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COMMENT

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I. INTRODUCTION

Although the first child is free, any person who becomes the biological parent of a second nonmarital child within the state of Mississippi is guilty of a

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misdemeanor punishable by a $250.00 fine and up to ninety days imprisonment.[1] Indeed, until the state amended its "crimes against public morals and decency" in 2004, Mississippi required its state health department to report the names and addresses of every person "listed on birth certificates of illegitimate children" to every district attorney in the state.[2] In Tennessee, county officials may indenture nonmarital children into servitude if it "satisfactorily" appears their mother "disregards their moral and mental culture, and either keeps or lives in a house of ill fame."[3] So long as it seems it would better the child's condition, Tennessee counties can "bind out illegitimate children," as apprentices even if the mother otherwise provides her children with sufficient clothing and food.[4]

Notwithstanding these rather extreme exceptions, modern statutory schemes generally disfavor laws that create legal distinctions based on the marital status of a person's parents, especially laws that deny rights to nonmarital children or perpetuate the stigma associated with the legal status of "illegitimacy."[5] This sentiment, however, represents a substantial evolution in social views that effected changes to important areas of law.[6] Although Wyoming law reflects some of the legislative trends related to the rights of nonmarital children, the state's laws of intestate succession continue to distinguish between marital and nonmarital children.[7] Wyoming Statute § 2-4-102, entitled "Rule of descent; illegitimate person," provides the "rule of descent of all property, real and personal, of any illegitimate person dying intestate" in Wyoming.[8] Under this provision,

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[1] *See* MISS. CODE ANN. § 97-29-11 (2018) ("If any person, who shall have previously become the natural parent of an illegitimate child . . . , shall again become the natural parent of an illegitimate child born within this state, he or she shall be guilty of a misdemeanor."). Each subsequent child born out-of-wedlock to a person in Mississippi could result in a fine of $500.00 and up to six months in jail. *Id.*

[2] Act of April 22, 2004, ch. 399, 2004 Miss. Laws 259 (codified as amended at MISS. CODE ANN. § 97-29-11 (2018)).

[3] *See* TENN. CODE ANN. § 71-3-302 (2018) (illegitimate children as apprentices) ("The county legislative body may bind out illegitimate children in the same way as orphans, upon its satisfactorily appearing that the . . . condition of such children would be thereby bettered, although the mother may provide ordinary food and clothing for the mother's children.").

[4] *See id.* To "bind out" means to indenture or legally obligate to serve. *Bind*, BLACK'S LAW DICTIONARY (5th Pocket ed. 2016).

[5] *See infra* notes 88–104, 205–23 and accompanying text. The examples of exceptions provided in the first paragraph represent the extreme. *See also* Karen A. Hauser, Comment, *Inheritance Rights for Extramarital Children: New Science Plus Old Intermediate Scrutiny Add Up to The Need for Change*, 65 U. CIN. L. REV. 891, 901–02 (1997) ("Birth inside of marriage or outside of marriage is a matter of status.").

[6] *See infra* notes 16–104 and accompanying text.

[7] *See infra* notes 8–9, 108–223 and accompanying text.

[8] WYO. STAT. ANN. § 2-4-102 (2018).

nonmarital children are categorically precluded from distributing property to their fathers through intestate succession, even after the father establishes paternity by judicial determination.[9]

Part II of this Comment begins with a brief history of the treatment of nonmarital children in state intestacy laws and in Wyoming's rules of intestate descent.[10] Part II follows with an overview of United States Supreme Court jurisprudence concerning discrimination against nonmarital children in state inheritance laws.[11] Part II concludes with an examination of how most state legislatures have responded to these Supreme Court decisions by eliminating statutory distinctions between marital and nonmarital children, including the stigmatizing classification of "illegitimacy."[12] Finally, Part III challenges the propriety of Wyoming Statute § 2-4-102 in light of surrounding provisions, equal protection concerns, and current social models.[13] Although Wyoming has eliminated the legal distinction from most of its statutes, the Wyoming State Legislature finds itself decades behind legislative and societal trends with respect to its laws of intestate succession.[14] Accordingly, Part III argues that Wyoming should repeal § 2-4-102, which continues to label nonmarital children as "illegitimate," both in title and in substance.[15]

II. BACKGROUND

Historically, the law has not been kind to nonmarital children.[16] Unequal treatment of children born out-of-wedlock frequently afforded nonmarital children fewer rights than children born to married parents.[17] Common law once precluded children born out-of-wedlock from paternal child support, social

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[9] *See id.*; *infra* notes 168–80 and accompanying text.

[10] *See infra* notes 16–38 and accompanying text (providing a brief historical survey of early state intestacy laws, including a lengthier discussion of Wyoming's rules specifically).

[11] *See infra* notes 39–87 accompanying text.

[12] *See infra* notes 88–107 and accompanying text.

[13] *See infra* notes 108–224 and accompanying text.

[14] *See infra* notes 27–38 and accompanying text.

[15] S*ee infra* notes 108–224 and accompanying text.

[16] *See infra* notes 17–22 and accompanying text.

[17] UNIF. PARENTAGE ACT § 202 cmt. (UNIF. LAW COMM'N 2017); *see also* 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 90.08[3][a] (Michael Allan Wolf ed., 2018); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 346–47 (2011) (citing Trimble v. Gordon, 430 U.S. 762, 768 (1977)); Susan E. Satava, Comment, *Discrimination Against the Unacknowledged Illegitimate Child and the Wrongful Death Statute*, 25 CAP. U.L. REV. 933, 933–35 (1996).

security benefits, and recovery for wrongful death.[18] Furthermore, state laws created the legal status of "illegitimacy," which perpetuated the stigma that nonmarital children were disfavored members of society.[19] Among the most pervasive effects of the legal distinctions imposed on nonmarital children, however, was the impact on inheritance and property distribution at death.[20]

A. Nonmarital Children and Intestate Succession

Early common law classified children born out-of-wedlock as *filius nullius*, or "the child of no one," and many state statutes considered them "nonpersons".[21] With this legal status, a person who was born out-of-wedlock could not inherit from anyone but that person's spouse.[22] Beginning in 1785, however, states began enacting laws that afforded nonmarital children more of the same rights enjoyed by marital children than they had under the common law.[23] Kentucky, Vermont, and Virginia were among the first states to pass laws that permitted children born out-of-wedlock to take from their mothers through intestate succession.[24] Throughout the nineteenth century, many new states and territories followed this trend.[25] Likewise, a number of states enacted laws that established at least some

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[18] Maldonado, *supra* note 17, at 346–47, 350–51; *see also* Jimenez v. Weinberger, 417 U.S. 628 (1974) (social security benefits); Gomez v. Perez, 409 U.S. 535 (1973) (child support); Levy v. Louisiana, 391 U.S. 68 (1968) (wrongful death).

[19] *See* Maldonado, *supra* note 17, at 346–48, 350–51; 16 POWELL, *supra* note 17, § 90.08 [3] n.29.

[20] *See, e.g.*, Trimble v. Gordon, 430 U.S. 762, 768 (1977); Maldonado, *supra* note 17, at 357–60, 364–67; Lawrence H. Averill, Jr., *The Wyoming Probate Code of 1980: An Analysis and Critique*, 16 LAND & WATER L. REV. 103, 109–33 (1981) [hereinafter Averill, *The Wyoming Probate Code of 1980*]; Lawrence H. Averill, Jr., *Wyoming's Law of Decedents' Estates, Guardianship and Trusts: A Comparison with the Uniform Probate Code—Part I*, 7 LAND & WATER L. REV. 169, 183–85 (1972) [hereinafter Averill, *Wyoming's Law of Decedents' Estates*]; *infra* notes 21–38, 51 and accompanying text.

[21] 16 POWELL, *supra* note 17, § 90.08[3][a]; Maldonado, *supra* note 17, at 350 (citing *Trimble*, 430 U.S. at 768); Satava, *supra* note 17, at 934, 937. "I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can acquire; for he can inherit nothing, being looked upon as the son of nobody; and sometimes called *filius nullius* . . . ." *Filius nullius,* BLACK'S LAW DICTIONARY (10th ed. 2014) (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *447 (1765)); *see also Levy*, 391 U.S. at 70; *infra* notes 48–49 and accompanying text.

[22] 16 POWELL, *supra* note 17, § 90.08[3][a]; Maldonado, *supra* note 17, at 350.

[23] *See* 16 POWELL, *supra* note 17, § 90.08[3][a] nn.34–46.

[24] *See id.* § 90.08[3][a]. Without the aid of a specific statute, Connecticut reached the same result when its courts construed the word "children" in the state's intestacy laws to include the nonmarital child of a female decedent. *Id.* (citing Heath v. White, 5 Conn. 228 (1824); Brown v. Dye, 2 Root 280 (Conn. 1795)).

[25] *See id.*

means for a child born to unwed parents to inherit from their fathers through intestate succession, if the child's parents later married.[26]

1. Early Intestate Succession Laws in Wyoming

In 1869, before Wyoming became a state, the territory's first legislative assembly enacted its original rules governing property distribution through intestate succession.[27] Consistent with other territories and states, Wyoming's pre-statehood intestate distribution rules distinguished between decedents based on the marital status of their parents.[28] Although the original act allowed a child born out-of-wedlock to inherit from the mother, a nonmarital child was permitted to inherit from the father only if the mother and father married each other after the birth of the child.[29] In addition, the act provided the rule of descent for all real and personal property "of any bastard or illegitimate person" dying intestate in Wyoming.[30] This rule, now codified at § 2-4-102, is distinct from the rule of descent for all "other persons" and precludes fathers from taking property through intestate succession from their nonmarital children.[31]

2. Wyoming's Archaic Rules of Intestate Descent

Although Wyoming's intestacy statutes predate its statehood, Wyoming's rules of descent for intestate succession have remained substantially unchanged.[32] Despite the enactment of two comprehensive probate acts and one major revision, the basic pattern of intestate distribution remains unaltered.[33] After Wyoming became a state, its first state legislature passed the Probate Procedure Act, which

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[26] *See id.* "Legitimation" is the act or process of declaring a nonmarital child legitimate, especially by the later marriage of the child's parents. *Legitimation*, BLACK'S LAW DICTIONARY, *supra* note 21 ("From the time of Constantine, the rule of Roman law was that children born before marriage were made legitimate by the subsequent marriage of their parents." (quoting G.C. CHESHIRE, PRIVATE INTERNATIONAL LAW 427–28 (6th ed. 1961))).

