169] For the individual years of 1922–1937, this was 6.8%, 2.9%, 2.8%, 3.9%, 6.7%, 4.2%, 6.2%, 4.0%, 5.4%, 5.4%, 6.8%, 4.7%, 6.5%, 4.3%, 5.6%, and 4.6%, respectively.[170] During these years, this share fluctuated substantially.[171] For example, in 1922 the share of total estate dollars going to charity was more than twice that of 1923 (6.8% vs. 2.9%).[172] Much of this fluctuation was driven by a few very large estates.[173]

For combined estate tax returns from 1916–1921, the share of total charitable giving coming from net estates of $8 million or more (and the total number of all such estates) was 30.3% (and 35 estates).[174] Clearly, the impact of a handful of large estates over this five year period was substantial.[175] However, the fluctuation in this impact became apparent when annual reporting for returns began in 1922.[176] For the individual years 1922–1937, the share of total charitable bequest transfers coming from net taxable estates of $8 million or more (and the total number of all estates of that size) was 55.5% (16), 0.1% (5), 0.9% (9), 2.4% (11), 38.1% (12), 2.0% (12), 25.6% (14), 8.6% (21), 4.2% (20), 5.2% (20), 3.7% (11), 0.2% (2), 0.1% (2), 1.5% (3), 12.3% (8), and 3.6% (9), respectively.[177] Depending upon the year, these few largest net estates represented more than half of all charitable bequest

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167. CLOTFELTER, *supra* note 2, at 229; Renée A. Irvin, *Endowments: Stable Largesse or Distortion of the Polity?*, 67 PUB. ADMIN. REV. 445, 450 (2007).
168. Johnson & Rosenfeld, *supra* note 153, at 29.
169. Author's opinion, based on data from I.R.S., *supra* note 111.
170. Author's opinion, based on data from I.R.S., *supra* notes 112–113.
171. *Id.*
172. *Id.*
173. *See* I.R.S., *supra* notes 112–113 (Author bases his calculations on the data found in these articles).
174. *See* I.R.S., *supra* note 111 (Author bases his calculations on the data found in these articles).
175. *Id.*
176. *See* I.R.S., *supra* notes 112–113 (Author bases his calculations on the data found in these articles).
177. *Id.*

dollars, or less than one-half of one percent of all charitable bequest dollars.[178]

More problematically, the reporting format during this early period understated the impact of large estates.[179] This is because, prior to 1938, the reports categorized estate size by net taxable estate, i.e., gross estates reduced by charitable deductions and other deductions, exemptions, and expenses.[180] Thus, a large gross estate with a large charitable gift would be categorized as a small net taxable estate.[181] Under the subsequently adopted gross estate category reports, the share of gifts coming from the largest estates still fluctuated greatly, but never fell as low as in the previous net estate reporting approach.[182] For returns filed in the years 1938–1945 the total share of charitable bequest dollars coming from gross estates valued at $10 million or more (and the total number of all estates of that size) was 31.8% (11), 21.1% (11), 22.5% (9), 29.5% (11), 16.5% (9), 39.2% (7), 2.8% (3), and 9.3% (10), respectively.[183] In these years the share of gross estates transferred to charity was 6.6%, 6.8%, 5.5%, 6.3%, 6.1%, 7.1%, 7.0%, and 5.6%, respectively.[184] The wide fluctuations in the share of total national charitable bequests coming from large estates in this period, e.g., from a high 39.2% to a low of 2.8%, resulted from fluctuations both in the share of total wealth these large estates represented and in the philanthropy within these large estates.[185] Gross estates valued at $10 million or more represented the following shares of total gross estate value in these years: 8.0%, 8.6%, 5.2%, 7.8%, 5.9%, 4.7%, 4.5%, and 4.6%, respectively.[186] The share of these largest estates transferred to charity in these years was 26.1%, 16.7%, 23.6%, 23.9%, 17.0%, 58.7%, 4.3%, and 11.2%, respectively.[187] Thus, analyzing or predicting trends in national charitable bequest totals is problematic because these are largely dependent upon fewer than a dozen wealthy decedents in each year.[188]

Data from subsequent years illustrate the presence of an additional issue: deflation of real exemption amounts.[189] From 1942 to 1976, the exemption amount stayed at $60,000.[190] However, $60,000 in 1976 was the

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178. *Id.*

179. *See* Vickrey, *supra* note 148, at 53.

180. *Compare, e.g.*, I.R.S., *supra* note 113, at 76 (1940) *with* I.R.S., *supra* note 111.

181. As an extreme example, the report for returns filed in 1938 showed 5 returns with net estates of $3.0 to $3.1 million (thus representing $15.0 to $15.5 combined net estates) which in total, generated *$49.5 million* in charitable deductions, amounting to one quarter of the all charitable transfers in that year; *see* I.R.S., *supra* note 113, at 57 (1940).

182. *See* I.R.S., *supra* notes 113, 116 (Author bases his calculations on the data found in these articles).

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. Jacobson et al., *supra* note 152, at 122.

190. *Id.*

equivalent of only $16,282 in 1942.[191] Correspondingly, the number of estate tax returns grew over 13-fold, from 15,187 for estates filed in 1943[192] to 200,747 for estates filed in 1977.[193] Including a much larger number of estates from less wealthy decedents impairs the ability to compare annual totals across time.[194] This is true with charitable bequests in particular because, as demonstrated below, less wealthy estates are less likely to donate, give a smaller share of their estates when they do donate, and concentrate their donations in different types of organizations.[195] In data from the filing years 1947–1951 and the more sporadic reports from 1954, 1955, 1959, 1961, 1963, 1966, 1970, 1973, and 1977, the percentage of estates going to charity was 4.4%, 4.7%, 6.0%, 4.2%, 5.0%, 4.8%, 5.3%, 5.7%, 6.5%, 5.2%, 6.0%, 7.8%, 5.1%, and 6.2%, respectively.[196] This continued to reflect variation from the handful of largest gross estates (over $10 million), which were responsible for the following shares of total charitable transfers, 3.1%, 14.0%, 29.9%, 0.9%, 11.6%, 12.6%, 20.2%, 22.6%, 32.8%, 13.3%, 25.5%, 42.7%, 29.6%, and 47.4%, respectively.[197]

Following a subsequent reporting gap (between the 1977 and 1986 reports, only 1983 data was reported) estate tax return data has been reported annually since 1986.[198] In this final period, the number of estate tax returns continued to fluctuate, resulting both from inflation and substantial legislative changes.[199] Beginning in 1982 the deduction for transfers to spouses became unlimited, rather than being limited to one-half of the decedent's gross estate.[200] Additionally, exemption amounts increased from $225,000 in 1982 to $600,000 in 1987[201] leading to a drop in estate tax returns filed from 63,251 in 1983 to 43,683 in 1988.[202] Exemption amounts then stayed fixed at a $600,000 nominal amount until 1998, then only modestly increased, reaching $675,000 in 2001,[203] which corresponded with a gradual increase in filings peaking at 108,322 returns in 2000.[204] The share of gross estates going to charity was 5.1% in 1983,[205] and during 1986–2001 was,

191. CPI INFLATION CALCULATOR, https://cpiinflationcalculator.com/ [perma.cc/K9ZT-U39H] (last visited Jan. 30, 2020).
192. I.R.S. 1945, *supra* note 116, at 274.
193. I.R.S., *supra* note 129, at 15.
194. *See supra* Sections II.B.2–3, II.D.3.
195. *Id.*
196. *See* I.R.S., *supra* notes 116–125, 127–129 (Author bases his calculations on the data found in this article).
197. *Id.*
198. *See supra* Section II.A.
199. Jacobson et al., *supra* note 152, at 125.
200. *Id.* at 122–23.
201. *Id.* at 122.
202. Bentz, *supra* note 130, at 1; Johnson 1990, *supra* note 131, at 44.
203. Jacobson et al., *supra* note 152, at 122.
204. I.R.S., *Table 1. Estate Tax Returns Filed in 2000* B9, https://www.irs.gov/pub/irs-soi/00es01c.xls [perma.cc/VWX5-Q8SA].
205. I.R.S., *supra* note 133.

6.0%, 6.0%, 6.8%, 6.3%, 6.3%, 6.9%, 6.9%, 7.0%, 8.0%, 7.4%, 7.4%, 8.8%, 6.2%, 7.4%, 7.4%, and 7.5%, respectively.[206]

In the recent period of 2002–2017, legislative changes have dramatically reduced the number of returns filed.[207] Exemption amounts rose from $675,000 in 2001 to $1 million in 2002–2003, $1.5 million in 2004–2006, $2 million in 2006–2008, $3.5 million in 2009, and finally $5 million in 2010 with only subsequent inflation adjustments prior to doubling in 2018.[208] Further complicating matters, estate taxes were optional for decedents dying in 2010,[209] thus dramatically reducing the number of returns filed in 2010–2012.[210] In the years 2001–2017 the number of estate tax returns filed was 108,071, 99,603, 73,128, 65,039, 45,070, 49,050, 38,000, 38,354, 33,515, 15,191, 4,588, 9,412, 10,568, 11,931, 11,917, 12,411, and 12,711, respectively.[211] During this period, the share of these estates going to charity was 7.5%, 8.4%, 7.4%, 7.7%, 10.7%, 8.3%, 9.7%, 12.3%, 8.2%, 8.8%, 15.1%, 11.4%, 9.8%, 10.9%, 11.9%, 9.6%, and 11.0%, respectively.[212]

Thus, the average share of estates (from estate tax return data) going to charity from 2010 to 2017 was 11.4% compared to only 6.1% for the years with reported data in the 1960s and 1970s.[213] Superficially, this would seem to represent an enormous increase in philanthropic behavior across the decades.[214] But, the dramatically different selection process for decedents required to file tax returns in these different times frustrates the ability to compare these numbers.[215]

A valid comparison across years requires comparing only those above the same real (inflation-adjusted) wealth level that exceeds the exemption amounts in all years.[216] A regression analysis of data from decedents dying from 1982 to 2014 with wealth over $10 million (in 2014 inflation-adjusted dollars) shows a small, non-significant annual increase in the share of wealth being left to charity,[217] but a significant decrease in the propensity to include any charitable gift.[218] For example, the propensity to leave any charitable bequest from these wealthy estates dropped from 41.9% and 44.8% in 1982 and 1983, respectively to 32.6% and 32.7% in 2012 and 2013, respectively.[219]

206. *See* I.R.S., *supra* notes 133–34 (Author bases his calculations on the data found in this article).
207. *See* Joulfaian, *supra* note 142, at 17, 29; I.R.S., *supra* note 133.
208. *See* I.R.C. § 2010(c)(3) (West 2017); Joulfaian, *supra* note 142, at 17, 29.
209. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, *supra* note 159.
210. *See* I.R.S., *supra* note 133.
211. *See id.*
212. *Id.*
213. *See* I.R.S., *supra* notes 123–125, 127–129, 133 (Author bases his calculations on the data found in this article).
214. *Id.*
215. *See* Joulfaian, *supra* note 142, at 17, 29.
216. *Id.* at 79.
217. *Id.* (Annual linear trend of +0.1% each year (p=.156) excluding those dying in 2010–when estate tax returns were optional–and 2014, noted as being "likely to be slightly understated as they do not include returns filed late in 2018 and beyond.").
218. *Id.* (Showing an annual linear trend of -0.22% each year (p=.000005) excluding 2010 and 2014 as discussed, *id.*).
219. *Id.* (Author bases his calculations on the data found in this article).

Thus, a smaller share of decedents are transferring a similar overall share of total wealth to charity, suggesting an increased concentration of charitable transfers among wealthy decedents.[220] As discussed below, this increasing concentration in charitable estate giving is occurring simultaneously with a rise in large gifts to private foundations and a drop in the, typically small, gifts to religious organizations.[221]

The influence of the largest estates, noted earlier, continues in the most recent data.[222] For example, the gross estate category of more than $50 million was first reported separately for returns filed in 2013.[223] In every year from 2013–2017, charitable decedents from this category, about 186 decedents annually, gave the majority of all charitable dollars reported on estate tax returns.[224]

Charitable transfers largely depend upon the extreme behavior of a few decedents, given that among both 2001 and 2014 decedents filing tax returns, those who left at least 90% of their wealth to charity gave more than 55% of total charitable bequest dollars, even though they constituted only about 10% of all donors.[225] Decedents giving more than half of their estate to charity constituted 17.1% of charitable donors in 1957 and 1959 tax returns ($60,000 exemption), 20.2% of donors among 2001 decedents ($675,000 exemption), and 23.2% of donors among 2014 ($5,340,000 exemption) decedents.[226] However, this increasing trend may simply reflect increasing exemption amounts given that among 1957 and 1959 returns with gross estates of $2 million or more, 23.0% of donors left half or more of their estates to charity, while only 15.3% of donors with gross estates less than $2 million did so.[227]

2. Charitable Share and Wealth

The share of estates left to charity decreases as wealth decreases.[228] For example, among tax returns filed in 2013–2017, those with gross estates of $50 million or more left the following gross estate shares to charity, 19%, 18%, 22%, 16%, and 19%, respectively.[229] For those with gross estates of $20 to $50 million, the charitable share was 8%, 10%, 10%, 10%, and 9%, in

