CHOICE BUILDING

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Default rules, which apply only if parties opt not to bypass them, are a common and consequential phenomenon in law. These rules fill gaps, serve as the backdrop against which parties make alternative arrangements, and formalize majoritarian social preferences. Through these roles, default rules affect the behavior and outcomes not only of those parties subjected directly to them, but also those who opt out of their reach. Because of this, the construction of default rules is an important policymaking tool. A significant body of theoretical scholarship debates the relative merits of several default rule designs. Among these are majoritarian defaults, which are intended to replicate what the affected parties would have chosen had they expressed their preferences. Such rules are favored in situations where there is little to be gained by forcing individuals to avoid an unpopular default and where there are instead substantial benefits to giving most people what they want. Intestacy— when individuals die without a will or other transfer arrangement for their property—is one such situation. In that situation, the laws of intestacy govern the distribution of property. These laws are intended to approximate the disposition that most individuals would prefer. Yet what if no rule captures what most people want? What if the preferences of those more likely to be subjected to the rules differ from the rest of the population? What if people's preferences regarding the allocation of their property are socially patterned? This Article takes up these questions, drawing on novel data from a national survey of estate-planning behavior and dispositive preferences (N = 1,975). The results not only document heterogeneity in dispositive preferences but also establish links between these preferences and individual characteristics. These empirical findings challenge assumptions about the existence of a clear majoritarian preference and bring to the fore the possibility that facially neutral default rules may have disparate impacts on some groups. In response, this Article considers the desirability and feasibility of several possible responses, including clarifying the subpopulation whose preferences are prioritized, enhancing the accuracy of default rules with additional empirical evidence, and increasing the complexity of default rules to offer greater personalization. In doing so, this Article not only contributes to current efforts to reform the laws of intestacy but also extends scholarship on default rule design by drawing attention to the challenges of what I

term choice building: *constructing the content of default rules from the ground up on the basis of empirical evidence.*

INTRODUCTION

The opposite of mandatory rules, default rules are legal provisions that apply only in the absence of action to avoid them.[1] They are a common phenomenon across many substantive areas of law: in contracts, they serve as gap-fillers, supplying terms where the contract is silent;[2] within the law of corporations, they provide terms missing from corporate documents;[3] in statutory interpretation, they

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      1.   I adopt the language of "mandatory" and "default" rules, building on foundational work on the conceptual distinction between the two. *See, e.g.,* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87 (1989) [hereinafter Ayres & Gertner, *Filling Gaps*] (distinguishing default and immutable rules); Randy Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 823–24 (1992) (tracing the rise of "a new and powerful heuristic device: the concept of default rules"); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) (differentiating between inalienable entitlements and those that are protected by liability or property rules).
      2.   Ayres & Gertner, *Filling Gaps*, *supra* note 1, at 87.
      3.   *See, e.g., id.;* Yair Listoken, *What Do Corporate Default Rules and Menus Do? An Empirical Examination*, 6 J. EMPIRICAL LEGAL STUD. 279, 279 (2009).

offer a guide for resolving indeterminacy;[4] and in the policy realm, they define the outcome that will occur in the absence of an active choice.[5] Yet there is one set of default rules that has what is likely the widest application of all: the laws of intestacy have the potential to affect everyone.

Each of us will die, and when we do, our property must be transferred to the living.[6] Unless we take action during life to avoid their application—by writing a will or trust or otherwise arranging for the transfer of our property at death—the laws of intestacy will determine who is eligible to receive our property and in what shares.[7] Given that less than half of all Americans have a will,[8] the direct application of the laws of intestacy is widespread.

Because they are avoidable, the laws of intestacy are default rules, and because they seek to carry out the likely wishes of most people, they are majoritarian defaults. Majoritarian defaults are one of the three primary forms of default rules along with penalty defaults, which intentionally impose outcomes that the affected parties would not have chosen, and personalized defaults, which seek to carry out the parties' wishes through highly specialized default provisions.[9] A large, primarily theoretical literature debates the relative merits of different structural designs for default rules for various legal and factual situations.[10] These design decisions— known as choice architecture[11]—are important because they can affect the behavior and outcomes of not only those individuals to whom the defaults are applied but also of those who opt out.

Yet the substance of default rules generated within a given structural form is also significant. This Article terms the process of generating such content *choice building*, to emphasize the relevance of bottom-up considerations. It illustrates the challenges inherent in choice building by considering how the laws of intestacy

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4. *See, e.g.*, Einer Elhauge, *Preference-Estimating Statutory Default Rules*, 102 COLUM. L. REV. 2027, 2030 (2002).

5. *See, e.g.*, Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 1–2 (2013) [hereinafter Sunstein, *Deciding by Default*] (comparing active choosing and impersonal and personalized defaults).

6. LAWRENCE FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 1, 15 (2009) ("Only living people can 'own' something. Once a person dies, ownership lapses, and the goods and assets pass into other hands.").

7. *See infra* Section II.A.

8. Alyssa A. DiRusso, *Testacy and Intestacy: The Dynamics of Wills and Demographic Status*, 23 QUINNIPIAC PROB. L.J. 36, 41 (2009); Russell N. James III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 EST. PLAN. & CMTY. PROP. L.J. 1, 15–17 (2015); *2019 Survey Finds that Most People Believe Having a Will Is Important, but Less than Half Have One*, CARING.COM, https://www.caring.com/caregivers/estate-planning/wills-survey/ (last visited Sept. 17, 2019); Jeffrey M. Jones, *Majority in U.S. Do Not Have a Will*, GALLUP.COM (May 18, 2016), https://news.gallup.com/poll/191651/majority-not.aspx; *More than Half of American Adults Don't Have a Will, 2017 Survey Shows*, CARING.COM, https://www.caring.com/care givers/estate-planning/wills-survey/2017-survey/ (last visited Sept. 17, 2019).

9. *See infra* Section I.B.

10. *Id.*

11. Richard H. Thaler, Cass R. Sunstein & John P. Balz, *Choice Architecture*, *in* THE BEHAVIORAL FOUNDATIONS OF PUBLIC POLICY 428, 428 (Eldar Shafir ed., 2013).

might be constructed within the structure of a majoritarian default.[12] More specifically, this Article focuses on the difficulties presented by heterogeneity in preferences. That is, how do we construct a default rule intended to carry out the preferences of most people when no one rule captures the preferences of a majority? While the literatures on default rules[13] and intestacy[14] have acknowledged the potential challenges raised by preference heterogeneity, the topic has not received sustained scholarly attention and has been the subject of limited empirical interrogation.

To address this gap in the literature, this Article presents an empirical study of dispositive preferences in two scenarios: situations where a decedent is survived by a parent and a spouse; and situations where a decedent is survived by a parent and a nonmarital romantic partner.[15] The intestacy laws disposing of decedents' property in these scenarios are controversial.[16] In the case of survival by a parent and a spouse, the jurisdictional variation in the share of property allocated to the surviving spouse provides evidence of disagreement about the optimal disposition.[17] In the case of survival by a parent and a nonmarital romantic partner, the controversy is manifest in the growing calls for reform to the widespread ban on inheritance by nonmarital partners.[18]

Relying on data from an original national survey of estate planning behavior and dispositive preferences (N = 1,975), the empirical study reveals significant heterogeneity in respondents' preferred allocation to a surviving spouse or partner.[19] Moreover, the study finds statistically significant variation in these allocations by testacy (whether an individual has a will) and relationship status, and across several socio-demographic characteristics.[20] These results present a significant challenge to the construction of legal provisions that are intended to capture the desires of the majority.

I consider three possible approaches to address this challenge. First, I highlight the need for greater clarity in identifying the goal of the laws of intestacy. More specifically, I illustrate how current formulations of the majoritarian nature of intestacy laws are imprecise, leaving open the question of exactly whose preferences should be prioritized in the process of building intestacy provisions.[21] As the findings of the empirical study make clear, this decision may impact the content of the default rule. Second, I highlight the potential relevance of insights from the literature on social choice.[22] This scholarship addresses the challenge of identifying

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12.   *See infra* Section II.C.
13.   *See, e.g.*, Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591 (1999) [hereinafter Ayres & Gertner, *Majoritarian*].
14.   *See, e.g.*, Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS. U. L.J. 643, 646 (2014).
15.   *See infra* Part III.
16.   *See infra* Section II.C.
17.   *See infra* Section III.B.
18.   *See infra* Section III.C.
19.   *See infra* Part III.
20.   *See infra* Sections III.B–C.
21.   *See infra* Section IV.A.
22.   *See infra* Section IV.B.

majoritarian preferences in the context of elections and policymaking designed to optimize social welfare, and illustrates the importance of preference strength and ranking in generating collective preferences. Additional empirical investigation taking into account these factors might yield enhanced assessments of collective preferences regarding the disposition of property at death. Finally, I evaluate the potential for tailored defaults to address the challenge of heterogeneity in dispositive preferences, taking into account current limitations in our ability to generate accurate predictions in this area.[23]

This Article makes several scholarly and policy-focused contributions. First, through its introduction of the concept of choice building, this Article offers a new direction for scholarly work on default rules, which has traditionally been dominated by top-down theoretical approaches. Second, the empirical study offers novel data and analysis relevant to both contemporary probate law reform efforts and broader scholarly interest in default rules. Finally, building on the findings of the empirical study, this Article introduces several creative approaches to addressing the problem of heterogeneity in the construction of majoritarian defaults and raises normative concerns about the development of legal rules in this situation.

This Article proceeds as follows. To situate this Article within existing scholarship on default rules, Part I presents an overview of the ways in which default rules affect behavior and outcomes,[24] and introduces the primary default rule structures.[25] The concept of choice building is then introduced and differentiated from traditional concerns with choice architecture. Part II focuses on the substantive area of law that is the subject of this Article's empirical investigation. It describes the structure and applicability of the laws of intestacy[26] and summarizes current understandings of their role as majoritarian defaults.[27] It also introduces the two provisions within the laws of intestacy that are the focus of this Article's empirical analyses and reviews existing empirical scholarship on the distribution of dispositive preferences for each scenario.[28] Part III presents the empirical study. This is followed by a discussion of several possible responses to the observed preference heterogeneity in Part IV and a brief conclusion.

I. DEFAULT RULES

A. The Significance of Default Rules

Default rules, by definition, apply only in the absence of an alternative provision. Although the effort required to opt out of default rules varies, they are united by the potential for circumvention.[29] Accordingly, the direct effects of default rules are felt only by those parties that opt not to bypass them.

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23.   *See infra* Section IV.C.
24.   *See infra* Section I.A.
25.   *See infra* Section I.B.
26.   *See infra* Section II.A.
27.   *See infra* Section II.B.
28.   *See infra* Section II.C.
29.   *See* Barnett, *supra* note 1, at 825 ("Any gap-filling rule that cannot be displaced by manifested assent is not properly called a default rule at all . . . .").

Making alternative arrangements in lieu of reliance on default rules takes effort.[30] Whether this effort is worthwhile could depend on the strength of one's preferences, one's ability to undertake affirmative action to avoid the default, or broader contextual factors. For example, social norms and other relational factors may influence parties' behavior,[31] as may the information-sharing consequences of negotiating around a default.[32] Even more fundamentally, the decision to avoid a default rests on one's understanding that the rule is, in fact, a default; behavior might also be affected by awareness of the substance of the default.[33] These factors, as well as bias that leads parties to favor the status quo, lead to the "stickiness" of default rules.[34] That is, even where avoiding a default might yield a superior outcome, parties may opt to retain the status quo. For this reason, the direct effects of default rules should not be understated.

Moreover, in addition to their direct effects, default rules may also indirectly affect parties. First, default rules serve as the backdrop against which parties operate, defining the best alternative to a negotiated agreement ("BATNA"),[35] and casting a shadow in the same way that litigation outcomes shape settlement negotiations.[36] By providing a starting point for negotiations, default rules may be particularly consequential given the psychological effect of anchoring.[37] Cognitive mechanisms such as this help to explain why it is not only the content but also the design of default rules that influences behavior.[38] In addition, default rules may also affect parties through their expression of social norms or hierarchies; for example, building on scholarship describing the expressive function

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30.   *See, e.g., id.* at 821–22 (discussing reasons for incomplete contracts, and thus the need for default rules); Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 MICH. L. REV. 1417, 1425 (2014).

31.   Omri Ben-Shahar & John A. E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651, 660–65 (2006); Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59, 67–72 (1993).

32.   Ayres & Gertner, *Filling Gaps, supra* note 1, at 94; Cass R. Sunstein, *Switching the Default Rule*, 77 N.Y.U. L. REV. 106, 110 (2002) [hereinafter Sunstein, *Switching the Default Rule*] (discussing, for example, how employees' understanding of the law exhibits "excessive optimism" that may distort their bargaining behavior).

33.   *See* Ayres & Gertner, *Filling Gaps, supra* note 1, at 95 n.39 (noting that it is "sometimes . . . useful to distinguish between situations in which the parties negotiate in ignorance of the default rule and situations in which the parties negotiate in the shadow of the default rule"); Sunstein, *Switching the Default Rule, supra* note 32, at 118 (stating that default rules will not matter in some situations because "[p]eople may not know about the default rule, and they might not order their affairs by reference to it").

34.   Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 639, 647 (1998) (reporting the results of experiments illustrating the effect of default rules on negotiation outcomes).

35.   *See* Russell Korobkin, *Inertia and Preference in Contract Negotiation: The Psychological Power of Default Rules and Form Terms*, 51 VAND. L. REV. 1583, 1609 (1998).

36.   Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979).

37.   RICHARD THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 23–24 (2008).

38.   *Id.*

of law,[39] researchers argue that default rules can stigmatize certain groups or behaviors.[40]

B. Default Rule Design

Because default rules affect behavior and outcomes both directly and indirectly, their reach can be widespread. Accordingly, defining the content and form of default rules is an important policymaking tool.[41] To optimize desired outcomes in various situations, scholars have proposed three primary alternative default rule structures: penalty, majoritarian, and personalized defaults.[42]

Penalty defaults—a form of minoritarian default—intentionally impose provisions that do not conform to parties' wishes.[43] These rules are intended to enhance outcomes by incentivizing parties to reveal information that improves negotiations to avoid the default.[44] While conceptually important to the development of default rule theory, scholars debate whether such rules exist in practice.[45]

Majoritarian defaults, in contrast, are common.[46] These defaults seek to further the goals of the parties, either by imposing a rule that reflects what most parties would have chosen had they opted out of the default[47] or by encouraging outcomes that make the parties better off.[48] Majoritarian defaults may be particularly

39.   Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996) ("Many people support law because of the statements made by law, and disagreements about law are frequently debates over the expressive content of law.").

40.   *See, e.g.*, Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 645 (2002) [hereinafter Gary, *Parent-Child Relationship*]; E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999) (noting that discriminatory default rules not only subject disfavored groups to inferior treatment but also "stigmatize the disfavored group with an inferior status").

41.   *See, e.g.*, Thaler et al., *supra* note 11, at 438.

42.   Because these three default rule designs are the most prevalent in the literature, I treat them here as three separate options. In terms of formal classification, however, one might categorize all defaults as majoritarian and minoritarian, with penalty defaults treated as one form of minority default and personalized defaults treated as either a highly tailored system of majority defaults or another form of minority default. *See, e.g.*, Porat & Strahilevitz, *supra* note 30, at 1426 (characterizing context-specific defaults as "a nod in the direction of personalization").

43.   Ayres & Gertner, *Filling Gaps, supra* note 1, at 91 (noting that "penalty defaults are purposefully set at what the parties would not want").

44.   *Id.*

45.   *See, e.g.*, Eric A. Posner, *There Are No Penalty Default Rules in Contract Law*, 33 FLA. ST. U. L. REV. 563, 565 (2006).

46.   *Id.*; George S. Geis, *An Experiment in the Optimal Precision of Contract Default Rules*, 80 TUL. L. REV. 1109, 1110 (2006).