[27] Act of Dec. 10, 1869, ch. 41, 1869 Wyo. Sess. Laws 398 (codified as amended in scattered sections of WYO. STAT. ANN. §§ 2-4-101 to 2-4-108 (2018)) (regulating intestate descent and distribution of property); Averill, *Wyoming's Law of Decedents' Estates*, *supra* note 20, at 172 ("This act covered nearly the full range of intestacy questions including the rights of all full blooded next of kin, half bloods, illegitimates, posthumous children, aliens, children receiving advancements, and children whose parents are divorced.").

[28] *See* Averill, *Wyoming's Law of Decedents' Estates*, *supra* note 20, at 172; *see also* WYO. STAT. ANN. §§ 2-4-101 to -102; *infra* notes 29–31 and accompanying text.

[29] Act of December 10, 1869, ch. 41, § 7, 1869 Wyo. Sess. Laws 398, 400 (repealed 1979).

[30] *Id.* § 10, at 400–01 (codified at WYO. STAT. ANN. § 2-4-102 (2018)).

[31] *See id.*; WYO. STAT. ANN. §§ 2-4-101, -102; *infra* notes 117–29 and accompanying text.

[32] Averill, *Wyoming's Law of Decedents' Estates*, *supra* note 20, at 172 ("Other than a minor amendment in 1877 and a little more significant one in 1915, the basic distribution provisions have remained unchanged.").

[33] *See id.*

governed the administration of decedents' estates until 1979, when Wyoming's legislature adopted the Wyoming Probate Code.[34] The following year, the Wyoming Legislature substantially revised the Probate Code to address practitioner concerns with the new provisions.[35] However, despite these sweeping changes to Wyoming's probate laws, the state's rules of intestate descent and the language of § 2-4-102 survived each major revision.[36] With each revision, the Legislature simply renumbered Wyoming's original rules of descent and incorporated them into each new version of the Wyoming Probate Code without amending the language or substance of the original provisions.[37] Consequently, Wyoming courts have been applying the same rules of intestate succession for nearly 150 years.[38]

B. Nonmarital Children and Equal Protection

In the late 1960s, the United States Supreme Court began addressing the constitutionality of state laws that denied children born out-of-wedlock certain rights otherwise afforded to marital children.[39] During this period, the Court invalidated a series of state statutes that distinguished between marital and nonmarital children for the purposes of determining legal heirship, beneficiaries, and the right to recover.[40] In each line of cases, the Court upheld its position that statutory discrimination against nonmarital children violated the Equal Protection Clause of the Fourteenth Amendment.[41] As the Court decided these

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[34] *See id.* at 172–73.

[35] Probate Code, ch. 142, 1979 Wyo. Sess. Laws 256 (1979) (codified as amended at WYO. STAT. ANN. §§ 2-1-101 to 2-15-106 (2018)); Probate Code of 1980, ch. 54, 1980 Wyo. Sess. Laws 267 (codified as amended at WYO. STAT. ANN. §§ 2-1-101 to 2-15-106 (2018)). The development of the Probate Code of 1980 served as the "last general review and recodification of probate law in Wyoming" by the Legislature to date. Ann Bradford Stevens, *Uniform Probate Code Procedures: Time for Wyoming to Reconsider*, 2 WYO. L. REV. 293, 294–95 (2002). For more information about the history of Wyoming's probate laws generally, see Averill, *Wyoming's Law of Decedents' Estates*, *supra* note 20, at 171–74; Averill, *The Wyoming Probate Code of 1980*, *supra* note 20, at 103, 109–33.

[36] Averill, *The Wyoming Probate Code of 1980*, *supra* note 20, at 106–07, 106 n.8, 109; *see also* WYO. STAT. ANN. § 2-4-102 (2018); *supra* notes 29–35 and accompanying text.

[37] *See, e.g.*, Probate Code, ch. 142, 1979 Wyo. Sess. Laws 256; Probate Code of 1980, ch. 54, 1980 Wyo. Sess. Laws 267.

[38] *See supra* notes 7–9, 27–37 and accompanying text.

[39] *See infra* notes 40, 47–87 and accompanying text.

[40] UNIF. PARENTAGE ACT § 202 cmt. (UNIF. LAW COMM'N 2017); Maldonado, *supra* note 17, at 351–52; *see also, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977) (intestate succession); Jimenez v. Weinberger, 417 U.S. 628 (1974) (social security benefits); N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) (public assistance); Gomez v. Perez, 409 U.S. 535 (1973) (right to child support); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) (worker's compensation); King v. Smith, 392 U.S. 309 (1968) (public assistance); Levy v. Louisiana, 391 U.S. 68 (1968) (wrongful death).

[41] *See supra* notes 39–40 and accompanying text. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see also infra* notes 47–87 and accompanying text.

cases, it clarified the level of scrutiny required for birth status discrimination claims, which evolved from a rational basis test in *Levy v. Louisiana* to the "not toothless," intermediate level of scrutiny that controlled in *Lalli v. Lalli*.[42] The following three cases illustrate not only the Court's analysis of equal protection questions concerning nonmarital children, but also the particular impact each holding had in shaping modern intestacy laws.[43]

Many of the Court's birth status cases assessed the constitutionality of laws that denied children born out-of-wedlock the right to inherit property *from* their biological fathers who died intestate.[44] In contrast, Wyoming Statute § 2-4-102 concerns the rights of nonmarital children to distribute property *to* their biological fathers through intestate succession.[45] Although the Court has yet to consider whether its holdings extend to rights of nonmarital children to freely distribute property at death, the Court's analysis of similar statutory distinctions provides some guidance as to how Wyoming courts might address an equal protection challenge to § 2-4-102.[46]

1. Levy v. Louisiana

In 1968, the United States Supreme Court decided *Levy v. Louisiana,* 391 U.S. 68 (1968), which served as a catalyst for a flood of challenges to state laws that distinguished between marital and nonmarital children.[47] In *Levy*, the Court invalidated on equal protection grounds a Louisiana statute that denied children born out-of-wedlock the right to recover for the wrongful death of a parent.[48] After their mother's death, a representative brought the case on behalf of five nonmarital children to challenge a Louisiana statute that classified nonmarital children as "nonpersons" for purposes of determining the right to recover for wrongful death.[49] The Court emphasized the limits on state power to create legal classifications between particular groups of people, noting that although "a State has broad power when it comes to making classifications, it may not draw a line

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[42] *See infra* notes 47–87, 144–53 and accompanying text.

[43] *See infra* notes 47–87 and accompanying text.

[44] *See, e.g.*, Lalli v. Lalli, 439 U.S. 259 (1978); *Trimble*, 430 U.S. 762; Labine v. Vincent, 401 U.S. 532 (1971).

[45] *See* WYO. STAT. ANN. § 2-4-102 (2018); *infra* notes 108–43 and accompanying text.

[46] *See infra* notes 47–87, 144–204 and accompanying text.

[47] *See supra* notes 39–40 and accompanying text.

[48] *See* Levy v. Louisiana, 391 U.S. 68 (1968). Nonmarital children were not considered "persons" for the purpose of determining the right to recover under the state's wrongful death statute. *Id.* at 70.

[49] *See id.* at 69–70.

which constitutes an invidious discrimination against a particular class."[50] The Court explained its extreme sensitivity for basic civil rights and cautioned that it would not hesitate to "strike down an invidious classification even though it had history and tradition on its side."[51]

Applying a rational basis test to determine the constitutionality of the line drawn between marital and nonmarital children, the Court looked to the State's purported purpose for the statutory distinction.[52] Louisiana's rationale for denying nonmarital children the right to recover for wrongful death was "based on morals and general welfare because it discourage[d] bringing children into the world out of wedlock."[53] In the context of equal protection, the Court questioned why rights should be denied to nonmarital children based solely on their birth to unwed parents.[54] Finding no rational reason for the distinction between marital and nonmarital children regarding the right to recover for wrongful death, the Court concluded that "it is invidious to discriminate against them when no action, conduct, or demeanor of theirs is possibly relevant to the harm that was done" to their loved one.[55] The Court found the statute violated the Equal Protection Clause and invalidated the law.[56]

2. Trimble v. Gordon

Several years later, in *Trimble v. Gordon*, 430 U.S. 762 (1977), the Court invalidated a section of the Illinois Probate Act that precluded children born

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[50] *See id.* at 71 (citations omitted) (citing Ferguson v. Skrupa, 372 U.S. 726, 732 (1963); Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942)). Invidious discrimination is "[a]ny distinction drawn in a population for inappropriate reasons [or] the creation or perpetuation of a burden on one individual or group, particularly if the motivation for the creation of that burden is ill-will toward the individual or group or a desire to harm one for the benefit of another." *Invidious discrimination,* THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012).

[51] *Levy*, 391 U.S. at 71 (citing Brown v. Bd. of Educ., 347 U.S. 483, (1954); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966)). The Court began its analysis with the premise that nonmarital children are "nonpersons" under the statute, concluding that they "are humans, live, and have their being. They are clearly 'persons' within the meaning of the Equal Protection Clause of the Fourteenth Amendment." *Id.*

[52] *See id.* at 70–72. "Though the test has been variously stated, the end result is whether the line drawn is a rational one." *Id.* (citing Morey v. Doud, 354 U.S. 457, 465–66 (1957)); *supra* notes 42, 48 and accompanying text.

[53] *Levy*, 391 U.S. at 70 (citing Levy v. State, 192 So. 2d 193, 195 (La. Ct. App. 1966)).

