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CONSTITUTIONAL LAW—POWER OF STATE TO DISCRIMINATE AGAINST FEDERAL GOVERNMENT BY TESTAMENTARY TRANSFER STATUTE—Decedent, domiciled in California, made a testamentary gift to the United States. By an interpretation of the state probate code,¹ the California Supreme Court held the gift invalid and directed distribution to decedent's heirs.² The United States asserted unconstitutional interference with the federal government's power to receive gifts. On appeal to the United States Supreme Court, *held*, affirmed. The California Probate Code did not violate the supremacy clause of the Constitution,³ and no unconstitutional discrimination was effected against the federal government thereby, even though the statute allows testamentary gifts by state domiciliaries to the state and prohibits testamentary gifts to the United States. *United States v. Burnison*, 339 U.S. 87, 70 S.Ct. 503 (1950).

Assuming that power of the federal government to receive gifts exists as an inherent sovereign power which has become firmly established by uninterrupted usage from the creation of the government,⁴ the question raised by the principal case is clearly whether or not such power reaches so far as to forbid a state to deny a testator the power to will his property to the United States.⁵ In this determina-

¹ "A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums, or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute." Cal. Prob. Code (1944) §27. The word "state" could be interpreted to include the United States, as it was by the trial court. See *In re Burnison's Estate*, (Cal. App. 1948) 196 P. (2d) 822. For a discussion of the case at the Cal. App. level from the wills standpoint, see 47 MICH. L. REV. 730 (1949).

² *In re Estate of Burnison*, 33 Cal. (2d) 638, 204 P. (2d) 330 (1949).

³ U.S. Const., Art. 6, cl. 2.

⁴ Principal case at 90. *Dickson v. United States*, 125 Mass. 311, 28 Am. St. Rep. 230 (1878) holds that, in the absence of statutory restrictions by the state, a bequest to the federal government is valid. See *Levy v. Levy*, 40 Barb. (N.Y.) 585 (1863) for a holding that a statute similar to the California statute was not intended to apply to the national or state governments. The statute was later reconstrued to apply to the United States, *United States v. Fox*, 4 Otto (94 U.S.) 315 (1876), *affg.* In the Matter of Will of Fox, 52 N.Y. 530 (1873).

⁵ This question had already been decided in the negative. *United States v. Fox*, *supra* note 4.

tion, the reserved power of the states under the Tenth Amendment obviously bears consideration.⁶ That the reserved power of the states includes the power to determine the manner of testamentary transfer by state domiciliaries, as well as who may be made a beneficiary, has already been held in a number of Supreme Court cases.⁷ Nevertheless, it is arguable that the receipt of gifts by the federal government is an exercise of a governmental function and therefore one with which the states cannot interfere.⁸ The Court in the present case, however, adopts the approach of the *Fox* case⁹ and analyzes the power of testamentary gift as a binary power, composed of the power to will and the power to receive, thus in effect eliminating any conflict between the federal and state powers. By this analysis, the power to will falls easily within the sphere of state regulation, no restriction being placed by the state on federal property, since without compliance with state probate law the gift is invalid and the property never reaches the federal government.¹⁰ Although it has been realized that state power over testamentary disposition is not absolute, being undoubtedly subject to due process, equal protection, and treaty limitations,¹¹ there is nothing of a substantive nature in the supremacy clause which in the absence of legislation prohibits a state from preventing its domiciliaries from willing property to the federal government or which militates against solution of the problem by the "binary power" theory applied in the present case. As to the limitations admitted to apply to state probate legislation, and even starting with the somewhat dubious proposition that the United States must receive "equal protection" under the Fourteenth Amend-

⁶ As to the amount of consideration to be given the reserved powers of the states under the Tenth Amendment, see *United States v. Sprague*, 282 U.S. 716 at 733, 51 S.Ct. 220 (1931); *United States v. Darby*, 312 U.S. 100 at 123, 61 S.Ct. 451 (1941).

⁷ *Mager v. Grima*, 8 How. (49 U.S.) 490 at 493 (1850); *United States v. Fox*, supra note 4, at 321; *United States v. Perkins*, 163 U.S. 625 at 628, 16 S.Ct. 1073 (1896); *Plummer v. Coler*, 178 U.S. 115 at 137, 20 S.Ct. 829 (1900); *Maxwell v. Bugbee*, 250 U.S. 525 at 542, 40 S.Ct. 2 (1919); *Lyeth v. Hoey*, 305 U.S. 188 at 193, 59 S.Ct. 155 (1938); *Irving Trust Co. v. Day*, 314 U.S. 556 at 562, 62 S.Ct. 398 (1942); *Demorest v. City Bank Co.*, 321 U.S. 36 at 48, 64 S.Ct. 384 (1944).