220. *Id.* (Author bases his calculations on the data found in this article).
221. *See infra* Section III.D.2–3.
222. *See supra* Section III.B.1.
223. *See* I.R.S. *supra* note 133.
224. *See id*. (Author bases his calculations on the data found in this article).
225. *See* Joulfaian, *supra* note 142, at 82 (Author bases his calculations on the data found in this article).
226. *See* Schaefer, *supra* note 150, at 98–102; *see also* Joulfaian, *supra* note 142, at 82 (Author bases his calculations on the data found in these articles).
227. *See* Schaefer, *supra* note 150, at 98–102 (Author bases his calculations on the data found in this article) (81 of 353 charitable gross estates of $2 million+ versus 179 of 1171 charitable gross estates under $2; note that this wealth difference in the propensity to make extreme share charitable bequests suggests a potential wealth-dependent impact of mortmain statutes limiting the total share of estates going to charity, discussed *supra* Section II.B.2 and *infra* Section IV.B).
228. *See* I.R.S., *supra* note 133 (Author bases his calculations on the data found in this article).
229. *See id.*

these years respectively.[230] For those of $10 million to $20 million it was 7%, 8%, 7%, 6%, and 7%, respectively.[231] For those of $5 million to $10 million it was 5%, 5%, 5%, 4%, and 5%, respectively.[232] And for those under $5 million it was 2%, 3%, 2%, 3%, and 3%, respectively.[233] Similar observations have been made with regard to summary tabulations divided by gross estate size in previous years.[234] Additionally, regression analyses controlling for factors such as differences in age and tax prices have also found significant decreases in the share of estates given to charity as estate size decreases.[235]

Even among smaller estates, the share of estates left to charity continues to decrease as wealth decreases.[236] Of particular interest are returns filed in 1977, as this followed the year with the lowest inflation-adjusted exemption amount, and was thus the year when the largest number of estate tax returns were filed.[237] The trend of a declining share of estates being left to charity as estate size fell continued even among the smallest estate observations.[238] For the 5,025 returns with gross estates from the exemption level $60,000 to $100,000, the share transferred to charity was 1.4%.[239] The share transferred to charity then grew with gross estate size, from 1.8% (estates $100,000 to $200,000), to 2.5% (estates $200,000 to $300,000), to 2.9% (estates $300,000 to $500,000), and to 3.8% (estates $500,000 to $1 million) with continued growth at each larger estate size category reported until reaching 48.0% for estates of $10 million or more.[240] Similarly, Clotfelter, analyzing only the taxable returns from this year, found, "for taxable returns, charitable bequests rose from five percent of gross estates in the lowest class to seventy-two percent in the highest."[241]

3. Charitable Propensity and Wealth

The share of estates with any charitable donation also decreases as wealth decreases.[242] For returns filed in 2013–2017, the proportion of gross estates of $50 million or more with any charitable gifts was 52%, 48%, 49%,

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230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *See, e.g.*, CLOTFELTER, *supra* note 2, at 232; Johnson, *supra* note 131, at 30 (1990); Johnson & Rosenfeld, *supra* note 153, at 30 (The problems with older net estate category data (*see* Vickrey, *supra* note 148, at 53) led some early commenters to observe no relationship (*see* Pechman, *supra* note 147, at 161; Harriss, *supra* note 145, at 532; Harriss, *supra* note 146, at 344)).
235. *See, e.g.*, Auten & Joulfaian, *supra* note 153, at 66.
236. *See infra* notes 237–241 and accompanying text.
237. *See supra* Section III.A.
238. *See* I.R.S., *supra* note 129 (Author bases his calculations on the data found in this article).
239. *Id.*
240. *Id.*
241. CLOTFELTER, *supra* note 2, at 232.
242. I.R.S., *supra* note 133 (Author bases his calculations on the data found in this article).

49%, and 48%, in these years, respectively.[243] For gross estates of $20 million to $50 million, the proportion was 36%, 36%, 33%, 34%, and 34%, respectively.[244] For gross estates of $10 million to $20 million, the proportion was 27%, 28%, 26%, 24%, and 28%, respectively.[245] For gross estates of $5 million to $10 million, this was 21%, 20%, 19%, 18%, and 19%, respectively.[246] Finally, for gross estates under $5 million the proportion leaving charitable gifts was 16%, 17%, 15%, 19%, and 15%, respectively.[247]

Summary data from older years show similar relationships.[248] For estates filed from 1916–1945, the share leaving any gifts to charity was 10.3% for estates less than $60,000, 12.3% for estates $60,000 to $100,000, 17.3% for estates $100,000 to $250,000, 24.2% for estates $250,000 to $500,000, 31.4% for estates $500,000 to $1 million, and 42.1% for estates $1 million or more.[249] Among returns filed in 1957 or 1959, the proportion leaving any charitable bequests was 18.0% for estates of less than $500,000, 32.1% for estates $500,000 to $1 million, 37.1% for estates $1 million to $1.5 million, 44.6% for estates $1.5 million to $2 million, 51.1% for estates $2 million to $3 million, 54.8% for estates $3 million to $5 million, and 66.2% for estates $5 million or more.[250]

Even for smaller estates, the share leaving any charitable donation decreases as wealth decreases.[251] As before, the returns filed in 1977 are of particular interest, providing insight into the smallest (inflation-adjusted) estates.[252] For the 5,025 total returns with gross estates between the then exemption level of $60,000 and less than $100,000, only 8.5% included any transfers to charity.[253] The share of estates making any gifts to charity grew with gross estate size to 10.3%, 14.1%, 18.1%, and 23.2% for estates of $100,000 to $200,000, $200,000 to $300,000, $300,000 to $500,000, and $500,000 to $1 million, respectively, then growing at each larger estate size until reaching 76% for estates worth more than $10 million.[254]

C. Tax Effects on Charitable Bequests

All analyses using estate tax data have found that charitable bequests increase in response to a reduced tax price.[255] However, the precise estimate of this responsiveness, called tax price elasticity, has varied from -0.1

243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.*
247. *Id*.
248. McCubbin & Rosenfeld, *supra* note 153, at 57.
249. *Id.*
250. Schaefer, *supra* note 150.
251. *See* I.R.S., *supra* note 129 (Author bases his calculations on the data found in this article).
252. *See supra* Section III.A.
253. *See* I.R.S., *supra* note 129 (Author bases his calculations on the data found in this article).
254. *Id.*
255. *See* Joulfaian, *Tax Repeal*, *supra* note 153, at 1226.

to -4.0.[256] A tax price elasticity between 0 and -1.0 is "budget" inefficient, meaning that at the margin, a $1 reduction in tax price generates less than a $1 increase in donations.[257] Analyses of returns filed in 1957–1959, 1969, 1977, and decedents dying in 1982, 1986, and1992 resulted in elasticity estimates of -.94 to -1.8,[258] -0.20 to -2.53,[259] -1.67 to -2.79,[260] -2.5,[261] -3.0,[262] and -2.3 to -2.7,[263] respectively.[264] These analyses used, inter alia, the abrupt rate changes at each tax bracket to separate the effects of different tax rates from differences in wealth.[265] Analyses comparing giving across different years and locations with different tax rates, resulted in elasticity estimates of -0.1 to -4.0,[266] and -1.62 to -2.14,[267] and other general observations of an inverse relationship between tax price and charitable bequest donations.[268]

A meta-analysis of research articles found that the tax-price elasticity for charitable bequest donations is greater than the tax-price elasticity for other types of charitable donations.[269] Three studies found that charitable bequests to private foundations were the most responsive to tax incentives and charitable bequests to religious organizations were the least responsive.[270] One found that the charitable bequests of married decedents were more sensitive to tax price.[271]

Estate tax repeal creates two offsetting effects for charitable bequests, eliminating the relative tax-price discount from deductibility, but increasing after-tax wealth.[272] Different analyses have estimated the net effects of repeal on charitable bequests as declines of 12%,[273] 16% to 28%,[274] 22% to 37%,[275] or no significant decline.[276] Finally, one study found that decedents who made a larger share of transfers to heirs via lifetime gifts also made larger charitable transfers, perhaps reflecting greater responsiveness to tax benefits in general.[277]

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256. Feldstein, *supra* note 152, at 1489–90.
257. Joulfaian, *supra* note 1, at 744.
258. Boskin, *supra* note 149, at 36.
259. *Id.*
260. CLOTFELTER, *supra* note 2, at 243.
261. Auten & Joulfaian, *supra* note 153, at 66.
262. Joulfaian, *supra* note 20, at 176.
263. Joulfaian, *supra* note 1, at 758.
264. *See* I.R.S., *supra* note 137 (Author bases his calculations on the data found in this article).
265. *See, e.g.*, Auten & Joulfaian, *supra* note 153, at 66.
266. Feldstein, *supra* note 152, at 1489–90.
267. Bakija et al., *supra* note 152, at 369.
268. Johnson & Rosenfeld, *supra* note 153, at 139; *see* Kopczuk & Slemrod, *Tax Impacts*, *supra* note 151, at 230; *see* Kopczuk & Slemrod, *Wealth Accumulation and Avoidance Behavior*, *supra* note 151, at 317.
269. Peloza & Steel, *supra* note 153, at 267.
270. Boskin, *supra* note 149, at 43, 52; Feldstein, *supra* note 152, at 1495; McNees, *supra* note 149, at 90; *Contra* Joulfaian, *supra* note 20, at 175 (finding lower responsiveness for giving to foundations).
271. Boskin, *supra* note 149, at 46.
272. Bakija & Gale, *supra* note 152, at 2.
273. Joulfaian, *supra* note 1, at 756.
274. McClelland, *supra* note 152, at 14.
275. Bakija & Gale, *supra* note 152, at 1.
276. *See* Joulfaian, *Evidence from Two Tax Regimes*, *supra* note 152, at 20.
277. McNeese, *supra* note 149, at 81–83.

D. Charitable Bequest Cause Types

1. Cause Types Across Time

In some years, summary data from tax returns has included information on the types of charitable organizations receiving gifts from estates.[278] For estate tax returns filed in 1939–1945, 1947–1950, 1954, 1959, and 1961 there were no statistically significant increasing or decreasing annual trends in the share of charitable bequest dollars going to any of the three reported categories of religious organizations (averaging 10.1% of all charitable bequest dollars per year),[279] private (averaging 17.4% per year),[280] or public (averaging 6.4% per year)[281] educational, scientific or literary organizations.[282]

For estate tax returns filed in 1986, 1987, and 1988, and for decedents dying in 1989, 1992, 1995, and 1998, different categories were reported, with no statistically significant increasing or decreasing trends in the share of charitable bequest dollars going to religious organizations (averaging 10.7% per year),[283] educational, medical, and science organizations (averaging 30.7% per year),[284] or arts and humanities organizations (averaging 3.9% per year).[285] However, there was a significant increasing trend in the share of charitable gifts going to private foundations in these years (averaging 30.8% overall, but increasing by about one percentage point every year)[286] and a significant decreasing trend for social welfare organizations (averaging 3.2% overall, but falling about one half percentage point each year).[287]

In reports for returns filed from 2001 to 2007, organizational categories were again changed.[288] In these years, looking only at estates of $3.5 million or greater (and consequently well above the fluctuating exemption levels

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278. *See, e.g.*, I.R.S., *supra* notes 113, 116, 118, 120, 122, and 123.

279. The annual share was 9.0%, 11.7%, 7.3%, 10.2%, 10.3%, 8.0%, 8.9%, 13.6%, 11.0%, 11.9%, 8.4%, 9.4%, 12.8%, and 9.4%, in these years, respectively.

280. The annual share was 24.8%, 13.4%, 8.8%, 14.6%, 25.2%, 15.9%, 14.0%, 14.2%, 12.5%, 33.1%, 22.0%, 18.8%, 17.5%, and 8.5%, in these years, respectively.

281. The annual share was 6.2%, 5.2%, 3.5%, 6.1%, 8.9%, 8.9%, 10.0%, 3.6%, 8.4%, 5.3%, 9.2%, 6.7%, 4.6%, and 3.4%, in these years, respectively.

282. *See* I.R.S., *supra* notes 113, 116, 118, 120, 122, and 123 (Author bases his calculations on the data found in these articles).

283. The annual share was 10.5%, 12.4%, 13.0%, 10.2%, 9.6%, 9.6%, and 9.9%, in these years, respectively.

284. The annual share was 37.4%, 34.4%, 25.5%, 29.9%, 27.5%, 31.6%, and 28.9%, in these years, respectively.

285. The annual share was 3.9%, 4.0%, 3.5%, 5.4%, 3.1%, 2.7%, and 4.4%, in these years, respectively. *See* Johnson 1990, *supra* note 131; Johnson 1993, *supra* note 131; Eller, *supra* note 132; Johnson & Mikow 1990, *supra* note 132, and Johnson & Mikow 2002, *supra* note 132 (Author bases his calculations on the data found in these articles).

286. The annual share was 27.9%, 25.1%, 31.5%, 29.3%, 28.8%, 30.9%, 42.4%, in these years, respectively, resulting in an annual linear trend of .010 (p=.031).

287. The annual share was 7.4%, 4.8%, 4.2%, 2.1%, 1.2%, 0.7%, 1.3%, in these years, respectively, resulting in an annual linear trend of -.005 (p=.025). *See* I.R.S., *supra* notes 139 & 141 (Author bases his calculations on the data found in this article).