[54] *Id.* at 71. One of the determinative factors considered by the Court was the fact that the law imposes the same *responsibilities* on all citizens—including the registration for the draft and the payment of taxes—without regard to the marital status of their parents. *Id.*

[55] *Id.* at 72 ("Legitimacy or illegitimacy of birth has no relation to the nature of the wrong allegedly inflicted on the mother. These children, though illegitimate, were dependent on her; she cared for them and nurtured them . . . ; in her death they suffered wrong in the sense that any dependent would.").

[56] *See id.* at 71–72.

out-of-wedlock from inheriting from their fathers through intestate succession.[57] Because the statute permitted nonmarital children to inherit only from their mothers, but allowed marital children to inherit from both parents, the Court held that it violated the Equal Protection Clause of the Fourteenth Amendment.[58] Applying intermediate scrutiny, the Court held the statutory discrimination against nonmarital children in the context of intestate succession unconstitutional, reversing Illinois's decision to uphold the statute.[59] In reaching this conclusion, the majority found the Illinois Supreme Court failed to complete the constitutional analysis because it did not address the relation between the State's alleged purpose and intestate distribution.[60]

As with *Levy*, a significant portion of the Court's reasoning in *Trimble* rested on the State's purpose and its interest in distinguishing between marital and nonmarital children in the context of intestate succession.[61] The Court first considered Illinois's purported interest in promoting "legitimate" family relationships.[62] Without challenging the State's concern for protecting the family unit as a fundamental social institution, the Court examined the relationship between the purpose and the statute.[63] Based on its prior decisions expressly rejecting "the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships," the Court found that a State does not reach its goal by imposing a total statutory disinheritance on nonmarital children.[64] As such, the Court ultimately held that the distinction between marital and nonmarital children in the statute did not bear a substantial relationship to the State's purported purpose.[65]

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[57] *See* Trimble v. Gordon, 430 U.S. 762 (1977).

[58] *Id*. at 763, 776.

[59] *See id*. at 765–67 (defining the level of scrutiny required for equal protection challenges involving nonmarital children).

[60] *Id*. at 769. The constitutionality of this state law "depends upon the character of the discrimination and its relation to legitimate legislative aims." *Id.* (quoting Mathews v. Lucas, 427 U.S. 495, 504 (1976)).

[61] *See id.* at 767–73; *supra* notes 47–56 and accompanying text.

[62] *See Trimble*, 430 U.S. at 768–70.

[63] *See id*. at 769 ("In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose . . . . The court below did not address the relation between [the statute] and the promotion of legitimate family relationships, thus leaving the constitutional analysis incomplete.").

[64] *Id*. at 769. The Court reasoned, "parents have the ability to conform their conduct to societal norms, but their illegitimate children can affect neither their parents' conduct nor their own status." *Id.* at 770 ("Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent.").

[65] *Trimble*, 430 U.S. at 769.

The Court next discussed the state's interest in orderly disposition of property at death.[66] The lower court placed significant emphasis on the evidentiary challenges associated with proof of paternity and related concerns about spurious claims to decedents' estates.[67] In response, the Court iterated its duty to "accord substantial deference to a State's statutory scheme of inheritance" and the difficulty of "vindicating constitutional rights without interfering unduly with the State's primary responsibility" in governing the orderly disposition of a decedent's property.[68] Regarding the evidentiary concerns posed by proof of paternity, the Court enounced the need for the proper balance in the context of equal protection.[69] The Court noted that evidentiary concerns should not be brushed aside lightly, but they also cannot justify "an impenetrable barrier that works to shield otherwise invidious discrimination" and arbitrary line drawing to avoid potential problems with proof.[70]

With respect to the second state interest, the Court concluded that the potential challenges in proving paternity do not create a sufficient justification "for the total statutory disinheritance of illegitimate children whose fathers die intestate."[71] Consequently, the Court held that the "reach of the statute extends well beyond the asserted purposes" in violation of the Equal Protection Clause of the Fourteenth Amendment, and it invalidated the statute on the basis that it categorically denied nonmarital children the right to inherit from their fathers.[72]

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[66] *See id.* at 770–72.

[67] *Id.* at 770 (explaining that the "more favorable treatment of illegitimate children claiming from their mothers' estates was justified because 'proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors'" (quoting *In re* Estate of Karas, 329 N.E.2d 234, 52 (Ill. 1975))). At the time of the Supreme Court's decision in *Trimble*, genetic testing as a reliable means of proving paternity was not readily available and would not be for another several decades. *See* Hauser, *supra* note 5, at 946–51; *infra* note 164 and accompanying text.

[68] *Trimble*, 430 U.S. at 771. The Court elaborated on the need for an appropriate legal framework for the orderly disposition of property at death, leaving the specific structure within the discretion of each individual state. *Id.* "In exercising this responsibility, a State necessarily must enact laws governing both the procedure and substance of intestate succession." *Id.* With respect to constitutional challenges, the Court explained the substantial deference they should accord to a state's inheritance rules when constitutional violations are alleged. *Id.*

[69] *See id.* at 771.

[70] *Id.* at 771 (quoting Gomez v. Perez, 409 U.S. 535, 538 (1973)).

[71] *Id.* at 772.

[72] *See id.* at 772–74 (citing Jimenez v. Weinberger, 417 U.S. 628, 637 (1974)). The Court summarized its reasoning as follows: "Traditional equal protection analysis asks whether this statutory differentiation on the basis of illegitimacy is justified by the promotion of recognized state objectives. If the law cannot be sustained on this analysis, it is not clear how it can be saved by the absence of an insurmountable barrier to inheritance under other and hypothetical circumstances." *Id.* at 773–74.

3. Lalli v. Lalli

Finally, in *Lalli v. Lalli*, 439 U.S. 259 (1978), the Court clarified its holding in *Trimble* by upholding a New York statute that precluded children born out-of-wedlock from inheriting from their fathers through intestate succession without formal proof of paternity.[73] The Court in *Lalli* distinguished the evidentiary requirement in the New York statute from the categorical preclusion prescribed by the Illinois statute invalidated in *Trimble*, holding that "the orderly settlement of estates [and] the dependability of titles to property passing under intestacy laws" were important state interests and the requirement to establish paternity was not overburdensome.[74]

The Court addressed whether the "discrete procedural demands that [the New York intestacy statute] places on illegitimate children bear an evident and substantial relation to the particular state interests this statute is designed to serve."[75] The Court again noted it has long recognized the considerable magnitude of a state's interest in the just and orderly disposition of property at death.[76] The Court also reiterated its position regarding evidentiary concerns, stating these concerns are "directly implicated in paternal inheritance by illegitimate children because of the peculiar problems of proof that are involved."[77]

The Court in *Lalli* distinguished *Trimble* on two separate grounds.[78] First, by requiring a nonmarital child's "legitimation" through the intermarriage of the child's biological parents as an absolute precondition to inheritance—in addition to the father's acknowledgment of paternity—the Illinois statute eliminated "the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity."[79] The statute in *Trimble* imposed a total

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[73] *See* Lalli v. Lalli, 439 U.S. 259 (1978). The statute at issue required that the proof of paternity be established during the purported father's lifetime. *Id.* at 261–62. Upholding this requirement, the Court explained, "[a]ccuracy is enhanced by placing paternity disputes in a judicial forum during the lifetime of the father." *Id.* at 271.

[74] *Id* at. 266 (citing *Trimble*, 430 U.S. at 771).

[75] *Id.* at 268. In contrast, the issue in *Trimble* was whether Illinois's purported interests in promoting traditional family structures and avoiding potential evidentiary issues regarding proof of paternity justified the total preclusion from paternal inheritance for nonmarital children. *See Trimble*, 430 U.S. at 771–72; *supra* notes 57–72 and accompanying text.

[76] *Lalli*, 439 U.S. at 268 (citing *Trimble*, 430 U.S. at 771; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 170 (1972); Labine v. Vincent, 401 U.S. 532, 538 (1971); Lyeth v. Hoey, 305 U.S. 188, 193 (1938)); *see also supra* notes 66–68 and accompanying text.

[77] *Lalli*, 439 U.S. at 268. As the Court noted, it is seldomly difficult to establish maternity. *Id.* "Proof of paternity, by contrast, frequently is difficult when the father is not part of a formal family unit." *Id.* at 269; *see also supra* note 67.

[78] *See id.* at 264–65; *infra* notes 79–85 and accompanying text.

[79] *Lalli*, 439 U.S. at 266–67 (quoting *Trimble*, 430 U.S. at 770–71). "[E]ven a judicial declaration of paternity was insufficient to permit inheritance" under the Illinois statute in *Trimble*. *Id.*

disinheritance of nonmarital children unless they were subsequently legitimated by their parents' marriage, making the law unconstitutional.[80] In contrast, the requirement of establishing paternity for the purpose of intestate succession did not inevitably result in the unnecessary disqualification of a substantial number of nonmarital children who were capable of proving the existence of the father-child relationship.[81]

Secondly, the Court in *Lalli* reasoned that the Illinois statute had been at least partially defended as a means of promoting marital family relationships.[82] New York, however, did not offer the same justification in support of the statutory distinction.[83] With respect to the evidentiary requirement in the New York statute, the Court ultimately held that the "administration of an estate [would] be facilitated, and the possibility of delay and uncertainty minimized, where the entitlement of an illegitimate child to notice and participation is a matter of judicial record before the administration commences."[84] Accordingly, the Court found that the reach of the statute fell within the asserted purpose.[85]

Concerning fraudulent assertions of paternity, the Court found spurious claims would be "much less likely to succeed, or even to arise, where the proof is put before a court of law at a time when the putative father is available to respond, rather than first brought to light when the distribution of the assets of an estate" is soon to occur.[86] The Court ultimately upheld the New York evidentiary requirement for proof of paternity on the basis that it reflected the proper balance between important state interests and the charge to grant nonmarital children the same inheritance rights as marital children, in so far as is practicable.[87]

C. Nonmarital Children and State Parentage Laws

Following the series of United States Supreme Court decisions striking down laws that discriminated against nonmarital children, states responded by revising their laws accordingly.[88] Shortly after the Court's decision in *Levy*, the Uniform

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[80] *See id.* at 273.

