

# Thy Will Not Be Done: Why States Should Amend Their Probate Codes to Allow an Intestate Share for Unmarried Homosexual Couples

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## I. INTRODUCTION

Property has often been characterized as a “bundle of sticks.”<sup>1</sup> Among the “bundle of sticks” is the right to freely dispose of a person’s property, subject only to applicable law.<sup>2</sup> Ever since the passage of the English Statute of Wills, the law has provided people with a right to transfer property, both real and personal, at death by their will.<sup>3</sup> Today, this right continues to exist, as the states have enacted laws governing the creation and performance of wills.<sup>4</sup> Although the right to devise property by will is not free of restriction, it is nonetheless widely available.<sup>5</sup> If used, this right allows a person to leave a personalized statement of who will inherit specific pieces of their property.<sup>6</sup>

However, not everyone does take advantage of this opportunity.<sup>7</sup> There are multiple reasons why people do not have wills at death, including procrastination, a belief that not having a will avoids the need for court administration of the estate, and a belief that not having a will makes it harder for creditors to collect outstanding debts.<sup>8</sup> Regardless of the reason, a person who dies without a valid will passes on his or her property

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<sup>1</sup> JAMES CHARLES SMITH ET AL., PROPERTY: CASES AND MATERIALS 2 (2004). The “bundle of sticks” is a metaphor for the assorted rights a person has with regards to their property.

<sup>2</sup> WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 73–74 (9th ed. 1783).

<sup>3</sup> *Irwin v. Rogers*, 157 P. 690, 691 (Wash. 1916).

<sup>4</sup> *See, e.g.*, MINN. STAT. §§ 524.1–101 — 524.8–103 (2004).

<sup>5</sup> *See, e.g.*, MINN. STAT. § 524.2–501 (Limiting wills to people of sound mind over the age of 18); *Id.* § 524.2–202 (creating spousal right of elective share). The elective share prevents a person from completely disinherit their spouse without that spouse’s consent.

<sup>6</sup> 1 WILLIAM J. BOWE ET AL., PAGE ON THE LAWS OF WILLS § 1.1 (2d ed. rev. 2003).

<sup>7</sup> *Id.* § 1.6, at 28.

<sup>8</sup> *Id.* § 1.6, at 31–32.

through the process of intestate succession.<sup>9</sup> The principal purpose of intestate succession laws is to provide for a distribution of property that approximates what a person would have likely done had he or she left a valid will.<sup>10</sup> If this is the case, then a question must be asked: Do intestacy statutes accurately reflect the wishes of the population?

Intestacy statutes operate by first providing a share of the estate to the surviving spouse.<sup>11</sup> If the statute does not give the entire estate to the spouse, or if there is no spouse, then any remaining property is given to other heirs of the decedent, including children, parents, and siblings, in a proscribed order.<sup>12</sup> If no heir can be found under the statutes, then the property escheats to the state and, if no one claims the escheated property within a statutorily defined time period, the property becomes the property of the state.<sup>13</sup>

The effect of intestacy is thus first to protect a person's spouse and children. Studies have shown that this effect is consistent with the behavior of married people who leave wills, who frequently leave their entire estate to their spouses, even if their children are still living.<sup>14</sup> The reason for doing so is based on the theory that, presuming all of the children are descended from the decedent and the surviving spouse, the surviving spouse will also provide for the surviving children.<sup>15</sup> This presumed concern for the children of the decedent can also be seen in the reduction of the spousal share in the event of stepchildren.<sup>16</sup>

While intestacy statutes serve the purpose of protecting a decedent's spouse and children, and protecting a decedent's spouse is completely consistent with the expectations of the population, the fact that the statute awards the property to the surviving spouse by definition requires that the decedent and intestate successor be married.<sup>17</sup> The requirement that a person claiming a spousal share under intestacy be married has been consistently applied by the courts. For example, in *Peffley-Warner v.*

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<sup>9</sup> *King v. Riffée*, 309 S.E.2d 85, 87 (W. Va. 1983). For an example of intestate succession statutes, see UNIF. PROBATE CODE § 2-102 (share of surviving spouse) and § 2-103 (share of other heirs) (2004).

<sup>10</sup> *King*, 309 S.E.2d at 87.

<sup>11</sup> RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 2.2 (1999). While the formula for determining the spouse's share varies among the states, it is irrelevant for this purpose.

<sup>12</sup> See, e.g., UNIF. PROBATE CODE § 2-103 (2004).

<sup>13</sup> See, e.g., UNIF. PROBATE CODE § 3-914 (2004).

<sup>14</sup> RESTATEMENT (THIRD) OF PROPERTY: WILLS & OTHER DONATIVE TRANSFERS § 2.2 reporter's note 1 (1999).

<sup>15</sup> *Id.*

<sup>16</sup> See, e.g., UNIF. PROBATE CODE § 2-102 (2004). The portion of the estate that did not go to the spouse would be given under § 2-103 to the children of the decedent to insure that they were provided for.

<sup>17</sup> BLACK'S LAW DICTIONARY 1438 (8th ed. 2004).

*Bowen*,<sup>18</sup> a woman was found to not have the intestacy rights of a spouse, in spite of the fact that she had lived with the decedent man for over twenty years, because they were not legally married.<sup>19</sup> As a result, two unmarried individuals will be unable to enjoy the benefits of intestacy with regard to each other.<sup>20</sup>

The flaw in the intestate succession system is evident when considering people who are unable to take advantage of it. “The institution of marriage . . . is a union of man and woman . . . as old as the book of Genesis.”<sup>21</sup> While the claimant in *Peffley-Warner* was not allowed to receive a spousal share,<sup>22</sup> she had the opportunity to enter into a legal marriage and thus fall under the definition of spouse. When two people do not have this opportunity, situations arise in which the results of intestate succession are directly contrary to people’s expectations.<sup>23</sup> Because only a few states in the country permit two people of the same sex to enter into legal unions,<sup>24</sup> individuals in same-sex relationships outside of those states will not be able to legally qualify as spouses, as the New York County Surrogate’s Court held in *In re Petri*.<sup>25</sup> As a result, two people in a homosexual relationship are unable to attain the prioritized place of a spouse under intestacy laws.<sup>26</sup> There is one difference between the parties of *Peffley-Warner* and *Petri* that warrants the statutory amendment I propose: The party in *Peffley-Warner* had the option of marrying the

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<sup>18</sup> *Peffley-Warner v. Bowen*, 778 P.2d 1022 (Wash. 1989).

<sup>19</sup> *Id.* at 1027.

<sup>20</sup> *Id.* at 1025. Note, however, that in states which recognize common-law marriages, that would be sufficient to establish a person’s right to a spousal share.

<sup>21</sup> *Baker v. Nelson*, 191 N.W.2d 185, 186 (Minn. 1971).

<sup>22</sup> *Peffley-Warner*, 778 P.2d at 1027.

<sup>23</sup> See Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1 (1998); see also *infra* Part III.

<sup>24</sup> For example, California, Hawaii, Massachusetts and Vermont provide for same-sex marriage or a parallel system. See HAW. REV. STAT. § 572C (2006); CAL. FAM. CODE §§ 297–299.6 (West 2004); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999). New Jersey invalidated the state’s limitation of marriage to opposite-sex individuals in *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006), and its civil union system took effect Feb. 19, 2007. See Civil Union Act, 2006 N.J. LAWS 103 (providing for system of civil unions).

<sup>25</sup> *In re Petri*, 211 N.Y.L.J. 29 (2004) (holding that same-sex partner was not a “surviving spouse” for intestate succession). See also *In re Cooper*, 592 N.Y.S.2d 797, 799 (1993) (holding that the term “surviving spouse” could not include a homosexual life partner for purposes of elective share statute). Although the elective share only applies in situations where a will exists, New York’s intestate succession law refers to a decedent being survived by a spouse. N.Y. EST. POWERS & TR. L. § 4–1.1 (1998).

