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Notre Dame Law Review

Volume 52 | Issue 4 Article 5

4-1-1977

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Kymson F. DesJardins, *Mortmain Statutes: Questions of Constitutionality*, 52 Notre Dame L. Rev. 638 (1977).
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NOTES

MORTMAIN STATUTES: QUESTIONS OF CONSTITUTIONALITY

I. Introduction

Laws which limit a testator's ability to bequeath his estate to charity are commonly referred to as mortmain statutes.[1] Such statutes have existed in various forms in this country since our early history and, traditionally, their constitutionality has been virtually assumed.[2] However, a decision by the Circuit Court of Appeals for the District of Columbia in November of 1976 was the second within two years to strike down a mortmain statute as violative of the United States Constitution.[3] The court of appeals determined, as the Supreme Court of Pennsylvania had previously done with regard to the mortmain provision of that state, that the statute violated guarantees of equal protection.

Although both courts found it sufficient to base their decisions on equal protection grounds alone, two other theories have been vigorously advanced by opponents of the statutes. These additional arguments challenge mortmain statutes on due process and first amendment grounds. While these challenges had been acknowledged, they were passed over without judgment in the opinions of both courts. Thus, since the due process and first amendment arguments were not expressly rejected, they presumably retain vitality as a basis for further attacks on mortmain statutes.

This note will undertake an examination and evaluation of the three theories which threaten mortmain statutes. It will then briefly review the salient features of the existing mortmain statutes in light of these theories, and discuss the possibility that the remaining statutes will succumb to the arguments posed.

II. Background

Mortmain statutes first appeared in England in the thirteenth century.[4]

1 Technically, mortmain statutes are considered to be only those which place direct restrictions on charitable organizations' power to acquire and retain real property. Statutes such as the ones discussed herein which place restrictions on a donor's ability to give real or personal property to charitable organizations, however, are also commonly referred to as mortmain statutes. 5 A. SCOTT, THE LAW OF TRUSTS § 589 (3d ed. 1967); *Committee on Succession, Restrictions on Charitable Testamentary Gifts,* 5 REAL PROP. PROB. AND TR. J. 290, 291 (1970).

2 For example, the Supreme Court of Pennsylvania commented in dictum in Rhymer's Appeal, 93 Pa. 142, 146 (1880):

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

See also the cursory treatment given the constitutional challenges to mortmain statutes in In Re Kruger's Will, 23 App. Div. 2d 667, 257 N.Y.S.2d 232 (1965) and Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615 (1944).

3 Estate of French, 365 A.2d 621 (D.C. App. 1976). Prior to *French* the district court for the District of Columbia had found the District's mortmain statute to be violative of the first and fifth amendments in In re Small, 100 Wash. L. Reptr. 453 (D.D.C. 1972). That decision was not binding upon the *French* court so the statute had to be reexamined.

4 Magna Carta, 9 HEN. 3, c. 36 (1224).

Their original purpose was to regulate the perpetual possession of increasingly vast amounts of land by charitable organizations.[5] Dead hand[6] control by the Church and other charities deprived the overlords of rents, taxes and fees upon inheritance, and the incidents of tenure attendant to feudal estates. The first of these regulatory enactments placed restrictions on the ability of charitable organizations to retain real property. Until the eighteenth century mortmain statutes generally continued to take the form of direct limitations on the power of charitable beneficiaries to receive and hold realty.

In 1736, Parliament enacted the Georgian Statute of Mortmain.[7] Instead of delimiting the power of the recipient to take, that statute placed restrictions on a donor's ability to bequeath real property to charitable organizations at death.[8] In addition to altering the object of the statutory limitation, a new purpose was recited in the preamble to the statute: to prevent a testator from making charitable bequests to the detriment of rightful heirs to his estate. It is this second type of mortmain statute with which this note is hereafter exclusively concerned.

Variations on the Georgian Mortmain Statute were enacted by numerous American states and have been subsequently repealed in most jurisdictions.[9] Prior to the Pennsylvania and District of Columbia decisions, statutes of this sort were in force in nine states.[10] Mortmain statutes essentially address the concern that a testator may, as a result of frailties accompanying final illness or of fears of impending death, improvidently direct that his entire estate, or an undue portion of it, be given to a religious or charitable organization in order to insure his own salvation. Their purpose is generally considered to be twofold. First their function is protection, both of the testator against himself and of rightfully expectant heirs to his estate. Their second function is to deter imposition upon the testator by representatives of charitable organizations and the clergy who hope to receive generous donations.[11]

The seven statutes currently in existence in the United States may be divided into three categories according to the nature of the restriction placed on the donor's testamentary power. First is the type of statute prohibiting charitable gifts made in a will executed within a designated time period prior to death. This period ranges from thirty days to one year depending on the particular statute. The second category of statute is one prohibiting charitable gifts which equal more than a designated fraction of the probate estate. Third is a type of statute

5 *See generally* 4 A. SCOTT, *supra* note 1 at § 362.1.