[81] *See id*.

[82] *See id*. at 267 (citing *Trimble*, 430 U.S. at 768).

[83] *See id.*

[84] *Id*. at 271.

[85] *See id*.

[86] *Id*. at 271–72.

[87] *Id*. at 274; *see also supra* notes 75–85 and accompanying text; *infra* notes 98–104 and accompanying text.

[88] *See* 16 POWELL, *supra* note 17, § 90.08[3][b]; Hauser, *supra* note 5, at 950–53; *supra* notes 39–87 and accompanying text.

Law Commission (Commission) promulgated the Uniform Parentage Act (UPA) to specifically address inequities for nonmarital children in conformity with the new constitutional guidelines.[89] In support of its approach, the Commission emphasized the need for new state legislation on the issue of parentage, explaining that "the bulk of current law on the subject of children born out of wedlock is either unconstitutional or subject to grave constitutional doubt."[90] For legislative guidance in complying with evolving case law, many states embraced the UPA, which catalyzed the trend toward the elimination of birth status classifications from state law.[91]

The Commission developed the UPA to accomplish two primary goals: provide a reliable legal framework for establishing paternity and eliminate statutory classification based on birth status as a benchmark for a person's legal rights.[92] Contributors sought not only to ensure nonmarital children enjoy the same rights as children born to married parents, but also to permanently eliminate the concept of "illegitimacy" and any remaining vestige of the stigma perpetuated by the discriminatory legal status.[93] As one means of mitigating inequitable treatment of nonmarital children, the UPA's substantive and procedural framework operates to ensure the parent-child relationship "is established solely on the basis of parentage and not on the basis of the parents' marital status."[94] As the Court noted in *Trimble* and *Lalli*, states can sufficiently satisfy their interest in orderly and accurate disposition of property through their freedom to prescribe any regularized procedure or formal method of proof that will assure the authenticity of an acknowledgment of paternity.[95] To assist states in accomplishing this goal,

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[89] *See* UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 2017); Paula Monopoli, *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 995, 1003 (2012); Hauser, *supra* note 5, at 917.

[90] UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 1973); *see also supra* notes 40–88 and accompanying text.

[91] *See* Monopoli, *supra* note 89, at 1003; Hauser, *supra* note 5, at 917; *supra* notes 39–87 and accompanying text.

[92] UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 2017) (citing UNIF. PARENTAGE ACT § 2, cmt. (1973)); UNIF. PARENTAGE ACT § 202 ("A parent-child relationship extends equally to every child and parent, regardless of the marital status of the parent."). The comment to § 202 states, the "provision reaffirms the principle that once a parent-child relationship has been established, that relationship is entitled to substantive equality, regardless of whether the child is a marital or a nonmarital child." UNIF. PARENTAGE ACT § 202 cmt.; *see also* Averill, *The Wyoming Probate Code of 1980*, *supra* note 20, at 111–12; Satava, *supra* note 17, at 933–35.

[93] UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 2017) (citing UNIF. PARENTAGE ACT § 2, cmt. (1973)).

[94] Averill, *The Wyoming Probate Code of 1980*, *supra* note 20, at 111–12; UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 2017); *see also* Hauser, *supra* note 5, at 917, 939.

[95] Lalli v. Lalli, 439 U.S. 259, 272 n.8 (1978).

the UPA substantively defines the parent-child relationship and then sets forth the procedural guidelines for establishing the parent-child relationship with respect to nonmarital children.[96]

Several states, including Wyoming, have adopted some form of the UPA from at least one of the three available versions.[97] Although the degree of the evidentiary requirements differs among states, the various statutory amendments were intended to ensure nonmarital children have the same legal rights as children with married parents.[98] To that end, the Commission later revised the Uniform Probate Code (UPC) to incorporate by reference the UPA's evidentiary framework for establishing paternity for the purposes of determining legal heirship for intestate succession.[99] The incorporation of the UPA into the UPC served as a final solution in the search for requirements "designed to ensure the accurate resolution of claims of paternity and to minimize the potential for disruption of estate administration."[100]

As the second means of mitigating inequitable treatment of nonmarital children through the UPA, the Commission sought to fully eliminate the stigmatizing legal status of "illegitimacy" from state statutes in accordance with changing social family models and marital trends.[101] The original version of the UPA eliminated the use of the term "illegitimate" entirely and replaced it with the phrase "child with no presumed father."[102] The second version uses the terms "nonmarital" and "born out-of-wedlock" interchangeably, and the most

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[96] UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017); Hauser, *supra* note 5, at 917.

[97] UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 2017) (citing *Legislative Fact Sheet – Parentage Act (2017)*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20(2017)); *see also Legislative Fact Sheet – Parentage Act (2002)*, UNIFORM LAW COMMISSION, http://uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20(2002) (last visited Nov. 30, 2018); *Legislative Fact Sheet – Parentage Act (1973)*, UNIFORM LAW COMMISSION, http://uniformlaws.org/LegislativeFactSheet.aspx?title=Parentage%20Act%20(1973) (last visited Nov. 30, 2018).

[98] *See Lalli*, 439 U.S. at 274 ("[T]he New York Legislature desired to 'grant to illegitimates in so far as practicable rights of inheritance on a par with those enjoyed by legitimate children . . . .'"); UNIF. PARENTAGE ACT § 2 (UNIF. LAW COMM'N 2017); Sol Lovas, *When Is a Family Not a Family? Inheritance and the Taxation of Inheritance Within the Non-Traditional Family*, 24 IDAHO L. REV. 353, 375–76 (1988); *supra* note 94 and accompanying text.

[99] Monopoli, *supra* note 89, at 1002–03, 1003 n.55 (citing UNIF. PROBATE CODE § 2-115, legislative note (2011), 8 U.L.A. pt. I, at 51 (Supp. 2011)); *see also* WYO. STAT. ANN. § 2-4-107 (2018) ("A person born out of wedlock is a child of . . . the father, if the relationship of parent and child has been established under the Uniform Parentage Act . . . ."); *infra* notes 132–36 and accompanying text. For information regarding states adopting the UPA and UPC, see Hauser, *supra* note 5, at 952–59.

[100] *See Lalli*, 439 U.S. at 269–71.

[101] *See* UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 2002) (citing UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 1973)); *supra* notes 89–94 and accompanying text.

[102] UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 1973); *see also, e.g.,* UNIF. PARENTAGE ACT §§ 6(c), 7 (UNIF. LAW COMM'N 1973).

recent version uses the term "nonmarital" exclusively.[103] Many states took similar measures to eliminate the use of the term "illegitimate" from their statutes after adopting the UPA.[104]

As evidenced by Wyoming Statute § 2-4-102, entitled "Rule of descent; illegitimate person," Wyoming is not among the majority of states that have taken formal action to entirely eliminate the term "illegitimate" and the related legal distinction from its laws, notwithstanding the state's enactment of the Wyoming Uniform Parentage Act.[105] The problem in Wyoming, however, extends beyond the use of the stigmatizing language of "illegitimacy" in reference to nonmarital children.[106] As a result of the Wyoming Legislature's continued failure to revise the state's original laws of intestate succession, § 2-4-102 continues to treat nonmarital and marital children differently for the purpose of intestate distribution on the basis of their birth status.[107]

III. ANALYSIS

Wyoming's laws of intestate succession provide default rules for the distribution of real and personal property for decedents who die without a will in the state.[108] For the purposes of intestate distribution, Wyoming's intestacy laws classify decedents based on the marital status of the decedent's parents, providing a separate rule of descent for nonmarital children.[109] Although § 2-4-101 provides the general rule of descent in Wyoming, § 2-4-102 governs the rule of descent for "any illegitimate person dying intestate in this state."[110]

Despite initial similarities between the two intestate provisions, the Wyoming rules of descent apply differently to a decedent if that person has no

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[103] *See, e.g.*, UNIF. PARENTAGE ACT, prefatory note, art. 4 cmt., § 601 cmt. (UNIF. LAW COMM'N 2002); *see generally* UNIF. PARENTAGE ACT (UNIF. LAW COMM'N 2017).

[104] *See, e.g.*, N.Y. GEN. CONSTR. LAW § 56 (McKinney 1925); Terms Describing Parents, Children, and Siblings Act, ch. 1046, 1994 Iowa Acts 87, 87 (replacing each and every occurrence of the word "illegitimate" in the Iowa Code with the word "biological."). *But see supra* notes 1–4 and accompanying text.

[105] *See* WYO. STAT. ANN. § 2-4-102 (2018); *id.* § 14-2-401 to -907; Lovas, *supra* note 98, at 375–76; *supra* notes 89–104; *infra* notes 130–42 and accompanying text.

[106] *See* WYO. STAT. ANN. § 2-4-102; *infra* notes 108–224 and accompanying text.

[107] *See infra* notes 108–223 and accompanying text.

[108] *See* WYO. STAT. ANN. §§ 2-4-101 to -108; JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 63–67 (10th ed. 2017).

[109] *See* WYO. STAT. ANN. §§ 2-4-101, -102; Averill, *Wyoming's Law of Decedents' Estates*, *supra* note 20, at 182–85.