<sup>26</sup> *In re Petri*, 211 N.Y.L.J. at 29. A person in a homosexual relationship may be able to fall within the intestacy statutes by adopting his or her partner. *Tinney v. Tinney*, 799 A.2d 235 (R.I. 2003). While an adoption would allow the surviving partner to share in the intestate estate, he or she would be required to share the estate with any other children, and the adoption itself can be attacked. See UNIF. PROBATE CODE § 2–103 (2004), *In re Adoption of Sewell*, 51 Cal. Rptr. 367 (Cal. Dist. Ct. App. 1966). There is also the danger that the relationship turns sour after the adoption, which can have consequences reaching beyond the parties to the adoption. See Pam Belluck & Alison Leigh Cowan, *Partner Adopted by an Heiress Stakes Her Claim*, N.Y. TIMES, Mar. 19, 2007, at A1.

decedent and thus falling within the intestacy statutes. The party in *Petri* did not.

Part II of this article considers the necessity of a statutory amendment by reviewing the obstacles to attacks through the courts on both the marriage statutes that prevent same-sex partners from becoming legal spouses and the intestacy statutes that prevent them from inheriting. Part III looks at the rationale for amending intestacy statutes to provide a share in cases of unmarried homosexuals. Part IV presents and explains the proposed amendment. Finally, Part V offers a defense of the proposal against state statutes or constitutions that prohibit same-sex marriages.

## II. JUDICIAL ATTACKS AGAINST MARRIAGE AND INTESTACY STATUTES: A RECIPE FOR DEFEAT

The outcome sought to be achieved by this amendment to state intestacy laws is that intestacy law be revised to reflect the probable desires of unmarried persons with same-sex partners that their surviving partner at least share in the estate, thereby fulfilling the purpose of intestacy statutes.<sup>27</sup> This goal could be accomplished judicially by allowing same-sex couples to fit the legal definition of a spouse or by expanding the definition of a spouse to include same-sex couples, or legislatively, as proposed in this article, by adding a separate provision to a state's probate laws.<sup>28</sup> Because passing a statute through the legislature is a complicated task with multiple opportunities for defeat,<sup>29</sup> it is worthwhile to first consider why a judicial remedy is not available, and the wisdom of judgments denying such a remedy.

### A. *Marriage Statutes and the Equal Protection Clause*

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."<sup>30</sup> As a practical matter, the Equal Protection Clause of the Fourteenth Amendment prohibits a state from granting rights to one class of citizens that are denied to another class of citizens.<sup>31</sup> Courts

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<sup>27</sup> *King v. Riffée*, 309 S.E.2d 85, 87 (W. Va. 1983). For discussion of probable intent, see *infra* Part III.

<sup>28</sup> Allowing same-sex couples to fit the legal definition of a spouse refers to defining spouse as a married person, but extending marriage rights to same-sex couples. Expanding the definition of spouse to include same-sex couples refers to changing the definition spouse such that it is not limited to married persons, without altering the requirements for creating a legal marriage.

<sup>29</sup> Legislation would have to pass committees in each house of the state legislature, a floor vote of each house, and a potential veto override.

<sup>30</sup> U.S. CONST. amend. XIV, § 1.

<sup>31</sup> *Standhardt v. Jeanes*, 77 P.3d 451, 464 (Ariz. Ct. App. 2003). ("Petitioners contend that the State violated their rights to equal protection by granting marriage benefits to one class of persons . . . while denying those benefits to another class of persons.")

interpreting this clause or parallel clauses in state constitutions have consistently held that “legislation may discriminate among classes as long as the burden imposed on the affected class is justifiable.”<sup>32</sup> In analyzing an equal protection challenge, two questions must be answered: What level of scrutiny is to be applied to the challenge? Does the governmental interest behind the statute withstand the appropriate scrutiny?<sup>33</sup>

While there is not absolute unanimity among the courts as to the appropriate level of scrutiny to be applied in same-sex couple cases, almost all courts have applied rational basis scrutiny.<sup>34</sup> Under rational basis scrutiny, the court looks to see whether “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.”<sup>35</sup> Although rational basis review is “highly indulgent towards the State’s classifications,”<sup>36</sup> it is not a “toothless” analysis, as “not every asserted rational relationship is a ‘conceivable’ one.”<sup>37</sup>

One court has applied strict scrutiny to equal protection attacks on marriage statutes,<sup>38</sup> and some dissenting opinions have also advocated greater scrutiny than rational basis review.<sup>39</sup> Courts apply strict scrutiny when a statute “implicates a fundamental right or uses a suspect classification.”<sup>40</sup> Fundamental rights are those rights which are “deeply rooted in this Nation’s history and tradition” and are “implicit in the concept of ordered liberty.”<sup>41</sup> A suspect classification is “one saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.”<sup>42</sup> In applying strict scrutiny, a law is presumed unconstitutional

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<sup>32</sup> *Id.*

<sup>33</sup> *Hernandez v. Robles (Hernandez I)*, 805 N.Y.S.2d 354, 385, 387 (N.Y. App. Div. 2005), *aff’d* 855 N.E.2d 1 (N.Y. 2006) (Saxe, J., dissenting).

<sup>34</sup> *Id.* at 386. *See generally* Robin Cheryl Miller and Jason Binimow, Annotation, *Marriage Between Persons of Same Sex—United States and Canadian Cases*, 1 A.L.R. FED.2D 1 (2005). The Equal Protection clause is addressed in § 7 and §§ 15–16.

<sup>35</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 960 (Mass. 2003).

<sup>36</sup> *Hernandez v. Robles (Hernandez II)*, 855 N.E.2d 1, 12 (N.Y. 2006).

<sup>37</sup> *Goodridge*, 798 N.E.2d at 960 n.20.

<sup>38</sup> *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). Note, however, that Hawaii’s Equal Protection clause explicitly prohibits discrimination on the basis of sex. HAW. CONST. art. I, § 5.

<sup>39</sup> *See, e.g., Hernandez II*, 855 N.E.2d at 30 (Kaye, C.J., dissenting) (noting that the classification should be reviewed using heightened scrutiny); *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 753 (Cal. Ct. App. 2006) (Kline, J., dissenting) (arguing that strict scrutiny should be applied); *Hernandez v. Robles (Hernandez I)*, 805 N.Y.S.2d 354, 385 (N.Y. App. Div. 2005) (Saxe, J., dissenting) (advocating intermediate review or “heightened scrutiny”).

<sup>40</sup> *Goodridge*, 798 N.E.2d at 960.

<sup>41</sup> *Lewis v. Harris*, 908 A.2d 196, 207 (N.J. 2006), (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997)).

<sup>42</sup> *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

unless the state proves the existence of a “compelling state interest”<sup>43</sup> and the law is “narrowly drawn to avoid unnecessary abridgements of constitutional rights.”<sup>44</sup>

Some judges have suggested that a “heightened scrutiny” standard should be applied.<sup>45</sup> This intermediate level is applied to claims that a law has a “negative impact upon a ‘discrete and insular minority’ which is being shut out of the political process.”<sup>46</sup> Under heightened scrutiny, the test is whether a classification serves “important governmental objectives”<sup>47</sup> and is “substantially related to achieve of those objectives.”<sup>48</sup>

When rational basis review is performed, marriage statutes generally withstand analysis.<sup>49</sup> There are a multitude of justifications offered as to why marriage should be restricted to opposite-sex couples. Among the more frequently used are “ensuring, promoting, and supporting an optimal social structure for the bearing and raising of children,”<sup>50</sup> providing a “favorable setting for procreation,”<sup>51</sup> and preservation of the traditional definition of marriage.<sup>52</sup> Because all that is required for rational basis review is that the legislature could logically believe that the purpose of the classification exceeds the harm suffered by members of the disadvantaged class,<sup>53</sup> the hurdle the law must pass is very low. In spite of this low hurdle, the above interests should not be found sufficient to justify limitation of marriage.

The common flaw in the argument that limiting marriage provides optimal environments for creating and raising children is that the argument has everything to do with *extension* of marriage and nothing to do with *restriction* of marriage.<sup>54</sup> To the extent that the offered justifications pertain to promotion of the welfare of children,<sup>55</sup> there is no link between

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<sup>43</sup> *Baehr*, 852 P.2d at 64.