47.   David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 MICH. L. REV. 1815, 1816 (1991).

48.   *See* Cass Sunstein & Richard Thaler, *Libertarian Paternalism*, 93 AM. ECON. REV. 175, 175 (2003) (introducing the concept of "libertarian paternalism" and advocating for design decisions that "influenc[e] the choices of affected parties in a way that will make those parties better off").

effective in situations where parties with strong adverse desires are likely to opt out of the default.[49]

There are several dimensions on which majoritarian defaults may vary, including the level of tailoring. At one end of a continuum are impersonal mass defaults in which there is no customization and a single rule applies to all parties.[50] Compound defaults are rules that incorporate additional complexity.[51] For example, the default remedy provided under law for breach of contract could be the same for all parties (a mass default) or could be contingent on the type of contract or some other characteristic of the situation (a compound default). Compound rules can enhance outcomes in some circumstances but are more costly to promulgate and administer than simple ones, and outcomes under such rules are more difficult to predict *ex ante*.[52]

Taking the idea of customization to its extreme, recent scholarship proposes the possibility of personalized defaults.[53] Part of a broader movement to harness big data and machine learning to customize law,[54] these proposals suggest that observable characteristics could be used to identify classes of individuals who share similar preferences, allowing for the creation of highly customized default rules that are more likely to be consistent with individual preferences.[55] Yet while some scholars hail personalized default rules as the future,[56] there are feasibility concerns in the present.[57] In addition, there are questions about the potential for algorithmic bias,[58] debates about the appropriateness of privatization in the development of personalized defaults,[59] constitutional concerns,[60] and fears of exploitive manipulation in situations of unequal bargaining power.[61]

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49.   Sunstein, *Deciding by Default, supra* note 5, at 34.
50.   *See generally* Ian Ayres, *Preliminary Thoughts on Optimal Tailoring of Contractual Rules*, 3 S. CAL. INTERDISC. L.J. 1 (1993).
51.   Geis, *supra* note 46, at 1110.
52.   *Id.* at 1124–28.
53.   Porat & Strahilevitz, *supra* note 30, at 1418–20; Sunstein, *Deciding by Default, supra* note 5, at 34.
54.   *See generally* Anthony J. Casey & Anthony Niblett, *The Death of Rules and Standards*, 92 IND. L.J. 1401 (2017).
55.   Porat & Strahilevitz, *supra* note 30, at 1434, 1450.
56.   Sunstein, *supra* note 5, at 57 (noting that "personalized default rules are the wave of the future").
57.   *Id.* at 49–52.
58.   *See, e.g.*, Anthony J. Casey & Anthony Niblett, *Framework for the New Personalization of Law*, 86 U. CHI. L. REV. 333, 345 (2019).
59.   *See, e.g.*, Andrew Verstein, *Privatizing Personalized Law*, 86 U. CHI. L. REV. 551, 567 (2019) (considering when personalized law should be created by private actors).
60.   Sunstein, *Deciding by Default, supra* note 5, at 34 (discussing constitutional challenges to compound default rules based on gender).
61.   *See generally* Gerhard Wagner & Horst Eidenmüller, *Down by Algorithms? Siphoning Rents, Exploiting Biases, and Shaping Preferences: Regulating the Dark Side of Personalized Transactions*, 86 U. CHI. L. REV. 581 (2019).

C. Choice Building

This literature combines three streams of scholarship. Theoretical debates about the superiority—generally in terms of economic efficiency—of one type of default design over another undergird much of the work on contract defaults.[62] This work originates in formal economic models relying on heavy assumptions and proceeds toward empirical work with increasingly greater external validity.[63] A second stream incorporates behavioral insights to design defaults in the policy context[64] and considers how the structure of defaults affects outcomes.[65] While far more applied than much of the contracts literature on defaults, this work shares a focus on the structural aspects of default design. Finally, the scholarship on personalized defaults has emerged from a larger body of work focused on the implications of artificial intelligence and big data for the future of law.[66] It remains largely theoretical, focused on the potential for technology to offer personalized rules as a new structural form for defaults.

Thus, although the boundary between the structure and content of law is never clear, the existing literature is focused primarily on the structural design of defaults. These structural design choices are referred to as choice architecture.[67] Relatively less attention has been afforded to the process of designing the actual substance of default rules within these structural parameters. This process requires greater consideration of context including deeper engagement with empirical realities of implementation. To emphasize the unique challenges of this task, this Article refers to the process as *choice building*.

This Article focuses on the process of choice building within the context of majoritarian default rules. More specifically, it considers how heterogeneity in preferences complicates this process. The literature on choice architecture has acknowledged the problem of heterogeneity[68] and considered the potential for structural reforms to address it.[69] This Article offers an empirical case study of the

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62.   *See, e.g.*, Ayres & Gertner, *Majoritarian, supra* note 13, at 1594–96; Ayres & Gertner, *Filling Gaps, supra* note 1, at 113–15.

63.   Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 615 (1990).

64.   *See, e.g.*, Thaler et al., *supra* note 11, at 438.

65.   *See generally, e.g.*, Sunstein, *Deciding by Default, supra* note 5.

66.   *See, e.g.*, Casey & Niblett, *supra* note 54, at 1403–04; Porat & Strahilevitz, *supra* note 30, at 1418.

67.   THALER & SUNSTEIN, *supra* note 37, at 3 (defining a choice architect as someone who "has responsibility for organizing the context in which people make decisions").

68.   Ayres & Gertner, *Majoritarian, supra* note 13, at 1612 (noting that "because of heterogeneity, a majoritarian default may not even exist—there may only be a plurality default").

69.   Sunstein, *Deciding by Default*, supra note 5, at 9–10 (arguing that "personalized default rules should generally be preferred to impersonal ones in the face of relevant heterogeneity"). *But see* Shelly Kreiczer-Levy, *Big Data and the Modern Family*, 2019 WIS. L. REV. 349, 352 (arguing that status-based personalization will not improve accuracy where heterogeneity is the result of relational factors).

issue and considers whether it is possible to address heterogeneity in preferences without abandoning the goal of establishing a majoritarian default.

II. THE LAWS OF INTESTACY

This Article investigates this topic within the context of the laws of intestacy. This Part provides an overview of these laws, including their structure and applicability. It then considers their role as majoritarian default rules. Finally, it introduces the two provisions that are the particular focus of this Article and reviews existing empirical evidence relevant to their design.

A. Overview and Structure

American law recognizes a right to control the distribution of property at death.[70] With few exceptions, the laws of succession, which govern the transfer of property at death, grant individuals broad freedom in exercising this right.[71] Indeed, decedents have taken advantage of this freedom to do an incredible range of things with their property at death: founding great institutions[72] and leaving vast fortunes

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70.   Hodel v. Irving, 481 U.S. 704, 715 (1987) ("There is no question . . . that the right to pass on valuable property to one's heirs is itself a valuable right.").

71.   Sitkoff, *supra* note 14, at 643–44 ("The American law of succession embraces freedom of disposition, authorizing dead hand control, to an extent that is unique among modern legal systems.").

72.   *See, e.g.*, HELEN HOPKINS THOM, JOHNS HOPKINS: A SILHOUETTE 87–120 (1929) (reprinting the letter of instructions from Johns Hopkins to his trustees regarding the founding of what is now Johns Hopkins University Medical Center); *History*, HARV. UNIV., https://www.harvard.edu/about-harvard/harvard-glance/history (last visited Oct. 22, 2019) ("[Harvard] was named after the College's first benefactor, the young minister John Harvard of Charlestown, who upon his death in 1638 left his library and half his estate to the institution."); *Planned Giving*, STAN. UNIV., http://giving.stanford.edu/planned-giving/overview/founding-grant-society (last visited Oct. 22, 2019) ("In 1891 Jane and Leland Stanford founded Stanford University in memory of their son, Leland Stanford Junior, with their own gifts and bequests."); Deed of Trust Dated Nov. 15, 1909 by Milton S. Hershey et al., https://www.mhskids.org/wp-content/uploads/2016/03/Deed_of_Trust_cons.pdf (establishing the Hershey Industrial School, now called the Milton Hershey School).

to pets;[73] supporting the arts[74] and mandating the destruction of priceless works;[75] pledging funds in support of lofty goals and for more questionable purposes.[76]

Individuals exercise this freedom by executing a valid will or other legally enforceable ownership or transfer arrangements during life. Any property not governed by these instruments is distributed under the auspices of the probate court pursuant to the laws of intestacy.[77] Intestacy provisions are widely used: less than half of Americans report having a will,[78] and studies of probate court records reveal the prevalence of intestate estates.[79]

The laws of intestacy form part of the probate code in each state. As part of the laws of succession, they fall under the probate exception to federal jurisdiction and are the exclusive dominion of state courts.[80] Yet although there are variations

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73.   *See, e.g.*, Niraj Chokshi, *Chaupette, Karl Lagerfeld's Cat, Has a Million Reasons to Purr*, N.Y. TIMES (Feb. 20, 2019), https://www.nytimes.com/2019/02/20 /style/karl-lagerfeld-choupette-cat.html (describing Karl Lagerfeld's plans to leave significant assets to his cat); Alan Feuer, *Helmsley, Through Will, Is Still Calling the Shots*, N.Y. TIMES (Aug. 30, 2007), https://www.nytimes.com/2007/08/30/nyregion/30leona.html (describing Leona Helmsley's bequest of $12 million to her dog).

74.   *See, e.g.*, *The Museum of Modern Art Announces More Than $200 Million Bequest from the Estate of David Rockefeller*, MUSEUM OF MOD. ART (Feb. 5, 2019), https://press.moma.org/news/the-museum-of-modern-art-announces-more-than-200-million-bequest-from-the-estate-of-david-rockefeller/.

75.   Whether these instructions are followed is another matter. *See, e.g.*, M. H. Miller, *From Claude Monet to Banksy, Why Do Artists Destroy Their Own Work?*, N.Y. TIMES STYLE MAG. (Mar. 11, 2019), https://www.nytimes.com/2019/03/11/t-magazine/artists -destroy-past-work.html (describing how Vladimir Nabokov appointed his wife Vera as his literary executor and charged her with destroying an unfinished manuscript which was later released by the artist's son).

76.   *See, e.g.*, Detwiller v. Hartman, 37 N.J. Eq. 347, 352 (Ch. 1883) (declaring unenforceable certain provisions of a will that included a provision for the establishment of an expansive memorial for the testator, complete with annual performances by a brass band, which the court could not (unfortunately, one gets the sense) invalidate "as a violation of good taste"); Feuer, *supra* note 73 (describing Rudi Hoffman, a "cryonics estate planner," who created an offshore financial instrument to shelter the assets of those who are cryogenically frozen in liquid nitrogen).

77.   Despite this, estate administration that occurs without the involvement of the probate court is not uncommon. MARVIN B. SUSSMAN, JUDITH N. CATES & DAVID T. SMITH, THE FAMILY AND INHERITANCE 62 (1970) (comparing deaths and probate filings in Cuyahoga County, Ohio); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277, 285–87 (1975) (reporting the number of deaths in Morris County, New Jersey, and the lower number of probate filings affiliated with those decedents).

78.   *See* sources cited *supra* note 8.

79.   *See, e.g.*, David Horton, *In Partial Defense of Probate: Evidence from Alameda County, California*, 103 GEO. L.J. 605, 627 (2015) [hereinafter Horton, *Defense of Probate*].

80.   Marshall v. Marshall, 547 U.S. 293, 293 (2006) ("Among longstanding limitations on federal-court jurisdiction otherwise properly exercised are the so-called 'domestic relations' and 'probate' exceptions."); James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533, 1534 (2014) ("In simple terms, the [probate] exception operates to deprive federal courts of jurisdiction over certain probate matters, even those that would otherwise qualify for federal jurisdiction.").

across states, the general structure of intestacy laws remains similar.[81] These laws identify the decedent's intestate heirs, which are comprised of his or her closest legally recognized kin.[82] The laws then allocate shares of property among these heirs, with priority given to those of closest kinship.[83] These determinations are bright-line rules based on relationship status. While an executor or personal representative administering a decedent's estate has flexibility in determining which property is used to fund each heir's share, there is no discretion on the part of the probate court to deviate from the proscribed allocation scheme when the intestacy laws apply.[84]

B. Intestacy Provisions as Majoritarian Default Rules

Because they apply only when property is not governed by a legally enforceable transfer instrument, the laws of intestacy are composed entirely of default rules.[85] Although these laws serve a gap-filling capacity for wills and other will substitutes,[86] decedents who engaged in estate planning during life that covers all property are not generally otherwise subject to them.[87] In this sense, they are like all other default rules in that they may be avoided through proactive behavior.

However, intestacy laws do differ in some ways from default rules in other common contexts. Much of the scholarship on default rules focuses on the contracts context, where parties may intentionally or accidentally leave issues unaddressed.[88] Intestacy differs because it is a statutory default whose application depends solely on the actions of the decedent, as opposed to being a function of negotiation between two or more parties. In addition, the inevitability of death means that the applicability of the intestacy defaults is certain if alternative action is not taken. In contract cases, in contrast, the default may never come into play.

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81.   *See* JEFFREY A. SCHOENBLUM, MULTISTATE GUIDE TO ESTATE PLANNING tbl.7 (2018).

82.   ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 65 (10th ed. 2017) ("American intestacy law generally favors the decedent's spouse, then descendants, then parents, and then collaterals and more remote kindred.").

83.   *Id.*

84.   *See, e.g.*, CAL. PROB. CODE § 6401 (West 2020) (directing the distribution of property to a surviving spouse). There are, however, statutory and common law bars to succession such as slayer statutes that prevent a murderer from inheriting from his or her victim, regardless of familial tie. *See, e.g.*, CAL. PROB. CODE § 250 (West 2020).

85.   Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 1 (2000) [hereinafter Gary, *Adapting Intestacy*] ("An intestacy statute can serve as a default rule . . . ."); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1032–33 (2004).

86.   *See* Sitkoff, *supra* note 14, at 645 ("Intestacy . . . supplies constructional rules that figure in the interpretation of wills, trusts, and other will substitutes.").

87.   Intestacy statutes could affect the disposition of the property of testate individuals indirectly. Gary, *Parent-Child Relationship*, *supra* note 40, at 644–45 (noting that in addition to governing the distribution of a testate decedent's probate property, the laws of intestacy determine standing for will contests, identify the disposition scheme against which dispositions are compared in cases of alleged undue influence, and determine beneficiary status for Social Security).

88.   *See, e.g.*, Ayres & Gertner, *Filling Gaps*, *supra* note 1, at 1 ("Default rules fill the gaps in incomplete contracts; they govern unless the parties contract around them.").