6 Indeed, "mortmain" is literally translated as "dead hand."

7 9 GEO. II, c. 36 (1736).

8 *Id.;* See also *Committee on Succession, supra* note 1.

9 The most recent state to repeal its mortmain provision was California. CALIF. PROB. CODE §§ 40-43 (West) (repealed 1971). Mortmain statutes have been completely repealed in England.

10 See D.C. CODE § 18-302 (1973); FLA. STAT. ANN. § 732.803 (West 1976); GA. CODE ANN. § 113-107 (1975); IDAHO CODE § 15-2-615 (Supp. 1976); MISS. CODE ANN. § 91-5-31 (1972); MONT. REV. CODES ANN. § 91-142 (1947); N.Y. EST., POWERS & TRUSTS LAW § 5-3.3 (McKinney Supp. 1976); OHIO REV. CODE ANN. § 2107.06 (Page 1976); PA. STAT. ANN. tit. 20 § 2507 (1) (Purdon 1975). Iowa also has a mortmain statute, but, like the early mortmain statutes of England, it has been held to be a direct restriction on the power of a charitable beneficiary to take property. Ross v. Alleghany Theological Seminary, 204 Iowa 648, 215 N.W. 710 (1927). Iowa's statute is therefore beyond the scope of this note.

11 *See, e.g.,* G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 326 (2d ed. 1964); 4 A. Scott, *supra* note 1 at § 362.4 (3d ed. 1967).

incorporating both of the former restrictions. All American statutes apply to personalty as well as realty, consistent with their family protection purpose.

III. The Constitutional Challenges

A. *Equal Protection*

Equal protection was the theory on which the mortmain statutes of Pennsylvania and the District of Columbia were declared unconstitutional. Both courts ultimately found that while the purpose of mortmain statutes, to protect the testator and his family from improvident giving and from the overreaching of charitable beneficiaries, is a legitimate state objective, the statutes under consideration created classifications which did not bear a reasonable relationship to this ascertained governmental purpose. The two opinions harmoniously held that the mortmain statutes in question denied charitable beneficiaries equal protection of the laws. Differences in analysis by the two courts, however, warrant separate examination of the opinions.

In re Estate of Cavill[12] involved a will which directed that the residue of Ms. Cavill's estate be distributed among five charitable organizations. Because the will was executed only twenty-four days prior to death, the executrix of the estate sought judicial clarification of the effect of the mortmain provision of the Pennsylvania Wills Act of 1947.[13] That section made voidable, by anyone who would benefit from their invalidity, all charitable bequests made in a will executed within thirty days prior to the death of the testator.

The lower court ruled that the residuary estate should be distributed to the five charitable organizations named in the will on the grounds that the mortmain provision in question was unconstitutional and should be given no effect. That court concluded that the mortmain provisions of the Act violated the due process, privileges and immunities, and equal protection guarantees of the fourteenth amendment. The decedent's intestate heirs appealed the lower court decision before the Supreme Court of Pennsylvania.

Considering only the equal protection argument, the Pennsylvania Supreme Court determined that the statute lacked "fair and substantial relation" to the legislative object. Accordingly, the statute was violative of the charitable beneficiaries fourteenth amendment rights.[14] The successful equal protection attack was based on two separate contentions with respect to the statute. The fundamental argument concerned the thirty day time period which the court agreed had the effect of dividing the testators into two classes: one class of testators consisted of those making charitable testamentary bequests within thirty days of death, whose gifts are invalidated by the mere objection of a dissatisfied party; a

12 459 Pa. 411, 329 A.2d 503 (1974), reviewed by 37 U. PITT. L. REV. 169 (1975).

13 PA. STAT. ANN. tit. 20 § 180.7(1) (Purdon 1964). This provision was identical to its successor, PA. STAT. ANN. tit. 20, § 2507 (1) (Purdon 1975), and the invalidation of the first applied equally to the second according to the court. 329 A.2d at 504 n.1. The relevant language of the statute states:

> Any bequest or devise for religious or charitable purposes included in a will or codicil executed within thirty days of the death of the testator shall be invalid unless all who would benefit by its invalidity agree that it shall be valid.