288. Raub, *supra* note 152, at 308.

during these years)[289] there were no significant increasing or decreasing trends in the share of charitable bequest dollars going to private foundations (averaging 57.4%), education (averaging 14.2%), human services (averaging 5.2%), arts and humanities (averaging 5.0%), religion (averaging 4.2%), health (averaging 3.2%), environment (averaging 1.4%), and specific disease causes (averaging 1.3%).[290] For decedents dying in 2007, 2009, 2011, and 2013, the share going to private foundations was much larger in some years, taking 72.3%, 51.5%, 63.9%, and 67.5%, in these years, respectively, of all charitable dollars.[291]

2. Cause Types Propensity and Gift Size

For estate tax returns filed in 1986, 1987, and 1988, and for decedents dying in 1989, 1992, 1995, and 1998, gifts to religious organizations were the most common (arising in 60.8% of charitable estates)[292], but also the smallest ($109,387 per estate making such gifts)[293] while gifts to private foundations were the rarest (arising in 7.6% of charitable estates)[294], but also the largest ($3,135,799 per estate making such gifts).[295] Gifts to "educational, medical, and science" organizations were also quite common (arising in 52.3% of charitable estates)[296], but about three times larger than gifts to religious organizations ($363,418 per estate making such gifts)[297], while gifts to arts and humanities were a bit smaller ($279,797 per estate making such gifts),[298] but much less common (arising in 8.8% of charitable estates).[299] Apart from gifts to religion, gifts to social welfare organizations were the smallest ($150,923 per estate making such gifts),[300] and became increasingly rare arising in 24.8%, 15.0%, 13.7%, 11.1%, 5.4%, 4.3%, and 5.4% of charitable estates in these years, respectively.[301]

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289. *Id.* at 302.
290. *Id.* at 308 (National Taxonomy of Exempt Entities (NTEE) code T "Philanthropy and volunteerism" labeled here as private foundations).
291. *See* I.R.S., *supra* note 141 (Author bases his calculations on the data found in this article).
292. *See id.* (63.4%, 62.3%, 62.1%, 59.3%, 60.9%, 58.8%, and 59.2% in these years, respectively).
293. *See id.* ($76,724, $89,549, $121,219, $101,631, $118,478, $115,515, and $142,590, in these years, respectively).
294. *See id.* (7.5%, 10.7%, 9.6%, 5.9%, 2.9%, 6.9%, and 9.9% in these years, respectively).
295. *See id.* ($1,724,679, $1,058,254, $1,896,783, $2,930,979, $7,515,948, $3,188,567, and $3,635,380 in these years, respectively); *see id.* (Author bases his calculations on the data found in this article).
296. *See id.* (57.2%, 50.4%, 49.6%, 53.0%, 52.4%, 51.2%, and 52.2% in these years, respectively).
297. *See id.* ($302,961, $307,205, $298,638, $335,457, $391,998, $437,027, and $470,637 in these years, respectively).
298. *See id.* ($166,095, $264,442, $211,594, $340,486, $225,952, $292,704, and $457,310 in these years, respectively).
299. *See id.* (10.8%, 6.8%, 9.7%, 9.4%, 10.2%, 6.5%, and 8.2% in these years, respectively) (Author bases his calculations on the data found in this article).
300. *See id.* ($138,151, $143,387, $177,596, $113,475, $167,689, $112,417, and $203,746 in these years, respectively).
301. *See id.* (Author bases his calculations on the data found in this article).

For decedents in 2001, 2004, 2007, 2011, and 2013 (during which the estate tax exemption equivalent amount increased from $675,000 to $5,250,000), different categories were reported with the share of charitable estates making any gifts to religion falling from 58.4% to 35.3%,[302] to private foundations rising from 19.6% to 41.2%,[303] to arts, culture, and humanities rising from 9.7% to 16.5%,[304] to health organizations falling from 29.5% to 24.8%,[305] to human services,[306] environment and animals,[307] and to international[308] organizations showing no statistically significant trends.[309] As exemption amounts grew, so too did the average gift size for all categories, with religion[310] being the smallest, followed by human services,[311] international,[312] environment and animals,[313] arts/culture and humanities,[314] health,[315] and the largest being for private foundations.[316]

3. Cause Types and Wealth

The share of charitable bequest gifts left to religious organizations decreases as wealth increases, and this has been true from the earliest reports forward.[317] In 1939 returns, gross estates of $40,000 to $50,000, $50,000 to $100,000, $100,000 to $1 million, and more than $1 million, directed 33.6%, 29.9%, 11.0%, and 6.1%, of their charitable transfers to religious organizations, respectively; in 1940 returns this was, 26.2%, 24.9%, 16.9%, and 5.5%, for these estate sizes, respectively; and in 1941 returns this was 37.3%, 29.2%, 13.3% and 1.2%, for these estate sizes, respectively.[318] Data from returns in 1957 and 1959, showed gross estates in the ranges of less than $200,000, $200,000 to $500,000, $500,000 to $1 million, and more than $1 million directing 30.8%, 29.3%, 17.0%, and 6.3% of their charitable dollars to religious organizations, respectively.[319] For taxable returns filed in 1961, the share of charitable estate dollars going to religious organizations also fell as estate size increased, falling from 66% for estates just over the $60,000

302. *See id.* (58.4%, 48.7%, 45.0%, 39.5%, and 35.3%, respectively).
303. *See id.* (19.6%, 26.4%, 29.5%, 37.3%, and 41.2%, respectively).
304. *See id.* (9.7%, 12.1, 13.5%, 15.9%, and 16.5%, respectively).
305. *See id.* (29.5%, 28.6%, 26.4%, 26.0%, 24.8%, respectively).
306. *See id.* (29.4%, 30.3%, 29.6%, 28.3%, and 27.1%, respectively).
307. *See id.* (9.6%, 11.4%, 10.6%, 13.9%, and 13.0%, respectively).
308. *See id.* (1.3%, 1.6%, 1.9%, 0.4%, and 0.3%, respectively).
309. *See id.* (Author bases his calculations on the data found in this article).
310. *See id.* ($164,220, $255,627, $363,776, $635,565, and $706,838, respectively).
311. *See id.* ($178,409, $354,530, $430,745, $833,170, and $983,048, respectively).
312. *See id.* ($196,657, $85,050, $345,068, $703,580, and $635,170, respectively).
313. *See id.* ($255,142, $441,390, $532,585, $1,013,472, and $1,299,506, respectively).
314. *See id.* ($364,453, $476,208, $551,897, $806,690, and $1,024,581, respectively).
315. *See id.* ($304,609, $446,009, $642,124, $1,089,809, and $1,570,025, respectively).
316. *See id.* ($2,720,305, $4,548,076, $9,879,385, $10,384,117, and $11,521,202, respectively).
317. *See* I.R.S. 1941, *supra* note 113; I.R.S 1942., *supra* note 116; I.R.S. 1943, *supra* note 116 (Author bases his calculations on the data found in these articles).
318. *See id.*
319. Boskin, *supra* note 149, at 37; *see also* Schaefer, *supra* note 150, at 173.

exemption level to 0.3% for estates of $20 million or more.[320] In 1986 returns, gross estates of $500,000 to $1 million, $1 million to $5 million, and more than $5 million, directed 38.1%, 5.1%, and 3.8%, respectively, of their charitable transfers to religious organizations; in 1987 returns this was 23.5%, 16.2%, and 5.4%, for these estate sizes, respectively; and in 1988 returns this was 41.5%, 17.5%, and 4.5%, for these estate sizes, respectively.[321] For decedents in 1995, the share of charitable dollars directed to religious organizations for gross estate sizes of $600,000 to $1 million, $1 million to $2.5 million, $2.5 million to $5 million, $5 million to $10 million, $10 million to $20 million, and more than $20 million, was 29.3%, 18.8%, 11.9%, 9.1%, 4.9%, and 2.5%, respectively[322] with similar results, ranging from 31.6% for the smallest estates to 0.3% for the largest, when measuring after-tax wealth for decedents in 1992.[323] Decedents in 2004 with gross estates of less than $3.5 million, $3.5 million to $5 million, and more than $5 million directed 18.5%, 9.7%, and 3.2% of their charitable bequest dollars to religious organizations, respectively; and for decedents in 2007 among those with these estate sizes, 20.9%, 17.6%, and 2.2%, respectively, of their charitable bequest dollars went to religious organizations.[324]

Although larger estates left a relatively smaller share of their charitable dollars to religious organizations, they were actually more likely to include at least some gifts to religious organizations.[325] For returns filed in 1961 with gross estates of less than $100,000, $100,000 to $500,000, $500,000 to $1 million, $1 million to $5 million, and more than $5 million, the share of estates making any gifts to religious organizations was 7.9%, 10.1%, 16.6%, 18.6%, and 23.1%, respectively.[326] For returns filed in 1986, 1987, and 1988, the proportion of estates giving anything to religious organizations was 11.8%, 11.6%, and 11.4%, for smaller (less than $1 million), 11.1%, 13.4%, and 12.4% for middle-sized ($1 million to $5 million), and 18.7%, 16.2%, and 14.9% for larger (more than $5 million) gross estates, in these years, respectively.[327] These earlier trends suggest that the drop in the propensity to include charitable bequests to religion in more recent years might not be simply the result of the increasing exemption amounts.[328]

320. CLOTFELTER, *supra* note 2, at 233.
321. *See* Johnson, *supra* note 131, at 56 (Author bases his calculations on the data found in this article).
322. Eller, *supra* note 1, at 177; *see also* Joulfaian, *The Pattern of Charitable Bequests*, *supra* note 152, at 33.
323. Joulfaian, *supra* note 1, at 751.
324. Raub, *supra* note 136, at 128; Raub & Newcomb, *supra* note 137, at 191.
325. *See* I.R.S., *supra* note 123 (Author bases his calculations on the data found in this article).
326. *Id.*
327. *See* Johnson, *supra* note 131, at 56 (Author bases his calculations on the data found in this article).
328. *See supra* Section II.D.2.

Larger estates tend to favor private foundations.[329] For returns filed in 1957 and 1959, 43% and 41%, respectively, of charitable bequest dollars by estates of more than $1 million went to private foundations.[330] For returns filed in 1986, 1987, and 1988, 41%, 41%, and 47%, respectively, of charitable bequest dollars by estates of more than $5 million, went to private foundations.[331] Among 1995 decedents with estates of more than $10 million (equivalent to $1.8 million in 1957[332]), 47% of charitable gifts went to private foundations.[333] Some results were even more extreme among the largest estates and in more recent years.[334] For returns filed in 1995, among estates of more than $20 million, 74% of all charitable gifts went to private foundations.[335] In a sample of decedents from 1996–1998, over 93% of all charitable dollars from estates of more than $50 million went to private foundations.[336] Among decedents in 2004 and 2007 with estates of more than $5 million, the share of charitable dollars going to private foundations was 70% and 78%, respectively.[337]

Other cause types have more ambiguous relationships with wealth.[338] For decedents in 2004 and 2007, those with estates less than $3.5 million gave a slightly larger share of their gifts (28.7% and 27.4%, respectively) to "educational institutions" than those with estates of $3.5 million to $5 million (28.2% and 21.8%, respectively), but a much larger share than those with estates of more than $5 million (10.5% and 8.2%, respectively).[339] For returns filed in 1986, 1987, and 1988, and decedents in 1995, the share of gifts going to education, medicine and science was always lowest for the highest wealth category (more than $5 million) and usually highest for the middle wealth category ($1 million to $5 million).[340] Additionally, using data from returns in 1960, one researcher found that the share of giving directed towards private educational organizations rose rapidly with estate size, but the share directed towards public educational organizations declined as estate size grew beyond $500,000.[341] Commenting on returns filed up to 1945,

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329. *See also* Boskin, *supra* note 149, at 37; Joulfaian, *supra* note 153, at 751 (2000); McNees, *supra* note 149, at 89; Schaefer, *supra* note 150, at 143.

330. SHOUP, *supra* note 148, at 62–63.

331. *See* Johnson, *supra* note 131, at 56 (Author bases his calculations on the data found in this article).

332. CPI INFLATION CALCULATOR, https://cpiinflationcalculator.com/ [perma.cc/Z5R5-WWVM] (last visited Jan. 30, 2020).

333. *See* Eller, *supra* note 1, at 177 (Author bases his calculations on the data found in this article).

334. *See* Joulfaian *supra* note 1, at 751 (reporting over half of charitable gifts for estates of $20 million or more went to private foundations among 1998 decedents).

335. Auten *et al.*, *supra* note 151, at 415.

336. Joulfaian, *supra* note 151, at 362.

337. Raub, *supra* note 136, at 128; Raub & Newcomb, *supra* note 137, at 191.

338. *See infra* notes 352–366 and accompanying text.

339. Raub, *supra* note 136, at 128; Raub & Newcomb, *supra* note 137, at 191.

340. *See* Johnson, *supra* note 131, at 56*; see* Eller, *supra* note 1, at 177 (33.8%, 44.8%, 29.2%, and 36.1%, respectively, in these years, for estates of less than $1 million, 46.6%, 39.8%, 42.2%, and 44.0%, respectively, for estates of $1 million–$5 million, and 32.2%, 26.4%, 15.3%, 25.1%, respectively, for estates of more than $5 million).

341. Feldstein, *supra* note 152, at 1499.

Harriss noted, "Privately owned scientific, educational, and literary institutions drew more heavily on large estates, except the very largest, than did any other group of recipient institutions."[342] The share of gifts going to other organization types, e.g., social welfare, arts and humanities, do not demonstrate a consistent relationship with wealth other than that resulting from a smaller share remaining at the largest estate sizes due to the dominance of private foundations.[343]

4. Cause Types and Gender

For several years, estate tax returns showed a relative preference among women for giving to religion and education, and a relative preference among men for giving to private foundations.[344] For decedents in 1986, 1989, 1992, and 1995, the share of gifts going to "education, medicine, and science" for women vs. men was 40% vs. 21%, 33.5% vs. 26.0%, 34.5% vs. 21.5%, and 31.9% vs. 31.3%, respectively, and for decedents in 1998 and 2001, the share of gifts going to "educational institutions" for women vs. men was 20.0% vs. 15.8%, and 24.5% vs. 13.2%, respectively.[345] For decedents in 1986, 1989, 1992, 1995, 1998, and 2001, the share of gifts going to religious organizations for women vs. men was 15% vs. 11%, 11.9% vs. 8.5%, 14.3% vs. 5.4%, 12.4% vs. 6.8%, 11.5% vs. 8.2%, and 13.2% vs. 5.4%, respectively.[346] Conversely, in these same years, the share of gifts going to private foundations for women vs. men was 16% vs. 42%, 18.0% vs. 41.3%, 18.7% vs. 37.6%, 23.2% vs 38.5%, 30.7% vs. 55.0%, and 30.0% vs. 63.8%, respectively.[347]

However, among 2004, 2007, 2009, 2011, and 2013 decedents filing tax returns, the use of private foundations by female decedents increased dramatically, with the share of gifts going to private foundations for women vs. men being 54.6% vs. 64.1%, 77.4% vs. 64.4%, 45.1% vs. 54.6%, 57.5% vs. 68.1%, and 68.1% vs. 66.9%.[348] In parallel with this change, the previous gender distinctions for education and religion became inconsistent, now simply corresponding with the relative use of private foundations in each particular year, with the share of gifts going to religion for women vs. men being 7.0% vs. 4.9%, 3.5% vs. 5.2%, 6.6% vs. 2.7%, 5.2% vs. 3.4%, and 2.9% vs. 4.2%, respectively, and the share going to educational institutions for women vs. men being 15.7% vs. 13.2%, 7.7% vs. 14.4%, 19.8% vs.