[110] WYO. STAT. ANN. §§ 2-4-101, -102.

surviving spouse or descendants and was born out-of-wedlock.[111] Under these circumstances, the decedent's property passes to the decedent's "mother and her children" pursuant to § 2-4-102(a)(iii).[112] In contrast, under § 2-4-101, the estate of a person who dies with no surviving spouse or children passes to the decedent's "mother, *father*, *brothers* and *sisters*," if that person was born to parents who were married.[113] By allowing the property of a decedent born out-of-wedlock to pass only to that person's mother and her descendants, § 2-4-102 categorically precludes nonmarital children from distributing property to their father and his descendants through intestate succession.[114]

A. Section 2-4-102 is Inconsistent with Surrounding Statutes

The interpretation of a revision to an entire area of law warrants consideration of the effects an alteration to one provision can have on the interpretation given to an otherwise unaltered provision.[115] With respect to § 2-4-102, certain legislative amendments to surrounding sections of Wyoming's laws of intestate succession have gone beyond merely affecting the given interpretation, causing § 2-4-102 to become entirely unnecessary and inconsistent with Wyoming's laws of intestate succession as a whole.[116]

1. Wyoming Statute § 2-4-101

Wyoming Statute § 2-4-101 provides the general rule of descent for purposes of determining intestate succession in Wyoming.[117] This provision provides the pattern of distribution to be applied when a decedent dies without a will: "Whenever *any person* having title to any real or personal property having the nature or legal character of real estate or personal estate undisposed of . . . dies intestate, the estate shall descend and be distributed in parcenary to his kindred,

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[111] *See id.* § 2-4-102(a)(i)–(iv). "If the deceased illegitimate person leaves no heirs, as above provided, the estate shall pass to and vest in the next of kin of the mother of such illegitimate person, in the same manner as the estate of a legitimate person would pass by law to the next of kin." *Id.* § 2-4-102(a)(iv).

[112] *Id.* § 2-4-102(a)(iii) ("If the deceased illegitimate person leaves no widow, surviving husband or descendents, his estate shall descend to and vest in the mother and her children, and their descendents, one-half (½) to the mother and the other half to be equally divided between her children and their descendents."); *supra* notes 7–9 and accompanying text.

[113] WYO. STAT. ANN. § 2-4-101(c)(ii) (emphasis added) ("If there are no children, nor their descendents, then to his father, mother, brothers and sisters, and to the descendents of brothers and sisters who are dead, the descendents collectively taking the share which their parents would have taken if living, in equal parts . . . .").

[114] *See id.* § 2-4-102; Averill, *Wyoming's Law of Decedents' Estates*, *supra* note 20, at 183–85; *supra* notes 7–9 and accompanying text.

[115] Averill, *The Wyoming Probate Code of 1980*, *supra* note 20, at 105.

[116] *See infra* notes 118–42 and accompanying text.

[117] WYO. STAT. ANN. § 2-4-101.

male and female. . . ."[118] Unlike § 2-4-102, which has never been amended, § 2-4-101 has seen at least thirteen minor amendments since it was enacted in 1869.[119]

As the emphasis above indicates, the language in § 2-4-101 applies to "any person."[120] Neither the excerpted nor the remaining language of the statute make any reference to the purported exception provided in § 2-4-102.[121] Indeed, the provision is void of any language commonly employed in Wyoming statutes to indicate the existence of another provision that may affect the interpretation regarding the statute's applicability.[122] Based on common phrases found in other Wyoming statutes, a practitioner may expect to see phrases such as, "subject to the limitations provided in subsequent provisions . . . " or "notwithstanding the rules provided by § 2-4-102 . . . ."[123] Section 2-4-101, however, contains no such language.[124]

In *Levy v. Louisiana*, the Court asserted that children born out-of-wedlock are "clearly persons" within the meaning of the Equal Protection Clause of the Fourteenth Amendment.[125] Applying this reasoning, nonmarital children are clearly "persons" within the meaning of § 2-4-101.[126] Furthermore, no case law or other authority offers an alternative interpretation.[127] Because § 2-4-101 governs the rule of intestate descent for "any person," the distinction provided by § 2-4-102 based on the marital status of a decedent's parents conflicts with § 2-4-101.[128] Under principles of statutory interpretation, this incongruity poses a challenge to

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[118] *Id.* § 2-4-101(a) (emphasis added).

[119] *See, e.g.*, Probate Code, ch. 142, 1979 Wyo. Sess. Laws 256 (1979) (codified as amended at WYO. STAT. ANN. §§ 2-1-101 to 2-15-106 (2018)); Probate Code of 1980, ch. 54, 1980 Wyo. Sess. Laws 267 (codified as amended at WYO. STAT. ANN. §§ 2-1-101 to 2-15-106 (2018)). These minor changes to § 2-4-102 were not substantive and did not affect the underlying pattern of distribution. *See supra* notes 32–38 and accompanying text.

[120] WYO. STAT. ANN. § 2-4-101(a).

[121] *See id.*

[122] *See id.*; *infra* note 123 and accompanying text.

[123] *See, e.g.*, WYO. STAT. ANN. § 25-11-105 (2018) ("Subject to the limitation in subsection (a) of this section, the resident, his estate and other legally responsible persons are liable after release of the resident for the payment of any unpaid established charge."); WYO. STAT. ANN. § 29-7-301 (2018) ("Notwithstanding the provisions of subsection (b) of this section, a house trailer shall not be removed pursuant to this section if it is occupied by the lessee.").

[124] *See id.* § 2-4-101(a).

[125] Levy v. Louisiana, 391 U.S. 68, 70 (1968).

[126] *See supra* notes 52–56, 125 and accompanying text.

[127] *See supra* notes 188 and accompanying text.

[128] *See supra* notes 108–27 and accompanying text.

practitioners because it creates uncertainty as to the operation of § 2-4-102 and whether it remains the controlling rule for intestate distribution for a Wyoming decedent who was born out-of-wedlock.[129]

2. Wyoming Statute § 2-4-107

Section 2-4-107 provides Wyoming's rules for determining the parent-child relationship for purposes of intestate succession.[130] As amended, this provision further eliminates the need for § 2-4-102 and the distinction it creates between decedents.[131] Shortly after adopting the Wyoming UPA in 1977, the Wyoming Legislature incorporated the UPA by reference into § 2-4-107 with the enactment of the Wyoming Probate Code of 1979.[132] As outlined above, the UPA provides a judicial and evidentiary framework for establishing a person's parentage and was intended to ensure certain rights and obligations between parents and children are based on parentage and not on the marital status of the parents.[133]

With respect to the determination of the parent-child relationship for nonmarital children, § 2-4-107 provides in relevant part, "[a] person born out of wedlock is a child of the mother. *That person is also a child of the father, if the relationship of parent and child has been established under the Uniform Parentage Act*."[134] The incorporation of the UPA into § 2-4-107 extends the framework for establishing the parent-child relationship to any person dying intestate, without regard to the marital status of the decedent's parents.[135] Because the UPA adequately addresses the evidentiary concerns commonly associated with proof of paternity, the incorporation of the UPA eliminates the need to impose separate rules of intestate descent for nonmarital children as dictated by § 2-4-102.[136]

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[129] WYO. STAT. ANN. § 2-4-107.

[130] *Id.*

[131] *See supra* notes 115–29 and accompanying text.

[132] *See* Averill, *The Wyoming Probate Code of 1980*, *supra* note 20, at 111. The Wyoming Uniform Parentage Act was originally enacted as Wyoming Statutes §§ 14-2-101 through 14-2-120. *Id.* at 111 n.20; *see also* Wyoming Uniform Parentage Act, 1977 Wyo. Sess. Laws 174 (1977). That version of the Act was repealed in 2003 and an amended version was codified in scattered sections of Wyoming Statutes §§ 14-2-401 through 14-2-907. *See* Wyoming Uniform Parentage Act, 2003 Wyo. Sess. Laws 93 (codified as amended at scattered sections of WYO. STAT. ANN. §§ 14-2-401 to 14-2-907 (2018)).

[133] UNIF. PARENTAGE ACT, prefatory note (UNIF. LAW COMM'N 2017); *see* Averill, *The Wyoming Probate Code of 1980*, *supra* note 20, at 111–12; *see also supra* notes 88–96 and accompanying text.

[134] WYO. STAT. ANN. § 2-4-107 (emphasis added).

[135] *See id.*; *supra* notes 88–107, 130–34 and accompanying text.

[136] *See* Averill, *The Wyoming Probate Code of 1980*, *supra* note 20, at 111–12 (citing WYO. STAT. § 14-2-104(c) (1977 Repub. Ed.)).

3. Wyoming Statute § 14-2-502

In addition to reflecting the UPA's broader purpose of establishing the evidentiary framework for proof of paternity, Wyoming's version of the UPA includes a provision that expressly precludes statutory discrimination based on marital status.[137] Aptly entitled "No discrimination based on marital status," Wyoming Statute § 14-2-502 provides that a "child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other."[138] This section is among the UPA provisions incorporated by reference into Wyoming's laws of intestate succession.[139]

Accordingly, the language in § 14-2-502 suggests that nonmarital children should be afforded the same right to distribute property to their fathers and his descendants as children born to parents who are married to each other.[140] The imposition of separate rules of descent provided by §§ 2-4-101 and -102, however, conflicts significantly with this interpretation.[141] Because § 2-4-102 operates to categorically preclude nonmarital children from distributing property to their fathers through intestate succession, the provision directly contradicts § 14-2-502's prohibition on this type of legal distinction.[142] Despite the apparent conflict, both provisions appear to remain fully operable according to Wyoming's statutory interpretation principles.[143]

B. Section 2-4-102 is Inconsistent with the Equal Protection Clause

The Wyoming Supreme Court has yet to evaluate the constitutionality of § 2-4-102.[144] Nevertheless, based on the United States Supreme Court cases invalidating state statutes that discriminate against children based on the marital status of their parents, the distinction between marital and nonmarital children created by § 2-4-102 implicates equal protection concerns.[145] However, because § 2-4-102 limits the rights of children born out-of-wedlock to distribute property through intestate succession, rather than their right to receive property, the proper analysis of Wyoming's rules of descent under *Trimble* and *Lalli* remains

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[137] WYO. STAT. ANN. § 14-2-502 (2018).

[138] *Id.*

[139] *See* WYO. STAT. ANN. § 2-4-107.

[140] *See supra* notes 137–39 and accompanying text.

[141] *See infra* notes 144–204 and accompanying text.

[142] *See* WYO. STAT. ANN. § 14-2-502; *infra* notes 144–204 and accompanying text.