<sup>44</sup> *Id.*

<sup>45</sup> See, e.g., *Hernandez v. Robles* (*Hernandez I*), 805 N.Y.S.2d 354, 385 (N.Y. App. Div. 2005) (Saxe, J., dissenting).

<sup>46</sup> *Id.* (quoting *In re Aliessa ex rel. Fayad v. Novello*, 754 N.E.2d 1085, 1095 (N.Y. 2001), itself quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938)).

<sup>47</sup> *Id.*

<sup>48</sup> *Hernandez I*, 805 N.Y.S.2d at 385 (Saxe, J., dissenting).

<sup>49</sup> See, e.g., *In re Marriage Cases*, 49 Cal. Rptr. 3d 675 (Cal. Ct. App. 2006); *Hernandez I*, 805 N.Y.S.2d 354; *Standhardt v. Jeanes*, 77 P.3d 451 (Ariz. Ct. App. 2003).

<sup>50</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 983 (Mass. 2003) (Cordy, J., dissenting).

<sup>51</sup> *Id.* at 961.

<sup>52</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d at 718. *But see* *People v. Greenleaf*, 780 N.Y.S.2d 899 (N.Y. Justice Ct. 2004) (holding that preserving traditional definition of marriage is not a legitimate state interest).

<sup>53</sup> *Goodridge*, 798 N.E.2d at 960.

<sup>54</sup> *Id.* at 963. (“The department has offered no evidence that forbidding marriage to people of the same sex will increase the number of couples choosing to enter into opposite-sex marriages in order to have and raise children.”)

<sup>55</sup> Promotion of child welfare is “a paramount state policy.” *Id.* at 962.

advancement of child welfare and the exclusion of same-sex couples from civil marriage.<sup>56</sup> In fact, given the “significant number of children . . . being raised by same-sex parents,”<sup>57</sup> to assert that the welfare of such children is promoted by excluding their parents from an institution that, by its proponent’s arguments,<sup>58</sup> exists to promote their welfare is disingenuous at best.<sup>59</sup>

Preservation of the traditional concept of marriage is also offered as a reason that a legislature could offer for excluding same-sex couples from marriage.<sup>60</sup> Little reason is given as to why tradition is a legitimate interest.<sup>61</sup> Offering tradition as reason enough to justify excluding an entire class of citizens from marriage is no justification at all. “The justification of ‘tradition’ does not explain the classification; it merely repeats it.”<sup>62</sup> The idea that otherwise unconstitutional conduct could be upheld because it has always been that way is disturbing in light of American history. “Slavery was also a traditional institution.”<sup>63</sup> Such a theory was also, in time, rejected as a justification for miscegenation laws.<sup>64</sup>

These arguments are based on the assumption that rational basis is the appropriate standard of review over heightened or strict scrutiny. The three rationales given for application of rational basis review over heightened or strict scrutiny are that there is no fundamental right to same-sex marriage,<sup>65</sup> sexual orientation is not a “suspect class,”<sup>66</sup> and that the marriage statutes do not constitute gender-based discrimination.<sup>67</sup>

If laws against same-sex marriage infringed on a fundamental right,

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<sup>56</sup> *Id.*

<sup>57</sup> *Baker v. State*, 744 A.2d 864, 881 (Vt. 1999).

<sup>58</sup> *Goodridge*, 798 N.E.2d at 983 (Cordy, J., dissenting).

<sup>59</sup> It is suggested that a legislature could conclude that “alternate family structures have not yet been conclusively shown to be the equivalent of the marital family structure that has established itself as a successful one over a period of centuries.” *Id.* at 979 (Sosman, J., dissenting). Given that, until 2003, states could criminalize homosexual conduct, this supposed lack of equivalency is largely of the states’ own design and should not be held against same-sex couples. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>60</sup> See *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 720 (Cal. Ct. App. 2006); *Hernandez v. Robles* (*Hernandez I*), 805 N.Y.S.2d 354, 374 (N.Y. App. Div. 2005) (Catterson, J., concurring) (quoting *Lawrence v. Texas*, 539 U.S. 558 (2003)) (O’Connor, J., concurring in judgment)).

<sup>61</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d. at 720 (citing *Elden v. Sheldon*, 758 P.2d 582 (Cal. 1988)).

<sup>62</sup> *Hernandez v. Robles* (*Hernandez II*), 855 N.E.2d 1, 33 (N.Y. 2006) (Kaye, C.J., dissenting).

<sup>63</sup> *People v. Greenleaf*, 780 N.Y.S.2d 899, 901 (N.Y. Justice Ct., 2004).

<sup>64</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d. at 753 (Kline, J., dissenting). (Judge Kline was quoting language from *Loving v. Virginia*, 147 S.E.2d 78, 82 (Va. 1966), *rev’d*, 388 U.S. 1 (1967), in which the Supreme Court of Appeals of Virginia discussed the tradition and historical acceptance of miscegenation statutes).

<sup>65</sup> *Id.* at 703.

<sup>66</sup> *Selland v. Perry*, 905 F. Supp. 260, 265–66, 267 (D. Md. 1995) (holding that “Don’t Ask, Don’t Tell” policy of the United States military did not violate the Fourteenth Amendment).

<sup>67</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d at 706.

then strict scrutiny would be appropriate.<sup>68</sup> In arguing for rational basis review, it is claimed that the fundamental right in question is the right to same-sex marriage.<sup>69</sup> Whether or not a right is “deeply rooted in this Nation’s history and tradition”<sup>70</sup> so as to be fundamental frequently depends on how the right is defined.<sup>71</sup> There is a well-established fundamental right to marriage,<sup>72</sup> upon which other courts have expanded.<sup>73</sup> When a court frames the right in question as the right to same-sex marriage, it must also reject as valid the question of whether same-sex couples are entitled to the fundamental right of marriage. This rejection is accomplished by assuming that marriage can only exist between a man and a woman.<sup>74</sup> As has been illustrated in Massachusetts<sup>75</sup> and Canada,<sup>76</sup> among other places, this is simply not the case.

It is also claimed that sexual orientation is not a “suspect class” requiring heightened scrutiny.<sup>77</sup> This claim is often intertwined with the argument that restriction of marriage to opposite-sex couples is not gender discrimination.<sup>78</sup> If either of the above statements was not true (meaning that sexual orientation is a suspect class or that restriction of marriage is gender discrimination), then heightened or strict scrutiny would be required.<sup>79</sup> In determining whether a classification constitutes a “suspect class,” one of the things a court looks for is whether the class is capable of protecting itself from discrimination through the political process.<sup>80</sup> To reject this claim, one need only look to the passage and fate of Colorado’s Amendment 2, which was struck down by the United States Supreme Court on the grounds that it violated the Equal Protection clause.<sup>81</sup> The effect of Amendment 2 was to repeal and prohibit any effort by the state of Colorado or any subdivision to prohibit discrimination against

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<sup>68</sup> *Id.* at 699.

<sup>69</sup> *Id.* at 703.

<sup>70</sup> *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997).

<sup>71</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d at 745 (Kline, J., dissenting).

<sup>72</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>73</sup> *See Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*4 (Alaska Super. Ct. 1998) (“The relevant question is not whether same-sex marriage is so rooted in our traditions that it is a fundamental right, but whether the freedom to choose one’s own life partner is so rooted in our traditions.”), *superseded by constitutional amendment*, ALASKA CONST. art. I, § 25; *Perez v. Lippold*, 198 P.2d 17, 19 (Cal. 1948) (“Since the right to marry is the right to join in marriage with the person of one’s choice . . .”).

<sup>74</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d at 746 (Kline, J., dissenting).

<sup>75</sup> *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 991 (Mass. 2003).

<sup>76</sup> Civil Marriage Act, 2005 S.C., ch. 33 s. 2–4 (Can.).