Despite these nuances, intestacy laws' status as default rules is not strongly questioned. However, there is somewhat less agreement as to whether intestacy laws should be designed as majoritarian defaults. The dominant position is that the laws of intestacy are majoritarian defaults that should be designed to carry out the probable intent of the average decedent.[89] This approach is consistent with fundamental tenets of property law.[90] It also furthers the freedom of disposition evidenced in the broader laws of succession[91] by carrying out those distributions that most decedents would have chosen had they exercised this freedom.[92] By mimicking what most decedents would have wanted, this approach is also likely consistent with public perceptions of fairness and may decrease contestation or strife among survivors.[93]

In addition, this approach is consistent with economic analysis of default rule design, which emphasizes the reason for individuals' failure to avoid the default and the potential benefits of alternate rule designs.[94] Survey evidence indicates that most individuals do not know how their estates would be distributed under intestacy[95] and that a desire to avoid this outcome is rarely the primary driver for

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89.   *See* Mary Louise Fellows, E. Gary Spitko & Charles Q. Strohm, *An Empirical Assessment of the Potential for Wills Substitutes to Improve State Intestacy Statutes*, 85 IND. L.J. 409, 412 (2010) ("[T]he central goal of an intestacy statute is to approximate the donative intent of decedents dying without wills . . . ."); Mary Louise Fellows, Rita J. Simon & William Rau, *Public Attitudes About Property Distribution at Death and Intestate Succession Laws in the United States*, 3 AM. BAR FOUND. RES. J. 319, 324 (1978) [hereinafter Fellows et al., *Public Attitudes*] ("[T]he preferred distributive pattern of intestate decedents should be given full effect and should be deviated from only if necessary to satisfy an overriding societal interest."); Gary, *Adapting Intestacy*, *supra* note 85, at 19–20 (effectuating decedent's intent is the "primary goal" of intestacy statutes); Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 345 (2017) (carrying out decedents' probable intent is the "predominant goal" of intestacy).
90.   Gary, *Adapting Intestacy*, *supra* note 85, at 8 ("This goal of carrying out the presumed intent of most decedents follows from the concept of private property, a concept at the heart of American property law.").
91.   Sitkoff, *supra* note 14, at 645.
92.   *See* SITKOFF & DUKEMINIER, *supra* note 82, at 63.
93.   Hirsch, *supra* note 85, at 1035–36 (describing the argument that majoritarian defaults in intestacy will "promote family harmony and respect for the legal system").
94.   *See* Ayres & Gertner, *Majoritarian*, *supra* note 13, at 1591.
95.   Mary Louise Fellows, Rita J. Simon, Teal E. Snapp & William D. Snapp, *An Empirical Study of the Illinois Statutory Estate Plan*, 1976 U. ILL. L.F. 717, 732 (1976) [hereinafter Fellows et al., *Illinois Study*] (reporting that 30% of Illinois survey respondents could not identify their intestate heirs and 64% who believed that they could identify their heirs were incorrect); Fellows et al., *Public Attitudes*, *supra* note 89, at 340 (reporting that while 70% of respondents in a multi-state survey about intestacy claimed to know who would inherit their estates if they died intestate, only 45% could accurately identify their intestate heirs); Joel R. Glucksman, *Intestate Succession in New Jersey: Does It Conform to Popular Expectations*, 12 COLUM. J.L. & SOC. PROBS. 253, 262–64 (1976) (reporting results of a survey of a random sample of New Jersey residents (N=50), finding that few respondents had an accurate sense of the probate process for intestate estates or the content of intestacy laws); *see* Monica K. Johnson & Jennifer K. Robbennolt, *Using Social Science to Inform the Laws of*

estate planning.[96] Thus, it is unlikely that changing the default rules will have a meaningful effect on behavior. Plus, there are several impediments that deter estate planning, even where individuals may recognize its benefits.[97] For these reasons, moving away from a majoritarian default would likely only have the effect of changing dispositions in ways that violate the preferences of more decedents.

However, some scholars advocate the use of intestacy laws to pursue societal goals[98] rather than treating them as majoritarian defaults designed solely to carry out the decedent's probable intent. These societal goals could include supporting dependents, easing administration, or avoiding the subdivision of property.[99] Relatedly, scholars have also proposed designing intestacy laws to maintain or subvert social norms and structures. Given that the laws of intestacy generate a system through which economic resources are allocated in conformity with social preferences, they rest at the nexus of law, society, and economy. These laws have historically been conservative, contributing to the persistence of existing structures over time, both through the transfers they mandate and the norms they embody.[100] As Lawrence Friedman notes, the laws of intestacy "anticipate what the majority of dying men would probably want, and what society would want them to want."[101] In moments of social change, these two things may diverge, leading to calls for the laws of intestacy to realign with societal norms or to lead in favor of fairness or equity.[102]

In practice, the theoretical approach to intestacy is something of a mix.[103] The primary goal is to institute majoritarian defaults defined by probable intent,

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Intestacy: The Case of Unmarried Committed Partners, 22 L. & HUM. BEHAV. 479, 489 (1998) (reporting that 47% of intestate survey respondents and 19% of testate respondents incorrectly believed that their nonmarital romantic partner would inherit under the laws of intestacy).

96. Fellows et al, *Public Attitudes*, *supra* note 89, at 339 (reporting that no respondents to a multi-state survey about public attitudes toward intestacy indicated that they were intestate "because they thought the intestacy statute of their states provided a satisfactory disposition").

97. *See, e.g.*, Reid K. Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 879–80 (2012); Cheryl Tilse et al., *Making and Changing Wills: Prevalence, Predictors, and Triggers*, SAGE OPEN, Jan.–Mar. 2016, at 1, 8.

98. Gary, *Adapting Intestacy*, *supra* note 85, at 9 (drawing on the work of Richard T. Ely to provide justifications for prioritizing societal interests in the design of intestacy laws).

99. *Id.*

100. Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 340, 364 (1966).

101. *Id.* at 364.

102. *See, e.g.*, Gary, *Adapting Intestacy*, *supra* note 85, at 72; Spitko, *supra* note 40, at 1107.

103. UNIF. PROB. CODE § 1-102 (UNIF. LAW COMM'N, amended 2019) (identifying multiple purposes of the probate code, including, *inter alia*, "to discover and make effective the intent of a decedent in distribution of his property" and "to promote a speedy and efficient system for liquidating the estate of the decedent"); Hirsch, *supra* note 85, at 1036 (criticizing the current approach to intestacy as a "theoretical grab-bag").

tempered by the need for efficient administration of intestate estates.[104] Reflecting this balance, intestacy is characterized by bright-line tests and personalized based only on easily identified family structure, but definitions of intestate heirs and their prioritization are reformed over time to better reflect social norms and practices.[105] At times, however, it is not easy to strike this balance, as the next Section details.

In recognition of this, scholars have proposed the adoption of personalized defaults in intestacy.[106] This would allow the application of unique default rules to different groups characterized by a propensity to prefer a particular dispositive scheme.[107] Doing so could address the challenge of heterogeneity that limits the accuracy of impersonal mass defaults. However, the paucity of existing empirical data on dispositive preferences presents a formidable obstacle to the feasibility of such proposals.[108] Moreover, it is currently unclear whether even large amounts of data would make it possible to predict dispositive preferences. This could be because, as one scholar argues, dispositive preferences are shaped by relational factors rather than observable status.[109] Or, it could be that dispositive preferences are associated with observable characteristics, but in ways that are so complex that accurate prediction is hindered. At this point, these are open empirical questions.

C. Contested Intestacy Defaults

To begin to address these questions, and to enhance our theoretical understanding of the role of intestacy laws as majoritarian default rules, this Article considers preferences regarding allocations in two illustrative intestacy provisions. These controversial provisions apply: (i) where a decedent is survived by a spouse and a parent; and (ii) where a decedent is survived by a nonmarital romantic partner and a parent. Intestacy provisions regarding the first scenario differ significantly across jurisdictions,[110] while there are growing calls for reform regarding the second.[111] In this Section, I describe current approaches to each of these situations and discuss the policy rationales that underlie them. I also review existing empirical evidence of individuals' preferred allocations in each of these situations. Although many of the laws of succession have developed without the benefit of empirical

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104. *See* UNIF. PROB. CODE pt.1, general cmt. (UNIF. LAW COMM'N, amended 2019) (describing the intestacy provisions as being "designed to provide suitable rules for the person of modest means who relies on the estate plan provided by law," a goal that can be read to encompass both a desire to provide desired dispositive preferences and to address administrative concerns).

105. *See, e.g.*, UNIF. PROB. CODE § 1-201 (UNIF. LAW COMM'N 2019) (revising the definition of "child" to conform to the Uniform Parentage Act).

106. Porat & Strahilovetz, *supra* note 30, at 1420.

107. *Id.* at 1419.

108. *See infra* Part III.

109. Krieczer-Levy, *supra* note 69, at 352.

110. SCHOENBLUM, *supra* note 81, at 7001 ("Wide differences from state to state are readily apparent in terms of the share afforded a surviving spouse when there are no issue . . . .").

111. *See infra* Section II.C.2.

evidence,[112] understanding public preferences is important in the context of intestacy, especially so for those situations where public policy concerns do not offer a clear guide.[113]

Before presenting the empirical evidence, it is important to make note of a few methodological considerations. Research in this area has adopted two approaches: (i) will studies; and (ii) surveys or interviews. While each approach offers certain advantages, each is also limited in its ability to identify dispositive preferences.

Will studies enjoy the advantage of relying on publicly available probate court records and are able to identify the dispositions that testators actually selected.[114] Policymakers have embraced this approach explicitly, at least at some points in history.[115] Using data drawn from wills to identify dispositive preferences can be problematic, however. The majority of wills are written by lawyers or with assistance from other sources,[116] and the wills therefore likely incorporate the influence of other parties. Whether this distorts or enhances the expression of individuals' preferences is an open question deserving of empirical investigation.[117]

In addition, testacy is socially patterned.[118] To the extent that the same characteristics that are associated with testacy also are related to dispositive

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112.   Jeffrey A. Schoenblum, *Will Contests—An Empirical Study*, 22 REAL PROP. PROB. & TR. J. 607, 607 (1987) ("Conclusions have been drawn and reforms proposed on the basis of certain assumptions about the laws of wills for which there has been absolutely no supporting data."); David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1101 (2015) [hereinafter Horton, *Wills Law*].

113.   Contemporary Studies Project, *A Comparison of Iowans' Dispositive Preferences with Selected Provisions of the Iowa and Uniform Probate Codes*, 63 IOWA L. REV. 1041, 1099 (1978) ("Because the interests of spouses and parents provide policy arguments for both sides, public preferences should be carefully considered.").

114.   *See, e.g.*, Horton, *Defense of Probate*, *supra* note 79, at 627.

115.   *See* UNIF. PROB. CODE art.2, pt.1, general cmt. (UNIF. LAW COMM'N, amended 2019) ("The [Uniform Probate] Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want.").

116.   DiRusso, *supra* note 8, at 42 (finding that 64% of testate respondents to a national survey reported having a lawyer draft their will).

117.   This type of analysis is made more challenging by the fact that when the provisions become actionable, the testator is dead, and thus unable to describe his or her preferences.

118.   Emily S. Taylor Poppe, *Surprised by the Inevitable: A National Survey of Estate Planning Utilization*, 53 U.C. DAVIS L. REV. 2511, 2528–30 (2020) (summarizing results of prior studies investigating variation in testacy by age, race and ethnicity, income, marital status, educational attainment, and family structure); SUSSMAN ET AL., *supra* note 77, at 44–45, 64–81; Glucksman, *supra* note 95, at 256–57; Contemporary Studies Project, *supra* note 113, at 1070–72; Fellows et al., *Public Attitudes*, *supra* note 89, at 321; Robert A. Stein & Ian G. Fierstein, *The Demography of Probate Administration*, 15 BALT. L. REV. 54, 79 tbl.4.1, 82–83, tbls.4.3, 4.4, 4.5 & 4.6 (1985); Lawrence M. Friedman, Christopher J. Walker & Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California,*

preferences, the desires of testate individuals will be a poor estimate of the desires of intestate individuals. Indeed, as discussed below, empirical evidence finds evidence of variation in the preferences of testate and intestate individuals.[119] Finally, some individuals are motivated to make wills precisely because they prefer a disposition other than intestacy.[120] While this is not the primary motivation for most estate planning,[121] it is not possible in a will study to identify the latent class of individuals whose wills were driven by such desires. Without this information, it is impossible to know the extent to which preferences revealed in wills are biased estimates of the preferences of the general population or of the intestate population.

The alternate approach to collecting data on preferences regarding the disposition of property at death is to interview or survey individuals and elicit their preferred allocations in various hypothetical situations. The use of hypotheticals has the advantage of illustrating individuals' preferences across multiple scenarios. Moreover, because surveys and interviews can collect information about individual characteristics and estate planning behavior, it is possible to analyze heterogeneity in preferences across socio-demographic status groups and between those who engage in estate planning and those who do not.

The benefits of this flexibility may come at the expense of greater external validity in that we are not able to observe what people actually do when faced with a particular scenario.[122] However, there has been little empirical verification of this potential, and at least one study that observes both stated preferences and actual estate planning provisions finds a strong correspondence between preferences expressed in response to a hypothetical and the arrangements testate respondents actually made in their wills.[123] As a result, the researchers of that study concluded that "concern over the accuracy of interview studies is largely unfounded."[124]

Surveys with hypotheticals as prompts may put individuals in the position of responding to situations that they are unlikely to ever experience. In some cases, the situations may even be impossible; for example, an orphan may be asked to express preferences about distributions to a surviving parent. Those who are more likely to experience a situation may have different preferences,[125] meaning that

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1964: A Research Note, 43 Hous. L. Rev. 1445, 1453, 1465 (2007); DiRusso, *supra* note 78, at 42–54; Horton, *Defense of Probate*, *supra* note 79, at 627; Russell N. James III, *The New Statistics of Estate Planning: Lifetime and Post-Mortem Wills, Trusts, and Charitable Planning*, 8 Est. Plan. & Cmty. Prop. L.J. 1, 15–16 (2015).

119. Johnson & Robbennolt, *supra* note 95, at 498 (concluding that "due to the differences between persons with and persons without wills, the results of will studies do not best reflect the probable donative intent of persons who die intestate").

120. *See, e.g.*, *In re* Kaufman's Will, 247 N.Y.S.2d 664, 667 (N.Y. App. Div. 1964) (infamous case involving will of gay decedent benefitting decedent's partner instead of his family).

121. *See* sources cited *supra* note 95.

122. Johnson & Robbennolt, *supra* note 95, at 484.

123. *Id.* at 496.

124. *Id.* at 497.

125. *Id.* at 493 tbl.4 (documenting variation in preferences by testacy and status among some groups of respondents). *But see* Contemporary Studies Project, *supra* note 113,

results generated from general population samples may not accurately represent the preferences of subgroups more likely to experience a given scenario. On the other hand, this issue also applies to will studies that analyze all will provisions, rather than those that are actually applied at death. This is because testators, while not revealing preferences about situations known to be impossible when the will was drafted, are asked to reveal preferences about any number of unlikely situations (such as when testators identify a remote contingent remainder beneficiary in the event of the deaths of all other named beneficiaries).

Finally, I note that there are some very early studies focused on distributive practices and preferences.[126] In addition to a host of other generational changes, these studies are less likely to be insightful regarding current testamentary preferences given changing patterns of family formation. As scholars have noted in other contexts, increased cohabitation, increased nonmarital births, and decreased marital stability all have implications for individuals' understanding of kin and household relationships.[127] The changing recognition of same-sex marriage has likewise also had implications for preferences over time. Therefore, I restrict my focus to the most recent studies, although even many of these rely on data collected more than a half-century ago. This suggests that some caution is in order in applying their findings today.

1. Survival by Parent and Spouse

At a high level, there are four potential approaches to allocating property to a surviving spouse: (i) the spouse receives the use of property during her lifetime (a life estate), with the remainder distributed among the decedent's other heirs; (ii) the spouse receives a fractional share of probate property outright; (iii) the spouse receives a minimum distribution, plus a fractional share of any probate property exceeding this distribution; or (iv) the spouse receives all of the probate property.[128] Under these scenarios, a surviving parent of the decedent may take as an intestate heir sharing in the remainder of a life estate to the spouse or as a recipient of a fractional share which may or may not be reduced by an initial minimum distribution to the spouse. Of course, spouses may also have additional inheritance rights through a homestead allowance, dower and curtesy, or family allowance.[129]

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at 1100 (reporting that allocations between a surviving spouse and parent were not materially different among those respondents who did not have living parents).