[143] *See* Averill, *The Wyoming Probate Code of 1980*, *supra* note 20, at 105; *In re* Estate of Fosler, 13 P.3d 686, 688–89 (Wyo. 2000); *infra* notes 144, 188 and accompanying text

[144] *See infra* notes 145–47 and accompanying text.

[145] *See* Lovas, *supra* note 98, at 376, 376 n.162; *supra* notes 39–87 and accompanying text; *infra* notes 148–204 and accompanying text.

unclear.[146] Although the statutory distinction concerns the right of nonmarital children to distribute property to—rather than receive property from—their fathers, it is possible to examine Wyoming's rules of descent under the Court's reasoning in *Trimble* and *Lalli*.[147]

1. Discrimination Based on Marital Status of Parents

The Court's constitutional analysis of the statute in *Trimble* considered "the character of the discrimination and the relation to legitimate legislative aims."[148] Although classifications based on parent's marital status are not subject to strict scrutiny, the validity of the statutory distinction under the Equal Protection Clause depends on whether the difference in treatment bears a substantial relation to important state interests.[149] Although the law permits all children to inherit from both their mother and father, with respect to intestate distribution, Wyoming laws of intestate succession apply differently to decedents born out-of-wedlock than to decedents born to parents who were married.[150] This difference in treatment may serve as a basis for an equal protection challenge under Justice Powell's "less than strict, but not toothless" level of intermediate scrutiny as outlined *Trimble*.[151]

2. Substantial Relation to Important State Purpose

When Wyoming's then-territorial legislature passed § 2-4-102, it failed to document any specific purpose for imposing a separate rule of descent for nonmarital children, and the Wyoming Legislature has subsequently declined to justify the vestigial distinction.[152] The United States Supreme Court, however,

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[146] Although the United States Supreme Court has yet to directly address the question of whether its holdings in *Trimble* and *Lalli* would extend to other testamentary contexts, some courts and scholars have contemplated other, related applications. *See, e.g.*, Eskra v. Morton, 524 F.2d 9 (7th Cir. 1975) (probable intent for intestate distribution); Monopoli, *supra* note 89 (class gifts in donative documents); *supra* notes 57–87 and accompanying text; *infra* notes 148–204 and accompanying text.

[147] *See infra* notes 148–204 and accompanying text.

[148] Trimble v. Gordon, 430 U.S. 762, 769 (1977) ("In a case like this, the Equal Protection Clause requires more than the mere incantation of a proper state purpose." (quoting Mathews v. Lucas, 427 U.S. 495, 504 (1976))); *see also supra* note 105–07 and accompanying text.

[149] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 699, 810 (Wolter Kluwer, ed. 2015); Lalli v. Lalli, 439 U.S. 259, 265 (1978) (citing *Mathews*, 427 U.S. at 506 (1976); *Trimble*, 430 U.S. at 767)); *see also supra* note 42 and accompanying text.

[150] WYO. STAT. ANN. § 2-4-102 (2018); *see also supra* notes 108–14 and accompanying text.

[151] *See Trimble*, 430 U.S. at 767 ("Despite the conclusion that classifications based on illegitimacy fall in a 'realm of less than strictest scrutiny,' [this] scrutiny 'is not a toothless one . . . .'" (quoting *Mathews*, 427 U.S. at 510)); Monopoli, *supra* note 89, at 1021–22; *infra* notes 152–204 and accompanying text.

[152] *See supra* notes 27–38 and accompanying text. Despite several minor updates to surroundings statutes over the years, Wyoming has never substantively amended §2-4-102.

discussed a number of state purposes in *Trimble* and *Lalli* to determine whether each was substantially related to the distinction between marital and nonmarital children.[153] The purported state purposes discussed by the Court are among the common purposes asserted to justify laws that treat nonmarital children differently.[154] As such, the Court's reasoning in these cases could be informative in an equal protection analysis of § 2-4-102.[155]

a. Promoting Legitimate Family Relationships

The *Trimble* Court quickly disposed of the government's first purported purpose for the statute, reaffirming its position that the encouragement of legitimate family relationships does not bear a substantial relation to the legal classification which denies certain rights to nonmarital children.[156] Given the evolution of social mores since *Trimble*, it is unlikely that Wyoming would offer a similar justification for imposing a separate rule of descent on nonmarital children in support of § 2-4-102.[157] Moreover, after the Court reiterated this reasoning in *Lalli*, any state's attempt to challenge the Court's well-settled position in the future is unlikely to be effective.[158] As such, the Wyoming Supreme Court would have a solid basis for invalidating § 2-4-102 on equal protection grounds, absent some other state purpose bearing a substantial relation to the disparate treatment.[159]

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[153] In *Trimble*, Illinois proposed two state interests: fostering "the encouragement of legitimate family relationships" and maintaining "an accurate and efficient method of disposing of an intestate decedent's property." *Lalli*, 439 U.S. at 265 (citing *Trimble*, 430 U.S. at 768). The issue in *Lalli* was "whether the discrete procedural demands that [the New York statute] places on illegitimate children bear an evident and substantial relation to the particular state interests this statute is designed to serve." *Id.* at 268.

[154] *See, e.g.*, Mathews, 427 U.S. 495 (discussing the state's interest in promoting legitimate family relationships and concerns about proving paternity, fraud, and error); Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972); Labine v. Vincent, 401 U.S. 532 (1971); Levy v. Louisiana, 391 U.S. 68 (1968).

[155] *See infra* notes 156–204 and accompanying text.

[156] *Trimble*, 430 U.S. at 769 ("[W]e have expressly considered and rejected the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships." (citing *Weber*, 406 U.S. at 173, 175)). The Court reasoned that visiting "society's condemnation of irresponsible liaisons beyond the bonds of marriage . . . on the head of an infant is illogical and unjust." *Id.*; *see also supra* note 64 and accompanying text.

[157] *See Lalli*, 439 U.S. at 273 ("Granting that the State was appropriately concerned with the integrity of the family unit, we viewed the statute as bearing 'only the most attenuated relationship to the asserted goal.'" (quoting *Trimble*, 430 U.S. at 771)).

[158] *See also supra* note 156 and accompanying text. The State in *Lalli* did not offer this justification, but the Court discussed it in distinguishing the statute at issue in *Trimble*. *Lalli*, 439 U.S. at 268 (citing *Trimble*, 430 U.S. at 771).

[159] *See supra* notes 144–58 and accompanying text; *infra* 160–85 and accompanying text.

b. Orderly Distribution of Property at Death

The United States Supreme Court has long recognized states' considerable interest in maintaining just and orderly disposition of property at death, especially for the significant number of people who die without a will.[160] Central to that purpose is a state's underlying interest in protecting against spurious claims to testators' estates.[161] Much of the concern for fraudulent or mistaken claims in the context of intestate succession arises out of the challenges associated with proving the legal and genetic relationships that determine legal heirship for intestate succession.[162] With respect to nonmarital children, the relationship at issue in § 2-4-102 and the above-discussed cases is one of parentage.[163]

When the Court decided *Trimble*, genetic testing was not an available tool for establishing paternity and few states had adopted the legal framework created under the UPA.[164] Because proof of the maternal relationship was more readily ascertainable, the *Trimble* Court found "more serious problems of proving paternity might justify a more demanding standard" for establishing a father-child relationship for a person born out-of-wedlock.[165] Although a state's interest in accurate and orderly property disposition is substantial, the Court held that the reach of the Illinois statute far exceeded its justifiable purposes.[166] As an absolute precondition to inheritance from the father, the Illinois statute required "the legitimation of the child through the intermarriage of the parents."[167] Indeed, not even a judicial adjudication of paternity could allow inheritance under the statute.[168] Similarly, because § 2-4-102 simply omits the father and his decedents from the line of intestate descent for children born out-of-wedlock, establishment of the father-child relationship in accordance with § 2-4-107 and

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[160] *Lalli,* 439 U.S. at 268 (citing *Trimble*, 430 U.S. at 771; *Weber*, 406 U.S. at 170; Labine v. Vincent, 401 U.S. 532, 538 (1971); Lyeth v. Hoey, 305 U.S. 188, 193 (1938)). About 56% of Americans die without a will. Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP (May 18, 2018), https://news.gallup.com/poll/191651/majority-not.aspx.

[161] *Lalli,* 439 U.S. at 268 (citing *Trimble*, 430 U.S. at 771; *Weber*, 406 U.S. at 170; *Labine*, 401 U.S. at 538; *Lyeth*, 305 U.S. at 193); *see also infra* notes 164–84 and accompanying text.

[162] *Lalli*, 439 U.S. at 268 (citing *Trimble*, 430 U.S. at 771; *Weber*, 406 U.S. at 170; *Labine*, 401 U.S. at 538; *Lyeth*, 305 U.S. at 193); *see also infra* notes 164–84 and accompanying text.

[163] WYO. STAT. ANN. §§ 2-4-101, -102, -107 (2018); *see supra* notes 88–143 and accompanying text.

[164] *See generally* Hauser, *supra* note 5, at 946–51.

[165] *Trimble*, 430 U.S. at 770–71 (quoting *In re* Estate of Karas, 329 N.E.2d 234, 240 (Ill. 1975)); *see also Labine*, 401 U.S. 532.

[166] *Lalli*, 439 U.S. at 273; *see also id.* at 271.

[167] *Id.* at 266–67 (citing Trimble, 430 U.S. at 770–71).

[168] *Id.*

the Wyoming UPA has no effect on whether the child will distribute property to the nonmarital father through intestate succession under the language of the statute.[169]

The problem with this approach in *Trimble* was the unnecessary categorical bar to significant categories of nonmarital children who could establish the father-child relationship "without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws."[170] Judicial procedures for establishing paternity sufficiently serve the states' interest, and states are free to evaluate the merits of the various forms of proof.[171] Difficulty proving paternity in limited situations, however, is not a significant justification for birth status classifications that effect a total statutory exclusion of nonmarital children from rights otherwise enjoyed by marital children.[172] Because Wyoming's intestacy laws provide a legal framework for establishing paternity under the UPA, the constitutionality of the status-based classification created by § 2-4-102 is questionable under the Court's reasoning in *Trimble*.[173]

In contrast, the right to inherit in *Lalli* was not based on the legal status as a child of wed or unwed parents; indeed, all children had the right to inherit from both parents.[174] The distinction for a nonmarital child in the New York statute arose from the requirement for proof to establish the legal father-child relationship.[175] Accordingly, only the failure to prove paternity would result in a bar to paternal inheritance to a nonmarital child.[176] Because this requirement does not inevitably result in the unnecessary disqualification of a significant number

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[169] *Trimble*, 430 U.S. at 771; WYO. STAT. ANN. § 2-4-107 (2018); *see also supra* notes 108–42 and accompanying text.