<sup>77</sup> *Singer v. Hara*, 522 P.2d 1187, 1196 (Wash. Ct. App. 1974).

<sup>78</sup> *Goodridge*, 798 N.E.2d at 991 (Cordy, J., dissenting).

<sup>79</sup> *Standhardt v. Jeanes*, 77 P.3d 451, 464 (Ariz. Ct. App. 2003).

<sup>80</sup> *Hernandez v. Robles* (*Hernandez I*), 805 N.Y.S.2d 354, 386 (N.Y. App. Div. 2005) (Saxe, J., dissenting).

<sup>81</sup> *See Romer v. Evans*, 517 U.S. 620 (1996).



homosexuals.<sup>82</sup> Any class of citizens that is the direct and explicit target of a constitutional amendment to grant *carte blanche* license to discriminate cannot be said to be able to protect itself through the political process after

said political process has been used to mount an assault that, against any other class of citizens, would unquestionably be invalidated.<sup>83</sup>

The final obstacle to rational basis review would be a determination that limitation of marriage to opposite-sex couples constitutes gender discrimination, which would require heightened scrutiny.<sup>84</sup> In resisting a charge of gender discrimination, it is proposed that limitation of marriage cannot be gender discrimination because “women and men are treated alike – they are permitted to marry people of the opposite sex, but not people of their own sex.”<sup>85</sup> The same argument was made in support of miscegenation statutes, and was rejected.<sup>86</sup> While it is suggested that the “sham equality” of miscegenation statutes can be distinguished from the actual equal application of the marriage statutes,<sup>87</sup> the form of “equality” offered is the “purported ‘right’ of gays and lesbians to enter into marriages with different-sex partners to whom they have no innate attraction.”<sup>88</sup> To grant same-sex couples an essentially different “right” is a weak claim of equality.

The case for finding marriage that statutes which only allow opposite-sex couples to marry are discriminatory is reinforced when one considers the meaning of discrimination.<sup>89</sup> The definition of discrimination can be reduced to the idea that one person can have something, another person cannot have that same thing, and the only difference between the two is a specific characteristic.

But consider the following example. Dr. A and Dr. B both want to marry Ms. C, an X-ray technician. Dr. A may do so because Dr. A is a

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<sup>82</sup> *Id.* at 624.

<sup>83</sup> Against a racial classification, strict scrutiny would be applied. *Standhardt*, 77 P.3d at 464. Against a gender classification, heightened scrutiny would be applied. *Id.* In either event, at the minimum an important government interest would have to be shown. *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Hernandez v. Robles (Hernandez II)*, 855 N.E.2d 1, 10–11 (N.Y. 2006).

<sup>86</sup> *Loving v. Virginia*, 388 U.S. 1, 8 (1967) (“[W]e reject the notion that the mere ‘equal application’ of a statute containing racial classifications is enough to remove the classifications from the Fourteenth Amendment’s proscription of all invidious racial discriminations . . . .”)

<sup>87</sup> *Hernandez II*, 855 N.E.2d at 11.

<sup>88</sup> *Id.* at 29 (Kaye, C.J., dissenting).

<sup>89</sup> “The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex, nationality, religion, or handicap.” BLACK’S LAW DICTIONARY 500 (8th ed. 2004).

man. Dr. B may not because Dr. B is a woman. Dr. A and Dr. B are people of opposite sexes who are similarly situated in the sense that they both want to marry a person of their choice. The [marriage] statute disqualifies Dr. B from marriage solely on the basis of her sex and treats her differently from Dr. A, a man. This is sex discrimination.<sup>90</sup>

If “black” and “white” were substituted for “a man” and “a woman” in the above example, one would have the equal application argument that was rejected in *Loving v. Virginia*.<sup>91</sup> The same argument should be rejected here.

Although not an attack on marriage statutes themselves, the Equal Protection Clause has also been the basis for challenges to the definition of “spouse.”<sup>92</sup> These challenges have alleged first that the claimant fits within the then-existing legal definition of spouse, and if they do not, then that definition is unconstitutional.<sup>93</sup> The claim of qualification as a surviving spouse necessarily failed,<sup>94</sup> given that New York had by statute defined spouse as a husband or wife.<sup>95</sup> In addressing the constitutional challenge, the Surrogate’s Court determined that the standard of review was irrelevant, since the state has a compelling interest in “having its descent and distribution scheme clear, simple, predictable, and capable of determining heirs at the moment of death”<sup>96</sup> that would satisfy even strict scrutiny, and the minimization of the work necessary to determine heirs at the moment of death can only be accomplished by the marriage licensure system.<sup>97</sup> I accept the importance of a clear and explicit system of descent to give effect to these interests, and would be absolutely opposed to invalidation of the entire system of intestate succession. Indeed, the purpose of my proposed statute is to create such a system.

It should also be noted that any attack against the marriage statutes would have to be made while the partner was alive. If a challenge is mounted after death, while claiming a spousal share from intestacy, the challenge runs the risk of being dismissed as a nonjusticiable question.<sup>98</sup>

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<sup>90</sup> *Baker v. State*, 744 A.2d 864, 906 (Vt. 1999) (Johnson, J., concurring in part and dissenting in part).

<sup>91</sup> *Loving*, 388 U.S. at 6–8.

<sup>92</sup> *In re Petri*, 211 N.Y.L.J. 29 (2004); *In re Cooper*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993).

<sup>93</sup> *In re Petri*, 211 N.Y.L.J. at 29.

<sup>94</sup> *Cooper*, 592 N.Y.S.2d at 799.

<sup>95</sup> N.Y. EST. POWERS & TR. L. § 5–1.2 (1998).

<sup>96</sup> *In re Petri*, 211 N.Y.L.J. 29.

<sup>97</sup> *Id.*

<sup>98</sup> *In re Estate of Hall*, 707 N.E.2d 201 (Ill. App. Ct. 1998) (finding claim that prohibition against same-sex marriage violates Equal Protection nonjusticiable because, even if the statute were invalidated, appellant would still not be married to her then-deceased partner). *Cf. Langan v. State Farm Fire & Cas.*, 849 N.Y.S.2d 105 (N.Y. App. Div. 2007) (holding that man lacked standing to pursue death benefits claim when he was not married to Decedent male under New York law). Of particular note is that Plaintiff and Decedent had entered into a Vermont civil union. *Id.* at 106.

*B. Marriage Statutes and the Due Process Clause*

“. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law.”<sup>99</sup> Ever since the Supreme Court held that the Due Process Clause could be used to incorporate the Bill of Rights as binding against the states,<sup>100</sup> the clause has held a substantive component, forbidding infringement on those rights which are “implicit in the concept of ordered liberty.”<sup>101</sup> The doctrine of substantive due process exists to prevent “unwarranted encroachment upon a constitutionally protected freedom.”<sup>102</sup> Among these constitutionally protected freedoms is the freedom to marry.<sup>103</sup>

Equal protection and substantive due process analyses look similar in that they both look to fundamental rights for their beginning. The difference is that the focus of equal protection is “invidiously discriminatory classifications,”<sup>104</sup> while due process is concerned with “sphere[s] of liberty.”<sup>105</sup> The question, then, is not whether the state can distinguish between its citizens, but whether the state can infringe upon the right to marry at all.

The concept of the fundamental right, discussed above in the context of the Equal Protection Clause, also applies to Due Process issues.<sup>106</sup> Fundamental rights are those “basic values ‘implicit in the concept of ordered liberty.’”<sup>107</sup> Statutes that infringe upon a fundamental right are subjected to strict scrutiny, and upheld only if they are narrowly drawn to serve a compelling state interest.<sup>108</sup>

Even if a right does not rise to the level of a fundamental right, it may still be a protected right entitled to heightened constitutional scrutiny. One of the most well known examples of this is *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>109</sup> where the Supreme Court found that, while there is no fundamental right to an abortion, the right to have an abortion is still a liberty protected by the Fourteenth Amendment.<sup>110</sup> While the court does not state explicitly when liberty is considered a protected liberty, as opposed to a fundamental right, it does note the competing

<sup>99</sup> U.S. CONST. amend. XIV, § 1.