126.   *See generally, e.g.*, Olin L. Browder, Jr., *Recent Patterns of Testate Succession in the United States and England*, 67 MICH. L. REV. 1303 (1969); Allison Dunham, *The Method, Process and Frequency of Wealth Transmission Data*, 30 U. CHI. L. REV. 241 (1963); Debra S. Judge & Sarah Blaffer Hrdy, *Allocation of Accumulated Resources Among Close Kin: Inheritance in Sacramento, California, 1890–1984*, 13 ETHOLOGY & SOCIOBIOLOGY 495 (1992); Edward H. Ward & J.H. Beuscher, *The Inheritance Process in Wisconsin*, 1950 WIS. L. REV. 393 (1950); John R. Price, *The Transmission of Wealth at Death in a Community Property Jurisdiction*, 50 WASH. L. REV. 277 (1975).

127.   *See* Andrew J. Cherlin & Judith A. Seltzer, *Family Complexity, the Family Safety Net, and Public Policy*, 654 ANN. AM. ACAD. POL. SCI. 231, 231–32 (2014).

128.   Contemporary Studies Project, *supra* note 113, at 1079–80.

129.   For an overview of state provisions on these points, see SCHOENBLUM, *supra* note 81, at tbl.6.

State intestacy provisions incorporate each of these approaches, sometimes in combination. Table 1 describes the general allocation to the surviving spouse in instances where the decedent is survived by his or her spouse and at least one parent across the 50 states and the District of Columbia. In community-property states, the spouse is entitled to all marital property; Table 1 indicates how the decedent's separate property is allocated. The single most common approach is to allocate 100% of the probate estate to the surviving spouse, but many states award only a minimum distribution with a fractional share in the remainder or a fractional share of the total. Indeed, if we count community-property states as effectively giving the spouse a minimum distribution plus a share in the balance of the probate property, this represents the most common approach. In all cases where the surviving spouse receives less than 100% of the probate estate, the surviving parent is entitled to a portion of the intestate estate.[130]

Table 1. State Intestacy Allocations to the Surviving Spouse for Decedents Survived by Spouse and Parent[131]

Allocation	Adopting States
Surviving spouse takes 100% of probate estate	Arizona, Florida, Georgia, Illinois, Iowa, Kansas, Minnesota, Mississippi, Missouri, New York, Ohio, Oregon, South Carolina, South Dakota, Tennessee, Texas (personal property), Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming
Surviving spouse takes minimum distribution plus share of balance	Alabama, Alaska, Colorado, Connecticut, Delaware (plus life estate in real property), District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, Montana, Nebraska, New Hampshire, New Jersey, North Carolina (personal property), North Dakota, Pennsylvania, Rhode Island (plus life estate in real property)
Surviving spouse takes share of probate estate	Arkansas (depends on length of marriage), California (separate property), Idaho (separate property), Indiana, Nevada, New Mexico (separate property), North Carolina (real property), Oklahoma (separate property), Texas (real property), Washington (separate property)
Surviving spouse takes only if no surviving parents, siblings, or descendants of siblings	Louisiana (separate property), Kentucky

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130.   *Id.* at tbl.7.
131.   Table derived from SCHOENBLUM, *supra* note 81, at tbl.7.

This split across jurisdictions reflects the competing policy interests at play when allocating property between a surviving spouse and parent.[132] These include the desire to provide support for the spouse or to recognize a partnership theory of marriage.[133] However, individuals may also have support obligations to parents, or may have derived wealth from them.[134] The balance between these competing goals may also shift over time or over the course of a marriage; the financial and familial circumstances surrounding the marriage may also influence the priority of one heir over another.[135]

Given the lack of clarity from these policy considerations, evaluation of preferences is particularly important, and a few existing empirical studies offer insights into the distribution of preferred allocations between a surviving spouse and parent or parents. A 1977 national telephone survey of a random sample of respondents (N = 750) from Alabama, California, Massachusetts, Ohio, and Texas drawn from a proprietary panel of families[136] offers the most comprehensive exploration of dispositive preferences.

The survey solicited respondents' preferred allocations in 11 scenarios, including survival by a spouse and mother.[137] The study found that nearly 71% of respondents preferred allocating the entire estate to the surviving spouse, while 19% indicated a preferred allocation of 51%–99% to the spouse and 1%–49% to the mother, and 10% would divide the estate evenly between the spouse and mother.[138] This pattern was consistent regardless of the number of years married[139] and the presence or absence of children.[140] In addition, while they found that the distribution of preferred allocations differed for respondents of some states,[141] they did not find a statistically significant difference in stated preferred allocations by estate size[142] or family income[143] for married respondents. However, when respondents were asked to imagine having larger estates, an increasing proportion expressed a preference to allocate some share of the estate to the mother.[144]

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132.   The evolution of the Uniform Probate Code highlights these tensions. *See* Contemporary Studies Project, *supra* note 113, at 1098.

133.   *See* Susan N. Gary, *The Probate Definition of Family: A Proposal for Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 790 (2012).

134.   Fellows et al., *Public Attitudes*, *supra* note 89, at 348.

135.   *Id.*

136.   *Id.* at 326.

137.   *Id.* at 330 tbl.3. The authors of the study indicate that they chose to focus exclusively on the situation involving the surviving mother "because the authors hypothesized that this would be the most likely case where the respondent might feel an obligation to share the estate between the spouse and the family of orientation." *Id.* at 351.

138.   *Id.* at 351 tbl.7.

139.   *Id.* at 351, 388 app. tbl.A3.

140.   *Id.* at 351, 388 app. tbl.A2.

141.   *See id.* at 352 tbl.8.

142.   *Id.* at 353 tbl.9.

143.   *Id.* at 353 tbl.10.

144.   *Id.* at 354, 389 app. tbl.A4.

A similar study published in 1978 examined congruence between the Iowa intestacy statute and dispositive preferences of Iowans.[145] Reporting results from a survey of a representative sample of Iowans (N = 600),[146] the study found that respondents most frequently preferred allocating everything to the surviving spouse (73% of respondents).[147] The average allocation to the surviving spouse was 89% of the estate.[148] However, the proportion of respondents allocating the entire estate to the surviving spouse changed drastically depending on whether the intestate's parents were financially secure (92%) or less well off (54%).[149] Descriptive results also offer evidence of heterogeneity in preferences by respondent age, income, sex, parental status, and testacy;[150] however, the magnitude of some of these changes is small, and they are not subjected to statistical analysis.

Finally, a third survey, focused on Illinois, was published in 1976.[151] Drawing on a telephone survey of a sample generated from a random draw of Chicago and downstate telephone numbers (N = 182),[152] the survey asked respondents about three hypothetical situations: survival by spouse, mother, and father; survival by spouse and mother; and survival by spouse and father.[153] In the first scenario, the study found that 58.6% of respondents favored leaving 100% of the estate to the surviving spouse to the exclusion of both parents, compared with 22% of respondents who favored leaving 34%–99% to the spouse and 19.34% of respondents who indicated a preference to leave 33% or less to the spouse.[154] In both of the other two scenarios—survival by a spouse and either mother or father—leaving the entirety of the estate to the surviving spouse was again the most common choice, selected by 54.4% and 59.7% of respondents, respectively.[155] Thus, the study concluded that "a majority of the respondents" preferred allocating the entire estate to a surviving spouse.[156]

This study documented variation in the distribution of preferred allocations by respondent and parent gender among married respondents, and by income and

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145.   Contemporary Studies Project, *supra* note 113, at 1044.
146.   *Id.* at 1053.
147.   *Id.* at 1099. It is somewhat unclear from the text how this number was generated. Since the authors write that they report "the combined average of the responses to [] two questions," it suggests that this represents the share of respondents who indicated a preference of allocating all of the probate estate to the parent in both scenarios.
148.   *Id.* at 1100, 1138 app. B.
149.   *Id.* at 1124, 1140 app. D.
150.   *Id.* at 1140 app. D.
151.   Fellows et al., *Illinois Study*, *supra* note 95.
152.   *Id.* at 720.
153.   *Id.* at 725.
154.   *Id.* at 726 tbl.4. The study does not indicate respondents' collective pattern of preferences, but instead reports only the frequency by recipient of allocations of 0%, 1–32%, 33%, 34–99%, and 100% of the estate. *Id.*
155.   *Id.* at 726 tbls.5 & 6.
156.   *Id.* at 726.

type of occupation (blue collar versus white collar).[157] However, these differences are not subject to statistical analysis.

In addition to these survey studies, a few studies drawing primarily on probate records have also investigated this topic. A study of Kentucky wills from nine counties probated in 1980–1981 (N = 449)[158] found that 241 testators were survived by a spouse, and an additional 38 were not survived by a spouse but had wills that made provision for a surviving spouse.[159] Of the wills of these testators, 227 (82%) distributed all of the estate to the surviving spouse.[160] However, the study does not indicate how many of those testators were also survived by a parent, making it impossible to infer the testators' preferences regarding an allocation between a surviving spouse and parent. On the other hand, the study notes that only one will included a specific provision for parents, which was made by an unmarried testator with no surviving issue but two surviving parents.[161] In this way, it offers suggestive evidence of a preference among testate decedents for a full allocation of the estate to a surviving spouse to the exclusion of a surviving parent.

An even earlier study, including both a random sample of probate estates closed in Cuyahoga County, Ohio, during a 1964–1965 observation period (N = 659) and interviews with legal next of kin and beneficiaries of the decedents from those estates (N = 1,234),[162] also analyzed dispositive provisions. The study found 226 estates in which a testate decedent was survived by a spouse and lineal kin—which could, but does not necessarily, include a parent—and that of those, 194 (85.8%) allocated the entire estate to the spouse.[163] Among survivor respondents, 367 had a spouse and lineal ascendant or descendant; of those, 313 (85.3%) would allocate the entirety of their probate estate to their spouse.[164] Because we do not know whether the lineal relative was, in fact, a parent, it is difficult to draw any strong conclusions. However, the results again offer some support for the prevalence of provisions allocating the entirety of a decedent's estate to a surviving spouse. Additional descriptive analyses suggest that this preference may vary with the value of the estate, the length of the marriage, and whether the decedent had been married previously.[165]

This empirical work suggests a preference for allocating the entire intestate estate to a decedent's surviving spouse in lieu of distributions to any surviving parents. However, the prevalence of this dispositive arrangement varies across existing studies, representing the preference of as little as 55% of respondents.[166] In

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157.   *Id.* at 734–35. They find no evidence of variation in preferred allocations by religious affiliation (Catholic versus Protestant). *Id.* at 735 tbl.13.

158.   Frederick R. Schneider, *A Kentucky Study of Will Provisions: Implications for Intestate Succession Law*, 13 N. KY. L. REV. 409, 412 (1987).

159.   *Id.* at 417.

160.   *Id.* Another two wills provided for a financial bequest to a church but allocated the entire remainder to the surviving spouse. *Id.* at 417 n.50.

161.   *Id.* at 430–31.

162.   SUSSMAN ET AL., *supra* note 118, at 62.

163.   *Id.* at 89 tbl.5-1.

164.   *Id.*

165.   *Id.* at 90–91.

166.   Fellows et al., *Illinois Study*, *supra* note 95, at 726 tbl.5.

addition, the popularity of this preference appears to vary with individual and estate characteristics, raising questions about its universality.

Moreover, because these studies are all dated, draw on relatively small samples from select jurisdictions, and offer limited statistical analysis, the continued vitality of their findings is unclear. Yet despite these issues, several of these studies—the most recent among them published in 1987—are cited as having influenced the 2008 revisions to the Uniform Probate Code regarding the share allocated to a surviving spouse;[167] later revisions presumably rely on these studies as well. Novel data and additional empirical analysis of individuals' preferences are sorely needed.

2. Survival by Parent and Romantic Partner

In the case of survival by a parent and a romantic partner, policymakers are faced not only with the question of relative allocation between the parties but with the more fundamental challenge of determining whether nonmarital romantic partners should be intestate heirs at all. Even in states that allocate the entire intestate estate to a surviving spouse, a surviving parent remains a potential heir in other circumstances.[168] In contrast, nonmarital romantic partners are not recognized as intestate heirs under any circumstances in the vast majority of states.[169]

Despite this broad agreement across jurisdictions, there are growing calls for reform. Prior to the Supreme Court's decision allowing same-sex marriage,[170] much of the commentary focused on the needs of same-sex couples.[171] However, the growing prevalence of nonmarital cohabitation ensures that the topic remains relevant. A significant movement toward broadening the definition of intestate heirs to include nonmarital cohabiting partners was a proposed amendment to the Uniform Probate Code initiated by Professor Lawrence Waggoner[172] and drafted by Professor Thomas Gallanis that would have provided intestacy rights to nonmarital cohabiting

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167. UNIF. PROB. CODE § 2-102 cmt. at 32 (UNIF. LAW COMM'N, amended 2010) ("Empirical studies support the increase in the surviving spouse's intestate share, reflected in the revisions of this section. The studies have shown that testators in smaller estates (which intestate estates overwhelmingly tend to be) tend to devise their *entire* estates to their surviving spouses, even when the couple has children.").

168. SITKOFF & DUKEMINIER, *supra* note 82, at 84.

169. E. Gary Spitko, *Intestate Inheritance Rights for Unmarried Committed Partners: Lessons for U.S. Law Reform from the Scottish Experience*, 103 IOWA L. REV. 2175, 2177 (2018).

170. Obergefell v. Hodges, 576 U.S. 644, 675 (2015).

171. SITKOFF & DUKEMINIER, *supra* note 82, at 74.

172. He has also offered proposals that would address this issue indirectly, by broadening statutory definitions of marriage to include certain cohabiting couples. Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 87 n.183 (2015).

partners "sharing a common household."[173] The amendment was not adopted, but a more recent proposal is now once again in progress.[174]

Despite the growing body of doctrinal scholarship arguing for reform in favor of recognizing nonmarital partners, empirical evidence regarding public preferences on this point is limited to two studies based on a 1996 telephone survey of Minnesota residents.[175] The survey was administered to four groups of individuals: (i) a random sample drawn from the general public of respondents who were not in a nonmarital committed relationship (N = 87); (ii) a sample of residents identified as being in an opposite-sex nonmarital committed relationship drawn from the general public survey and through snowball sampling (N = 33); (iii) a sample of men in same-sex nonmarital committed relationships (N = 51); and (iv) a sample of women in same-sex nonmarital committed relationships (N = 85) recruited via various mechanisms.[176]

The first study reports the distribution of the preferred allocations between a surviving partner and parent across these groups. Across all groups, the majority of respondents allocated something to the surviving partner.[177] For those respondents with same-sex partners, the most common allocation was to give the partner the entire estate.[178] In the general public sample and the sample of individuals in opposite-sex nonmarital committed relationships, the most common preference was to split the estate between the partner and parent.[179] These patterns remained stable when the scenario was manipulated to include a same-sex partner.[180]

The second study found that among respondents with opposite-sex partners the distribution of these preferences varied by testacy, although this association diminished when demographic controls associated with variation in testacy were included in the statistical models.[181] The study did not find an association between testacy and dispositive preferences among respondents with same-sex partners.[182]

Thus, several existing studies offer empirical evidence regarding the distribution of preferred allocations at death between a surviving parent and a spouse or romantic partner. However, these studies are dated and changes in family law, patterns of family formation, and public opinion suggest that these preferences may have evolved. In addition, the studies offer evidence of heterogeneity in these preferences, which merits additional investigation given the potential implications

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173.   T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 87 (2004).

174.   *See Economic Rights of Unmarried Cohabitants Committee*, UNIF. L. COMM'N (2018), https://www.uniformlaws.org/committees/community-home?CommunityKey=5f044 999-b4b3-458a-b6d4-d984885d913b.

175.   Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 9 (1998) [hereinafter Fellows et al., *Committed Partners*]; *see* Johnson & Robbennolt, *supra* note 95, at 485.

176.   Fellows et al., *Committed Partners, supra* note 175, at 31.

177.   *Id.* at 38.

178.   *Id.* at 38–39.

179.   *Id.*

180.   *Id.* at 39.