14 329 A.2d at 506.

second class consisted of those making charitable bequests prior to thirty days before death, whose gifts are invalidated only by strict proof of lack of testamentary capacity or undue influence. Comparing this thirty day basis for classification with the legislative objective of preventing a testator who is in less than reasonably competent physical and mental condition from making charitable gifts, the court found the required thirty day period to be wholly arbitrary. In finding this period not reasonably related to the testator's actual competence to dispose of his estate the court stated:

> Clearly the statutory classification bears only the most tenuous relation to the legislative purpose. The statute strikes down charitable gifts of one in the best of health at the time of the execution of his will and regardless of age if he chances to die in an accident within twenty-nine days later. On the other hand, it leaves untouched the charitable bequest of another, aged and suffering from a terminal disease, who survives the execution of his will by thirty-one days. Such a combination of results can only be characterized as arbitrary.[15]

The second aspect of the equal protection argument involved the scope of protection provided by the statute. The court, in a rather narrow fashion, determined that the appropriate legislative objective of mortmain statutes is to protect only the "near relatives" of the testator.[16] The Pennsylvania statute, by contrast, permitted any next of kin to object to the bequest, regardless of the degree of relation to the testator. The court determined that the effect of the statute was to preserve the estate for relations not sufficiently near the testator and not contemplated by the legislative objective of "family" protection, at the expense of defeating the testator's intent. The court termed this result as irrational protection of a "nonexistent family."[17]

Considering together these discrepancies between statutory purpose and effect, the court concluded that the Pennsylvania mortmain statute was both substantially over-inclusive and under-inclusive. Over-inclusiveness was found "[b]ecause the statute sweeps within its prohibition many testamentary gifts which present no threat of evils which the statute purports to minimize."[18]

The Court of Appeals for the District of Columbia, in *Estate of French*,[19] likewise determined that the mortmain statute of the District of Columbia violated the beneficiaries' rights to equal protection. However, the faulty classification attacked by that fourteenth amendment challenge primarily involved an arbitrary distinction between classes of similarly situated beneficiaries rather than classes of testators. The case involved a residuary bequest to two local churches contained in a will executed twenty days prior to the death of the decedent. Like that of Pennsylvania, the statute in question prohibited testamentary charitable

15 *Id.* at 505-06.
16 *Id.* at 505.
17 *Id.* at 506.
18 *Id.* Contrastingly, under-inclusiveness also existed due to the fact that the statute leaves unaffected many gifts which do present such a threat.
19 365 A.2d 621.

gifts made within thirty days of death.[20] However, it was more restrictive in two respects: first, the statute specifically prohibited only gifts made to churches or the clergy; second, any such gift was completely void, as opposed to voidable by potential heirs. The executor of the estate instituted an action seeking instruction on proper distribution of the estate. The lower court granted summary judgment for the charitable organizations, who were party to the proceeding, holding that the statute violated both the fifth and first amendments. The defendant-heirs appealed.

The court of appeals chose to rest its affirmance solely on equal protection grounds and found that the classification established by the statute bore "no rational relation" to the purpose of the legislation.[21] The equal protection argument advanced in *French* focused on the parties who could improperly influence the testator prior to death. The court found that the statute created two classes of beneficiaries. The first class was comprised of religious organizations who were conclusively presumed to have exerted undue influence if they were the recipient of a gift made in a will executed less than thirty days prior to death. The second class consisted of all other potential beneficiaries who, though recipients of testamentary gifts made less than thirty days before death, were not presumed to have exerted undue influence on the decedent. By comparison to the statutory purpose, which was to insulate the testator and his family from truly being taken advantage of during a time when the testator is unable to conscientiously weigh relevant considerations, the court found the statutory language both too broad and too narrow. On the one hand, the statute created a complete bar to religious donations made within thirty days of death on the presumption, correct or not, that they were unduly elicited. On the other hand, the statute failed to reach other parties (lawyers, doctors, nurses, and other charities suggested by the court) who are in an equally influential position prior to the testator's death. Citing the additional arguments put forth in *Cavill,* and combining them with its own objections to the statute, the *French* court concluded:

> The statute is substantially over-inclusive in that it voids many intentional bequests by testators who were not impermissibly influenced. . . . It is also substantially under-inclusive in that it does not effect . . . legacies to persons who are in equal position with religious persons to influence a testator.[22]

In evaluating these two equal protection arguments, the first, which attacks an improper classification of testators arbitrarily set according to a time period before death, appears to be broader in scope. It potentially threatens any mortmain statute that sets a time within which testamentary charitable gifts are deemed to be improper, since time before death is not necessarily a function of testamentary capacity, regardless of the duration of that period. The second argument appears to be more limited in scope; it applies only to statutes, similar

20 The District of Columbia Statute reads in relevant part:
> A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order or denomination, or to or for the support, use, or benefit thereof, or in trust therefore, is not valid unless it is made at least 30 days before the death of the testator.

21 365 A.2d at 624.