<sup>100</sup> See *Palko v. Connecticut*, 302 U.S. 319, 324 (1937).

<sup>101</sup> *Id.* at 325.

<sup>102</sup> *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978) (Stewart, J., concurring).

<sup>103</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (“The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”).

<sup>104</sup> *Zablocki*, 434 U.S. at 391 (Stewart, J., concurring).

<sup>105</sup> *Id.* at 392.

<sup>106</sup> See, e.g., *Standhardt v. Jeanes*, 77 P.3d 451, 454 (2003).

<sup>107</sup> *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

<sup>108</sup> *Washington v. Glucksburg*, 521 U.S. 702, 721 (1997).

<sup>109</sup> 505 U.S. 833 (1992).

<sup>110</sup> *Id.* at 869.

individual and state interests involved in abortion.<sup>111</sup> In evaluating the validity of laws infringing on this form of liberty interest, a heightened form of rational basis review is applied – a law will be struck down if it represents an “undue burden,”<sup>112</sup> which means that “the state regulation has the purpose or effect of placing a substantial obstacle” in the path of exercising the right.<sup>113</sup>

Thus far, however, courts have not been willing to consider the application of this intermediate level of scrutiny.<sup>114</sup> The analysis more frequently employed is a determination of whether the right that is allegedly being infringed is a fundamental right, deserving strict scrutiny analysis, or if it is not, rational basis review.<sup>115</sup> In making the fundamental right determination, two approaches have been taken. Some courts will ask whether the fundamental right to marry recognized in *Loving v. Virginia* includes the right to marry someone of the same sex,<sup>116</sup> while others consider whether there is a distinct fundamental right to same-sex marriage.<sup>117</sup>

No state has found that there is a fundamental right to same-sex marriage.<sup>118</sup> As defined by *Glucksberg*,<sup>119</sup> all this conclusion means is that the right to marry someone of the same sex is not deeply rooted in American history. Given the history of American treatment of homosexuals, which once included classification of homosexuality as a personality disorder,<sup>120</sup> this historical view is not a surprise. A right can be defined too broadly or too narrowly.<sup>121</sup> In this case, however, defining the right as “the right to same-sex marriage” may be too narrow. “How the right is defined may dictate whether it is deemed fundamental.”<sup>122</sup>

In this case, if the claimed right is defined as the right to same-sex marriage, it is inevitable that the court will find that the right is not “deeply

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<sup>111</sup> *Id.* at 871.

<sup>112</sup> *Id.* at 875.

<sup>113</sup> *Id.* at 877.

<sup>114</sup> See Robin Cheryl Miller and Jason Binimow, Annotation, *Marriage Between Persons of Same Sex—United States and Canadian Cases*, 1 A.L.R. FED.2D 1 (2005). The Due Process clause is addressed in § 8 and §§ 15-16.

<sup>115</sup> *Standhardt*, 77 P.3d at 454–55.

<sup>116</sup> *Id.* at 456.

<sup>117</sup> *Dean v. District of Columbia*, 653 A.2d 307, 331 (D.C. App. 1995).

<sup>118</sup> *Lewis v. Harris*, 908 A.2d 196, 211 (2006).

<sup>119</sup> *Washington v. Glucksburg*, 521 U.S. 702, 720–21 (1997).

<sup>120</sup> *Kentucky v. Wasson*, 842 S.W.2d 487, 489 (Ky. 1992) (“homosexuality is *no longer* classified as a personality disorder by either the American Psychological Association or American Psychiatric Association . . . .”) (emphasis added).

<sup>121</sup> Compare *Glucksburg*, 521 U.S. at 722–23 (stating that the right being considered was not the “liberty to choose how to die,” but the right “to commit suicide [with] a right to assistance in doing so.”) with *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (noting that the holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986), finding no fundamental right to engage in homosexual sodomy, “discloses the Court’s own failure to appreciate the extent of the liberty at stake.”).

<sup>122</sup> *Lewis*, 908 A.2d at 207.

rooted in this Nation's history and tradition."<sup>123</sup> Of course, since anyone who tried to plant the seeds of same-sex marriage by applying for a license would be refused (due to said lack of tradition) and run the risk of being arrested,<sup>124</sup> it is hardly surprising that "the issue of whether states should or must permit marriage between same-sex partners has only recently come into public debate."<sup>125</sup> To allow an acknowledged "severe curtailment of the liberty of gays and lesbians"<sup>126</sup> to justify a further curtailment of their liberty is allowing one wrong to justify another in a self-perpetuating cycle. Of course, courts can always claim that, even without the criminalization of homosexual conduct, there would not be sufficient background to support a fundamental right.<sup>127</sup>

History is being overvalued as an argument against inclusion of same-sex couples in the fundamental right of marriage. At the time *Loving* was decided, "it was simply inconceivable that the right of interracial couples to marry could be deemed 'fundamental.'"<sup>128</sup> That inconceivableness did not stop the Supreme Court in 1967, and should not stop courts today.

The basis for separating same-sex marriage from opposite-sex marriage is claimed to be that the Supreme Court called marriage a fundamental right because of its link to procreation.<sup>129</sup> This claim sounds plausible until one considers that the fundamental right of marriage has been upheld<sup>130</sup> even for people for whom procreation is literally impossible, such as prison inmates. If marriage is a fundamental right for prison inmates, then it cannot be inexorably linked to procreation. The availability and usage of assisted-reproduction techniques<sup>131</sup> only serves to further separate marriage from creation of children. While marriage and childbirth may once have been intertwined, they are no longer, and courts should recognize this fact.

### III. THE RATIONALE FOR AMENDING STATE LAW: IDENTIFYING THE PROBLEM

There is no relief from exclusion from intestacy that same-sex couples

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<sup>123</sup> *Glucksburg*, 521 U.S. at 720–21.

<sup>124</sup> See *Lawrence*, 539 U.S. at 583–84 ("In Texas, calling a person a homosexual is slander *per se* because the word homosexual impute[s] the commission of a crime."). It is irrational to expect someone who can be prosecuted for homosexual conduct to admit in a courthouse to being a homosexual, which would have to happen to apply for a marriage license.

<sup>125</sup> *In re Marriage Cases*, 49 Cal. Rptr. 3d 675, 703 (Cal. Ct. App. 2006).

<sup>126</sup> *Id.*

<sup>127</sup> Dean, 653 A.2d at 333.

<sup>128</sup> *Hernandez v. Robles* (*Hernandez II*), 855 N.E.2d 1, 25 (N.Y. 2006) (Kaye, C.J., dissenting).

<sup>129</sup> Dean, 653 A.2d at 332.

<sup>130</sup> *Hernandez II*, 855 N.E.2d at 31 (Kaye, C.J., dissenting) (citing *Turner v. Safley*, 482 U.S. 78, 95–96 (1987)).

<sup>131</sup> *Baker v. State*, 744 A.2d at 881 (Vt. 1999).

will be able to obtain from the judiciary. If any change in the law is to be had, the change must come from each state's legislature. Before asking the legislature to act, the legislature should be told what defect in the law they are being asked to cure, and why it is a defect at all.

The principal purpose of intestacy is to approximate what a person would do if he or she had left a valid will.<sup>132</sup> Intestacy also has other objectives, including "produc[ing] a pattern of distribution that the recipients believe is fair,"<sup>133</sup> "promot[ing] and encourag[ing] the nuclear family,"<sup>134</sup> and "protecting the financially dependent family."<sup>135</sup> I suggest, therefore, that to the extent current intestacy law provides an outcome inconsistent with these objectives, that law should be amended to bring it in line with these expectations.