181.   Johnson & Robbennolt, *supra* note 95, at 492.

182.   *Id.*

for the design of these majoritarian defaults. The next Part presents an empirical study of dispositive preferences that addresses the need for additional empirical inquiry and illustrates several complexities that arise in attempting to build majoritarian default rules.

III. THE EMPIRICAL STUDY

This study reports the results of a survey that solicited respondents' preferred allocations at death between a surviving spouse and parent, and between a surviving nonmarital partner and parent. In this Part, I begin by describing the data and analytic approach. I then present descriptive results of the distribution of preferred allocations for each scenario. In addition, I investigate heterogeneity in these distributions across several dimensions, both descriptively and through statistical models.

A. Data

Data were generated from an original online survey administered to a national sample of adults in the United States (N = 1,975). The survey was administered by Qualtrics, which recruited participants in accordance with a sampling frame comprised of Census-based quotas for gender, age, race and ethnicity, income, education, and region. The distribution of the sample on each of these dimensions is largely consistent with the national distribution.[183] Incomplete responses and short responses suggestive of poor data quality were excluded.[184] The survey included questions on basic demographics, socioeconomic status, estate planning usage, beliefs and attitudes about estate planning, and dispositive preferences; this Article relies on questions about dispositive preferences, estate planning, and socio-demographic characteristics.

To assess individuals' dispositive preferences, respondents were presented with several hypothetical scenarios and asked to allocate their estate among the survivors identified in the scenario. To measure respondents' preferred allocations, they were asked to slide a ruler along a bar ranging from 0% to 100% to indicate their preferred allocation to each survivor. For each scenario, all allocations must sum to 100%; that is, respondents were required to allocate all property between the survivors indicated and could not allocate more than 100% of the estate. Because there were only two survivors in each of the scenarios analyzed in this Article, the allocations to these two survivors are inverses of each other. To simplify the presentation of results, the analyses focus on the distribution of the allocations to the spouse or romantic partner only.

Information regarding estate planning usage and individual characteristics was also collected. Testacy—having a valid will—is operationalized with an indicator variable (0 = intestate, 1 = testate). Marital status is also measured with a binary variable indicating whether an individual is married or never married/divorced/widowed. An indicator for individuals with a nonmarital cohabiting romantic partner (0 = no, 1 = yes) was created by identifying individuals

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183.   *See* Taylor Poppe, *supra* note 118, at 2558 app. tbl.1 (comparing the distribution of the sample with national Census parameters).

184.   For a discussion of possible selection bias as a result, see *id.* at 2541.

who: (i) were not married; (ii) reported having more than one person in their household; and (iii) identified one of the additional members of their household as either an opposite-sex or same-sex romantic partner. Parental status is measured with a variable indicating whether the respondent has "any children (including biological, adopted, or step)" (0 = no, 1 = yes).

Other demographic characteristics used in the analyses are self-reported gender (variable is female: male = 0, female = 1), age,[185] and race and ethnicity (non-Latino White, non-Latino Black, non-Latino Asian, Latino, or non-Latino Other[186]). Socioeconomic status indicators are household income in the past 12 months, wealth, and highest level of completed education (less than a high school diploma, high school diploma, some college, a college degree, or a graduate degree). Table 2 provides summary statistics for the sample.

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185.   Due to a survey administration error, age is missing for some respondents (n = 21). These respondents are excluded when age is operationalized using a continuous variable and are included in a "missing" category when a categorical variable for age is used.

186.   The non-Latino Other category includes individuals who indicated that they were not Latino and selected as their race Native American, Other, or multiple races.

Table 2. Summary Statistics of Sample

	Proportion or Mean (SD)		Proportion or Mean (SD)
Female	0.52	Education	
Age		<High School	0.04
<25	0.07	High School Diploma	0.28
25 - <35	0.18	Some College	0.32
35 - <45	0.18	College Degree	0.23
45 - <55	0.20	Graduate Degree	0.14
55 - <65	0.17	Testate	0.43
65+	0.18	Marital Status	
Missing	0.01	Never Married	0.28
Race/Ethnicity		Married	0.52
White	0.62	Separated	0.02
Black	0.13	Divorced	0.11
Asian	0.05	Widowed	0.06
Latino	0.17	Non-Marital Partner	0.09
Other	0.03	Parent	0.67
Household Income ($1,000)	67.19 (49.65)		
Wealth			
Negative Wealth	0.20		
Zero Wealth	0.24		
>$0 - <$50,000	0.18		
$50,000 - <$100,000	0.09		
$100,000 - <$150,000	0.07		
$150,000 - <$250,000	0.07		
$250,000 - $500,000	0.06		
$500,000 - $1M	0.05		
$1M - <$5M	0.04		
$5M +	0.01		
N	1975		

B. Results: Survival by Parent and Spouse

To investigate dispositive preferences regarding spouses and parents, the survey asked respondents, "Imagine that when you died you had about as much wealth as you do now, and were survived only by a spouse and a parent. What percent of your wealth would you want your spouse and parent to receive?"[187] Table

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187.   Drawing on the similarity of results for situations involving both parents, mother only, and father only in prior empirical work, the question does not consider these scenarios separately. *See* Fellows et al., *Illinois Study*, *supra* note 95 at 726.

3 provides summary statistics of the distribution of preferred allocations to the surviving spouse for the full sample, by both testacy and by marital status. In the full sample, respondents allocated an average of 69.16% of property to the surviving spouse (SD = 28.81, median = 71) and 30.84% to the parent (SD = 28.81, median = 29). This average allocation to the surviving spouse is statistically significantly higher than the average allocation to the parent.[188]

Table 3. Summary Statistics for Preferred Allocation to the Surviving Spouse for the Full Sample, by Testacy, and by Marital Status

| | Full Sample | Testacy | | Marital Status | |
		Intestate	Testate	Married	Unmarried
Mean	69.16	66.84	72.29	79.00	58.50
(SD)	(28.81)	(29.47)	(27.61)	(23.29)	(30.41)
Median	71	70	77	86	52
N	1,975	1,134	841	1,027	948

However, the mean is a poor summary of the distribution of preferred allocations. Figure 1 illustrates the distribution of the preferred allocations to the spouse for the full sample. Figure 1a provides a frequency histogram showing the number of respondents who selected each possible allocation. Figure 1b transforms this frequency histogram into a density histogram, which requires that the sum of the bars equals to one, thus representing relative incidence. This is overlaid with a kernel density estimate, which estimates a function of the relative probability of a respondent allocating a given percent of the probate estate to the surviving spouse.[189] Because kernel density estimates are lines as opposed to bars, they are useful for comparing multiple distributions in a single figure, as I will do below.

188. $t(1,974) = 29.55$, $p < 0.001$.
189. Kernel density estimation is a non-parametric method of estimating the probability density function of a distribution. Weighted estimates of the density within overlapping intervals are generated to form a smooth line approximating the probability density function without imposing any assumptions about the function's form. All figures in this Article use a bandwidth of 0.3 to preserve the significant characteristics of the distributions.
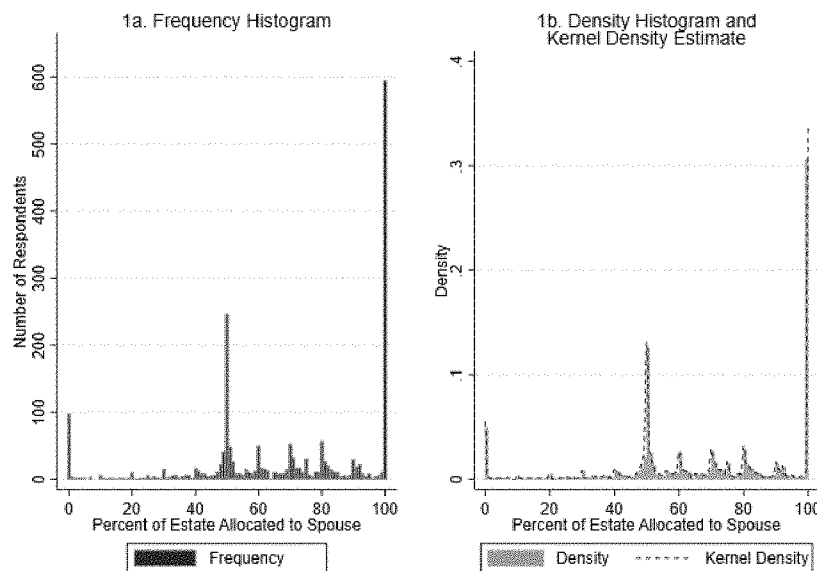
Figure 1. Frequency Histogram and Density Histogram with Kernel Density Estimate of Distribution of Preferred Allocations to the Surviving Spouse for the Full Sample

As Figure 1 shows, the distributions peak at allocations around 50% and 100% of the estate, offering evidence of preferences for distributing the estate equally between the spouse and parent or excluding the parent in favor of the spouse. Although there are several smaller peaks at allocations of 60%, 70%, and 80%, these are less popular relative to giving half or all of the estate to the surviving spouse. In keeping with prior research on this topic—and to illustrate divergence from the scenario presented below—I also include in the analyses the share of respondents who excluded the surviving spouse.

Table 4 lists the frequency with which respondents selected each of these three focal allocations. In calculating these frequencies, I include allocations close to each of the responses to capture the full weight of these preferences. Specifically, I include allocations of 5% or less of the probate estate as a preference of allocating nothing to the surviving spouse, allocations from 45% to 55% of the estate to the spouse as evidence of a desire to give half to the spouse, and allocations to the spouse of at least 95% of the estate as indicative of a preference to give everything to the surviving spouse.

Table 4. Frequency of Common Allocations to the Surviving Spouse for the Full Sample, by Testacy, and by Marital Status[190]

	None to Spouse		Half to Spouse		All to Spouse		Total
	N	%	N	%	N	%	N
Full Sample	112	5.67	433	21.92	627	31.75	1,975
Testacy							
Intestate	72	6.35	293	25.84	337	29.72	1,134
Testate	40	4.76	140	16.65	290	34.48	841
Marital Status							
Married	11	1.07	160	15.58	442	43.04	1,027
Not Married	101	10.65	273	28.80	185	19.51	948

As Table 4 indicates, the modal—most common—preference among the full sample of respondents is to exclude the surviving parent in favor of the spouse (n = 627, 32%), followed by awarding half of the estate to the spouse (n = 433, 22%), and excluding the spouse in favor of the parent (n = 112, 6%). Thus, distributing the entire probate estate to the surviving spouse is the most popular response, but it represents the preferences of only about one-third of respondents.

It is also more likely to represent the preferences of some groups than others. Because intestacy is a default rule that is not applied to the property of individuals who die testate—apart from its application in any gap-filling, construction-guiding capacity—testacy determines the applicability of the default rule to respondents. The average allocation among those who are intestate (mean = 66.84, SD = 29.47, median = 70) is statistically significantly lower than the mean allocation among those who are testate (mean = 72.29, SD = 27.61, median = 77)[191] (see Table 3).

In addition, the distribution of preferred allocations differs between the two groups.[192] Figure 2 presents kernel density plots of the distribution of the preferred allocations to the surviving spouse among respondents who are testate and intestate. While the most frequent allocation among both groups of respondents is to award the entirety of the probate estate to the spouse, the share of respondents that selected this allocation is higher among those who are testate (34%) than those who are intestate (30%) (see Table 4). Allocating half of the estate to the surviving spouse

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190. None to Spouse includes allocations to spouse from 0% to 5% of probate estate; Half to Spouse includes allocations from 45% to 55%; and All to Spouse includes allocations from 95% to 100%. Unmarried includes any marital status other than married.

191. $t(1,973) = -4.17, p < 0.001$.

192. $X^2 (4, N = 1975) = 32.59, p < 0.001$. In addition to preferences for excluding the spouse (allocating 0%–5%), apportioning half to the spouse (allocating 45%–55%), or allocating everything to the spouse (95%–100%), this analysis includes categories for allocating more than 5% but less than 45% of the estate to the spouse and allocating more than 55% but less than 95% of the estate to the spouse.

represents the preferred allocation of a notable share of intestate respondents (26%). Thus, a policy of enacting the preferences of intestate individuals would yield the same plurality rule—allocating the entire probate estate to the surviving spouse—as one that optimized the preferences of all individuals, but it would represent the preferences of an even smaller share of the focal population.
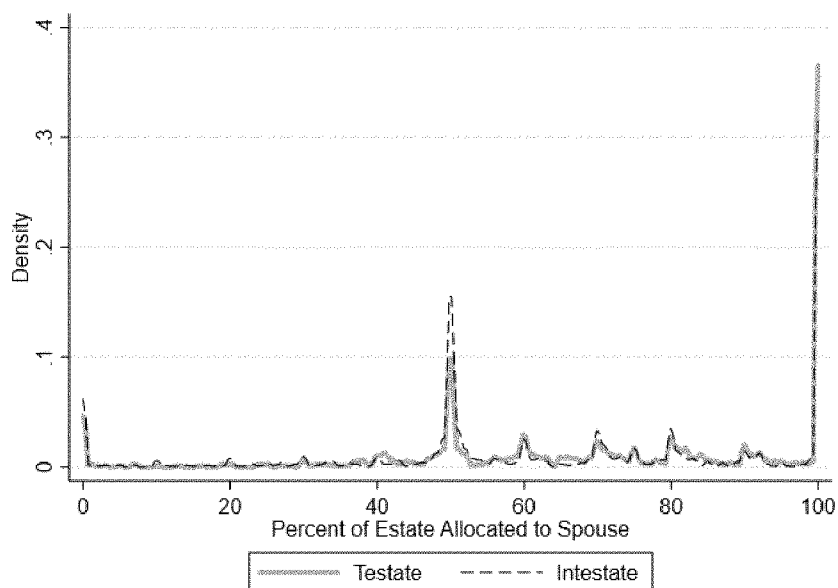

Figure 2. Kernel Density Estimates of the Distribution of the Preferred Allocation to the Surviving Spouse, by Testacy

However, there are additional factors that also contribute to the applicability of the intestacy defaults. Another determinant of whether respondents will be affected by intestacy provisions governing the disposition of property between a spouse and parent is marital status. Table 3 reports the average allocations to the surviving spouse for respondents who are married (mean = 79, SD = 23.29, median = 86) and those who are not (mean = 58.50, SD = 30.41, median = 52),[193] which are statistically significantly different.[194] So too are the differences in the distributions across preference categories for these two groups.[195] As Table 4 indicates, the modal preference among married respondents is to allocate the entire estate to the spouse (n = 442, 43%). In contrast, the greatest share of unmarried respondents favor allocating only half of the probate estate to the surviving spouse (n = 273, 24%). Figure 3 provides kernel density plots of the distributions of the preferred allocations to the surviving spouse for those respondents who are married and those who are not, which shows this difference in preferred allocation. This

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193.   The unmarried group consists of respondents who reported any marital status other than currently married.

194. $t(1,973) = -16.89, p < 0.001$.