[170] *Trimble*, 430 U.S. at 771; *Lalli*, 439 U.S. at 266–67 ("This combination of requirements eliminated 'the possibility of a middle ground between the extremes of complete exclusion and case-by-case determination of paternity.'" *Id.* (quoting *Trimble*, 430 U.S. at 770–71)).

[171] *See Trimble*, 430 U.S. at 772, 773 n.14; *Lalli*, 439 U.S. at 272 n.8.

[172] *See Trimble*, 430 U.S. at 771.

[173] *See* Estate of Stern, 311 S.E.2d 909, 911–12 (N.C. Ct. App. 1984), *aff'd per curiam*, 322 S.E.2d 771 (N.C. 1984) ("Though the classification in the present case differs from those in *Trimble* [and *Lalli*] . . . ; nevertheless, we shall apply the intermediate standard of review rather than the lower standard of review because it is at least arguable that the classification here is one 'based on illegitimacy.'"); David E. Webb, *The Prodigal Father: Intestate Succession of Illegitimate Children in North Carolina Under Section 29-19*, 63 N.C.L. REV. 1274, 1285 (1985) ("Stern establishes for North Carolina the modest proposition that the same equal protection and statutory analysis is applicable . . . whether the plaintiff is an illegitimate child or the heir of an illegitimate child's father."); *see also* Estate of Hicks, 675 N.E.2d 89, 97 (Ill. 1996) (applying the Court's analysis in *Trimble* to invalidate a statute that categorically precluded fathers from inheriting from their nonmarital children through intestate succession).

[174] *Lalli*, 439 U.S. at 267.

[175] *Id.*

[176] *Id.* at 273.

of nonmarital children, such a legal framework is generally permissible.[177] Indeed, the proof-of-paternity requirement works to improve accuracy in property disposition, while a total statutory preclusion extends far beyond that purpose.[178]

With respect to the freedom of distribution, Wyoming Statute § 2-4-102 functions more like the statute in *Trimble* because it operates as a total statutory bar, preventing all nonmarital children in Wyoming from distributing property to their fathers through intestate succession.[179] Likewise, nonmarital children in Wyoming also cannot overcome the statutory preclusion, even after establishing the father-child relationship through the state's legal framework for judicially acknowledged paternity.[180] However, in the context of orderly disposition at death, the Court finds no difficulty of proof or opportunity for inaccurate or spurious claims where the father has formally established paternity by adjudication or through any state authorized procedure.[181] Moreover, scientific advancements in and increased access to genetic testing further "eliminate the public policy justification for continued discrimination against extramarital children in the area of inheritance rights."[182] As such, this state interest offers no justification for the distinction between marital children and formally acknowledged nonmarital children imposed by § 2-4-102.[183] Because the law also applies to nonmarital children who do not need to be included for the state to serve its purpose, the provision likely fails intermediate scrutiny as to this purpose.[184]

3. Presumed Testamentary Intent

The freedom of disposition afforded to donors is an organizing principle of American succession laws, which aim to facilitate the posthumous implementation of a decedent's donative intent.[185] The primary concern of the law of succession is "enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent's *probable* intent."[186]

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[177] *Id.; see also supra* notes 73–87 and accompanying text.

[178] *Lalli*, 439 U.S. at 273 (citing *Trimble*, 430 U.S. at 771); *see also id.* at 271 (finding that placing paternity disputes in a judicial forum actually enhances accuracy); *supra* notes 50–72 and accompanying text.

[179] *See supra* notes 102–29 and accompanying text.

[180] *See supra* notes 79, 179 and accompanying text.

[181] *See* Labine v. Vincent, 401 U.S. 532, 553 (1971).

[182] Hauser, *supra* note 5, at 892; *see supra* notes 67, 164 and accompanying text.

[183] *Id.*

[184] *See* CHEMERINSKY, *supra* note 149, at 702 ("A law is overinclusive if it applies to those who need not be included in order for the government to achieve its purpose."); *see also supra* notes 148–51 and accompanying text.

[185] *See* DUKEMINIER & SITKOFF, *supra* note 108, at 1.

[186] *Id.* (emphasis added); *see also infra* notes 187–204 and accompanying text.

In accordance with the notion of freedom of disposition, an underlying purpose of a state's default rules of intestate descent represent a typical testator's probable intent.[187]

Because the Wyoming Supreme Court has yet to interpret § 2-4-102 or discuss its merits, Wyoming's purported purpose for imposing a separate rule of descent on nonmarital children remains unclear.[188] Although it was not until 2000, the court has discussed the legislative purpose of Wyoming's intestacy laws generally when it first interpreted the language of the rule of descent for marital children provided in § 2-4-101.[189] The court stated, in "drafting intestate laws, legislatures have tried . . . to provide for a scheme of distribution that would likely coincide with the desires of the average man who owns an average size estate composed of ordinary property to be distributed among a usual number and kind of relatives . . . ."[190] To the extent the legislature intended § 2-4-102 to coincide with the desires of the average nonmarital child, the question arises whether a categorical bar to intestate distribution by children born out-of-wedlock to nonmarital fathers bears a substantial relation to that purpose.[191]

In its discussion of the asserted state interest served by the Illinois statute, the *Trimble* Court briefly remarked about whether a state can justify disparate treatment of nonmarital children on the basis of presumed intent of decedents alone.[192] However, after concluding that the "statutory provisions at issue were shaped by forces other than the desire of the legislature to mirror the intentions of the citizens of the State with respect to their illegitimate children," the majority chose not to address the question in its evaluation of the Illinois statute.[193] Although the *Trimble* Court declined to address the question

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[187] DUKEMINIER & SITKOFF, *supra* note 108, at 65 ("In accordance with the principle of freedom of disposition, the primary objective in designing an intestacy statute is to carry out the probable intent of the typical intestate decedent."); Averill, *Wyoming's Law of Decedents' Estates*, *supra* note 20, at 176 ("The general intent of intestacy laws is to distribute a person's wealth on his death in a pattern which represents a close facsimile to that which the person would have designed had he properly manifested his intent.").

[188] Only one Wyoming case mentions the statute, but the provision was not at issue in the case. *See In re* Estate of Scherer, 2014 WY 129, ¶¶ 15–17, 336 P.3d 129, 134–35 (Wyo. 2014); *supra* note 144 and accompanying text. To determine a legislative intent that is reasonable and consistent, "the court must look to the mischief the statute was intended to cure, the historical setting surrounding its enactment, the public policy of the state, the conclusions of law, and other prior and contemporaneous facts and circumstances, making use of the accepted rules of construction . . . ." *In re* Estate of Fosler, 13 P.3d 686, 688 (Wyo. 2000) (citing State *ex rel.* Motor Vehicle Division v. Holtz, 674 P.2d 732, 736 (Wyo. 1983)).

[189] *See* Fosler, 13 P.3d 686.

[190] *Id.* at 689–90 (citing 1 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 1.6 (1960)); Averill, *Wyoming's Law of Decedents' Estates*, *supra* note 20, at 176).

[191] *See supra* note 168 and accompanying text.

[192] Trimble v. Gordon, 430 U.S. 762, 775 (1977).

[193] *Id.*

directly, some authorities suggest presumed intent would also fail as a justification for the limitation on intestate distribution imposed on nonmarital children by § 2-4-102.[194]

a. Substantial Relation to an Important State Purpose

Although courts afford states broad latitude to determine the probable intent of testators under the default rules of intestacy, a state's discretion is not without limits.[195] However, as noted above, state statutory classifications that distinguish based on the marital status of a decedent's parents warrant "stricter" scrutiny to ensure the law does not unnecessarily deny significant categories of nonmarital children rights it otherwise affords marital children.[196]

Wyoming Statute § 2-4-101 allows marital children to distribute property to both of their parents through intestate succession, while § 2-4-102 precludes children born out-of-wedlock from distributing property to their biological father and his descendants.[197] Under current notions of presumed testamentary intent, it is unreasonable to presume that nonmarital children in Wyoming are "unanimous in their sentiment" to disinherit their father and paternal half siblings.[198] While some testators who were born out-of-wedlock may choose to distribute property only to their mothers and disinherit their biological fathers, "the obligation to afford all persons equal protection of the laws arises" when the decision is made by the state.[199]

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[194] *See infra* note 201 and accompanying text.

[195] *Trimble*, 430 U.S. at 767. The Court explained that structuring the appropriate procedural and substantive framework of intestate succession is "particularly within the competence of the individual States." *Id.* at 771 ("Absent infringement of a constitutional right, the federal courts have no role here, and, even when constitutional violations are alleged, those courts should accord substantial deference to a State's statutory scheme of inheritance."); *see also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 174 (1972).

[196] *Trimble*, 430 U.S. at 767 ("Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. . . .").

[197] *See supra* notes 108–36 and accompanying text.

[198] *See* Estate of Dulles, 431 A.2d 208, 214 (Pa. 1981) (citing *Trimble*, 430 U.S. at 775 n.16) (rejecting the argument that the theory of presumed intent under Pennsylvania's laws of intestacy justified the exclusion of nonmarital grandchildren from a class gift to "grandchildren" in testamentary instruments). "Even if one assumed that a majority of the citizens of the State preferred to discriminate against their illegitimate children, the sentiment hardly would be unanimous." *Trimble*, 430 U.S. at 775 n.16 ("At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of "presumed intent." (citing Eskra v. Morton, 524 F.2d 9, 12–14 (7th Cir. 1975))). *See also* Monopoli, *supra* note 89, at 1024–27; *infra* notes 205–24 and accompanying text.