22 *Id.*

to the District of Columbia's, which specifically single out charitable religious organizations. There is some promise that this argument will have broader impact, however, since the court suggested that in addition to charitable beneficiaries, others, including doctors, lawyers, and hospital personnel, are also in a position to impermissibly influence the testator prior to death. Under this view, even a mortmain statute which includes secular as well as religious charitable organizations could be considered intolerably under-inclusive according to the requirements of equal protection. Nonetheless, the prospects for this particular equal protection attack are somewhat remote, barring the sort of inexplicably arbitrary classification found in the District of Columbia statute.

The more promising challenge is that which goes to the scope of protection afforded the testator's next of kin, particularly when applied to a statute such as the District of Columbia's. There gifts were rendered wholly void by the statute regardless of the existence of next of kin. Under that statutory scheme, property would escheat before going to the named organizations. In contrast, the Pennsylvania court criticized its statute merely for giving priority to relations which it considered not to be of sufficiently close relation to the testator. That court, however, probably defined the protective purpose of the mortmain statute too narrowly by restricting the object to "near relations." So long as some expectant next of kin is given priority over charitable beneficiaries, the matter seems to be a question of legislative wisdom rather than power. The willingness of the Pennsylvania court to accept this challenge, nonetheless, indicates greater promise for this argument than might first appear.

B. *Due Process*

Although due process was not relied upon by either the Pennsylvania or District of Columbia appellate courts, the lower court in *Cavill* rested its decision in part on due process grounds. The due process conclusion asserted therein found that mortmain statutes raise an irrebuttable presumption of incapacity and undue influence which has the effect of impermissibly infringing upon a charitable beneficiary's right to receive testamentary property. Because the conclusive presumption is not reasonably related to the realities of undue influence or testamentary capacity, such an invasion of property rights is a violation of due process.

Justice Pomeroy, dissenting in *Cavill*,[23] argued against the validity of the due process claim in a number of ways. First, he questioned whether in fact the statute either created an irrebuttable presumption or altogether proscribed charitable gifts willed within a designated time prior to death. This is an important threshold question because there is little argument that a state can absolutely prohibit any or all forms of testamentary giving. It is a different matter, however, for a state to insure the transmission of testamentary gifts unless incapacity or undue influence are shown, and then deem a particular sort of gift as irrebuttably so given regardless of the actual fact. Justice Pomeroy maintained that mortmain statutes create an absolute prohibition within the power of the state.

23 329 A.2d at 506.

However, the statute may more appropriately be characterized as raising a presumption of improvident gifts. This is so because the statute's motivation is unquestionably fear of unwise testamentary giving, and its effect is to avoid a determination of whether the bequests were improperly made by mechanically categorizing as unwise all gifts made within a certain period or of a certain amount. No other type of testamentary gift, no matter when or to whom made, is similarly void or voidable without a showing of incapacity or undue influence.

Justice Pomeroy further contested that any presumption, if raised, is not irrebuttable for two reasons. First, he claimed, that proof of inclusion of a substantially identical gift in a prior will, executed before the thirty day period, revoked by the violative will, saved the gift by operation of the doctrine of dependent relative revocation.[24] This escape mechanism, however, can be a matter of judicial discretion, and in cases or in jurisdictions where this doctrine is not invoked, the presumption is ironclad. Second, he argued, the presumption which might be found can be rebutted, in the case of the Pennsylvania statute, by obtaining the consent of all potential recipients of the gift. There is a difference, however, between being able to pursuade a variety of persons not to exercise their power to void the gift without cause, and being able to present arguments before a judicial forum demonstrating the competence of the testator or lack of overreaching. Moreover, in jurisdictions where the gift is void rather than voidable, this means of "rebuttal" is unavailable.

Perhaps the most effective argument put forth by Justic Pomeroy is that the guarantees of procedural due process, on which this argument depend, do not attach until a complaining party has some recognized interest in "life, liberty or property." The power to receive property from a decedent is generally regarded to be a statutorily granted, rather than a natural right. Therefore, without some minimal interest in the testator's probate property that is recognized or protected, a beneficiary's claim to the property is little more than a unilateral expectation. Such a trifling claim of right cannot reasonably be considered to rise to constitutional significance under the fourteenth amendment.

Although this factor may impede a due process challenge directed at the beneficiaries' rights, prospects for a due process claim are considerably improved if it is argued that the rights which are infringed by the irrebutable presumption are those of the testator. When the testator's rights become the focus of discussion, the required "property interest" seems to be fulfilled. State law has, by means of an elaborate system of probate law, recognized a testator's interest in his property as well as his interest in having the property pass according to his wishes after death unless undue influence or lack of capacity is shown. This interest, if sufficient, will cause the due process guarantees to attach. Mortmain statutes may then, by creating an irrational irrebuttable presumption about a

24 Dependent relative revocation is a judicial doctrine whereby a bequest thought to be revoked by a subsequent testamentary gift is revived. The doctrine is invoked when the revoking instrument is found to be invalid, and when it is determined that the testator conditioned revocation of the first bequest upon successful operation of the second. There is great disagreement at to when the doctrine may be applied, and courts have both considerable discretion in choosing to invoke it and in naming the preconditions for its application. See Warren, "*Dependent Relative Revocation*," 33 HARV. L. REV. 337 (1920).

testator's capabilities, be subject to challenge as an impermissible deprivation of his property.