195. $X^2 (4, N = 1975) = 245.25, p < 0.001$.

indicates that the plurality position is consistent with the preferences of those most likely to face the scenario but departs from the most frequent wishes of those who are not currently likely to be subject to the default rule.
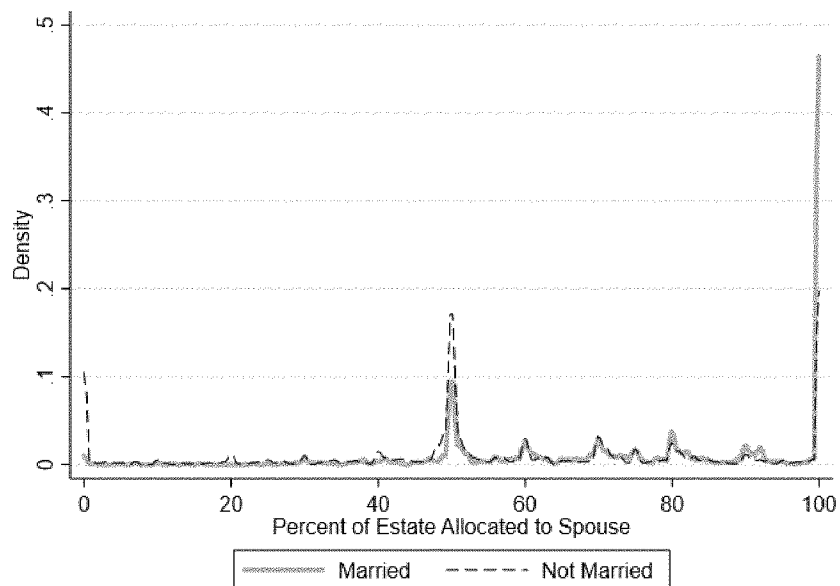

Figure 3. Kernel Density Estimates of the Distribution of the Preferred Allocation to the Surviving Spouse, by Marital Status

Finally, Figure 4 provides kernel density estimates of the distribution of preferred allocations to the surviving spouse by testacy and marital status, differentiating the group of respondents most likely to face this situation—because they are both married and intestate—from all other respondents. Unlike in the prior analysis separating respondents by marital status, the modal allocation of these two groups does not differ; the most common preference among both groups is to allocate the entire estate to the spouse.
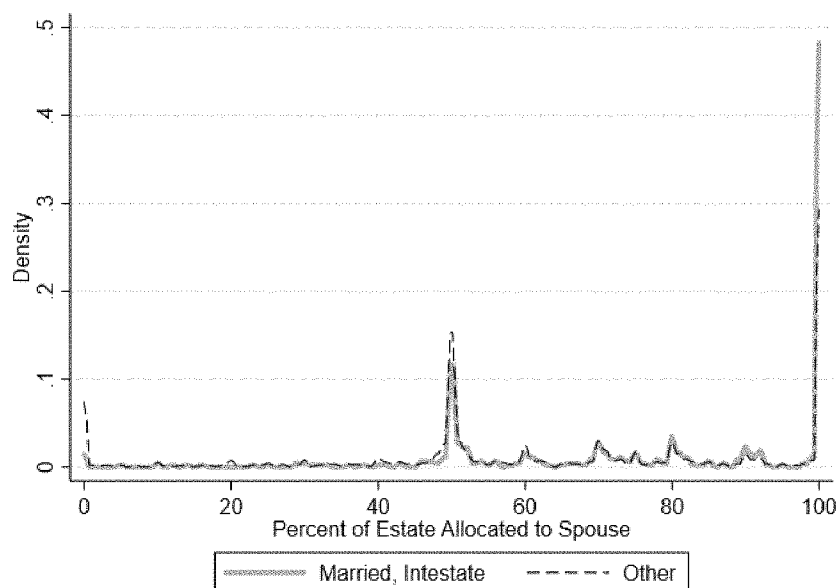
Figure 4. Kernel Density Estimates of the Distribution of the Preferred Allocation to the Surviving Spouse, by Marital Status and Testacy

In sum, these results illustrate that the mean is a poor representation of most individuals' preferred allocation. They also document variation in both the average allocation and the distribution of preferred allocations by testacy and marital status. However, it is only unmarried individuals whose modal allocation is a preference other than distributing the entirety of the probate estate to the surviving spouse. This suggests that intestacy provisions favoring the surviving spouse to the exclusion of a surviving parent captures the preferences of the greatest number of individuals. However, even this approach fails to satisfy a majority, capturing the preferred allocation of only 32% of respondents.

It is possible that membership in this latent class of respondents is socially patterned in ways beyond testacy and marital status. This possibility is important for two reasons. First, if observable characteristics are associated with dispositive preferences, it opens the possibility of generating more tailored defaults.[196] The

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196.   There remain several theoretical and empirical questions about how to interpret an observed association between a given characteristic and a dispositive preference. For example, it is unclear whether an association between wealth and dispositive preferences is a function of the size of the respondent's likely estate or evidence of variation in preferences among those with greater financial resources. On the other hand, since our goal is not to identify causal mechanisms but simply to enhance the accuracy of our prediction, it may not matter.

other side of that coin, however, is it could reveal that intestacy has a disparate impact on certain socio-demographic groups.[197]

To address this topic, I first investigate the links between individual socio-demographic characteristics and dispositive preferences. I find statistically significant variation in the distribution of respondents across categories of preferred allocations to the surviving spouse by race and ethnicity,[198] age,[199] education,[200] and wealth.[201] Variation by gender does not achieve statistical significance.[202] In the Appendix, I provide histograms illustrating the distributions of preferred allocations by race and ethnicity (Appendix Figure 1), age (Appendix Figure 2), and education (Appendix Figure 3).

While these bivariate analyses illustrate variation in dispositive preferences across individual characteristics, they do not offer an estimate of the extent to which these characteristics, taken together, are able to predict dispositive preferences. For this, I turn to regression analysis. Although the original dependent variable is continuous, I transform it into a categorical variable to better capture the substantively meaningful peaks in the distribution. Using observed individual characteristics, I estimate multinomial logistic regression models predicting the probability of reporting a preferred range of allocations to the surviving spouse relative to the probability of allocating the entire probate estate to the spouse.[203] This is an appropriate method for situations where the dependent variable is categorical.[204]

Appendix Table 1 reports the estimated coefficients and robust standard errors. Several coefficients are statistically significant, indicating an association between the individual characteristic and the probability of reporting a preferred allocation range relative to allocating the entire estate to the spouse, after adjusting for all other covariates. However, the model's predictive power is quite limited, accounting for only about 10% of the observed variation in preferred (categorical) allocation to a surviving spouse.[205]

Taken together, these results offer empirical support for intestacy provisions that award the entirety of the probate estate to a surviving spouse in lieu of including distributions to a surviving parent. However, they also document significant heterogeneity in preferred allocations, with the dominant approach

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197.   *See* Naomi Cahn, *Dismantling the Trusts and Estates Cannon*, 2019 WIS. L. REV. 165, 174–75 (2019).

198. $X^2(16, N = 1975) = 129.33, p < 0.001$.

199. $X^2(24, N = 1975) = 226.08, p < 0.001$.

200. $X^2(16, N = 1975) = 48.94, p < 0.001$.

201. $X^2(20, N = 1975) = 93.63, p < 0.001$.

202. $X^2(4, N = 1975) = 3.282, p = 0.51$.

203.   The model predicts the probability of allocating all of the probate estate to the surviving spouse relative to the probability of selecting an alternate allocation (half to the surviving spouse, nothing to the surviving spouse, allocating more than 5% but less than 45% of the estate to the spouse, or allocating more than 55% but less than 95% of the estate to the spouse).

204.   JOHN SCOTT LONG, REGRESSION MODELS FOR CATEGORICAL AND LIMITED DEPENDENT VARIABLES 3 (1st ed. 1997).

205. $R^2_{McFadden} = 0.11$.

capturing the preferences of only about one-third of respondents. Moreover, the results indicate that dispositive preferences in this scenario are socially patterned. While links between individual characteristics and dispositive preferences might suggest the potential for increasingly tailored default rules, the limited predictive power of the observed individual characteristics suggests that such an approach is not feasible using the characteristics observed in this study.

C. Results: Survival by Parent and Romantic Partner

The second controversial intestacy scenario investigated in this study involves survival by a nonmarital romantic partner and a parent. To elicit respondents' preferred allocations among these parties, the survey asked respondents, "Imagine you had about as much wealth as you do now and were survived only by a romantic partner to whom you were not married and a parent. What percent of your wealth would you want your partner and parent to receive?"

Table 5 reports summary statistics for the preferred allocations to the partner. Respondents allocated an average of 45.73% of property to the nonmarital partner (SD = 33.45, median = 49.00) and 54.27% to the parent (SD = 33.45, median = 51.00). This average allocation to the nonmarital partner is statistically significantly less than the average allocation to the parent,[206] in contrast to the greater average allocation to a surviving spouse relative to a parent in the prior scenario.

Table 5. Summary Statistics for Preferred Allocation to the Surviving Nonmarital Partner for the Full Sample, by Testacy, and by Nonmarital Partnership Status[207]

	Full Sample	Testacy		Nonmarital Partner	
		Intestate	Testate	Partner	No Partner
Mean	45.73	44.04	48.00	54.44	44.88
(SD)	(33.45)	(33.33)	(33.50)	(28.28)	(33.80)
Median	49	47	50	50	48
N	1,975	1,134	841	174	1,801

However, as in the prior scenario, the mean does not summarize the distribution of preferences well. Figure 5 provides the frequency histogram and a density histogram overlaid with the kernel density plot of the distribution of the preferred allocations to the surviving nonmarital partner for the full sample. There are three peaks in the distribution. Similar to the plots for scenario 1, these indicate the prevalence of preferences for splitting the estate evenly or allocating the entire

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206. $t(1,974) = -5.68, p < 0.001$.
207.   Partner indicates that a respondent is not married and lives with a same-sex or opposite-sex romantic partner.

probate estate to the partner. In contrast to the prior scenario, however, there is also substantial support for excluding the nonmarital partner.
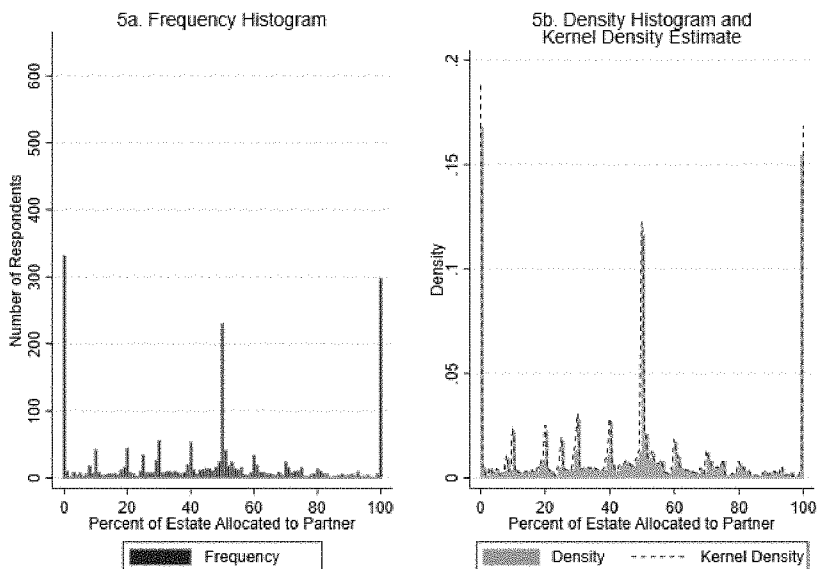

Figure 5. Kernel Density Estimates of the Distribution of the Preferred Allocation to the Surviving Nonmarital Partner

        In addition, the frequency with which respondents indicated a preference for each of these allocations is much closer. Table 6 presents the frequency of these common allocations and indicates that 18.53% of respondents (N = 366) indicate a preference for excluding the nonmarital partner, 21.37% (N = 422) would allocate half of the estate to the partner, and 15.95% (N = 315) would allocate everything to the partner. Thus, awarding half to the partner is the most common response, but it is followed more closely by the other two options than in the case of survival by a parent and spouse. In addition, about three times as many respondents would exclude a nonmarital partner compared to a surviving spouse.

Table 6. Frequency of Common Allocations to the Surviving Nonmarital Partner for the Full Sample, by Testacy, and by Nonmarital Partnership Status[208]

	None to Partner		Half to Partner		All to Partner		Total
	N	%	N	%	N	%	N
Full Sample	366	18.53	422	21.37	315	15.95	1,975
Testacy							
Intestate	224	19.75	262	23.10	177	15.61	1,134
Testate	142	16.88	160	19.02	138	16.41	841
Partnership Status							
Partner	13	7.47	54	31.03	28	16.09	174
No Partner	353	19.60	368	20.43	287	15.94	1,801

I next consider whether the dispositive preferences in this situation differ by testacy. Figure 6 provides the kernel density estimates of the distributions of preferred allocations to a nonmarital partner by testacy. I find that allocating half of the estate to the nonmarital partner is the most frequent preference for both testate and intestate respondents (see Table 6), but that the distribution of testate and intestate respondents across preference categories is statistically significantly different.[209] In addition, the average allocation to the partner among testate individuals (mean = 48.00, SD = 33.50) is statistically significantly different from that of intestate individuals (mean = 44.04, SD = 33.33) (see Table 5).[210]

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208. None to Partner includes allocations to partner from 0%–5% of probate estate; Half to Partner includes allocations from 45%–55%; and All to Partner includes allocations from 95%–100%. Partner indicates that a respondent is not married and lives with a same-sex or opposite-sex romantic partner.

209. $X^2(4, N = 1975) = 20.43, p < 0.001$.

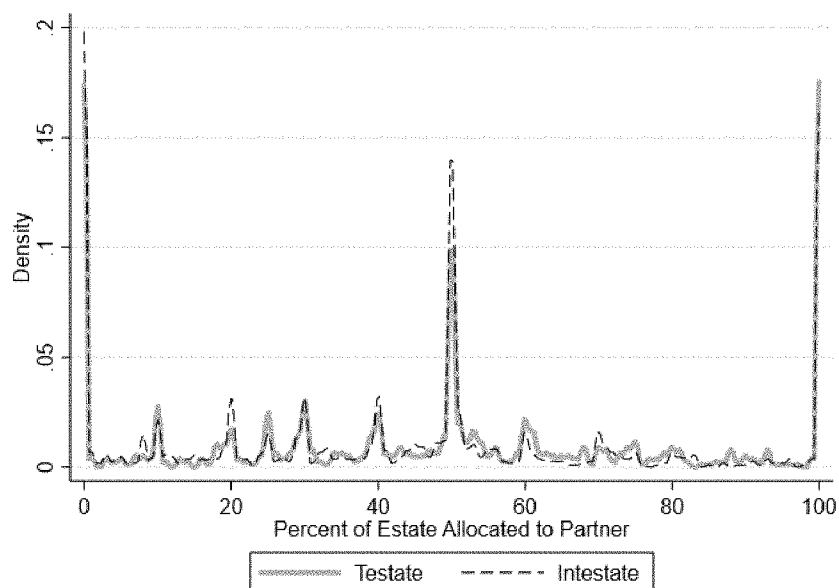210. $t(1,973) = -2.60, p < 0.01$.

Figure 6. Kernel Density Estimates of the Distribution of the Preferred Allocation to the Nonmarital Partner, by Testacy

In considering whether relationship status is associated with dispositive preferences in this situation, Figure 7 illustrates the distributions of preferred allocations for respondents who report having a nonmarital cohabiting romantic partner and all other respondents. As shown by the figure, and confirmed by the frequencies reported in Table 6, the patterns of these groups' preferences differ.[211] Respondents with partners favor allocating half of the estate to the partner (N = 54, 31%), while other respondents are more evenly split between allocating half of the estate to the partner (N = 368, 20%) and excluding the partner (N = 353, 20%). The average allocations of the groups also diverge, with those in partnerships directing an average of 54.44% (SD = 28.28) of the estate to the partner and all other respondents directing only 44.88% (SD = 33.80) (see Table 5).[212]

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211. $X^2(4, N = 1975) = 22.28, p < 0.001$.
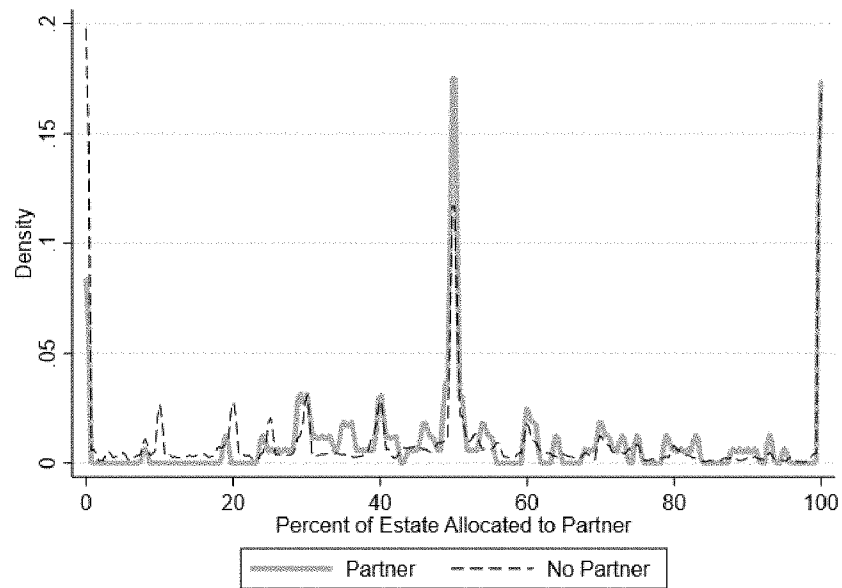212. $t(1,973) = -3.61, p < 0.01$.