The last of these purposes, promotion of the family, may actually be better served by providing intestacy rights for same-sex couples. "The inheritance law objective of supporting the nuclear family becomes highly contestable given the historical context of marriage."<sup>136</sup> If the objective is seen as part of the state's effort to support the traditional concept of marriage, then allowing intestacy rights to people who are not and cannot become married is entirely "inconsistent with the objectives of an intestacy statute because it would devalue marriage."<sup>137</sup> If one values the "family" aspect more, then amending intestacy is not only "more likely to result in persons in committed relationships conforming to traditional family norms,"<sup>138</sup> but also is more consistent with contemporary views of who is part of a family.<sup>139</sup>

The more pressing case for amending the intestacy laws is that these laws completely fail to reflect the probable intent of same-sex individuals. To illustrate this idea, consider the hypothetical case of two lesbian women named Amara and Michelle. Amara and Michelle have lived together for twenty-five years, have intermingled their finances, and are perceived in the community as being inseparable. Were it not for the fact that the state they live in has a statutory prohibition against same-sex marriage, they would be married. Between them, Amara is the sole wage earner. They have no children, Amara's parents are deceased, and her two sisters despise homosexuality. If Amara were to die without a will, application of

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<sup>132</sup> King v. Riffe, 309 S.E.2d 85, 87-88 (W. Va. 1983).

<sup>133</sup> Fellows, *supra* note 23, at 12.

<sup>134</sup> *Id.* at 13.

<sup>135</sup> Jennifer Seidman, Comment, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. Colo. L. Rev. 211, 221 (2004).

<sup>136</sup> Fellows, *supra* note 23, at 14.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 15.

<sup>139</sup> See *Braschi v. Stahl Assocs. Co.*, 543 N.E.2d 49(N.Y. 1989) (holding that same-sex partner of deceased person can qualify as a family member for purposes of rent-controlled apartment).

intestacy law would give her entire estate to her living relatives and nothing to Michelle.<sup>140</sup> In other words, intestacy presumes here that Amara would give her entire estate to two people who hate her lifestyle over a person with whom she has lived for twenty-five years. If Amara had no other relatives, then her estate would escheat to the state<sup>141</sup> and intestacy would presume that she would rather no one receive her property than Michelle receive anything. This is an extreme example, but the point to be made is that application of existing intestacy law sometimes leads to extreme outcomes.

Of course, it would be impossible to ensure that intestacy would *always* result in a probable disposition of property, which is why the objective of intestacy is to approximate what a person would have done, not emulate it. To obtain a clearer view of what individuals in such relationships would do, a study was conducted in 1998 by the University of Minnesota of the attitudes of Minnesota residents about inheritance rights of unmarried couples.<sup>142</sup> The study consisted of presenting several scenarios to the participants, who were divided into a general public sample, a sample of participants with opposite-sex committed partners, and (most importantly for this purpose<sup>143</sup>), a sample of participants with same-sex committed partners.<sup>144</sup> The scenarios described a set of survivors of an opposite-sex partner and asked the participants to divide the estate between the surviving partner and the other survivors,<sup>145</sup> then checked for any difference if the scenario was switched so that decedent and surviving partner were of the same sex.<sup>146</sup>

The results say something very clear about the correlation of intestacy to probable intent. In the two scenarios where the estate is distributed between the surviving partner and the decedent's parents or siblings, *not one of the people with same-sex partners chose to give nothing to the surviving partner*.<sup>147</sup> The result mandated by intestacy law is the result which was unanimously rejected. This suggests that, as far as its application to same-sex couples, intestate succession is broken. Instead of

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<sup>140</sup> Under § 2-102 of the Uniform Probate Code, Michelle would not constitute a surviving spouse, so Amara's estate would pass under § 2-103(3) to the descendants of her parents.

<sup>141</sup> UNIF. PROBATE CODE § 3-914 (2004).

<sup>142</sup> Fellows, *supra* note 23, at 31.

<sup>143</sup> My proposal only considers same-sex couples. See discussion *infra* Part IV.

<sup>144</sup> Fellows, *supra* note 23, at 31. Note that the study used self-identification for determining the existence of a committed relationship. *Id.* at 34. My proposal does not permit self-identification as a means of qualifying for an intestate share. *Infra* Part IV.

<sup>145</sup> Fellows, *supra* note 23, at 35.

<sup>146</sup> *Id.* at 39, 42, 48.

<sup>147</sup> *Id.* at 41, 43. In both scenarios, when the scenario was changed to a same-sex partner, over 94% of the participants with same-sex partners who had given a share to the opposite-sex partner indicated that they would not change their distribution. It is unstated whether the remainder would increase or decrease their share. *Id.* at 39 n.193, 42 n.202. However, it is unlikely that they would want to give someone in their position less than they would someone in another position.

approximating what they would do if they had a will, intestacy has emulated what they would *not* do, and several states are becoming aware of this fact.<sup>148</sup>

The current status of intestacy law also endangers families of same-sex couples that are dependant on the decedent through deprivation of the spousal share. Presently, the spousal share protects families that were financially dependant on the decedent by ensuring that at least a portion of the estate (if not the entire estate) will remain with the family, which provides a source of support to avoid the necessity of turning to public assistance.<sup>149</sup> This safety net is not available to similarly situated same-sex couples. Recalling the example of Amara and Michelle, Michelle was financially dependent on Amara. With her death, there is no income, which could have the effect of forcing Michelle to seek public assistance until she establishes her own income stream. In dissolution of a relationship between domestic partners, one of the concerns that needs to be addressed by the law is the “protection of society from social-welfare burdens that should be born, in whole or in part, by individuals.”<sup>150</sup> The law should reflect the concept that death is the ultimate dissolution.

It could be suggested that no amendment is necessary because same-sex partners can simply draft a will leaving anything or everything to their partners. While this is true, I would reject this argument as a defense of the status quo because, by this reasoning, there is no need for intestacy at all, as anyone can simply leave a will that would provide for the same outcome as intestacy. However, because there are people who do not leave wills,<sup>151</sup> who leave wills with fatal defects,<sup>152</sup> or whose wills are successfully contested,<sup>153</sup> there should be rules for what happens when there is no valid will. Whatever reasons a state may have for not wanting to recognize same-sex marriages do not apply nearly as well to same-sex intestate succession.<sup>154</sup>

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<sup>148</sup> Ronald J. Scalise, Jr., *New Developments in United States Succession Law*, 54 AM. J. COMP. L. 103, 104–05 (Supp. 2006).

<sup>149</sup> The same purpose is served by elective share statutes, which prevent testators from disinherit their spouses. As a spouse cannot legally be disinherited by a will, so they cannot be “disinherited” by the default will of intestacy.

<sup>150</sup> PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS § 6.02(2) (2002).

<sup>151</sup> BOWE, *supra* note 6, § 1.6 at 28.

<sup>152</sup> See generally UNIF. PROBATE CODE § 2–502 (2004) (describing requirements of a valid will). With the advent of assorted curative doctrines, this has become a less frequent occurrence. For discussion of curative doctrines, see *id.* § 2–503 and JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 225–35 (7th ed. 2005).

<sup>153</sup> For a basic overview of grounds for contesting a will, see DUKEMINIER ET AL., *supra* note 152, at 148–93.

<sup>154</sup> Scalise, Jr., *supra* note 148, at 104.



#### IV. A PROPOSED STATUTE FOR PROVIDING INTESTACY RIGHTS TO UNMARRIED HOMOSEXUALS

Before presenting the text of my proposal, a review of some past proposals will provide a perspective for understanding and evaluating the substance of this proposal. I will then present my proposed statute and accompanying explanation of my policy decisions.