To determine the nature of property interests which must exist before due process can attach, a recent Supreme Court decision, *Paul v. Davis,*[25] is instructive. Arising in the context of civil rights litigation under § 1983, the issue of *Paul* was the specificity with which a particular interest must come within the language of the fourteenth amendment to attain constitutional significance. The Court acknowledged that a property interest recognized under the fourteenth amendment may take many forms:

> [T]here exists a variety of interests which are difficult of definition but are nevertheless comprehended within the meaning of either "liberty" or "property" as meant in the Due Process Clause. These interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law, and we have repeatedly ruled that the procedural guarantees of the Fourteenth Amendment apply whenever the state seeks to remove or alter that protected status.[26]

Aside from the question of whether the right to dispose of property at death is inherent or of purely statutory nature, unquestionably the power to dispose of one's property is an interest recognized and protected by state law. A leading authority typically comments:

> The nature and extent of the right [to make testamentary dispositions of property] has been the subject of much controversy by courts and text writers generally, but all of them recognize the free and unlimited right of a person of sound mind and otherwise competent to make a testamentary disposition of his property according to his wishes, unless in contravention of some statute or well-established rule of public policy or positive law.[27]

The due process protection against irrebuttable presumptions is applicable even to preserve rights, such as that of testamentary disposition, which are wholly regulated, and may even be withheld, by the state. A Supreme Court case, *Bell v. Burson,*[28] illustrates this notion that even a right which is granted exclusively at the discretion of the state cannot constitutionally be denied by an arbitrary conclusive statutory presumption. In *Bell,* the Court found that despite the fact that a state had complete power to regulate who may be licensed to drive an automobile, the state's issuance of a driver's liscense implies a right to maintain that license and use state highways. Denial of that right, by a conclusive presumption that could not be rationally justified, without an examination of the facts under which it was revoked, constitutes a violation of due process. Similarly, it may be argued that a mortmain statute's irrebuttable presumption prohibiting what may otherwise be a completely valid gift, solely on the basis of the date of that gift in relation to death, is to irrationally frustrate the testator's protected interest.

Admittedly the due process argument is likely to be the weakest of the three

25 424 U.S. 693 (1976).
26 *Id.* at 710-11.
27 G. THOMPSON, THE LAW OF WILLS § 17 (3d ed. 1947).
28 402 U.S. 535 (1971).

arguments presented. The premise of this contention, that mortmain statutes raise presumptions of incompetence and overreaching, is a threshold question which may be difficult to overcome. Furthermore, questions of "conclusiveness" and vested fourteenth amendment rights add additional problems to the argument. Finally, the invalidity of the irrebuttable presumption, if created, depends on the lack of a rational connection between the presumption and the actual likelihood of the fact; the finding or irrationality is itself dependent upon the arbitrary time period of the statute. Consequently, the effectiveness of this position against various mortmain statutes is in actuality no broader than that of the equal protection argument which more effectively challenges the arbitrary time period designation of mortmain statutes.

C. *First Amendment: Free Exercise Clause*

Perhaps the most novel of the constitutional arguments against mortmain statutes is the one based on the first amendment. Three lower courts have relied on the free exercise clause and Judge Reilly rested his concurring opinion in *French* solely thereon.[29] This argument asserts that promises of salvation and the donations made in response thereto, which are the very objects of mortmain statutes, are a form of religious practice protected by the first amendment.

Judge Reilly's concurring opinion points to the rights of the beneficiaries and maintains that statutes which negative gifts made to religious organizations are based on an assumption that salvific promises, in response to which the donations are made, are illusory. Such a position of the government toward consolations by the clergy impermissibly abridge the free practice of religion. Judge Reilly explained:

> According to Appellees, the statute's main purpose is to prevent advocates of traditional religions, particularly the clergy, from influencing the dying by holding out hopes of salvation or avoidance of damnation in return for generous gifts to practice the furtherance of religion. But such an object is precisely what the "free exercise" of religion of the First Amendment forbids, for it is premised on the assumption that such representations are false and hence Congress can enact safeguards against their effect.[30]

The District of Columbia statute was a particularly prime target for the first amendment argument since it singled out religious donations alone, appearing unusually discriminatory against religious gifts. There is promise, however, that this challenge may be effectively leveled against mortmain statutes not specifically confined to prohibitions on religious donations. A lower Pennsylvania court in *In re Reilly*[31] also rested its decision to strike down that state's generalized mortmain statute on first amendment grounds.[32] The Supreme Court has re-