342. Harriss, *supra* note 146, at 344.
343. *See, e.g.*, Raub, *supra* note 136, at 128; Raub & Newcomb, *supra* note 137, at 191; Johnson, *supra* note 131, at 56; Joulfaian, *supra* note 153, at 751.
344. Joulfaian, *supra* note 20, at 173; Eller, *supra* note 1, at 176.
345. *See* I.R.S., *supra* note 141; *see also* Johnson & Rosenfeld, *supra* note 153, at 31.
346. *Id.*
347. *Id.*
348. *See* I.R.S., *supra* note 141 (private foundations labeled here as public societal benefit organizations).

10.5%, 11.9% vs. 13.1%, and 11.8% vs. 9.5%.[349] Additionally, neither period reflected consistent gender differences for the share of donations going to other, less common categories such as social welfare or arts and humanities.[350]

An alternative comparison that is not dominated by extremely large gifts is to look at the propensity to leave anything to particular cause types.[351] However, this comparison is problematic for gender comparisons because female donors tend to give to a larger number of organizations and cause categories than male donors.[352] Nevertheless, among 2001, 2004, 2007, 2009, 2011, and 2013 charitable decedents, females were always less likely to leave anything to private foundations,[353] but were always more likely to leave anything to religious organizations,[354] environmental and animal organizations,[355] or human services,[356] with variations from year to year in the relative gender-related propensity to leave anything to the other categories of health, education, international, or arts, culture and humanities organizations.[357]

5. *Diversification in Cause Types and Organizations*

Among six organizational cause types, charitable decedents in 1986 and 1995 gave to an average of 1.8 and 1.7 types, respectively.[358] Among 1986 charitable decedents, 51% gave to only one type, 78% gave to one or two types, and 93% gave to three or fewer types.[359] Similarly, among 1957 and 1959 returns, 50% of charitable estates gave only to one cause type.[360] Decedents who were wealthier, older, never married, or female, contributed to a larger number of cause types.[361]

Similar results arose when analyzing individual organizations, rather than cause types.[362] Among charitable decedents in 1998, females, on average, supported 4.0 charitable organizations, while males supported 3.0

349. *Id.*
350. *Id.*
351. *See supra* Section III.B.A (discussing the impact of a few large donations on national totals).
352. Johnson & Mikow 2000, *supra* 132, at 144; Joulfaian, *supra* note 20, at 177.
353. *See* I.R.S., *supra* note 141 (Female vs. male propensity was 17.5% vs. 23.0%, 25.6% vs. 27.3%, 27.6% vs. 31.6%, 33.2% vs. 40.9%, 35.9% vs. 38.7%, and 39.3% vs. 43.1%, in these years, respectively).
354. *See id.* (Female vs. male propensity was 60.9% vs. 54.3%, 52.9% vs. 43.4%, 48.8% vs. 40.9%, 43.4% vs. 38.0%, 42.5% vs. 36.4%, and 38.5% vs. 43.1%, in these years, respectively).
355. *See id.* (Female vs. male propensity was 11.4% vs. 6.8%, 13.7% vs. 8.4%, 13.3% vs. 7.8%, 12.0% vs. 8.0%, 19.5% vs. 8.0%, and 17.0% vs. 9.0%, in these years, respectively).
356. *See id.* (Female vs. male propensity was 31.2% vs. 26.6%, 33.0% vs. 26.9%, 34.4% vs. 24.3%, 28.9% vs. 26.0%, 31.7% vs. 24.6%, and 31.6% vs. 22.7%, in these years, respectively).
357. *See* I.R.S., *supra* note 141.
358. Joulfaian, *supra* note 20, at 173; Eller, *supra* note 1, at 176 (the six categories were Arts/Humanities, Religious, Education/Medicine/Science, Social Welfare, Foundations, and Other).
359. *See* Joulfaian, *supra* note 20, at 175.
360. Schaefer, *supra* note 150, at 69.
361. Joulfaian, *supra* note 20, at 177.
362. *See infra* notes 376–79 and accompanying text.

organizations.[363] Among charitable estate tax returns filed in 2003, 38% gave to only one charitable organization, 30% gave to two, 32% gave to three or more, and only 5% gave to ten or more, for an overall average of 3.5 organizations.[364] Among these, the smallest estates (less than $1 million) averaged 2.5 organizations while the largest (more than $20 million) averaged 4.5 organizations.[365] Those donating less than $100,000 to charity (about half of all charitable estates) contributed to an average of 2.2 organizations, while those giving $100,000 or more averaged 4.8 organizations.[366] Additionally, the oldest charitable decedents tended to give to more organizations, with those aged under 65, 65 to 75, 75 to 85, and over 85, averaging 2.8, 2.6, 3.6, and 3.8 organizations supported, respectively.[367]

E. Gender, Marriage, and Age in Charitable Bequests

1. Gender and Marriage

Across the history of estate tax data, females have always been more likely to leave a charitable bequest than males, with the charitable bequest propensity for females vs. males averaging 23% vs. 14% from 1916–1945[368] and 26% vs. 16% from 1986–2013.[369] However, part of this difference is due to decedent marital status, as most female decedents are widows, while most male decedents are married.[370] In regressions controlling for gender and other factors, married decedents donated the least to charity and those never married donated the most, with widows/widowers falling in between.[371] Although not available in the tax data, the heightened propensity for donations among never married decedents likely relates to a dramatically higher proportion of childlessness in this group.[372]

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363. Johnson & Mikow, *supra* note 132, at 144.
364. *See* Joulfaian, *Basic Facts*, *supra* note 152, at 30.
365. *Id.* at 26.
366. *Id.* at 29.
367. *Id.* at 27.
368. McCubbin & Rosenfeld, *supra* note 153, at 57.
369. *See id.* (For decedents dying in 1986, 1989, 1995, 1998, 2001, 2004, 2007, 2009, 2011, and 2013, the female vs. male propensity was 23% vs. 14%, 27.0% vs. 15.2%, 25.9% vs. 14.3%, 24.3% vs. 13.4%, 21.0% vs.13.4%, 22.1% vs. 12.8%, 26.4% vs. 16.2%, 23.3% vs. 16.5%, 29.0% vs. 18.6%, 33.3% vs. 22.2%, and 29.7% vs. 19.2%, respectively); *see* Johnson & Rosenfeld, *supra* note 153, at 30 (1986 decedent numbers); *see* I.R.S., *supra* note 141; *see* I.R.S., ESTATE TAX RETURNS FILED FOR MALE DECEDENTS, https://www.irs.gov/statistics/soi-tax-stats-estate-tax-statistics-year-of-death-table-4 [perma .cc/WC7U-3UQS] (last visited Jan. 31, 2020); *see* I.R.S., ESTATE TAX RETURNS FILED FOR FEMALE DECEDENTS, https://www.irs.gov/statistics/soi-tax-stats-estate-tax-statistics-year-of-death-table-5 [perma .cc/NL3W-PW9R] (last visited Jan. 31, 2020) (1989–2013 decedent numbers).
370. *See Estate Tax Returns Filed for Male Decedents*, *infra* note 383; *see also* ESTATE TAX RETURNS FILED FOR FEMALE DECEDENTS, *infra* note 383 (among decedents in 2013 estate tax returns, 28% of females vs. 68% of males were married and 61% of females vs. 19% of males were widowers).
371. *See* Boskin, *supra* note 149, at 46; CLOTFELTER, *supra* note 2, at 243; Joulfaian, *supra* note 20, at 176 (1991); Joulfaian, *supra* note 1, at 755 (2000).
372. U.S. Census, *Historical Table 2: Distribution of Women Age 40 to 50 by Number of Children Ever Born and Marital Status*, https://www2.census.gov/programs-surveys/demo/ tables/fertility/time-series/his-cps/h2.xlsx (last visited Jan. 31, 2020) (in 1976, 89% of never married women age 40-44

Nevertheless, even within marital categories, some gender differences remain.[373] The most likely to leave a charitable bequest has always been never–married women (about 48%), followed by never–married men (about 34%), widows (about 27%), widowers (about 24%), and either married women or married men (about 8% each).[374] However, among bequest donors, women often leave a smaller share of their estates to charity, with married female vs. married male donors leaving 9% vs. 11% of estates in 1916–1945 and about 15% vs. 19% in 1989–2013, never–married female vs. never–married male donors leaving 26% vs. 28% in 1916–1945 and about 43% vs. 49% in 1989–2013, but widow vs. widower donors leaving roughly the same share of their estates (17% vs. 16% in 1916–1945 and about 33% vs. 34% in in 1989-2013).[375] Additionally, male donors tended to have larger estates than female donors, both in 1925–1945 (29% larger for married decedents, 63% larger for never married decedents, and 26% larger for widow/widower decedents), and in 1992–2013 (39% larger for married decedents, 27% larger for never married decedents, and 14% larger for widow/widower decedents).[376] Thus, although male decedents had a reduced

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reported being childless as compared with 8.6% of women who had ever married); see also, Russell N. James III, *Health, wealth, and charitable estate planning: A longitudinal examination of testamentary charitable giving plans*, 38 NONPROFIT AND VOLUNTARY SECTOR Q. 1026 (2009) (showing predictive strength of childlessness in charitable bequests); *see also* Joulfaian, *supra* note 1, at 754; *see also* McNees, *supra* note 149, at 81–83 (finding that those leaving gifts to a larger number of heir categories left less to charity).

373. *See infra* notes 374–377 and accompanying text.

374. *See Estate Tax Returns Filed for Male Decedents*, *infra* note 383; *see also Estate Tax Returns Filed for Female Decedents*, *infra* note 383; *see* Johnson & Rosenfeld, *supra* note 153, at 30; *see also* McCubbin & Rosenfeld, *supra* note 153, at 56 (among returns from 1925–1945 (combined), decedents dying in 1986, 1989, 1992, 1995, 1998, 2001, 2004, and 2007, the share of decedents leaving any bequest gift to charity was 12.7%, 11.4%, 7.7%, 8.5%, 9.1%, 5.9%, 6.6%, 5.8%, and 5.8%, respectively, among married women, 11.2%, 9.2%, 8.2%, 7.5%, 6.9%, 6.7%, 6.4%, 9.6%, and 9.9%, respectively, among married men, 40.5%, 56.0%, 54.7%, 41.9%, 48.9%, 44.4%, 44.9%, 54.0%, and 47.9%, respectively, among never married women, 28.0%, 32.2%, 33.5%, 31.1%, 38.3%, 32.4%, 34.3%, 36.2%, and 42.0%, respectively, among never married men, 24.8%, 29.0%, 29.1%, 29.3%, 26.4%, 23.0%, 24.9%, 31.8%, and 28.1%, respectively, among widows, and 21.1%, 26.9%, 25.2%, 25.1%, 23.1%, 23.2%, 20.5%, 26.7%, and 25.6%, respectively, among widowers).

375. *See Estate Tax Returns Filed for Male Decedents*, *infra* note 383; *Estate Tax Returns Filed for Female Decedents*, *infra* note 383; Johnson, *supra* note 131, at 79; Johnson & Rosenfeld, *supra* note 153, at 30*; see also* McCubbin & Rosenfeld, *supra* note 153, at 56 (among returns filed 1925–1945 (combined), decedents dying in 1989, 1992, 1995, 1998, 2001, 2004, 2007, 2009, 2011, and 2013, the share of estates left to charity among donor decedents was 9.2%, 9.0%, 10.7%, 11.2%, 8.1%, 15.1%, 65.0%, 5.8%, 12.7%, 7.2%, and 8.0%, respectively, for married females 10.9%, 11.3%, 13.5%, 19.3%, 12.0%, 37.0%, 15.5%, 18.8%, 28.1%, 14.3%, and 19.1%, respectively, for married males, 26.1%, 36.9%, 42.9%, 36.5%, 35.6%, 39.4%, 43.1%, 49.3%, 54.6%, 47.3%, and 47.5%, respectively, for never–married females, 27.7%, 49.0%, 40.6%, 52.1%, 54.1%, 39.0%, 43.4%, 51.1%, 49.0%, 54.9%, and 56.5%, respectively, for never–married males, 16.9%, 24.1%, 31.0%, 29.7%, 30.5%, 29.3%, 29.0%, 53.6%, 31.2%, 32.5%, and 41.0%, respectively, for widows, and 15.8%, 26%, 34.0%, 28.5%, 34.9%, 31.2%, 31.7%, 33.5%, 40.5%, 42.4%, and 36.3%, respectively, for widowers).