⁸ *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466 at 477, 59 S.Ct. 595 (1939) considers every authorized activity of the United States to be a governmental function, since all federal functions are derived from delegated powers. See also *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 at 32, 60 S.Ct. 15 (1939); *Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95 at 102, 62 S.Ct. 1 (1941); *Alabama v. King & Boozer*, 314 U.S. 1, 62 S.Ct. 43 (1941). For a discussion of cases and the intergovernmental immunity problem broadly, see 12 *TEMPLE L.Q.* 514 (1938); 37 *MICH. L. REV.* 88 (1938); 44 *MICH. L. REV.* 853 (1946).

⁹ *United States v. Fox*, supra note 4.

¹⁰ This analysis has been applied in cases of state inheritance taxes on gifts to the federal government. *United States v. Perkins*, supra note 7, at 628-630. The analysis would also apply where the testator is statutorily incompetent or has not complied with witnessing or attestation statutes, in which cases the gift would be invalid, or where surviving spouse statutes exist, in which case the federal government, if it could by state probate law become a beneficiary, would take only after the surviving spouse.

¹¹ Principal case at 93. Treaty: *Clark v. Allen*, 331 U.S. 503 at 517, 67 S.Ct. 1431 (1947); equal protection and conflict with federal control of aliens: *Oyama v. California*, 332 U.S. 633, 68 S.Ct. 269 (1948); due process: *Thompson v. Consolidated Gas Utilities Corp.*, 300 U.S. 55, 57 S.Ct. 364 (1937).

ment, unconstitutional discrimination is still missing; the discrimination being based on a reasonable and therefore permissible distinction, viz., the close relationship of the state with its domiciliaries and their property.¹² It would appear, however, that a state probate law which did not equally apply against all foreign corporations, in which group the United States is included, but which rather discriminated solely against the United States, would have no reasonable classification for its basis and should be unconstitutional. The same considerations would apply to state probate laws which attempted to give unequal preferences or disadvantages to the various sister states. An interesting sidelight suggested by the principal case is the effect of possible congressional legislation, perhaps as a necessary and proper complement of the inherent and sovereign federal power to receive gifts, enlarging this federal power by the elimination of state probate law obstacles.¹³ In the light of a long line of cases stemming from *Martin v. Hunter's Lessee*¹⁴ and *McCulloch v. Maryland*,¹⁵ surely such action would appear constitutionally sustainable.¹⁶ Once it is admitted that the federal power exists, it would appear that Congress could go even farther and audaciously invade the historically formulated states' "reserved" probate power¹⁷ by establishing a federal probate code which fixed minimum requirements of capacity and procedure for effectuating a gift to the federal government. While Congress has not yet spoken on this question, and has thus left the states free to act for themselves, its expression of intent in the form of legislation would override state legislation on the matter, since the Tenth Amendment states but a truism that powers not delegated to the federal government or retained by the people are reserved to the states.¹⁸

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¹² Only when the classification is unreasonable and arbitrary does an unconstitutional discrimination occur. *Campbell v. California*, 200 U.S. 87 at 95, 26 S.Ct. 182 (1906); *Maxwell v. Bugbee*, supra note 7, at 542; *Queenside Hills Realty Co. v. Saxl*, 328 U.S. 80, 66 S.Ct. 850 (1946). That the close relationship of the state with its residents and their property makes such distinctions permissible, see *Maxwell v. Bugbee*, supra note 7, at 542; *Board of Education v. Illinois*, 203 U.S. 553, 27 S.Ct. 171 (1906). Cf. *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541, 68 S.Ct. 682 (1948).

¹³ A direct analogy could be drawn between the government's rights under such a law and the right to sue on a federal cause of action in a state court without discrimination, which analogy was denied the government in the principal case, since, by the supremacy clause, new federal legislation is placed on a par with all previous federal legislation, i.e., it would become the law of the states, while "capacity," "power," or "right" is not. Principal case at 94. See *Claffin v. Houseman*, 3 Otto (93 U.S.) 130 at 136 (1876); *Second Employers' Liability Cases*, 223 U.S. 1 at 57, 32 S.Ct. 169 (1912).

¹⁴ 1 Wheat. (14 U.S.) 304 (1816).

¹⁵ 4 Wheat. (17 U.S.) 316 (1819).

¹⁶ "From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end." *United States v. Darby*, 312 U.S. 100 at 124, 61 S.Ct. 451 (1941).

¹⁷ See the cases collected in note 7 supra.

¹⁸ *United States v. Darby*, supra note 6, at 124. Once having found a federal power, the only limitations on legislation based thereon would appear to be whether it is "appropriate and plainly adapted to the permitted end." *Ibid.* See note 16 supra.