Figure 7. Kernel Density Estimates of the Distribution of the Preferred Allocation to the Surviving Nonmarital Partner, by Partnership Status

Finally, Figure 8 further narrows the focus to those individuals who are most likely to be subjected to the default provision governing this scenario because they are in a nonmarital partnership and intestate. The results largely follow those divided by partnership status, with intestate respondents with partners differing from other respondents in their average allocation[213] and pattern of responses.[214]

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213. Intestate nonmarital partner mean = 54.22, SD = 28.53; all other respondents mean = 45.14, SD = 33.69; $t(1,973) = -2.96, p < 0.01$.
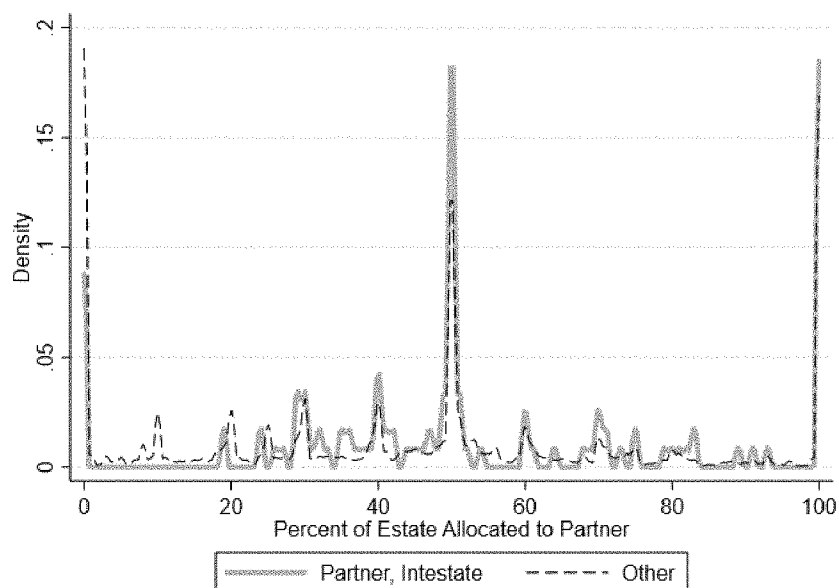214. $X^2(4, N = 1975) = 12.67, p < 0.05$.

Figure 8. Kernel Density Estimates of the Distribution of the Preferred Allocation to the Surviving Nonmarital Partner, by Partnership Status and Testacy

As in the scenario above, it is possible that dispositive preferences in this scenario also vary with individual characteristics beyond testacy and relationship status. In this scenario, I again find statistically significant variation in the distribution across categories of preferred allocations to the surviving spouse by race and ethnicity,[215] age,[216] education,[217] and wealth.[218] Here, unlike in the scenario involving a surviving spouse, I also find variation by gender.[219] In the Appendix, I provide histograms of the distributions of preferred allocations by race and ethnicity (Appendix Figure 4), age (Appendix Figure 5), education (Appendix Figure 6), and gender (Appendix Figure 7).

Building on these bivariate results, I next estimate a multinomial logistic regression model—the same approach employed above—predicting the probability of a range of allocations to a surviving nonmarital partner relative to another based on observed individual characteristics (see Appendix Table 2). Here again, while the coefficients for several individual characteristics are statistically significantly different from zero, indicating that they are associated with variation in dispositive preference category, the model's predictive power is limited.[220]

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215. $X^2(16, N = 1975) = 58.25, p < 0.001$.
216. $X^2(24, N = 1975) = 89.83, p < 0.001$.
217. $X^2(16, N = 1975) = 68.02, p < 0.001$.
218. $X^2(20, N = 1975) = 34.95, p < 0.05$.
219. $X^2(4, N = 1975) = 34.08, p < 0.001$.
220. $R^2_{McFadden} = 0.05$.

These results present a serious challenge for policymakers charged with generating a majoritarian default provision allocating property between a surviving parent and a nonmarital romantic partner. No clear plurality preference emerged, let alone a majority position; the proportion of respondents who reported a preference for allocating none, half, and all of the probate estate to a surviving partner were all within six percentage points of each other.[221] However, among respondents who have a nonmarital cohabiting romantic partner and are intestate—the group of respondents most likely to be affected by the default rule—there is a stronger preference for allocating half of the probate estate to the partner.[222] Thus, the empirical results offer some support for reform efforts aimed at expanding inheritance rights to nonmarital partners but also help explain why such efforts remain controversial.

IV. CHOICE BUILDING FOR INTESTACY

While estates and trusts scholars have acknowledged the potential difficulties presented by heterogeneity in dispositive preferences,[223] and earlier empirical work offered evidence of such variation,[224] the topic has not received sustained scholarly attention. However, the empirical results presented above establish that preference heterogeneity is a serious challenge to the development of majoritarian intestacy provisions. This Part considers how clarifying intestacy's aim, using additional empirical evidence to determine collective preferences more accurately, and tailoring defaults might offer possible solutions.[225]

A. Clarifying Intestacy's Aim

The idea that intestacy provisions should represent decedents' probable intent underlies probate scholarship, policymaking, and practice. Yet connecting pronouncements evidencing this view to empirical reality reveals the imprecision with which this goal is currently formulated. For example, two typical formulations posit that intestacy laws should represent the wishes of the "average decedent"[226] or the "typical person."[227] These are not the same thing. The average decedent, for

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221.   *See supra* Table 6.
222.   *Id.*
223.   Sitkoff, *supra* note 14, at 646 ("[O]n some issues, there is no clear majoritarian preference or preferences may be in flux. In such circumstances, should legislators favor the traditional view or the one that seems to be emerging? Should legislators look to how the issue is typically addressed in professionally drafted wills?"); *see also* Rebecca Friedman, *Intestate Intent: Presumed Will Theory, Duty Theory, and the Flaw of Relying on Average Decedent Intent*, 49 REAL PROP. TR. & EST. L.J. 565, 578–81 (2015).
224.   *See supra* Section II.C.
225.   These solutions assume that we maintain a system of bright-line rules. An alternative approach would be to increase discretion.
226.   *See generally* Friedman, *supra* note 223.
227.   *E.g.*, Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALA. L. REV. 891, 912 (1992).

example, is older than the typical person in the population, and as this study reveals, dispositive preferences vary with age.[228]

In addition, while some formulations of the majoritarian nature of intestacy would draw on the preferences of all individuals, others narrow intestacy's focus to intestate decedents. For example, Robert Sitkoff suggests that to create intestacy provisions, "disparate preferences of persons *without a will* must be aggregated into a model *intestate* decedent."[229] This distinction also matters. Prior empirical studies and the results presented in this paper indicate that preferences can vary between intestate and testate decedents.[230] Given this, one might be inclined toward the observation of a policy working group in the United Kingdom that "it seems odd to allow . . . the half of the population who make wills to dictate what should happen to the property of the other half who do not."[231]

This also would counsel against using will provisions to estimate the preferences of intestate individuals. On the other hand, some scholars have argued that to promote fairness and freedom of testation, intestacy laws should reflect *informed* preferences.[232] This idea is seconded by the proposal that intestacy provisions "should approximate the will that the average person would write."[233] Given that most intestate individuals have likely not had the benefit of legal advice, their reported preferences offer a poor estimate of such informed choices.

Finally, a further challenge is the reality that intestate individuals are more likely to be younger, unmarried, not parents, and poorer.[234] But none of them will stay young forever (alas!) and many will get married, become parents, and accumulate more wealth over the life course. Should all intestate individuals contribute equally to the determination of intestacy laws? Or should our analysis be limited or weighted by consideration of whether individuals are more likely to experience a given situation? The empirical study shows that this decision may be consequential for the substance of intestacy provisions.

This discussion makes clear that a fundamental prerequisite to improving intestacy laws' congruence with probable intent is to determine exactly whose intent we are aiming to capture. This raises several normative questions about the goal of intestacy and the portions of the population it is designed to serve. By clarifying this goal, the normative basis for intestacy provisions might become more transparent,

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228.   One might quibble that older individuals' preferences are not a function of age itself, but a function of other factors associated with age. For example, wealth, marital status, the age of descendants and the mortality of ancestors, cohort effects, and health status all could be implicated in the mix. Yet the point remains that preferences vary with age and we must be clear in deciding whose preferences should guide the development of intestacy provisions.

229.   Sitkoff, *supra* note 14, at 645 (emphasis added).

230.   *See supra* Part III.

231.   Law Commission, *Distribution on Intestacy* 32 (Working Paper No. 108, 1988) https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/08/No.108-Distribution-on-Intestacy.pdf.

232.   Fellows et al., *Public Attitudes, supra* note 89, at 325.

233.   Glucksman, *supra* note 95, at 253.

234.   *See* Taylor Poppe, *supra* note 118, at 2546–47, 2557.

and future empirical work could focus on the relevant population to better identify the distribution of preferred allocations.

B. Amassing Preferences

Even if the population whose preferences we want to model is identified, we still face the challenge of aggregating those preferences. Here, the political-science literature on social choice offers insights that may enhance this process. Foundational research in this tradition shows that in some circumstances, cycles can arise such that it is impossible to identify a single majoritarian preference.[235] However, in other cases, additional empirical evidence might help to clarify which allocation best captures the preferences of the group.[236]

Rigorous empirical evidence of dispositive preferences—to the extent it exists at all—has never taken into account the strength of individuals' preferences nor asked individuals to rank preferences. Doing so may more clearly reveal that a single allocation better satisfies the desires of a greater number of individuals than any other. Or from the inverse perspective, additional research might reveal ways in which the rule can be drafted to minimize individuals' dissatisfaction. More work is needed to generate empirical data regarding dispositive preferences and to undertake analyses informed by interdisciplinary perspectives.

C. Tailoring Defaults

Finally, it could be that by tailoring intestacy provisions, we are able to increase accuracy without unacceptably complicating their application. Indeed, these empirical results offer evidence of variation in preferences across some observed characteristics. However, the limited predictive power of the statistical models suggest that we are not yet able to estimate dispositive preferences from individual socio-demographic characteristics with a level of accuracy sufficient to justify a shift to more complicated defaults.

Moreover, the lack of data on dispositive preferences currently prohibits a big data approach that might generate more accurate results. Wills are publicly available, but their accessibility is limited;[237] as noted above, there are also issues with using wills as the data source for estimating preferences. As this study illustrates, survey data can be generated but do not currently exist on the scale necessary to generate highly detailed defaults, and it is not clear how or why or by whom such data will be generated in the near future. Thus, while evidence that the distribution of dispositive preferences varies with socio-demographic characteristics suggests the possibility of more tailored defaults, this is not currently a realistic possibility.

Accordingly, the results of this empirical investigation suggest that additional empirical investigation might enhance the accuracy of our understanding

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235. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1951).

236. *See* Amartya Sen, *The Possibility of Social Choice*, 89 AM. ECON. REV. 349, 357–58 (1999).

237. *See, e.g.*, Horton, *Wills Law*, *supra* note 112, at 1121 (describing the data collection process for a will study in Alameda County, California).

of collective preferences regarding the allocation of probate property. This, combined with a more precise—and transparent—description of the individuals whose preferences we seek to capture, might well identify plurality positions. However, without the benefit of more complex default rules, which at this point remain infeasible, it also appears unlikely that all scenarios will generate majority positions. Thus, there is a need for greater recognition of the reality that our "majority" defaults in intestacy satisfy only a plurality.

CONCLUSION

By investigating variation in individuals' preferences regarding the allocation of property at death, this Article makes several scholarly and policy-relevant contributions. First, by introducing the concept of choice building, this Article draws attention to the need for more bottom-up, empirically grounded scholarship on the substance of default rules. Dominated by theoretical considerations of the structural design of defaults, this literature has largely ignored the process of generating substantive content within these structures. Yet this content—as illustrated by the case study presented by this Article—can have important consequences for a broad range of individuals.

In addition, this Article's empirical analysis provides novel evidence of dispositive preferences for two of the most controversial situations addressed by the laws of intestacy. In doing so, this Article provides much-needed empirical evidence to guide the development of intestacy law. It also provides an empirical case study that illumines the challenge presented by heterogeneity in preferences in the context of a majoritarian default rule, a topic that merits additional scholarly attention. Finally, this Article draws attention to the potential inequalities generated by majoritarian default rules in such circumstances. While the existing literature recognizes that there will be winners and losers as individual preferences are collapsed into a single rule, this research raises normative questions about exactly who those winners and losers should be.
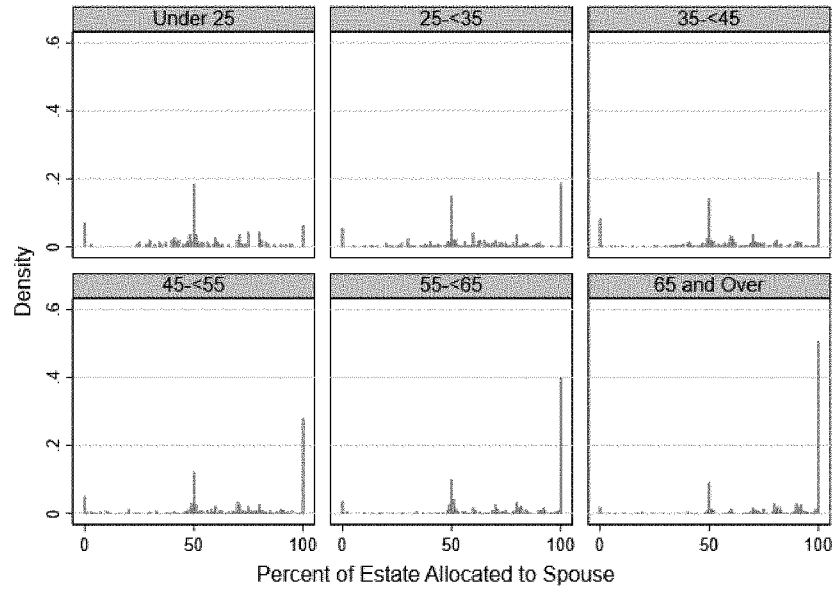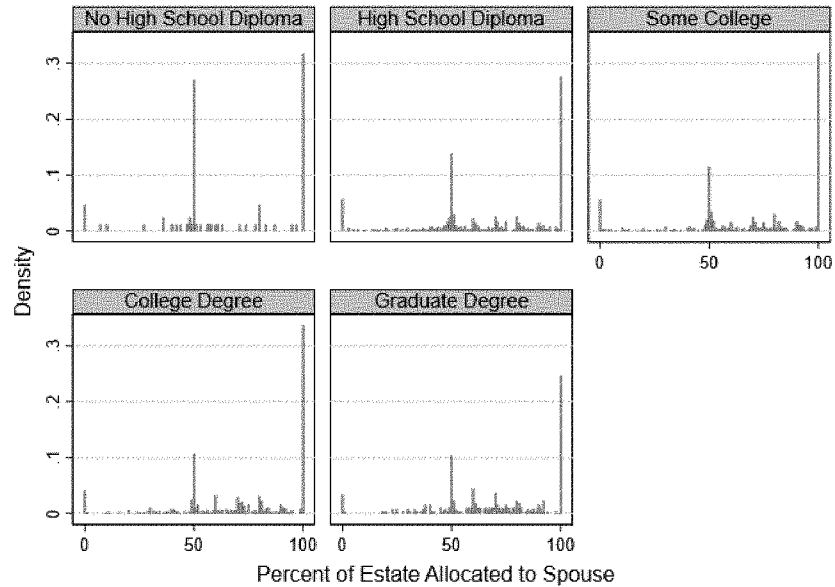
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APPENDIX
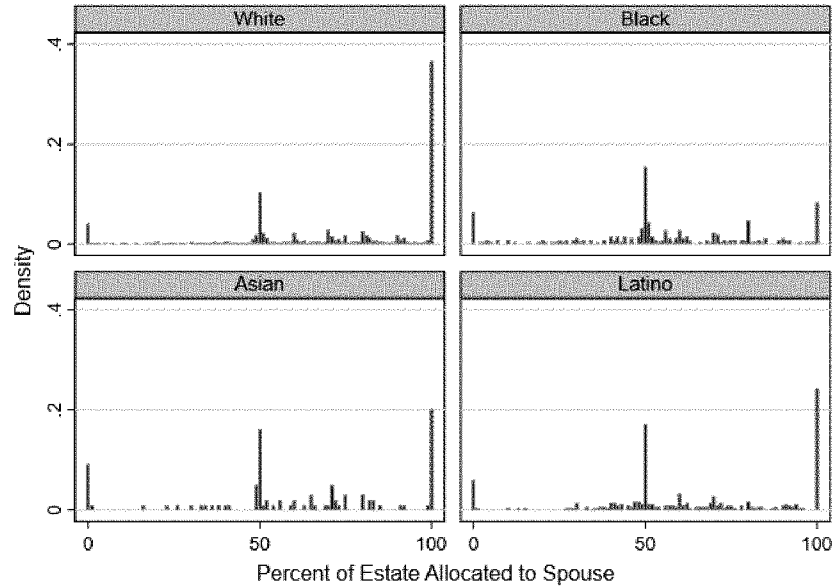
Appendix Figure 1. Histograms of the Distribution of Preferred Allocations to Surviving Spouse, by Race and Ethnicity