29 365 A.2d at 625.
30 *Id.*
31 459 Pa. 428, 329 A.2d 511.
32 *Reilly* was reported immediately following the *Cavill* opinion, and summarily affirmed on identical grounds. The Pennsylvania Supreme Court set aside without analysis or evaluation the first amendment and due process grounds relied upon by the lower court in *Reilly*.

peatedly held that even indirect burdens on religious practice must be closely scrutinized for a compelling state interest which justifies their existence.[33]

Concededly, states have generally been given exclusive prerogative to control the devolution of probate property. Nonetheless, state restrictions of a person's freedom of religion have been held permissible only when 1) the state is attempting to prevent a substantial evil; 2) the nature of the restriction is reasonably related thereto; and, 3) the state's object is not readily achieved by some other means. While it is possible to effectively argue that the testator's disposal of all or a substantial part of his estate may be a significant evil, mortmain statutes fail with regard to the two other requirements.[34]

To further strengthen the first amendment argument, it would seem equally sensible to fix upon the testator's first amendment rights. The very concern of mortmain statutes is that a testator, in making a prohibitive gift, is religiously motivated by hopes that his gift will help effect his own redemption. The donation of that gift, therefore, is precisely the practice of religious beliefs which the free exercise clause protects, and his expectation that the gift will so function is a protected interest.[35]

It is universally recognized that American mortmain statutes modeled after the Georgian Statute of 1736 are not motivated by a sense of hostility toward the Church.[36] However, their direct prohibition of a type of donation which is a meaningful and age-old gesture of faith could well be a broad target for future first amendment attacks.[37]

Theoretically, since all mortmain statutes are directed against charitable religious gifts, the first amendment challenge is applicable against all such statutes regardless of their particular features. In this way the first amendment argument has the greatest potential of the three theories for undermining mortmain statutes. Noteworthy is the fact that the first amendment argument attacks not the method by which states prohibit testamentary giving, but whether states may prohibit testamentary religious gifts at all.

IV. The Theories as Applied to the Statutes

In summary, the specific features of mortmain statutes which become vulnerable before each theory are as follows:

1) The equal protection argument strikes at three aspects of mortmain

33 *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Jones v. Opelika, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

34 If family protection is the real motivation behind the statute, why is the family given no protection against charitable giving prior to the statutory period or through inter vivos gift; and why is family welfare not directly secured by protection statutes?

35 Religious beliefs and the practice of those beliefs must be distinguished. The freedom to practice religious beliefs is not absolute, and does not generally extend to situations where public safety or morals may be jeopardized. See, e.g., Jacobsen v. Massachusetts, 197 U.S. 11 (1905) (compulsory vaccination upheld); Church of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (prohibition on polygamy upheld). The right to freely practice, absent such compelling state interest, is generally protected by the first amendment.

36 *See, e.g.*, G. BOGERT, *supra* note 11 at § 326.

37 One of the important considerations of the Supreme Court in *Murdock*, 319 U.S. 105, was the fact that the religious practice in question was one of long-standing tradition. 319 U.S. at 108-09.

statutes: First, provisions which invalidate charitable gifts on the basis of a designated time period before death which bears an insufficient relationship to the objective of isolating gifts which have been inadvisedly given; second, provisions which "overprotect" by giving distant relatives of the testator priority over charitable beneficiaries or permit gifts to escheat; third, provisions which create arbitrary classes of beneficiaries by treating in different ways various similarly situated parties capable of unduly influencing the testator.

2) The due process argument applies to mortmain statutes which create an unrealistic irrebuttable presumption that a gift is improvidently made. Usually, the irrationality of the presumption lies with the arbitrariness of the designated time period of the statute.

3) The first amendment argument attaches to statutes which prohibit donations to church and church-affiliated organizations, thereby impairing the guaranteed right to freedom of religion.

Now follows an examination of the salient features of the seven mortmain statutes remaining in various American jurisdictions, and an evaluation of their ability to withstand these constitutional attacks.[38]

A. *The Remaining Statutes*

1. Florida

The Florida statute comes into play only for the benefit of natural and adopted children of the testator, his spouse, and the issue of his children. Overprotection, therefore, seems not to be a vulnerability of the statute. The statute provides for a six month time period within which gifts are prohibited, potentially rendering it vulnerable to equal protection attack. The statute applies broadly to most charitable gifts, so it is therefore not likely to succumb to the equal protection argument attacking arbitrary classifications of beneficiaries. This statute has been specifically interpreted not to raise a presumption of incompetence, but instead to limit directly the power of a testator to dispose of his property, thus precluding the due process argument. Religious gifts are prohibited by the statute, in possible violation of the first amendment.