376. *See Estate Tax Returns Filed for Male Decedents*, *infra* note 383; *see also Estate Tax Returns Filed for Female Decedents*, *infra* note 383*; see* McCubbin & Rosenfeld, *supra* note 153, at 56 (among returns filed 1925–1945 (combined), decedents dying in 1992, 1995, 1998, 2001, 2004, 2007, 2009, 2011, and 2013 the average gross estate size among donor decedents was $418,011, $2,687,672, $1,896,006, $3,186,327, $3,532,411, $16,439,033, $8,660,839, $12,734,937, $36,490,365, $19,088,654, respectively, for married females, $540,670, $4,658,110, $5,241,160, $4,541,857, $7,948,025, $9,017,966, $11,820,072, $31,992,040, $40,472,025, $29,971,648, respectively, for married males, $252,176,

propensity to give, those who did give made larger charitable transfers, on average, both in 1925–1945 (53% larger for married decedents, 74% larger for never married decedents, and 18% larger for widow/widower decedents), and in 1989–2013 (about 56% larger for married decedents, 41% larger for never married decedents, and 13% larger for widow/er decedents).[377]

As a result of these offsetting factors, for combined estate returns from 1916–1945, male decedents contributed 63% of all charitable bequest dollars,[378] and among decedents in 1989, 1992, 1995, 1998, 2001, 2004, 2007, 2011, and 2013, males contributed 48%, 53%, 50%, 48%, 55%, 43%, 35%, 67%, 60%, and 51%, respectively.[379] Finally, data from 1986 decedents suggests that the share of estates going to charity varied much more strongly with wealth for men than for women because as wealth increased from the lowest net worth category ($500,000 to $1,000,000) to the highest (more than $5,000,000), the share of estates going to charity among donors nearly doubled, from 16.3% to 30.4% for men, but changed only slightly, from 22.5% to 25.1%, for women.[380]

Misunderstanding this propensity difference can lead to other errors, as in a recent publication that estimated the wealth gap between married and unmarried decedents by looking only at charitable estates, claiming erroneously that "there is no reason to assume that the population that made charitable contributions is different in terms of wealth holding and family status from those populations who did not make such contributions."[381] The author then pointed to the average wealth of $9.8 million for single female (charitable) decedents compared with $19 million for married female

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$1,384,509, $1,565,456, $1,599,801, $1,814,134, $3,429,100, $5,315,987, $8,911,981, $9,425,067, $9,815,401, respectively, for never–married females, $412,303, $1,830,582, $2,014,085, $3,114,641, $2,222,371, $4,467,236, $6,405,728, $9,110,931, $14,262,541, $11,441,220, respectively for never–married males, $327,592, $2,074,893, $2,157,243, $2,871,400, $2,858,324, $5,606,732, $11,390,910, $10,752,634, $14,585,133, and $20,927,497, respectively, for widows, and $413,158, $2,747,058, $2,519,684, $2,837,788, $3,127,415, $8,226,234, $8,371,560, $14,713,742, $20,003,380, and $20,985,073, respectively, for widowers).

377. *See Estate Tax Returns Filed for Male Decedents*, *infra* note 383; *see also Estate Tax Returns Filed for Female Decedents*, *infra* note 383; *see* Johnson, *supra* note 131, at 79 (1993); Johnson & Rosenfeld, *supra* note 153, at 30 (1991); and McCubbin & Rosenfeld, *supra* note 153, at 56 (among returns filed 1925–1945 (combined), decedents dying in 1989, 1992, 1995, 1998, 2001, 2004, 2007, 2009, 2011, and 2013, donating estates contributed an average of $38,457, $235,522, $288,192, 212,544, $262,654, $534,643, $10,689,018, $975,020, $1,618,476, $2,638,642, and $1,521,008, respectively, among married females, $58,933, $450,585, $628,702, $1,012,405, $556,174, $2,937,555, $1,393,378, $2,217,590, $8,973,796, $5,770,197, and $5,727,350, respectively, among married males, $65,818, $552,189, $593,300, $570,818, $574,178, $715,021, $1,479,197, $2,621,240, $4,869,090, $4,455,978, and $4,657,971, respectively, among never married females, $114,208, $1,290,614, $742,680, $1,049,145, $1,712,907, $867,219, $1,939,006, $3,275,908, $4,464,677, $7,832,294, and $6,464,378, respectively, among never married males, $55,363, $513,620, $643,081, $640,764, $878,286, $837,727, $1,628,495, $6,110,633, $3,356,413, $4,740,957, and $8,587,605, respectively, among widows, and $65,279, $604,106, $932,799, $718,446, $986,795, $974,264, $2,610,607, $2,802,541, $5,965,294, $8,471,462, and $7,623,091 respectively, among widowers).

378. McCubbin & Rosenfeld, *supra* note 153, at 56.

379. *See Estate Tax Returns Filed for Male Decedents*, *infra* note 383; *see also Estate Tax Returns Filed for Female Decedents*, *infra* note 383; *see* Johnson, *supra* note 131, at 79 (1993); Johnson & Rosenfeld, *supra* note 153, at 30 (1991*); see also* McCubbin & Rosenfeld, *supra* note 153, at 56.

380. Johnson & Rosenfeld, *supra* note 153, at 30.

381. Erez Aloni, *The Marital Wealth Gap*, 93 WASH L. REV. 1, 19 (2018).

(charitable) decedents in this group as evidence of an overall wealth gap between all married and unmarried females.[382] However, including all estate tax returns for this year showed single female decedents with slightly more wealth, $11.2 million, than married female decedents, $11.1 million.[383]

Summarizing the gender differences discussed above, as compared with females of the same marital status, male decedents were less likely to make charitable bequest gifts.[384] However, when male descendants did give, their gifts were larger, both absolutely and as a share of their estates, were concentrated in a smaller number of causes and organizations, and were more likely to fund a private foundation.[385]

2. *Age*

Older decedents were more likely to make charitable transfers.[386] For the age categories under 21, 21 to 35, 35 to 45, 45 to 55, 55 to 65, 65 to 75, 75 to 85, and over 85, the share of decedents leaving any gifts to charity (among estate tax returns filed in 2003) was 0%, 3.7%, 5.0%, 6.2%, 8.3%, 11.4%, 15.5%, and 29.7%, respectively.[387] Similarly, among 1995 decedents in their 50s, 60s, 70s, 80s, and 90 and above, the share leaving any gift to charity was 6%, 8%, 12%, 21%, and 38%, respectively.[388] For tax returns filed from 1916–1945, in the age categories under 60, 60s, 70s, and 80 and above, the share of decedents leaving gifts to charity was 9.8%, 15.0%, 19.8%, and 24.2%, respectively.[389]

Older decedents are constituting an increasingly large share of all charitable bequest donors, given that among returns filed in 1963, 1970, 1973, 1977, 1983, 1987, 1990, and for 2003 decedents, those aged 75 and older made up 65%, 70%, 72%, 71%, 77%, 81%, 83%, and 83% of all charitable bequest donors, respectively, while those under 65 constituted 13%, 9%, 8%, 10%, 7%, 5%, and 6% of all donors, respectively.[390]

Older adults are also particularly important for charitable dollars transferred because wealth among those filing estate tax returns increases with every year of age, even up to age 98.[391] This is due in part to differential mortality; those with greater wealth die at older ages than those with less

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382. *Id.*
383. *See* I.R.S., *Estate Tax Returns Filed for Male 2013 Decedents* (2017), https://www.irs.gov/pub/irs-soi/13es05yd.xls [perma.cc/U2SD-WVVE] (last visited Jan. 31, 2020); *see also* I.R.S., *Estate Tax Returns Filed for Female 2013 Decedents* (2017), https://www.irs.gov/pub/irs-soi/13es06yd.xls [perma.cc/2P4T-XR2R] (last visited Jan.31, 2020).
384. I.R.S., *Estate Tax Returns Filed for Male 2013 Decedents*, *supra* note 383; I.R.S., *Estate Tax Returns Filed for Female 2013 Decedents*, *supra* note 383.
385. *See supra* Section III.E.1.
386. Steuerle et al., *supra* note 152, at 11.
387. *See* Joulfaian, *Basic Facts*, *supra* note 152, at 27.
388. Eller, *supra* note 1, at 181.
389. McCubbin & Rosenfeld, *supra* note 153, at 57.
390. *See* Joulfaian, *Basic Facts*, *supra* note 152, at 27; Rosenfeld, *supra* note 152, at 27.
391. Kopczuk, *supra* note 153, at 1831–32.

wealth.[392] Accordingly, decedents aged 80 and older contributed 68%, 70%, and 77% of all charitable dollars among decedents in 1986, 1992, and 1995, respectively.[393] Decedents under age 50 contributed only 0.9% and 0.4% of all charitable dollars in 1992 in 1995, respectively.[394] For returns filed in 2003, most charitable dollars (55%) came from decedents over age 85, while those under 65 contributed only 4.3%.[395] Several regression analyses have shown that older decedents leave more to charity, even controlling for differences in wealth and marital status.[396]

F. Connecting Lifetime and Bequest Giving

1. Lifetime Donations by Bequest Donors

Some analyses have connected income tax returns filed by decedents in the year or years prior to death with their estate tax returns.[397] These have shown that most current donors leave nothing to charity when they die.[398] Among 2007 decedents filing estate tax returns, only 13% of those reporting some donations, but less than 2% of income, on income tax returns in the five years prior to death left any charitable bequest.[399] Even among those donating 10–20% of their income to charity, only 30% left anything to charity at death.[400] Only among the most philanthropic, those donating more than 20% of their income to charity, did the majority, 51%, leave anything to charity at death.[401]

Conversely, the absence of lifetime charitable gifts in the last one to five years prior to death was a relatively weak indicator of the propensity to leave a charitable bequest gift.[402] Among 2007 decedents, 14% who reported no donations on income tax returns in the five years prior to death (average estate size of $3.8 million) left a charitable bequest, while only 13% of those reporting some donations, but less than 2% of income, on these income tax

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392. Lena K. Makaroun, et al., *Wealth-Associated Disparities in Death and Disability in the United States and England*, 177 JAMA INTERNAL MED. 1745, 1745 (2017).

393. Eller, *supra* note 132, at 20; Eller, *supra* note 1, at 182; Johnson & Rosenfeld, *supra* note 153, at 31.

394. Eller, *supra* note 132, at 20; Eller, *supra* note 1, at 182; Johnson & Rosenfeld, *supra* note 153, at 31.

395. *See* Joulfaian, *Basic Facts*, *supra* note 152, at 27.

396. *See, e.g.*, Boskin, *supra* note 149, at 41; CLOTFELTER, *supra* note 2, at 243; *see* Joulfaian, *The Pattern of Charitable Bequests*, *supra* note 152, at 34; Joulfaian, *supra* note 1, at 7.

397. *See, e.g.*, Auten, et al., *supra* note 151, at 414; *See* Joulfaian, *Estate and Gift Tax*, *supra* note 152, at 61; Steuerle, *supra* note 151, at 209; Steuerle et al., *supra* note 152, at 11.

398. Steuerle et al., *supra* note 152, at 11.

399. *Id.*

400. *Id.*

401. *Id.* (Those who give a larger share of their income are, on average, much wealthier which may be responsible for this trend. For another analysis showing that those giving a large share of income are often giving a relatively small share of their much larger wealth); *see* Russell N. James III & Deanna L. Sharpe, *The Nature and Causes of the U-Shaped Charitable Giving Profile*, 36 Nonprofit and Voluntary Sector Q., 218 (2007).

402. Steuerle et al., *supra* note 152, at 11.

returns (average estate size of $5.8 million) did so.[403] Among 2007 decedents, 29% of those leaving no charitable bequest reported no current giving on their 2006 income tax returns, while 25% of substantial estate donors (leaving 20% or more of their estates to charity) did the same.[404] Among estates filing returns in 1977, 44.6% of decedents leaving no charitable bequest reported no current giving on their income tax returns in the year prior to death, while 36.0% of those leaving 20% or more of their estates to charity did so.[405]

The wealthy concentrate their giving as estate gifts, rather than lifetime gifts.[406] Charitable bequest contributions for decedents filing estate tax returns in 1977 were 22.4 times their lifetime giving in the year prior to death.[407] Decedents in 2007 with estates under $2 million, $2 million to $5 million, $5 million to $10 million, $10 million to $50 million, $50 million to $100 million, and more than $100 million, produced estate gifts averaging 3.5 times, 20 times, 25 times, 28 times, 50 times, and 103 times, respectively, their average annual giving in the last five years prior to death.[408] Similarly, in estate tax returns for 1982, estates less than $1 million, $1 million to $10 million, $10 million to $20 million, and more than $20 million, produced estate gifts averaging about 9 times, 15 times, 26 times, and 38 times, respectively, average annual giving in the year prior to death.[409] An analysis using ten years of income tax returns for 882 decedents dying in 1996–1998 extended this finding, showing that the previous ten years of combined giving represented about 30% of charitable bequests among those with assets over $10 million.[410] This behavior may reflect a preference among the wealthy for holding wealth, given that current giving comes at the cost of personal wealth holding, but bequest giving does not, as this is no longer possible after death.[411]

Additionally, among 2007 decedents, this estate giving multiple was highest (62 times average annual current giving) for women 70 years or older, lower (31 times annual giving) for men 70 years or older, lower still (22 times annual giving) for men under 70, and lowest (18 times annual giving) for women under 70.[412] Given that people can donate either during life or at death, it is also no surprise that statistical analysis finds that tax policies making either method relatively cheaper causes some shifting of charitable

403. *Id.*
404. *Id.* at 10.
405. Steuerle, *supra* note 151, at 209.
406. Auten et al., *supra* note 151, at 414; *See* Joulfaian, *Estate and Gift Tax*, *supra* note 152, at 61; Joulfaian, *supra* note 151, at 360; Steuerle, *supra* note 151, at 207; Steuerle et al., *supra* note 152, at 13.
407. Steuerle, *supra* note 151, at 207.
408. Steuerle et al., *supra* note 152, at 13.
409. Auten et al., *supra* note 151, at 414; *See* Joulfaian, *Estate and Gift Tax*, *supra* note 152, at 61.
410. Joulfaian, *supra* note 151, at 360.
411. *See* Joulfaian, *supra* note 151, at 354; Kopczuk, *supra* note 153, at 1801–02; Steuerle, *supra* note 151, at 216.
412. Steuerle et al., *supra* note 152, at 12.

transfers toward the cheaper method.[413] Although greater income in children increases current charitable giving, it does not have a significant effect on charitable bequest giving.[414]

2. Organization Receipts and Bequest Contributions

In 2004 and 2007 nonprofit organizations including private foundations reported receiving $266.2 billion and $366.4 billion, respectively, in total contributions, gifts, and grants on IRS Forms 990 and 990-PF (these typically exclude churches and similar organizations).[415] Estate tax returns for decedents dying in 2004 and 2007 included $16.7 billion and $28.5 billion, respectively, of charitable gifts (excluding religious organizations), representing about 6.3% and 7.5% of the total contributions, gifts, and grants reported by nonprofit organizations during those years.[416] Although, due to variations in cause type classifications, comparisons of these contribution reports are not possible within every cause type, however, some comparisons within cause types are possible.[417] For example, charitable bequest contributions reported on estate tax returns for decedents dying in 2004 and 2007 represented the following share of total combined contributions that nonprofit organizations reported on IRS Form 990 for 2004 and 2007, respectively: 0.1% and 0.2% for international–foreign affairs,; for human services (such as American Red Cross, YMCA, Salvation Army) it was 1.5% and 1.3%; for arts, cultural, and humanities: 3.5% and 2.9%; for education: 4.0% and 3.1%; and for environment and animals: 6.4% and 4.2%.[418] For returns filed in 2003, this last combined category can be separated into 4.4% for environmental organizations, and 8.9% for animal-related organizations.[419]

Private foundations, which are generally classified as public societal benefit organizations, along with public charities, also classified as public societal benefit organizations, reported combined contributions, gifts, and grants of $55.8 billion and $94.1 billion in 2004 and 2007, respectively.[420]

413. Auten & Joulfaian, *supra* note 153, at 55; Bakija, et al., *supra* note 152, at 3; Joulfaian, *supra* note 151, at 365.