##### *A. A Brief History of Domestic Partner Inheritance Proposals*

One of the first proposals for domestic partner intestate succession was by Professor Lawrence Waggoner in 1995.<sup>155</sup> Professor Waggoner, the principal drafter of the 1990 Uniform Probate Code,<sup>156</sup> had drafted and proposed an addition to the Code which provided an intestate share of at least one half of the estate to any “committed partner,”<sup>157</sup> employing multifactor and presumption tests for eligibility. Of special note in Professor Waggoner’s proposal is that the proposal only applies to decedents who do not leave a valid will.<sup>158</sup>

Another proposal was published by Professor E. Gary Spitko in 2002. After reviewing the issues that needed to be addressed by committed partner proposals,<sup>159</sup> determination of the amount to be taken,<sup>160</sup> and eligibility,<sup>161</sup> Professor Spitko set out a system in which the percentage of the estate taken as the share accrued based on the duration on the relationship (as measured by cohabitation), and is then subjected to fractional reduction based on surviving descendants, parents, and prior termination of the relationship.<sup>162</sup> This allowance for a share even if the decedent and partner were not together at death is based on concerns that, when a relationship is terminated shortly before death, it is less likely that the surviving partner has undone any financial dependence on the decedent.<sup>163</sup> While he recognizes the equivalency between separation for

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<sup>155</sup> The proposal was originally set forth in LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS 108–09 (3d ed. 2002), and is reprinted in Appendix A of E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, app. A, at 342 (2002) [hereinafter “Waggoner Draft”].

<sup>156</sup> John H. Langbein, *Curing Execution Errors and Mistaken Terms in Wills: The Restatement of Wills Delivers New Tools (and New Duties) to Probate Lawyers*, 18 PROB. & PROP. 28, 28–29 (2004).

<sup>157</sup> Spitko, *supra* note 155, at 342 § b.

<sup>158</sup> *Id.* at 342 § a. Normally, intestate succession applies to all property not otherwise distributed by a person’s will. With this language, the committed partner would not take under his proposal if a valid will was left, even if there was property not distributed by the will.

<sup>159</sup> *Id.* at 269–89.

<sup>160</sup> *Id.* at 289–314.

<sup>161</sup> *Id.* at 315–39.

<sup>162</sup> *Id.* at 345.

<sup>163</sup> *Id.* at 304.

cohabitants and divorce for married persons,<sup>164</sup> the inability to obtain spousal support or other equitable distribution makes it necessary for him to provide a share in cases of recent separation.<sup>165</sup>

The last proposal considered here was drafted by Professor T.P. Gallanis during a study prepared at the behest of the ABA Section on Real Property, Trust, and Estate Law.<sup>166</sup> After an overview of domestic partnership and American inheritance law, four areas of concern were discussed before the proposal was presented: Should the statute cover all domestic partnerships or only same-sex partnerships? How should qualification be determined? Should the domestic partner share equal the spousal share? Should the other spousal rights of probate be extended?<sup>167</sup> Professor Gallanis's proposal took the form of amending Professor Waggoner's 2002 draft,<sup>168</sup> which consisted of an extensive definition of domestic partner, and added "domestic partner" or "domestic partnership period" to any references to "spouse" or "marriage."<sup>169</sup>

### *B. The Proposal*

What follows is my proposed statute. I have drawn from the various proposals set forth by Professors Waggoner, Spitko, and Gallanis, as well as provisions of the Uniform Probate Code, and have structured the proposal in a way that makes it similar to Professor Waggoner's draft. The statute is designed to be incorporated into the Uniform Probate Code, and should be adapted as necessary to fit into a state's probate code.

(a) Amount. The surviving life partner of an unmarried adult decedent who dies without leaving a valid will shall be entitled to take the following portion of the decedent's intestate estate:

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 305. *But see* Vasquez v. Hawthorne, 33 P.3d 735 (Wash. 2001) (holding that property acquired during marital-like relationship between two men could be subjected to equitable division).

<sup>166</sup> T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 56 (2004).

<sup>167</sup> *Id.* at 83–86. Specifically, the rights in question are the family allowance, elective share, and protection from a premarital will.

<sup>168</sup> This is a revision of Professor Waggoner's 1995 draft. *Id.* at 86 n.199.

<sup>169</sup> *Id.* at 87–90.

<u>Duration of Relationship between Surviving Life Partner and Decedent:</u>	<u>Percentage of Intestate Estate:</u>
Less than 2 years	0%
At least 2 years but less than 3 years	4%
At least 3 years but less than 4 years	8%
At least 4 years but less than 5 years	12%
At least 5 years but less than 6 years	16%
At least 6 years but less than 7 years	20%
At least 7 years but less than 8 years	24%
At least 8 years but less than 9 years	28%
At least 9 years but less than 10 years	32%
At least 10 years but less than 11 years	35%
At least 11 years but less than 12 years	38%
At least 12 years but less than 13 years	41%
At least 13 years but less than 14 years	44%
At least 14 years but less than 15 years	47%
At least 15 years	50%

If, however, there is no other heir as provided by state law, and if the duration of the relationship between the surviving life partner and decedent exceeded five years, the surviving life partner shall be able to claim the remainder of the estate from the state escheat fund if six years<sup>170</sup> have

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<sup>170</sup> Six years was chosen because, under the Uniform Probate Code, the statutory period for claiming from the escheat fund is eight years. This provides adequate time for another claimant to

elapsed since payment into the escheat fund.

(b) Requirements of Life Partner. In order to be considered the life partner of the decedent, an individual must (i) be an unmarried adult, (ii) be prohibited by state law from being married to the decedent by reason of being of the same gender, (iii) not be otherwise prohibited from marrying the decedent by reason of blood relationship, (iv) have been living in a marriage-like relationship with the decedent at the time of death, (v) have been cohabiting with the decedent, and (vi) not be considered the life partner of another person.<sup>171</sup>

(c) Definition of “Living in a Marriage-Like Relationship.” For the purposes of subsection (b), the following factors shall be employed in determining if a person is living in a marriage-like relationship with the decedent:

- (1) the intermingling of finances between the parties;
- (2) the raising of children by the parties;
- (3) whether or not a public or private commitment ceremony was performed;
- (4) the exchange of symbols of the relationship (e.g. a ring);
- (5) the reputation of the parties in the community in which they resided;
- (6) the existence and content of written statements by the parties pertaining to their relationship; and
- (7) any other factor which the court finds pertinent and relevant to the determination.

(d) Presumption of Marriage-Like Relationship. For the purposes of subsection (b), a marriage-like relationship shall be presumed to exist if any of the following conditions are met:

- (1) the parties were registered with the state as domestic partners;<sup>172</sup>
- (2) one of the parties received employee benefits from the other that were contingent on the parties being found to be domestic partners;<sup>173</sup>

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arrive while also insuring that a person is not compelled, by choice of life partner, to give property to the state.

<sup>171</sup> This subsection contains provisions substantively identical to the Waggoner Draft, *supra* note 155, except for the subsec. (b)(ii) requirement that the decedent and life partner be of the same gender.

<sup>172</sup> “Domestic Partner” here would be replaced by whatever name the state had selected for the relationship.

<sup>173</sup> This refers to employer benefits, such as health insurance, that are available to the domestic partners of employees.

or

(3) the parties qualify as domestic partners under any other applicable state law or local ordinance.

(e) Force of Presumption. If a presumption arises under subsection (d) due to satisfaction of one factor, the presumption may be rebutted by preponderance of the evidence. If a presumption under subsection (d)

arises due to satisfaction of multiple factors, the presumption may be rebutted by clear and convincing evidence.<sup>174</sup>

(f) Limitation of Intestate Share. The amount of the intestate share under subsection (a) shall not exceed the amount that the life partner would be entitled to if the decedent and life partner were legally married under the applicable state law.<sup>175</sup>

(g) Non-Creation of Marital Union. Nothing in this section shall be construed to create any marital union or to entitle the life partner to any other benefit or privilege otherwise restricted to persons in a marital union.

### *C. Analysis and Commentary on the Proposal*

In drafting this proposal, a principal concern was whether the proposal could actually be enacted into law. In the current political environment, marked by states enacting Defense of Marriage Acts<sup>176</sup> and amending their constitutions to prohibit same-sex marriages,<sup>177</sup> were I to suggest giving the surviving life partner a share equal to the spousal share and all associated rights, as Professor Gallanis proposed,<sup>178</sup> the legislation would probably either be voted down or found unconstitutional. While the proposal does place same-sex partnerships on a lower level than marriage, which perhaps implies a lesser degree of legitimacy,<sup>179</sup> the proposal also provides a level of protection that is otherwise absent. The statute is not intended to provide a replacement for a will, only a precaution.