[199] *Eskra*, 524 F.2d at 14.

With two separate classes of testators for determining intestate distribution, Wyoming's intestacy laws presume a different probable intent for marital children than they presume for nonmarital children.[200] In the context of § 2-4-102, Wyoming law presumes the probable intent of marital children would be to include their fathers in the distribution of property, but presumes the probable intent of nonmarital children would be to exclude their fathers and any paternal siblings.[201] Accordingly, the State could argue that § 2-4-102 of Wyoming's intestate succession laws seeks to carry out a general intent of nonmarital children to exclude their fathers from the distribution of their property at death.[202] However, by denying nonmarital children the freedom to distribute property to their biological fathers through intestate succession, § 2-4-102 imposes a limitation on the freedom of disposition on nonmarital children that is not similarly imposed on marital children.[203] The existence of these equal protection concerns evidences the Wyoming Legislature's need to consider the constitutional validity of § 2-4-102 and whether any state purpose is served by its continued operation. However, even if probable intent does not serve as a sufficient basis to sustain an equal protection claim against the provision, the presumption and inconsistency with surrounding sections provide strong policy arguments in support of the repeal of § 2-4-102 by the Legislature.[204]

C. Section 2-4-102 is Inconsistent with Current Legislative and Societal Trends

Section 2-4-102 also conflicts with current social models and changing family and marital trends.[205] As increasingly more couples decide to start families but choose not to marry, most state legislatures have responded by eliminating the stigmatizing language of "illegitimacy" and related distinctions from their statutes.[206] Although Wyoming has eliminated this stigmatizing language from most of its statutes, the Wyoming Legislature has yet to respond to the legislative and societal trends with respect to its laws of intestate succession.[207] The Legislature's failure to update Wyoming's 150 year-old rules of descent

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[200] *See supra* note 17 and accompanying text.

[201] *See* Labine v. Vincent, 401 U.S. 532, 554 (1971) ("Intestate succession laws might seek to carry out a general intent of parents, not to provide for publicly acknowledged illegitimate children.").

[202] *See id.*

[203] *See supra* notes 194–202 and accompanying text.

[204] *See infra* notes 205–22 and accompanying text.

[205] *See infra* notes 206–24 and accompanying text.

[206] *See* DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 1–2, 4 (4th ed. 2015); DUKEMINIER & SITKOFF, *supra* note 108, at 74–75; *infra* notes 209–14 and accompanying text.

[207] S*ee supra* notes 32–38 and accompanying text.

since their enactment by the territory evidences the need for a reevaluation of the state's intestacy provisions and the policies on which they are based.[208]

According to the research of social scientists, "nothing short of a revolution has occurred in family life."[209] From 1960 to 2011, the number of couples choosing to cohabitate without marrying rose by more than 1,700%.[210] Between 1960 and 2013, the number of married adult men and women shifted from approximately two-thirds of the population to a point where less than half of households were occupied by married couples.[211] Between 2000 and 2010, the number of cohabitating unmarried couples increased by 41.1%, while the total population only increased 9.71%.[212] Conversely, the number of married households grew by only 3.7% during this period.[213] The 2010 data also revealed that, of the 6.6% of unmarried couple households, "39 percent of unmarried opposite couple households, and 17 percent of same-sex couple households, included children."[214] This rapid shift in the current social and family models and recent United States Supreme Court decisions indicate these trends will likely continue to evolve into the future.[215] This shift from predominately marital families to "functional" or "nontraditional" families has particular import for the functioning of intestacy laws.[216]

Through its failure to update the state's intestacy laws and its failure to repeal its rule of descent for "illegitimate persons," Wyoming perpetuates the vestigial

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[208] Hauser, *supra* note 5, at 892; *see also* Lovas, *supra* note 98, at 376; *supra* notes 50–72, 144–204 and accompanying text.

[209] ABRAMS ET AL., *supra* note 206, at 1 (quoting Suzanne M. Bianchi, *Family Change and Time Allocation in American Families,* 638 ANNALS 21, 21 (2011)).

[210] ABRAMS ET AL., *supra* note 206, at 4; *see also* DUKEMINIER & SITKOFF, *supra* note 108, at 74–75.

[211] ABRAMS ET AL., *supra* note 206, at 4; *see also* DUKEMINIER & SITKOFF, *supra* note 108, at 74–75.

[212] DUKEMINIER & SITKOFF, *supra* note 108, at 74; *see also* ABRAMS ET AL., *supra* note 206, at 1–2, 4.

[213] DUKEMINIER & SITKOFF, *supra* note 108, at 74–75 (noting that the 2010 census data show opposite-sex partners make up 90% of unmarried couple households); *see also* ABRAMS ET AL., *supra* note 206, at 1–2, 4.

[214] DUKEMINIER & SITKOFF, *supra* note 108, at 74; *see also* ABRAMS ET AL., *supra* note 206, at 1–2, 4.

[215] ABRAMS ET AL., *supra* note 206, at 1; *see also, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (finding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment afford same-sex couples a fundamental right to marry; invalidating state laws excluding same-sex couples from civil marriage; and holding that states do not have the right to refuse to recognize a lawful same-sex marriage on the ground of its same-sex character when it was performed in another state).

[216] *See* DUKEMINIER & SITKOFF, *supra* note 108, at 74–75; *see also* ABRAMS ET AL., *supra* note 206, at 1–4.

stigma that nonmarital children are disfavored members of society.[217] Essentially, § 2-4-102 continues to classify each nonmarital child as a "non-child" of the father, indicating that genetic testing and judicially established paternity are not sufficient for recognition of the parent-child relationship under the statute.[218] In conflict with the above-discussed principles of the UPA, the provision still classifies nonmarital children as "illegitimate."[219] Especially under current social constructs, the term continues to carry a powerfully negative connotation as a label for children who were born to unwed parents.[220] For example, the dictionary definitions for "illegitimate" include "improper," "invalid," and "against the law/unlawful."[221] In contrast, dictionaries define "legitimate" as "valid," "genuine," and "complying with the law/lawful."[222] With respect to children, the label can also mean "unintended" or "unwanted."[223] The term "illegitimacy" is shrouded with the notion of deviancy and is not an acceptable legal status for states to impose on nonmarital children.[224]

IV. CONCLUSION

Giving the words of Wyoming Statute § 2-4-102 their plain meaning, as we must, it appears the Wyoming Legislature intends to send the message that nonmarital children are disfavored by society.[225] However, according to some Wyoming practioners and district court judges, there is a greater likelihood that this statute has simply been overlooked by Wyoming courts and legislators.[226] To the extent Wyoming fails to update state law in conformity with the civil rights decisions of the United State Supreme Court, the continued effectiveness of § 2-4-102 calls in to question whether the Wyoming Legislature has any duty to

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[217] *See* Maldonado, *supra* note 17, at 378–86.

[218] *See supra* note 21 and accompanying text.

[219] *See supra* notes 89–107 and accompanying text.

[220] *See supra* notes 206–16 and accompanying text.

[221] *Illegitimate*, BLACK'S LAW DICTIONARY *supra* note 4.

[222] *Legitimate*, BLACK'S LAW DICTIONARY *supra* note 4.

[223] Maldonado, *supra* note 17, at 348 n.15 (citing *Illegitimate Child Definition*, URBAN DICTIONARY, http://www.urbandictionary.com/define.php?term=illegitimate+child (last visited Jan. 3, 2010); Virginia Heffernan, *Street Smart*: Urban Dictionary, N.Y. TIMES, July 1, 2009, http://www.nytimes.com/2009/07/05/magazine/05FOB-medium-t.html (last visited Nov. 25, 2018)).

[224] *See* Maldonado, *supra* note 17, at 349, 386, 393.

[225] *See In re* Estate of Fosler, 13 P.3d 686, 688 (Wyo. 2000); Campbell Cty. Mem'l Hosp. v. Pfeifle, 2014 WY 3, ¶ 25, 317 P.3d 573, 579 (2014); *supra* note 19, 217–24 and accompanying text.

[226] Again, only one Wyoming case mentions the statute, but the provision was not at issue in the case. *See In re* Estate of Scherer, 2014 WY 129, ¶¶ 15-17, 336 P.3d 129, 134–35 (Wyo. 2014).

periodically review state laws and evaluate their utility and validity.[227] Accordingly, the Wyoming Legislature should carefully review its state laws, repeal § 2-4-102 and any other discriminatory provisions, leaving behind only the fittest under modern statutory schemes and current social mores.[228]

> *AUTHOR'S NOTE:* At the time of publication, the Wyoming Legislature was considering a bill to repeal Wyoming Statute § 2-4-102. Inspired by this Comment, House Bill No. HB0269, "Illegitimate persons descent-repeal" was proposed by Representative Charles "The Bastard" Pelkey (D), with Representatives Landon Brown (R), Cathy Connolly (D), Jared Olsen (R), Dan Zwonitzer (R), and Senator Tara Nethercott (R) joining as co-sponsors. In addition to the repeal of § 2-4-102, the proposed bill calls for a conforming amendment eliminating language from Wyoming Statute § 2-1-301 that expressly excluded nonmarital children from the definition of "child" for the purpose of the Wyoming Probate Code. House Bill 269 was introduced in the Wyoming House of Representatives on January 28, 2019. Following unanimous approval by the House Judiciary Committee, it passed 58-2 in the Wyoming House of Representatives on February 5, 2019 and was introduced in the Wyoming Senate the following day. A draft of the bill is available at https://wyoleg.gov/Legislation/2019/HB0269.

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[227] Hauser, *supra* note 5, at 892; Lovas, *supra* note 98, at 376; *see supra* note 208 and accompanying text.

[228] Hauser, *supra* note 5, at 892; Lovas, *supra* note 98, at 375–76, 376 n.162; *see supra* note 208 and accompanying text.