Note: White, N = 1,234; Black, N = 251; Asian, N = 99; Latino, N = 337. Due to limited sample size, Other Race/Ethnicity is excluded.
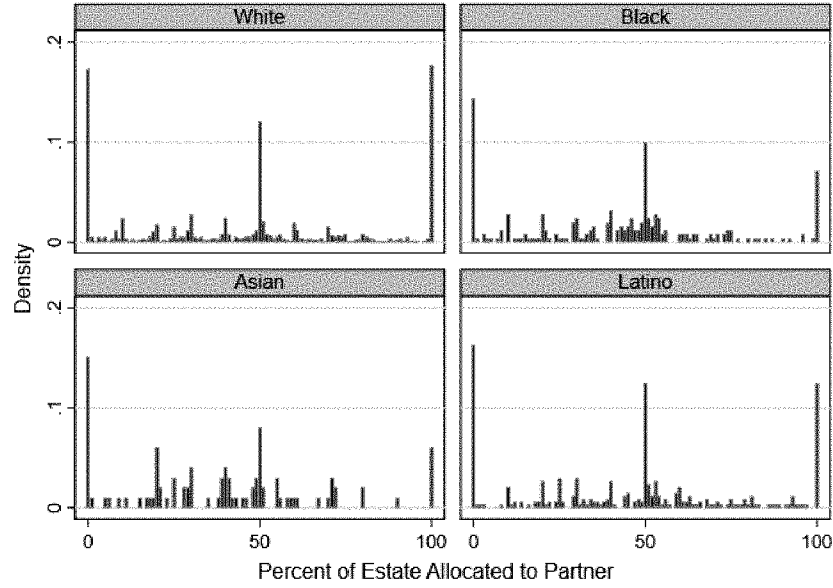
Appendix Figure 2. Histograms of Distribution of Preferred Allocations to Surviving Spouse, by Age Group

Note: Under 25, N = 140; 25-<35, N = 364; 35-<45, N = 355; 45-<55, N = 395; 55-<65, N = 336; 65 and Over, N = 365. Missing (N = 20) excluded.

Appendix Figure 3. Histograms of Distribution of Preferred Allocations to Surviving Spouse, by Education

Note: No High School Diploma, N = 85; High School Diploma, N = 547; Some College, N = 624; College Degree, N = 451; Graduate Degree, N = 268.

Appendix Figure 4. Histograms of the Distribution of Preferred Allocations to Surviving Partner, by Race and Ethnicity
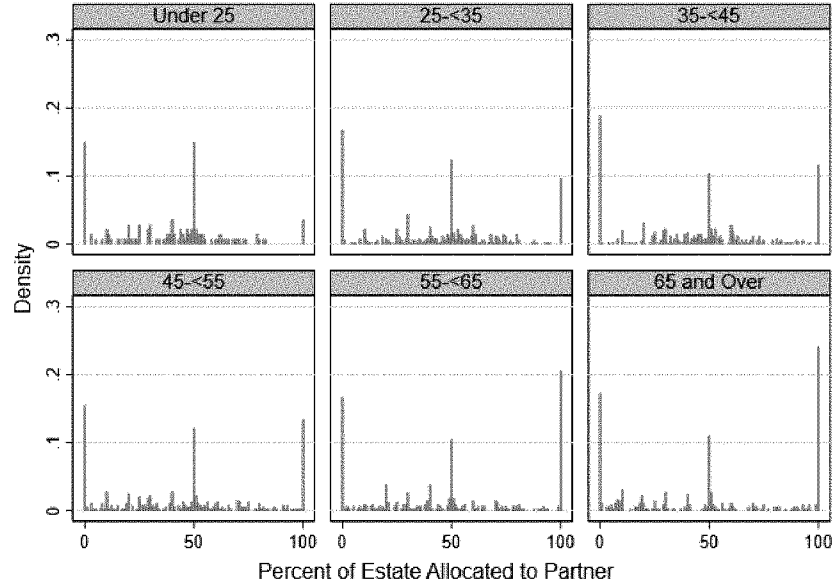
Appendix Figure 5. Histograms of Distribution of Preferred Allocations to Surviving Partner, by Age Group
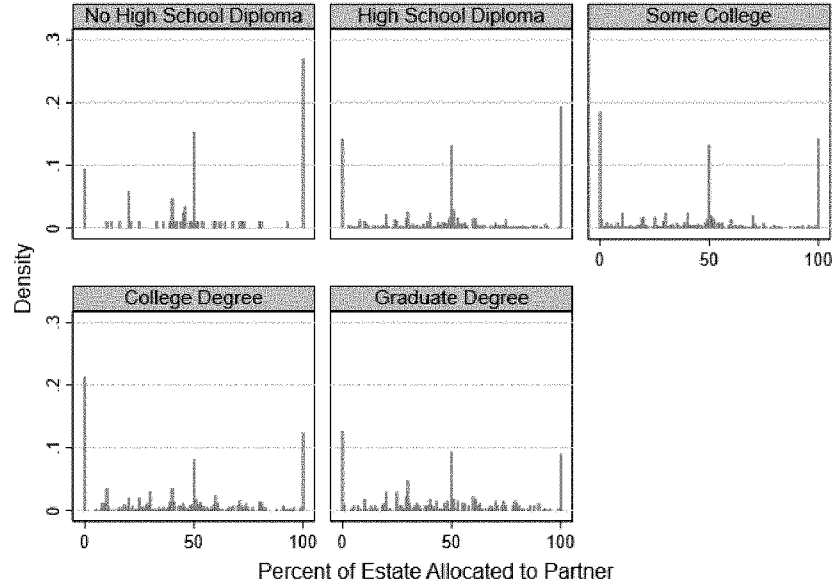
Appendix Figure 7. Histograms of Distribution of Preferred Allocations to Surviving Partner, by Gender

Note: Male, N = 949; Female, N = 1,026.

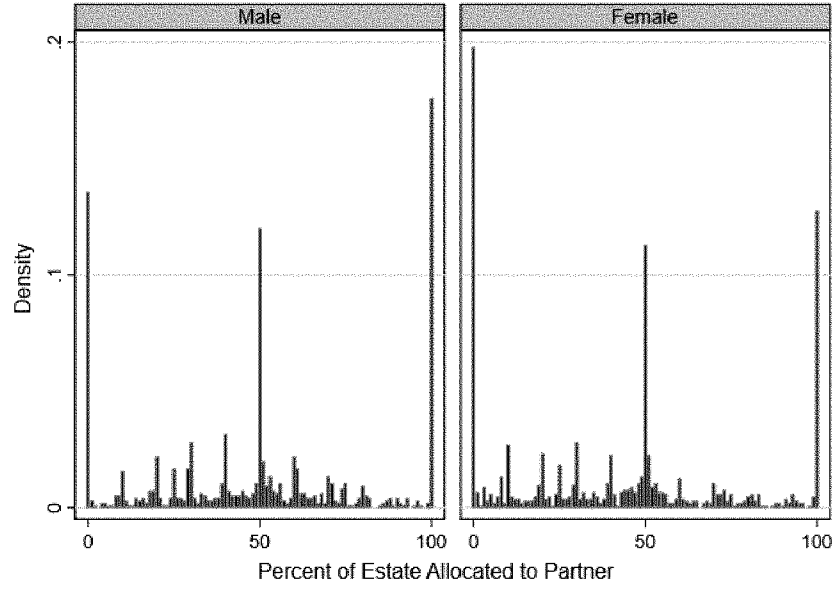**Appendix Table 1. Estimated Coefficients from Multinomial Logistic Regression Model Predicting Category of Preferred Allocation to Spouse**

	0%-5% to Spouse	<5%-<45% to Spouse	45%-55% to Spouse	>55%-<95% to Spouse
Testate	0.39	0.39*	0.01	0.23*
	(0.25)	(0.22)	(0.16)	(0.14)
Married	-3.10***	-1.68***	-1.31***	-0.69***
	(0.36)	(0.22)	(0.15)	(0.14)
Female	0.11	-0.14	-0.08	-0.04
	(0.23)	(0.20)	(0.14)	(0.12)
Race/Ethnicity				
Non-Latino White (ref.)	--	--	--	--
Non-Latino Black	1.27***	1.90***	1.31***	1.13***
	(0.36)	(0.31)	(0.26)	(0.26)
Non-Latino Asian	1.62***	1.15***	1.03***	0.61**
	(0.45)	(0.44)	(0.32)	(0.30)
Latino	0.09	0.21	0.31	-0.09
	(0.33)	(0.27)	(0.19)	(0.18)
Non-Latino Other	-0.82	-0.21	-0.10	-0.20
	(0.82)	(0.62)	(0.44)	(0.39)
Age	-0.04***	-0.07***	-0.04***	-0.04***
	(0.01)	(0.01)	(0.00)	(0.00)
Education				
Less than High School	--	--	--	--
High School Diploma	0.92	0.64	0.20	0.77**
	(0.62)	(0.47)	(0.33)	(0.37)
Some College	0.96	0.48	0.03	0.76**
	(0.61)	(0.47)	(0.33)	(0.37)
College Degree	0.77	0.83*	-0.04	0.84**
	(0.64)	(0.49)	(0.35)	(0.38)
Graduate Degree	1.73**	1.88***	0.66*	1.46***
	(0.73)	(0.55)	(0.40)	(0.41)
Wealth				
Negative Wealth (ref.)	--	--	--	--
Zero Wealth	0.65**	0.35	0.26	0.79***
	(0.32)	(0.27)	(0.20)	(0.20)
<$50,000	0.34	-0.45	-0.32	0.36*
	(0.33)	(0.31)	(0.22)	(0.21)
$50,000 - <$150,000	-0.15	0.21	-0.09	0.63***
	(0.43)	(0.32)	(0.24)	(0.22)
$150,000 - <$500,000	0.17	-0.10	-0.41	0.66***
	(0.47)	(0.38)	(0.28)	(0.23)
$500,000 +	0.17	-0.54	-0.22	0.45*
	(0.58)	(0.49)	(0.32)	(0.27)
Household Income ($10,000)	-0.02	-0.02	0.00	0.00
	(0.03)	(0.03)	(0.02)	(0.02)
Constant	-0.05	1.60	2.0	0.87
	(0.74)	(0.58)	(0.43)	(0.44)
Observations	1,955	1,955	1,955	1,955

Note: *** $p<0.01$, ** $p<0.05$, * $p<0.1$. Robust standard errors in parentheses.

Appendix Table 2. Estimated Coefficients from Multinomial Logistic Regression Model Predicting Category of Preferred Allocation to Partner

	0%-5% to Partner	45%-55% to Partner	<5%-<45% to Partner	>55%-<95% to Partner
Testate	-0.19	-0.06	-0.10	0.29
	(0.19)	(0.18)	(0.17)	(0.19)
Non-Marital Partner	-1.12***	0.13	-0.20	0.10
	(0.35)	(0.27)	(0.27)	(0.30)
Female	0.72***	0.28*	0.42***	0.05
	(0.17)	(0.16)	(0.15)	(0.17)
Race/Ethnicity				
Non-Latino White (ref.)	--	--	--	--
Non-Latino Black	0.50*	0.85***	0.88***	0.45
	(0.30)	(0.28)	(0.28)	(0.31)
Non-Latino Asian	0.90*	1.05**	1.44***	0.80
	(0.49)	(0.47)	(0.45)	(0.49)
Latino	-0.04	0.06	-0.03	-0.05
	(0.24)	(0.22)	(0.22)	(0.24)
Non-Latino Other	-0.37	-1.20**	-0.30	-2.01***
	(0.44)	(0.51)	(0.40)	(0.76)
Age	-0.03***	-0.04***	-0.03***	-0.04***
	(0.01)	(0.01)	(0.01)	(0.01)
Education				
Less than High School (ref.)	--	--	--	--
High School Diploma	0.79*	0.32	0.44	0.39
	(0.47)	(0.35)	(0.36)	(0.44)
Some College	1.49***	0.71**	0.88**	0.63
	(0.47)	(0.35)	(0.36)	(0.45)
College Degree	1.63***	0.59	1.15***	0.97**
	(0.49)	(0.38)	(0.38)	(0.47)
Graduate Degree	1.69***	1.19***	1.74***	1.44***
	(0.55)	(0.44)	(0.43)	(0.51)
Wealth				
Negative Wealth (ref.)	--	--	--	--
Zero Wealth	-0.20	0.19	0.33	0.72***
	(0.24)	(0.23)	(0.22)	(0.26)
<$50,000	0.03	0.14	0.12	0.08
	(0.25)	(0.25)	(0.25)	(0.30)
$50,000 - <$150,000	0.31	0.42	0.60**	0.63**
	(0.28)	(0.28)	(0.27)	(0.30)
$150,000 - <$500,000	0.22	0.48	0.58**	0.72**
	(0.31)	(0.31)	(0.29)	(0.33)
$500,000 +	-0.06	0.29	0.38	0.33
	(0.36)	(0.36)	(0.33)	(0.37)
Household Income ($10,000)	-0.01	-0.04*	-0.02	0.01
	(0.02)	(0.02)	(0.02)	(0.02)
Constant	0.06	1.45	0.99	0.72
	(0.60)	(0.48)	(0.47)	(0.54)
Observations	1,955	1,955	1,955	1,955

Note: *** $p<0.01$, ** $p<0.05$, * $p<0.1$. Robust standard errors in parentheses.