414. Auten & Joulfaian, *supra* note 153, at 66.

415. *See* Paul Arnsberger, *Charities, Social Welfare, and Other Tax-Exempt Organizations, 2004*, 27 STAT. INCOME BULL. 210, 214 (2007); Paul Arnsberger & Mike Graham, *Charities, Social Clubs, and Other Tax-Exempt Organizations, 2007*, 30 STAT. INCOME BULL. 169, 174 (2010); Melissa Ludlum, *Domestic Private Foundations and Charitable Trusts: Charitable Distributions and Investment Assets, Tax Year 2004*, 27 STAT. INCOME BULL. 174, 175 (2007); Cynthia Belmonte, *Domestic Private Foundations and Excise Taxes, Tax Year 2008*, 31 STAT. INCOME BULL. 92, 92 (2011).

416. *See* Joulfaian, *Basic Facts*, *supra* note 152, at 31.

417. *See* Arnsberger, *supra* note 415, at 214; Arnsberger & Graham, *supra* note 415, at 174; Raub, *supra* note 136, at 182–83; Raub & Newcomb, *supra* note 137, at 207–08.

418. Arnsberger, *supra* note 415, at 214; Arnsberger & Graham, *supra* note 415, at 174; Raub, *supra* note 136, at 182–83; Raub & Newcomb, *supra* note 137, at 207–08.

419. Arnsberger, *supra* note 415, at 214; Arnsberger & Graham, *supra* note 415, at 174; Raub, *supra* note 136, at 182–83; Raub & Newcomb, *supra* note 137, at 207–08.

420. Arnsberger, *supra* note 415; Arnsberger & Graham, *supra* note 415; Belmonte, *supra* note 415; Ludlum, *supra* note 415.

Estate tax returns for decedents dying in 2004 and 2007 included $10.5 billion and $20.8 billion of gifts to public societal benefit organizations, representing 18.7% and 22.1% of total contributions, gifts, and grants received in those years by such organizations.[421] Thus, donors appear to favor bequest giving, relative to current giving, more for private foundations and "environment and animals" nonprofits, while disfavoring bequest giving, relative to current giving, for "international, foreign affairs" nonprofits.[422]

G. Other Relationships

One study found that "the more liquid the estate, the larger the charitable bequest."[423] Additionally, charitable estates held a smaller share of their assets as businesses or insurance proceeds than non-charitable estates.[424] Estates taking the special use valuation election for family businesses and farms were also less likely to donate, and among charitable estates, gave less.[425]

Decedents with more lengthy terminal illnesses were more likely to use of end-of-life estate planning, inter vivos transfers, and complex estate tax avoidance techniques.[426] Instantaneous death was relatively rare among older decedents, occurring in 34%, 29%, 25%, 19%, 17%, 12%, and 10% of cases for decedents in their 30s, 40s, 50s, 60s, 70s, 80s, and 90s, respectively.[427] Finally, comparing across regions, decedents from the Midwest and Northeast gave significantly larger amounts than decedents from the West or South, controlling for wealth, age, and marital status.[428]

IV. IMPLICATIONS FOR POLICY AND PRACTICE

A. Charitable Estate Tax Policy as Private Foundations Transfer Policy

Much empirical research and analysis has focused on the question of tax price elasticity of charitable bequests.[429] Although previous research clearly shows that charitable bequest giving increases in response to estate tax deductibility, the precise amount is not certain and in a few analyses may

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421. Arnsberger, *supra* note 415; Arnsberger & Graham, *supra* note 415; Belmonte, *supra* note 415; Ludlum, *supra* note 415; I.R.S., *supra* note 141.

422. *See supra* Section III.E.2.

423. Boskin, *supra* note 149, at 47; *see also* James & Baker, *supra* note 6 (showing liquid assets were more important than housing assets in predicting charitable bequests using Australian probate records).

424. Joulfaian, *supra* note 1, at 754–56; *see* Joulfaian, *The Pattern of Charitable Bequests*, *supra* note 152, at 34; *but cf.* Joulfaian, *supra* note 151, at 366 (where the relationship was statistically insignificant in a smaller sample).

425. Martha Eller Gangi & Brian G. Raub, *Utilization of Special Estate Tax Provisions for Family-Owned Farms and Closely Held Businesses*, 26 STAT. INCOME BULL. 128 (2006).

426. Kopczuk, *supra* note 153, at 1803, 1807.

427. *Id.* at 1809.

428. Joulfaian, *supra* note 1, at 758; *See* Joulfaian, *Evidence from Two Tax Regimes*, *supra* note 152, at 15; McClelland, *supra* note 152, at 17.

429. *See supra* Section III.C.

even be "budget" inefficient where the decrease in tax revenue is not fully offset by an equivalent increase in charitable organization revenue.[430] However, what is missing from these analyses is an understanding of which charitable entities actually benefit from the tax policy.[431]

The types of charities benefitting from charitable bequest deductibility are not the same as the types of charities benefitting from other tax policies such as giving tax exempt organizational status or allowing charitable income tax deductions for contributions.[432] Even prior to the most recent increase in exemption levels, private foundations were already receiving about two-thirds of every charitable bequest dollar reported on estate tax returns.[433] Given that this share has always increased with wealth, the new higher estate tax exemption levels make the charitable estate tax deduction almost entirely a private foundation estate tax deduction.[434]

This reality is particularly relevant given that a key policy objective of the estate tax was to curb large, permanent accumulations of wealth.[435] If the primary result of the charitable estate tax deduction is to subsidize large transfers from the largest estates into an entity that: is permanently free from meaningful, current, or inter-generational taxation,[436] is not divided at each subsequent generation, is unlikely to be dissipated by spendthrift heirs, is commonly controlled by surviving family members[437] (who can themselves be employed by the entity),[438] then the policy ultimately encourages the creation of large, permanent accumulations of wealth.[439] The dynastic power transferred to family members controlling these large foundations' investments and grants is substantial.[440] Subsidizing large, permanent accumulations of wealth is not merely a theoretical result; such private grantmaking foundations hold over three-quarters of a trillion dollars in

430. *See supra* Section III.C.

431. *See supra* Section III.D.

432. *See supra* Section III.F.2.

433. *See supra* Section III.D.3.

434. *See supra* Section III.D.3.

435. *See, e.g.*, S. REP. NO. 144, 97th Cong., 1st Sess. 124, reprinted in 1981 U.S. CODE CONG. & AD. NEWS 105, 226 (noting that the proper function of the estate tax is to "break up large concentrations of wealth"); Irving Fisher, *Some Impending National Problems*, 26 J. POL. ECON. 711 (1916) (showing that proponents of the original imposition of the estate tax were concerned about large concentrations of wealth); *see also* Paul L. Caron, *The One-Hundredth Anniversary of the Federal Estate Tax: It's Time to Renew Our Vows*, 57 B.C. L. REV. 823, 824, 839 (2016); Miranda Perry Fleischer, *Charitable Contributions in an Ideal Estate Tax*, 60 TAX L. REV. 263, 277 (2007); James R. Repetti, *The Case for the Estate and Gift Tax*, 86 TAX NOTES 1493, 1497 (2000).

436. *See* I.R.C § 4940(a) (2019); Treas. Reg. § 53.4940-1(a) (as amended in 1973) (defining the excise tax of 1% or 2% of net investment income as not a meaningful burden on wealth preservation).

437. Tanya D. Marsh, *A Dubious Distinction: Rethinking Tax Treatment of Private Foundations and Public Charities*, 22 VA. TAX REV. 137, 166 (2002) ("Normally, the original donor forms an independent foundation during his or her lifetime, and either the original donor or the donor's immediate family controls the foundation for a generation or two.").

438. *See* I.R.C. § 4941(d)(2)(E) (2006); Treas. Reg. § 53.4941(d)-3(c) (as amended in 1984).

439. *See* Fleischer, *supra* note 435, at 284–87; Ray D. Madoff, *What Leona Helmsley Can Teach Us about the Charitable Deduction*, 85 CHI.-KENT L. REV. 957, 960 (2010).

440. *See* Fesicher, *supra* note 435, at 484–87; Madoff, *supra* note 439.

assets, the bulk of which is controlled by the largest foundations (those with over $100 million in assets).[441]

Although such entities are subject to an excise tax if they do not distribute at least 5% of net noncharitable (or net investment) assets,[442] this 5% distribution is reduced by taxes paid by the foundation as well as by compensation of employees, travel expenditures (including, potentially, compensation and reimbursements to family members or other insiders),[443] rent, and other administrative expenses related to the organization's exempt purposes.[444] In some cases, the money spent on such administrative expenses exceed the grants actually transferred to public charities.[445] Additionally, this 5% requirement does not apply to assets such as land, buildings, equipment, collections, and facilities owned and used by the foundation, or planned to be used by the foundation to conduct its charitable functions.[446] Further, the 5% obligation is reduced by distributions in prior years that exceeded the minimum required amount.[447] Thus, it is common for most of the largest foundations to have actual payout rates (charitable giving as compared with the organization's net investment assets) less than 5%.[448] These payout rates are typically less than half the rates of return experienced by large foundations; and, as a matter of practical reality, these obligations have not prevented the dramatic growth of the net assets among these largest foundations, either individually or as a group.[449]

A misunderstanding of the present-day nature of the philanthropy actually subsidized by the charitable estate deduction can lead to further confusion.[450] For example, Paul Caron and James Repetti note that, "[T]he evidence suggests that the current estate tax is in fact contributing to the breakup of large accumulations of wealth by encouraging charitable contributions and imposing a significant tax burden."[451] This makes intuitive

441. I.R.S. *Table 1. Domestic Private Foundations: Number and Selected Financial Data, by Type of Foundation and Size of Fair Market Value of Total Assets, Tax Year 2015*, AJ41, AJ49 (2018), https://www.irs.gov/pub/irs-soi/15pf01ta.xls [perma.cc/PA79-GKRL].

442. *See* Bruce R. Hopkins & Jody Blazek, *The Tax Law of Private Foundations* 237 (2018); I.R.C. § 4942(d).

443. *See* I.R.C. § 4941(d)(2)(E).

444. *See* Hopkins & Blazek, *supra* note 442; Madoff, *supra* note 440, at 968; Melissa Whitten, *Large Nonoperating Private Foundations Panel Study, 1985–1997,* 21 STAT. INCOME BULL. 142, 144, (2001).

445. Christine Ahn, et al., *Foundation Trustee Fees: Use and Abuse*, 24–31 (Sept. 2003).

446. *See* Treas. Reg. § 53.4942(a)-2(c)(3)(ii) (as amended in 1973); Hopkins & Blazek, *supra* note 442, at 240–42.

447. *See* Hopkins & Blazek, *supra* note 442, at 256, 283.

448. *See* Whitten, *supra* note 444, at 148 (note that a median payout rate below 5.0 indicates that the majority have payout rates below 5.0).

449. *See* I.R.S., *Domestic Private Foundations: Type of Foundation and Size of End-of-Year Fair Market Value of Total Assets, 1985–2015*, https://www.irs.gov/statistics/soi-tax-stats-domestic-private-foundation-and-charitable-trust-statistics [perma.cc/PA79-GKRL]; Whitten, *supra* note 444, at 148, 150 (showing the individual asset growth rates of the 100 largest foundations over 12 years).

450. *See supra* Section III.D.