2. Georgia

Like the Florida statute, Georgia's is limited to near relatives and in that respect escapes the over protection argument. The statute places a ninety day time limit on the charitable giving, thereby potentially violating equal protection. The prohibited beneficiaries include all charitable, religious, educational, or civil institutions so, although it probably does not create arbitrary classes of beneficiaries, the first amendment argument is applicable to the prohibitions on donations to the church. Gifts prohibited by the statute are absolutely void, thus opening the possibility for accusations of creating an irrebuttable presumption in violation of due process.

38 The following overview does not provide in detail the provisions of each statute. For their particular provisions, the statutory language itself should be examined. Citations of the statutes appear at note 10, *supra.*

3. Idaho

The Idaho statute shares the same thirty day restriction as that of the Pennsylvania legislation declared unconstitutional in *Cavill*. A gift made in a will executed within this period is void, and on this basis the Idaho statute risks attack on grounds of overprotection and due process. The statute is applicable to religious gifts, and thus is susceptible to first amendment attacks, but its general prohibition of gifts to all charitable organizations precludes equal protection attack on the basis of arbitrary classifications of beneficiaries.

4. Mississippi

The mortmain provisions in Mississippi are embodied both in statutory form and in the state constitution. Consequently, any contravention of the United States Constitution by the Mississippi statute impliedly invalidates its identical constitutional provision. Nearly all of the earmarks for the equal protection, due process, and first amendment arguments appear in this mortmain statute. A ninety day time limit is placed on charitable gifts, which, if made during the period, are void. Only near family is protected, and up to one third of the estate is not affected by the statute, thus avoiding the over protection claim. The statute's application to religious beneficiaries makes it susceptible to first amendment attacks.

5. Montana

Montana's mortmain statute voids all testamentary charitable gifts made within thirty days of death, without regard to the testator's surviving heirs. On this basis the statute is open to over protection, equal protection and due process challenges. The prohibition runs against all gifts to charitable or benevolent organizations, probably avoiding an impermissible arbitrary classification of beneficiaries in violation of equal protection, but falls prey to first amendment attack.

6. New York

The New York statute is likely to escape attack on grounds of equal protection as well as due process since it takes the form of a direct prohibition on excessive general charitable giving (one-half the estate), when the testator is survived by near family, regardless of how long prior to death the will containing the gift was executed. The first amendment argument may still be advanced, however, to challenge the restrictive effect of the statute on religious donations.

7. Ohio

The Ohio mortmain statute voids all charitable gifts made within one year of death when the testator is survived by near relatives. While the one year time period is open to equal protection challenge, the other two avenues of equal pro-

tection attack are foreclosed. The irrebuttable presumption raised by the statute during the one year period may be the object of due process claims, and the first amendment challenge is applicable, due to the statute's effective prohibition of religious charitable gifts.

B. *Prospects for Overturning the Remaining Statutes*

As has been demonstrated, each of these remaining mortmain statutes is vulnerable to at least one constitutional argument. Such vulnerability, combined with a generally negative judicial view of mortmain statutes,[39] would seem to indicate that the disappearance of this type of restraint on charitable giving is a likely possibility. Two obstacles to an acceptance by the judiciary of any or all of these constitutional theories pose difficulties, however.

First, there remains a deep-seated view that control of the devolution of property at death time is a matter exclusively within the discretion of the states and is not subject to constitutional attack. Past decisions in New York,[40] Florida[41] and Iowa,[42] ruling on constitutional attacks on their respective mortmain statutes, have sustained them against attacks on equal protection and due process grounds.[43] While these courts questioned the advisability of certain mortmain restrictions in particular cases, all have uniformly adopted the view that constitutional attacks go only to the wisdom of the legislation and not to legislative power under the fourteenth amendment. Illustrative of this judicial attitude is a passage taken from *Taylor v. Payne*[44] in which the Florida court rejected a challenge of that state's mortmain statute on constitutional grounds. The court stated:

> [T]he right of testamentary dispositions of property does not emanate from organic law . . . but is a creature of the law derived solely from statute without constitutional limit. Accordingly, the right is at all times subject to regulation and control by the legislative authority which creates it. The authority which confers the right may impose conditions thereon, such as limit dispositions to a particular class, or fixing the time which must ensue subsequent to the execution of a will before gifts to a particular class shall be deemed valid; or the right to dispose of property by will may be taken away altogether, if deemed necessary without the private or constitutional rights of the citizen being thereby violated.[45]

An attitude such as this will diminish chances that a mortmain statute will

39 *Committee on Succession, supra* note 1.
40 In re Kruger's Will, 23 App. Div. 2d 667, 257 N.Y.S. 2d 232 (1965).
41 Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615 (1944).
42 Decker v. American Univ., 236 Iowa 895, 20 N.W.2d 466 (1945).
43 The most sound rationale for mortmain statutes is well expressed by the New York Court of Appeals in *In re Kruger's Will* where the court viewed their mortmain provision as a protection of private rights and as an expression of public policy:

> It has long been recognized that at the approach of death, a testator may be influenced by hopes or fears for his condition in the future world and may devise or bequest the whole or principal part of his estate to benevolent charities or religious institutions to the exclusion of his family and close relatives. For this reason it has been considered the dictate of sound public policy to restrain testamentary dispositions to such institutions.