While I opted for the accrual system advocated by Professor Spitko, I also selected an accrual schedule more reminiscent of the elective share.<sup>180</sup>

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<sup>174</sup> This subsection contains identical provisions to the Waggoner Draft, *supra* note 155.

<sup>175</sup> Of course, anyone claiming under this statute would be unable to marry the decedent as per (b)(ii). This subsection is intended to provide that the intestate share would not exceed what the survivor would receive if he or she were able to be married and had done so.

<sup>176</sup> *Hernandez I*, 805 N.Y.S.2d at 386 (Saxe, J., dissenting).

<sup>177</sup> See, e.g., OR. CONST. art. XV, § 5a.

<sup>178</sup> Gallanis, *supra* note 166, at 90.

<sup>179</sup> Seidman, *supra* note 135, at 248.

<sup>180</sup> UNIF. PROBATE CODE § 2-201(a) (2004).

The basis for this change, including the limit on the size of the share at 50% of the estate, was a political concern. The fractional reduction for surviving parents and descendants was eliminated as unnecessary given that the statute cannot distribute the entire estate if there is another claimant. I rejected the possibility of allowing a person to claim an intestate share if he or she was not in a relationship with the decedent at the time of death<sup>181</sup> because, as Professor Spitko concurred, the donative intent of a marital divorce and a separation of domestic partners is generally equivalent<sup>182</sup> – the decedent does not want to give his or her property to the person from whom he or she was divorced (or separated). Not only is this notion consistent with the decedent's probable intent, it also treats married and unmarried same-sex couples alike in that a person cannot claim an intestate share from an ex-partner's estate. To allow otherwise would be, in this respect at least, to elevate the unmarried couple above the status of the married couple, a proposal with a minimal, if existent at all, chance of being accepted.

I intentionally departed from all the other proposals in limiting this proposal to same-sex couples. Although it is true that there are many reasons why opposite-sex couples do not get married,<sup>183</sup> and such relationships are also not covered by intestacy,<sup>184</sup> the difference that prompted this proposal at all is that many opposite-sex couples have *chosen* not to become married. If they wanted to marry, they could claim the protection of intestacy. Currently, I see a greater need to protect those who cannot fall within intestacy than those who, for whatever reason, have chosen not to fall within intestacy. Perhaps in time, intestate succession will be extended to such relationships. However, while they can be brought within the reach of intestacy, it is more pressing to include relationships that cannot be brought within intestacy.

Finally, the subsections limiting the share size to that which would be available to a married couple and explicitly disclaiming any other rights associated with marriage were added to conform with any constitutional limitations on recognizing same-sex marriages. In their absence, an argument could be made that, because this statute allows the survivor of a same-sex relationship a greater share than an equally placed marriage, and is granting rights that are provided by statute to married couples, that the law is creating a union similar to marriage and is therefore unconstitutional. In states which do not have such language in their constitutions, subsections (f) and (g) can be freely omitted.

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<sup>181</sup> *Supra* Part IV(b)(iv)–(v).

<sup>182</sup> Spitko, *supra* note 155, at 304.

<sup>183</sup> Gallanis, *supra* note 166, at 83.

<sup>184</sup> *Id.*

## V. CONSTITUTIONAL CHALLENGES TO THE PROPOSAL: MUCH ADO ABOUT NOTHING

Because this proposal takes a right currently only available to married persons and extends it to unmarried homosexuals, there is a possibility that it could be challenged in some states as an unconstitutional effort to replicate marriage. Twenty-seven states have amended their state constitutions to prohibit recognition of marriage except between two individuals of different sexes.<sup>185</sup> These amendments all provide that marriage is only between a man and a woman.<sup>186</sup> Some go further to forbid recognition of any other relationship entitling people to the benefits of marriage.<sup>187</sup> Intestate succession rights, being limited to spouses, are one of the rights of marriage, and one could attack this proposal as violating such constitutional language.

There are two defenses in support of the proposal presented in this article. The first is that the statute simply does not create any legal relationship between the parties. While it uses the term Life Partner to describe who is eligible to claim under the statute, this term is simply a term of art. No language in this proposal creates any form of legal union, and does not touch in any way the laws governing marital unions. There is no legally recognized union established, and the proposal does not create any claim by which someone could argue that same-sex couples are entitled to any benefit of marriage. Indeed, subsection (g) explicitly states the contrary.

The other defense is that, even if the proposal does create a legal relationship, it certainly does not “entit[e] the parties to the rights or incidents of marriage.”<sup>188</sup> Married persons receive a multitude of rights and benefits.<sup>189</sup> Among these benefits are protection against disinheritance through the elective share, tax advantages, spousal privilege, and the ability to bring a civil action for wrongful death.<sup>190</sup> My proposal does not allow for claiming any of these rights. In fact, it does not allow for claiming any rights until a person has died. Amara and Michelle, while they are alive, do not receive any tax benefits that are given to married couples, cannot assert a spousal privilege in court, and if Amara wanted to

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<sup>185</sup> Danny Dougherty, State Policies on Same-Sex Marriage, Stateline.org, <http://www.stateline.org/live/ViewPage.action?siteNodeId=136&languageId=1&contentId=20695> (last visited Jan. 14, 2007).

<sup>186</sup> *E.g.*, ARK. CONST. amend. 83, § 1.

<sup>187</sup> *E.g.*, KAN. CONST. art. 15, § 16 (“No relationship, other than a marriage, shall be recognized by the state as entitling the parties to the rights or incidents of marriage.”).

<sup>188</sup> *Id.*

<sup>189</sup> *Baehr v. Lewin*, 852 P.2d 44, 59 (Haw. 1993).

<sup>190</sup> *Id.*

leave a will completely disinheriting Michelle, she could do so.<sup>191</sup> The only right of marriage that is comparable is the right to claim under intestacy before parents. First, the fact that parents, children, and siblings also have claims under intestate succession<sup>192</sup> diminishes the argument that intestacy is a right of marriage at all. My proposal could be seen as providing a class of claimants with lower priority than spouses, but greater priority than parents. Second, the right provided by the proposal is not the same right provided to the surviving spouse. Under prevailing law, the surviving spouse can obtain up to the entire estate if he or she was married to the decedent for any period of time.<sup>193</sup> According to this proposal, the only way the surviving partner can claim the entire estate is if he or she was with the decedent for six years, and then only if there is no other heir. If there is another heir, which includes anyone up to a descendant of the decedent's grandparent,<sup>194</sup> then the survivor will only receive up to half of the estate regardless of how long the couple was together. While the survivor can never receive more than a married person in an equivalent situation would, he or she can receive less. This proposal does not create any legal union, does not extend any right uniquely tied to marriage, and is not marriage in disguise. The proposed statute simply seeks to remedy a deficiency in existing intestacy law and should not raise any constitutional problems.

## VI. CONCLUSION

There are some states that already have full intestacy rights for same-sex partners. Hawaii, for example, has a reciprocal beneficiary system<sup>195</sup> that confers equivalent intestacy rights on those who register as such with the state.<sup>196</sup> To lawmakers in states which have already provided inheritance rights for unmarried homosexual couples, I would urge them to ignore this proposal. This statute is intended for states that do not have any such protection. To lawmakers in those states, this proposal is not about same-sex marriages; it is about protecting the families of people in same-sex relationships. I would urge all states without other provisions to separate family law from inheritance law, consider this statute on its merits, and adopt legislation based on this proposal.

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<sup>191</sup> Not only does the elective share only apply to a surviving spouse, UNIF. PROBATE CODE § 2-202 (2004), but the proposal is identical here to the Waggoner Draft, *supra* note 155, and only applies if no valid will is left.

<sup>192</sup> UNIF. PROBATE CODE § 2-103 (2004).

<sup>193</sup> *Id.* § 2-102 (1).

<sup>194</sup> *Id.* § 2-103(4).

<sup>195</sup> HAW. REV. STAT. §§ 572C-1— 572C-6 (2006).

<sup>196</sup> *Id.* § 560:2-102.