451. Paul L. Caron & James R. Repetti, *Occupy the Tax Code: Using the Estate Tax to Reduce Inequality and Spur Economic Growth*, 40 PEPP. L. REV. 1255, 1278 (2013); *see also*, JoAnn R. Locke, *The Estate Tax and Charitable Donations*, 20 WAYNE L. REV. 1227, 1234 (1974) ("If our primary goal is

sense using the common understanding of charitable contributions as gifts going to support existing public charities, but does not match the current reality of where deductible charitable bequests are actually being transferred.[452] To alter the quote, the actual charitable bequest evidence suggests that the current estate tax charitable policy is in fact supporting large accumulations of wealth by encouraging charitable contributions to private foundations as a means of permanently avoiding a significant tax burden.[453]

B. The Hidden Impact of Mortmain Statutes

A relatively large amount of empirical research has focused on the potential impact of estate taxation policy on charitable bequests.[454] Often completely overlooked, however, is the potential impact of sweeping changes in state-level restrictions on charitable bequests known as "mortmain statutes."[455] Such legislation typically restricted the share of estates transferred to charity (usually when a spouse or child survived) and the timing of wills transferring gifts to charity (usually prohibiting charitable gifts contained in wills written one month, three months, or six months within death).[456] In 1970, nearly 40% of the U.S. population was subject to these restrictions with repeal occurring in 1971 (California), 1976 (Pennsylvania), 1980 (Iowa, District of Columbia), 1981 (Montana, New York), 1985 (Ohio), 1991 (Florida), 1992 (Mississippi), 1994 (Idaho), and the last remaining state in 1998 (Georgia).[457] This frustrates the ability to measure the impact of differing estate tax rates across these years,[458] top tax rates fell and exemptions rose (thus decreasing tax incentives from charitable bequest deductions)[459] at the same time that these state-level restrictions on charitable bequests were being removed.[460]

Restrictions on the share of estates left to charity may have a dramatic impact, given that for both 2001 and 2014 estate tax returns, decedents who

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to prevent excessive accumulation of wealth, then charitable giving does it as effectively as, or even better than, the [estate] tax.").

452. *See supra* Sections III.D.1, III.F.

453. *See supra* Section IV.A.

454. *See supra* Section III.C.

455. *See* Elizabeth R. Carter, *Tipping the Scales in Favor of Charitable Bequests: A Critique*, 34 PACE L. REV. 983, 1012–15 (2014); Kristine S. Knaplund, *Charity for the Death Tax: The Impact of Legislation on Charitable Bequests*, 45 GONZ. L. REV. 713, 737–40 (2009).

456. *See* RESTATEMENT THIRD OF PROP. § 9.7 at cmt. b (2003); *see also*, ABA Section Committee on Succession*, Restrictions on Charitable Testamentary Gifts*, 5 REAL PROP. PROB. & TR. J. 290, 292 (1970) (giving examples of minimum will age requirements).

457. *See* RESTATEMENT THIRD OF PROP. § 9.7 at cmt. b (2003); *see* U.S. Bureau of the Census, *Population of States and Counties of the United States: 1790–1990*, 2 (Mar. 1996), https://www.census.gov/population/www/censusdata/PopulationofStatesandCountiesoftheUnitedStates1790-1990.pdf [perma.cc/W7TV-2CFZ] (showing 1970 population of these states as 79,225,224 of 203,211,926 or 39%).

458. *See, e.g.*, Bakija, et al., *supra* note 152, at 367; *see* Kopczuk & Slemrod, *Tax Impacts*, *supra* note 151, at 230, 317; *see* Kopczuk & Slemrod, *Wealth Accumulation and Avoidance Behavior*, *supra* note 151, at 317.

459. *See* Jacobson, et al., *supra* note 152, at 122.

460. *See* RESTATEMENT THIRD OF PROP. § 9.7 at cmt. C reporter's note.

left at least 90% of their wealth to charity gave the majority of total charitable bequest dollars.[461] This is particularly problematic for comparing charitable bequests and estate taxes across years because larger estates were both more likely to leave extreme charitable bequests constituting half or more of the estate, and also subject to higher estate taxes.[462]

Beyond this impact when comparing changes across time in the U.S., differences in such restrictions may also be relevant for contemporary international comparisons.[463] For example, in Scotland, which restricts charitable bequest shares, 11.2% of testators included absolute or conditional bequests to charity among wills probated 2007–2008, while in England and Wales, which have fewer restrictions, 16.8% of testators did so.[464] Similarly, the lower rate of charitable bequests among high wealth Australians compared to the U.S. or the U.K. has been attributed to the lack of Australian estate taxation.[465] However, the lower rate may also relate to substantial restrictions on the testamentary freedom to donate to charity under Australian "family provision" protections, even for testators leaving no spouse or descendants.[466]

Estimating the effects of prohibitions against charitable wills signed within 1–6 months of death is complicated by changes in estate planning practices over time.[467] Historically, a large share of wills were signed just prior to death, as shown in samples from 1850 Essex County, NJ (25% within 1 month, 57% within 1 year), 1875 Essex County, NJ (28% within 1 month, 64% within 1 year), 1900 Essex County, NJ (19% within 1 month, 51% within 1 year), and 1893 Los Angeles County (30% within 1 month, 58% within 1 year).[468] Combined with the often more restrictive 19th century mortmain statutes, this suggests a potentially dramatic historical impact of such limitations.[469]

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461. Joulfaian, *supra* note 142, at 82.

462. *See* Schaefer, *supra* note 150, at 98–102 (For example, Shammas, et al., *supra* note 13, at 181 points to the introduction of estate taxes as an explanation for the increase in high wealth charitable bequests without a corresponding increase in low wealth charitable bequests when comparing 1890s probate records with 1979/80 probate records in Los Angeles and Bucks County, Pennsylvania. But, this also compares periods with and without mortmain restrictions, which, if such restrictions differentially affected high wealth estates, would also be part of the explanation for this difference. Finally, the availability of private family foundations for wealthy decedents is much greater in the modern era.).

463. *See* Anthony B. Atkinson, *Charitable Giving and Economics*, CHARITABLE GIVING AND TAX POLICY: A HISTORICAL AND COMPARATIVE PERSPECTIVE 21, 28 (Gabrielle Fack & Camille Landais eds., May 2012).

464. *Id.*

465. *See* Christopher Baker, *Encouraging Charitable Bequests by Australians* 59 (Feb. 2014), https://www.swinburne.edu.au/media/swinburneeduau/research/research-centres/csis/documents/Encouraging-Charitable-Gifts-by-Australians-Baker.pdf [perma.cc/8EYK-9WF7] ("[A]n estate tax would be the most efficacious means of boosting charitable bequests in Australia.").

466. *See* Myles McGregor-Lowndes & Frances M. Hannah. EVERY PLAYER WINS A PRIZE? FAMILY PROVISION APPLICATIONS AND BEQUESTS TO CHARITY, 61–70, 96–100, https://eprints.qut.edu.au/28202/ [perma.cc/CQ8K-4TZX] (Queensland University of Technology, 2008).

467. Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 251–60 (2018).

468. *Id.* at 251–52.

469. *See, e.g.*, Griffith v. Delaware, 2 DEL. CH. 421 (1848) (prohibiting charitable bequests signed within 12 months of death); *see also supra* notes 54–55 and accompanying text.

However, such near-death will making has become less common in modern samples such as from 1953 and 1957 Cook County, IL (27% within 6 months, 36% within 1 year), 1964–1965 Cuyahoga County, OH (9% within 6 months, 15% within 1 year), 2007 Alameda County, CA (7% within 1 month, 33.3% within 2.75 years, median 7 years) and 2014 Hamilton County, OH (3.4% within 1 month, 26% within 2.75 years, median 7.5 years).[470]

Nevertheless, some evidence suggests that timing may be closer to death for charitable wills.[471] This has not been analyzed in U.S. probate data except in the 1893–1894 St. Louis sample where 24% of non-charitable wills (35 of 145) were executed within a month of death, while 37% of charitable wills (10 of 27) were executed within a month of death.[472] Additionally, in a national sample of probate records in Australia from 2012, the average time between will execution and death was 10 years for non-charitable wills and 5.63 years for charitable wills.[473] In this national Australian sample, over a quarter of charitable wills were signed within 1 year of death, and most were signed within four years of death.[474] Similarly, in 2012, data from 12,238 decedents in the U.S. Health and Retirement study, 40% of decedents whose estates transferred gifts to charity indicated within 2 years of death that they, at that time, had no charitable component in their estate plan.[475] Thus, historical and contemporary evidence suggests that the lifting of mortmain restrictions on both the charitable share and the timing of charitable wills may have had a significant impact on charitable bequest transfers.[476]

C. The Need for IRS Form 990 Reform

Much effort has been expended over the last century to monitor and analyze charitable bequest transfer data in order to provide a basis in empirical reality for policy discussions.[477] However, this ability is now largely disappearing as the new higher estate tax exemptions drastically limit the number of estate tax returns, and thus the ability to track charitable bequest behavior.[478] Although decedent data for those dying after the 2018 tax legislation is not yet available, the 2020 estate tax exemption equivalent of $23.16 million for a married couple can be compared with the 2017 tax return data where only 565 returns with charitable gifts were filed for estates over $20 million.[479] The impact of the new estate tax exemptions on

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470. Glover, *supra* note 467, at 254–60.
471. *See, e.g.*, Baker, *supra* note 465, at 5.
472. Knaplund, *supra* note 14, at 36.
473. Baker, *supra* note 465.
474. James & Baker, *supra* note 6, at 279.
475. *Id.* at 280.
476. *See supra* Section IV.B.
477. *See supra* Parts II–III.
478. *See* 26 CFR § 20.2010-2; Rev. Proc. 2019–44 § 3.41; IRS, *Table 1. Estate Tax Returns Filed in 2017*, BJ13-14 (Oct. 2018).
479. *See* 26 CFR § 20.2010-2; Rev. Proc. 2019–4 § 3.41; IRS, *Table 1. Estate Tax Returns Filed in 2017*, BJ13-14 (Oct. 2018).

charitable bequests will be essentially impossible to observe, because the charitable giving of estates that are no longer subject to estate taxes will go unrecorded.[480]

Although probate records remain as a potential source of specifically local information, contemporary probate records are now far less informative as a result of the "non-probate revolution" in estate transfers leading to a smaller share of the population having will documents, a smaller share of these will documents actually being used by heirs, and probate processes including a much smaller share of assets within the probate estate.[481]

This dire situation for the contemporary empirical analysis of charitable bequests has a simple and easy solution: The IRS Form 990 currently requires separate reporting of contributions from cash gifts, twenty-four individual types of non-cash gifts, gifts from fundraising events, gifts from federated campaigns, and gifts from related organizations, but charitable bequests are not reported separately.[482] Adding charitable contributions from estates to the IRS Form 990 report would provide an enormous boon to empirical analysis of charitable bequests.[483]

For the first time, America could have national, individual-organization-level data on charitable bequests that could inform both policy and practice.[484] This type of individual-organization-level data information is currently available for purchase in the United Kingdom and has resulted in substantial empirical analysis and practical applications for charities there.[485] Because IRS Form 990 records are publicly available, anyone would be able to access and analyze this data.[486] As a hint of the types of policy-relevant data that could become available, Miranda Perry Fleischer analyzed the bequest income reports volunteered to the Council for Aid to Education Study and found that thirty-five elite private educational institutions—constituting one-tenth of one percent of all private educational institutions—received 26% of all charitable bequests to education.[487]

Beyond the important implications for empirically-based policy discussions, this small change could provide an enormous benefit to nonprofit organizations themselves.[488] Currently, many nonprofit organizations spend funds to encourage charitable bequest gifts.[489] However,

480. *See* 26 CFR § 20.2010-2; Rev. Proc. 2019–44 § 3.41.
481. *See* James, *supra* note 5, at 15–17, 27–28.
482. *See* I.R.S., *Form 990*, https://www.irs.gov/pub/irs-pdf/f990.pdf [perma.cc/6DEL-R65Y].
483. *See infra* notes 484–491 and accompanying text.
484. *See, e.g.*, Jane K. Dokko, *Does the NEA Crowd out Private Charitable Contributions to the Arts?*, 62 NAT'L TAX J. 57 (2009); Nicolas J. Duquette, *Do Tax Incentives Affect Charitable Contributions? Evidence from Public Charities' Reported Revenues*, 137 J. OF PUB. ECON. 51 (2016).
485. *See, e.g.*, Atkinson et al., *supra* note 22; Cathy Pharoah & Mark Pincher, CHARITY MARKET MONITOR 2010: TRACKING THE FUNDING OF UK CHARITIES (2010).
486. 26 CFR § 301.6104(d)-1.
487. Fleischer, *supra* note 435, at 303.
488. *See, e.g.*, Erica Harris et al., *The Effect of Nonprofit Governance on Donations: Evidence from The Revised Form 990*, 90 THE ACCT. REV. 579 (2014); John M. Trussel & Linda M. Parsons, *Financial Reporting Factors Affecting Donations to Charitable Organizations*, 23 ADVANCES IN ACCT. 263 (2007).
489. *See, e.g.*, NATIONAL ASSOCIATION OF CHARITABLE GIFT PLANNERS, https://charitablegift

there is no way to ultimately compare successful or unsuccessful organizational approaches, because there is no way to know which organizations are receiving relatively more, or less, revenue from charitable bequest gifts.[490] Should this information be included on IRS Form 990, the best and worst performers would be known to everyone, likely prompting much improvement in fundraising efficiency for charitable bequests and planned giving.[491]

D. Key Demographic Realities of Charitable Bequest Donors

Understanding the demographic realities of charitable estate planning can be practically useful for attorneys providing planning services and for fundraisers seeking to encourage gifts for nonprofit organizations.[492] This allows for marketing and communications targeted to the most likely prospects.[493] It also alerts the practitioner to be particularly intentional about raising such issues when working with those most likely to be interested.[494] Additionally, future trends in relevant demographics can help forecast growth in charitable estate planning and transfers.[495]

1. The Economic Irrelevance of the Typical Bequest Donor

The usual approach in describing the demographics for any product or service user is to focus on the typical user.[496] However, analyzing, predicting, or encouraging charitable bequest dollars transferred has little to do with the typical charitable bequest donor.[497] Instead, charitable bequest dollars are determined by a handful of outliers.[498] Even national charitable bequest totals often depend largely upon the behavior of fewer than a dozen wealthy decedents in each year.[499]

Among charitable decedents, the typical behavior is to leave less than 10% of the estate to charity.[500] Over 60% of charitable estate tax returns reported these typical donations for decedents dying in 2001 when the exemption amount was only $675,000.[501] However, these typical charitable

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planners.org/ [perma.cc/32U4-6RUD] (last visited Feb. 1, 2020).

490. *See* I.R.S., *supra* note 482.