23 App. Div. 2d at 668, 257 N.Y.S.2d at 234.
44 154 Fla. 359, 17 So. 2d 615.
45 *Id.* at 363, 17 So. 2d at 617.

be stricken down under the fourteenth amendment. This is true because an evaluation thereunder must be confined to traditional "rational basis" analysis, since no fundamental right or suspect criterion is involved. A court taking this view may easily sustain the statute by finding that the classifications created are not wholly arbitrary. Indeed, Justice Pomeroy, in his dissent to *Cavill,* argued that the majority, without justification, had applied the more stringent strict scrutiny test.[46] Courts of this pursuasion may, as Justice Pomeroy also suggested, refuse to find that the legislation creates any classification or presumption; instead, such courts may construe the statute as a condition justifiably imposed on testamentary giving.

In contrast, due to the fundamental rights involved in the first amendment, a challenge based upon this amendment would require strict scrutiny and a reciprocal compelling state interest. For this reason, the free exercise argument may be more difficult for courts to avoid. The theory was not advanced before any of the three courts which ruled that mortmain statutes were constitutional, and the Pennsylvania and District of Columbia courts reserved comment on the theory. On this basis, then, the potential of the argument is promising.

A second judicial predisposition which must be recognized is a reluctance to acknowledge and deal squarely with the rights of decedents. As discussed above, the success of the due process and first amendment arguments will depend in part on a concern with the testator's rights under the law. Courts are hesitant to consider question of whether a testator's expectancy that his property will pass according to his wishes is an actual right. Because this issue involves concepts of psychological satisfaction and questions concerned with the continuance of rights after death, courts, fearing that they will become ensnared in vague and difficult problems, prefer to wholly avoid the area. However, a recognition that a testator's interest in his property extends beyond its title, to a right to dispose of it, is necessary. Despite the complexities involved, the right is both real and significant.

Notably, both the Pennsylvania and District of Columbia courts held that the rights violated were those of the beneficiaries and not those of the testator, thus avoiding discussion of the testator's rights. In the Pennsylvania case, this factor is somewhat difficult to understand since the impermissible class created by the mortmain statute was that of testators rather than beneficiaries. A discussion of the testator's rights in these cases is warranted, however, since the mortmain statutes in question involve a restriction on the testator's right to give, not the beneficiaries' right to receive property.

V. Conclusion

Last fall's decision by the District of Columbia Circuit striking down the Capital's mortmain statute gave strong impetus to recent judicial stirrings about the constitutionality of such limitations on testamentary charitable giving. The two-man majority reinforced credibility in the equal protection challenge, to which the majority of the remaining statutes are susceptible. The concurring

46 329 A.2d at 509.

opinion chose to rest its rejection of the statute solely on first amendment grounds, joining other courts which have ruled similarly. In addition to these two grounds, a due process argument invoked by some lower courts may also merit promise as a viable attack. Together, they comprise a variety of approaches which constitute grounds for attack on the mortmain statutes which exist today in several American jurisdictions. Combined with a willingness by the judiciary to reexamine old biases with regard to mortmain statutes, they may spell the demise of these laws.

Some authorities opposing mortmain statutes have argued that there is no longer a need for these statutes in present day secular society where fear of hell and damnation does not have the overpowering effect it once did.[47] It is impossible, however, to say that people today are less likely to rely upon good works as a means of salvation. A better reason for elimination of this eighteenth century anachronism is that the object of safeguarding family welfare can be achieved directly by means of protection statutes.[48] This solution is more rational than mortmain statutes which may be easily avoided[49] and which provide only the most primitive means for distinguishing between improvident and well considered gifts. The variety of potential constitutional arguments and the serious consideration given them in recent decisions indicate the strong possibility of a growing momentum toward making mortmain statutes a thing of the past.

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47 See, e.g., 37 U. PITT. L. REV. *supra* note 12, at 179.
48 *Id.* at 178. See also *Committee on Succession, supra,* note 1 at 299.
49 Various methods by which mortmain statutes may be avoided are collected and analyzed in *Committee on Succession, supra,* note 1 at 293-95.