491. *See, e.g.*, Harris, *supra* note 488.

492. *See, e.g.*, Adrian Sargeant & Toni Hilton, *The Final Gift: Targeting the Potential Charity Legator*, 10 INT'L J. OF NONPROFIT AND VOLUNTARY SECTOR MARKETING 3, 3 (2005).

493. *Id.*

494. *Id.*

495. *See, e.g.*, James, *supra* note 5, at 6–15.

496. *See, e.g.*, Jason Cohen et al., *A League of Their Own: Demographics, Motivations and Patterns of Use of 1,955 Male Adult Non-Medical Anabolic Steroid Users in The United States*, 4 J. OF THE INT'L SOC. OF SPORTS NUTRITION 12, 12 (2007).

497. *See supra* Section III.B.1.

498. *See supra* Section III.B.1.

499. *See supra* Section III.B.1.

500. *See* Joulfaian, *supra* note 142, at 83.

501. *Id.*

decedents were also financially irrelevant, transferring only 3.8% of total charitable bequest dollars.[502] The most typical charitable estate gift goes to religious organizations, such as in 2001 when over 58% of charitable estates made such gifts.[503] However, these typical charitable beneficiaries were again largely irrelevant, constituting less than 9% of charitable bequest transfers.[504] In 2003, the typical charitable decedent, representing about half of charitable estate tax returns, transferred less than $100,000 to charity.[505] Once again, these typical charitable decedents were financially irrelevant, transferring only 1.1% of total charitable bequest dollars.[506] Thus, for attorneys focused on sophisticated charitable planning instruments (usually involving larger transfer amounts), charities focused on purely financial fundraising goals, or policy makers focused on affecting total charitable dollars transferred, the critical reality is that the bulk of dollars are transferred from a few extreme donors, rather than from typical donors.[507]

2. The Dominance of Childlessness, Age, and Wealth

Fortunately, the same key factors—childlessness, age, and wealth—that predict these extreme donors also predict other charitable outcomes such as overall charitable bequest propensity, amount, and share of estates.[508] Childlessness has been a dominant predictor of charitable bequests across 350 years of American probate data, with childless decedents often representing the majority of all charitable decedents.[509] Commenting on the dominance of childlessness and wealth as predictors of charitable bequest giving, one researcher summarized his findings with the sentence, "[S]how me a rich man with no kids, and I'll show you a philanthropist."[510] Data from lifetime surveys and post-mortem transfers in the nationally-representative Health and Retirement Study corroborate the dominant importance of childlessness.[511] Although estate tax data does not observe childlessness, decedents in the "never married" category are the most likely to make charitable transfers and are also the most likely to be childless.[512] The importance of childlessness suggests that future interest in charitable estate planning will be expanding dramatically because the upcoming generations of older adults are much more likely to be childless.[513] Additionally, experimental research has found that childless testators are much more

502. *Id.*
503. *See* I.R.S., *supra* note 383.
504. *Id.*
505. *See* Joulfaian, *Basic Facts*, *supra* note 152, 29.
506. *Id.*
507. *See supra* Section IV.D.2.
508. *See supra* Sections II.B, III.B.2-3, III.E.2.
509. *See supra* Section II.B.
510. Menchik, *supra* note 14, at 123.
511. James, *supra* note 6.; James, *supra* note 372.
512. *See supra* Section III.E.1; *see* James, *supra* note 372.
513. James, *supra* note 5, at 12–13.

responsive to suggestions to include a charitable provision than are others, suggesting another reason why nonprofits may want to focus on communicating with this group.[514]

Decedents age 75 or older transfer 83% of charitable estate dollars with decedents under age 65 contributing only about 4%.[515] Beyond transferring the dollars at these older ages, additional evidence suggests that the decisions to make such bequests also occur near these oldest ages.[516] Charitable wills tend to be signed closer to death than non-charitable wills, typically within 5 years of death.[517] A national sample of Australian wills found that 76% of charitable bequest dollars were controlled by will documents signed at age 80 or older.[518] Further, these plans executed at older ages appear to be changing the charitable provisions; for example, among estates filing estate tax returns, decedents dying within each older age segment are correspondingly more likely to leave any charitable bequest, suggesting that charitable components tend to be added to the plan as testators age.[519] Additionally, nationally-representative surveys of the oldest adults found that 61% of charitable decedents indicated having no charitable estate component at some point within the last five years of their lives.[520] Among older living adults, only about 55% of charitable estate components remain in the estate plan for at least ten years.[521] All of this evidence converges to the same conclusion: the decisions that control the bulk of charitable bequest dollars are made at the oldest ages.[522] Understanding the age for the decisions that actually control charitable bequest dollars is particularly relevant for nonprofits seeking to raise funds from such gifts.[523]

It is no surprise that wealthy decedents control the bulk of charitable dollars transferred.[524] Beyond this, greater wealth is associated with differences in charitable bequest behavior.[525] Increased wealth is associated with an increased propensity to leave a charitable bequest,[526] an increasing tendency to leave a larger share of the estate to charity,[527] and an increasing tendency to make charitable transfers as bequests rather than lifetime gifts.[528] As estate and gift sizes grow, charitable bequest dollars shift first from religious organizations to other public charities such as education/health

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514. Michael Sanders & Sarah Smith, *Can Simple Prompts Increase Bequest Giving? Field Evidence from a Legal Call Centre*, 125 J. OF ECON. BEHAVIOR & ORG. 179, 179 (2016).
515. *See* Joulfaian, *Basic Facts*, *supra* note 152, at 27.
516. *See supra* Section IV.B.
517. *See supra* Section IV.B.
518. James & Baker, *supra* note 6, at 279.
519. *See* Joulfaian, *Basic Facts*, *supra* note 152, at 27.
520. James & Baker, *supra* note 6, at 280–81.
521. *Id.*
522. *See supra* Section IV.D.3.
523. James & Baker, *supra* note 6, at 277.
524. *See supra* Section III.B.1.
525. *See supra* Section III.B.1–3.
526. *See supra* Section III.B.3.
527. *See supra* Section III.B.2.
528. *See supra* Section III.F.1.

organizations.[529] Although wealthier estates are increasingly likely to leave gifts to religious organizations, these gifts remain relatively small.[530] Thus, for religious organizations seeking to increase such gifts, a key goal could be to promote projects that warrant a larger bequest among those donors who already intend to leave a gift.[531] As wealth and gift sizes increase further, public charities gradually lose their bequest gifts to private foundations.[532] Recognizing that the primary competition for large charitable bequests is private foundations suggests that offering some similar features (e.g., endowed funds named after the donor or donor's family with distribution input by family members) may be a successful strategy for nonprofit organizations.[533]

E. Psychology in Charitable Bequest Transfers

Experimental research in the field of psychology known as "terror management theory" suggests that personal mortality reminders (such as those presumably experienced during personal estate planning or nearing the end of life) tend to increase support for "in-groups"—such as one's family, community, or ethnicity—and increase resistance to "out-groups."[534] Additionally, such reminders will tend to increase attraction to making a permanent or lasting impact as a valued member of such in-groups.[535] Making a lasting impact in support of one's identity-defining group can provide a sense of "symbolic immortality" because some part of one's self—one's name, values, story, family, community, etc.—continues after death.[536] This pursuit of "symbolic immortality" is attractive because it

529. *See supra* Section III.D.2–3.
530. *Id.*
531. *Id.*
532. *Id.*
533. S*ee, e.g.*, *Oklahoma City Community Foundation Scholarship Fund Policy* , OKLAHOMA CITY COMMUNITY FOUNDATION, para. 4 (Apr. 6, 2007), https://www.occf.org/documents/ScholarshipPolicy.pdf [perma/cc/EN3L-75F8] (allowing the creation of permanent scholarship funds with donor appointment of representatives on the scholarship committee. This is currently the largest scholarship program in Oklahoma not restricted to a specific university as described in Oklahoma City Community Foundation).
534. *See, e.g.*, Jeff Greenberg & Spee Kosloff, *Terror Management Theory: Implications for Understanding Prejudice, Stereotyping, Intergroup Conflict, and Political Attitudes*, 2 SOC. AND PERSONALITY PSYCHOL. COMPASS 1881, 1881 (2008).
535. *See, e.g.*, Russell N. James III, *Encouraging Repeated Memorial Donations to a Scholarship Fund: An Experimental Test of Permanence Goals and Anniversary Acknowledgements*, 2 PHILANTHROPY AND EDUCATION 1, 19 (2019); Kimberly A. Wade-Benzoni, et al., *It's Only a Matter of Time: Death, Legacies, and Intergenerational Decisions*, 23 PSYCHOL. SCI. 704, 706 (2012).
536. *See* Brian L. Burke, Andy Martens, & Erik H. Faucher, *Two Decades of Terror Management Theory: A Meta-Analysis of Mortality Salience Research*, 14 PERSONALITY AND SOC. PSYCHOL. REV. 155, 182 (2010) ("symbolic immortality takes the form of extensions of the self (e.g., children, achievements) continuing to exist after the person's biological death").

provides a psychological defense to the discomfort of being confronted with one's own impermanence.[537]

The largest charitable transfers go to a charitable structure, private foundations, which almost perfectly match the psychological descriptions of symbolic immortality.[538] For example, private foundations are typically designed and operated as permanent entities.[539] A 2009 survey of private family foundations found that 16.3% of those with living founders indicated that their foundation would not exist in perpetuity, while only 4.8% of those with deceased founders did so.[540] Approximately 85% of private foundations are named after the founders[541] and they give "people a way to 'live on' after death."[542] Even those charitable bequests going to existing public charities such as universities tend to go to the largest, wealthiest, and presumably most enduring, of such organizations.[543] Beyond these observational realities, experimental research in charitable giving has found that giving opportunities offering a more permanent or lasting impact are particularly compelling in a death-related context.[544]

Charitable bequest gifts may be more likely to focus on close "in-group" members as compared with lifetime charitable gifts; for example, comparisons of 17th and 18th century bequest donations and current donations in New York City found much stronger ethnic loyalty for charitable bequest gifts than for current donations.[545] Similarly, charitable bequests from probate records in the 17th and 18th century from multiple regions in America displayed an almost exclusive focus on causes limited to the decedent's city or village.[546] This is not simply a historical phenomenon considering that, "the overwhelming majority, 90%, of foundations restrict their grants to their local community."[547] Conversely, international relief

537. *See, e.g.*, Victor Florian & Mario Mikulincer, *Symbolic Immortality and the Management of the Terror of Death: The Moderating Role of Attachment Style*, 74 J. OF PERSONALITY AND SOC. PSYCHOL. 725, 725 (1998).

538. *See* William A. Drennan, *Surnamed Charitable Trusts: Immortality, at Taxpayer Expense*, 61ALA. L. REV. 225, 239–240 (2010).

539. *Perpetuity or Limited Lifespan: How Do Family Foundations Decide?*, THE FOUNDATION CENTER (Apr. 2009), https://foundationcenter.issuelab.org/resource/perpetuity-or-limited-lifespan-how-do-family-foundations-decide.html [perma.cc/VFJ4-A8QR].

540. *Id.*

541. Drennan, *supra* note 538, at 237.

542. Madoff, *supra* note 440, at 963.

543. *See* Fleischer, *supra* note 487.

544. *See, e.g.*, James, *supra* note 535; Wade-Benzoni et al., *supra* note 535.

545. *See supra* Section II.B.1.

546. *See supra* Section II.B.1; *see also*, Elise Van Nederveen Meerkerk, *The Will to Give: Charitable Bequests, Inter Vivos Gifts and Community Building an The Dutch Republic, c. 1600–1800*, 27 CONTINUITY AND CHANGE 241, 265 (2012) (In a historical study of Dutch wills "'Proximity' played a crucial role in determining the destination of [charitable] bequests. Generally, people donated to their fellow religionists, fellow citizens, and, at times indirectly to their own relatives via institutions which would care for them.").

547. Julina Wolpert, *Redistributional Effects of America's Private Foundations*, in LEGITIMACY OF PHILANTHROPIC FOUNDATIONS: UNITED STATES AND EUROPEAN PERSPECTIVE 123, 128 (2006).

charities receive a remarkably small share of their charitable support from bequest gifts relative to lifetime gifts.[548]

When immediate family survives, this would typically be the closest in-group, perhaps suggesting why such circumstances usually eliminate charitable bequests.[549] However, charitable bequests can actually involve family when the gift is made to a private family foundation controlled by family members or, as shown from some larger 19th century bequests, when a gift is made in honor of a family member or the distribution is controlled by a family member.[550] In experimental research, suggesting a memorial bequest gift to charity in honor of a family member dramatically increases interest in making a charitable bequest for many people.[551]

Finally, detailed gift instructions or restrictions are common with the largest bequest gifts, whether these be from gifts in 19th century wills or in the modern private foundation.[552] In experiments with current giving, allowing donors to make restricted gifts typically increases giving, at least in part because it makes the impact of the gift more easily visualizable.[553] In charitable bequest giving such gift restrictions may be attractive both through increased visualization of the impact of the donations and also from an increased sense of the decedent's personal influence and identity extending beyond his or her life.[554]

548. *See supra* Section III.F.2.

549. *See supra* Section IV.D.2.

550. *See supra* Sections II.B.2, IV.A.

551. Russell N. James III, *The Family Tribute in Charitable Bequest Giving: An Experimental Test of The Effect of Reminders on Giving Intentions*, 26 NONPROFIT MANAGEMENT AND LEADERSHIP 73 (2015).

552. *See supra* Sections II.B.2, III.D.2.

553. Stephan Dickert et al., *Mental Imagery, Impact, and Affect: A Mediation Model for Charitable Giving*, 11 PLOS ONE e0148274 (2016).

554. *See* Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 942–43 (1997) ("Laws enforce perpetual funds for charity because to do otherwise would discourage gifts . . . donors take into account the likelihood that their donated property will remain governed by their wishes.").