Federal Visions of Private Family Support

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This Article offers a new perspective on the relationship between family and federalism by analyzing why the government—whether state or federal—recognizes family at all. The Article examines the current balance between state and federal authority over family by reviewing the Supreme Court's recent decisions in Astrue v. Capato*, upholding the Social Security Administration's deference to states' intestacy laws when distributing benefits to posthumously conceived children, and* United States v. Windsor*, in which the Court struck down a provision of the federal Defense of Marriage Act. Although each decision affirmed the states' primary role in defining family status, developments before and after* Capato *and* Windsor *reveal that federal agencies and courts are increasingly promulgating federal definitions of family. In particular, federal courts have rejected many states' definitions of marriage post-*Windsor*. This Article argues that these developments are not motivated by a rejection of federalism or the diversity and pluralism that is thought to flow therefrom. Instead, federalism remains an important value so long as it does not displace the underlying reason for legal recognition of family: the encouragement of private family support.*

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I. INTRODUCTION

The individual states have long played a primary role in defining the legal family in the United States, with states often determining who does and does not enjoy the legal status of spouse, parent, and child. Two recent U.S. Supreme Court cases, *Astrue v. Capato*[1] and *United States v. Windsor*,[2] acknowledged and affirmed the diverse definitions of family that flow from this federalist approach. Yet these cases do not solidify the states' place in defining family for purposes of marriage, parentage, divorce, and death. Instead, they foreshadow an increasingly federal conception of family status—a conception that values private family support over diversity and pluralism.

This Article describes this federalization of family status and then analyzes the ways it furthers the underlying reason for legal family recognition: private family support. Federal agencies and courts have increasingly usurped the states' authority to define family. These decisions are not rooted in rejections of state sovereignty, however, or the diversity and pluralism that flow therefrom. Instead, federalism remains an important value so long as it addresses family dependencies and facilitates the private support of those dependencies.

Part II examines the role of federalism in the Supreme Court's *Capato* and *Windsor* decisions. Although many commentators have analyzed the deployment of federalism in *Windsor*, in which the Court struck down a provision of the Defense of Marriage Act, this Article offers the first robust comparison of *Windsor* and *Capato*, in which the Court affirmed the Social Security Administration's deference to states' intestacy laws when distributing survivors benefits to children. Although the Court decided neither case on federalism grounds, the Court in both cases affirmed the states' primary role in defining family.

Yet developments both before and after *Capato* and *Windsor* reveal that federal courts and agencies do not consistently defer to states' authority to define family. In fact, the Supreme Court and other federal courts have increasingly imposed definitions of family upon the

1. 132 S. Ct. 2021 (2012).
2. 133 S. Ct. 2675 (2013).

states. Part III analyzes this federalization of family. In particular, this Article offers the most comprehensive overview to date of the ways federal courts have rejected many states' definitions of marriage post-*Windsor*.

Part IV then analyzes why federal courts and agencies may continue to defer to states' definitions of family in some situations but not others. The Article concludes that a hierarchy of values is at play. Federalism and state sovereignty remain important, but they are not as important as the legal family's private support function. Federal agencies and courts therefore embrace federalism only when it potentially furthers the privatization of family dependencies. By returning to why the government—whether federal or state—recognizes family at all, the Article offers a new perspective on the relationship between family and federalism.

II. DEFINING FAMILY: LOOKING TO THE STATES TO DETERMINE WHO'S IN AND OUT

The U.S. Supreme Court has long pronounced that family law belongs to the states in our federalist system.[3] Although the federal government also has regulated various matters affecting families, at first sporadically and then more consistently,[4] the Court has affirmed

3. *See, e.g.*, Sosna v. Iowa, 419 U.S. 393, 404 (1975) (describing domestic relations as "an area that has long been regarded as a virtually exclusive province of the States"); De Sylva v. Ballentine, 351 U.S. 570, 580 (1956) ("The scope of a federal right is . . . a federal question, but that does not mean that its content is not to be determined by state, rather than federal law. This is especially true where a statute deals with a familial relationship . . . ."") (citation omitted); Haddock v. Haddock, 201 U.S. 562, 575 (1906) ("[T]he states, at the time of the adoption of the Constitution, possessed full power over the subject of marriage and divorce."), *overruled on other grounds by* Williams v. State of North Carolina, 317 U.S. 287 (1942). For historical discussions of how this assignment developed and then survived the demise of dual federalism, see Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1815–42 (2005); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821–25 (1995); and Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1306–10 (1998). For discussions of the related issues of the domestic relations exception and probate exception to federal court jurisdiction, see Naomi R. Cahn, *Family Law, Federalism and the Federal Courts*, 79 IOWA L. REV. 1073, 1076–94 (1994) (domestic relations exception); Peter Nicolas*, Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1520–21 (2001) (probate exception); and James E. Pfander, *The Playmate and the Probate Exception*, 94 ILL. B.J. 320, 320–21 (2006) (probate exception).

4. *See* MARK E. BRANDON, STATES OF UNION: FAMILY AND CHANGE IN THE AMERICAN CONSTITUTIONAL ORDER 216–26, 232–49, 265–73 (2013) (tracing how the family came to be a subject of U.S. constitutional law beginning in the early twentieth century through the present); Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 211–31 (1999) (demonstrating how "family law appears throughout federal statutory and regulatory law, cast not

the states' primary role in defining family.[5] Many commentators praise this allocation of authority, arguing that it promotes family pluralism by honoring local choices and values.[6] Others note, however, that federalism produces "inequality by design."[7] Many commentators thus

as family, but as the proper subject of enumerated federal power"); Linda D. Elrod, *The Federalization of Family Law*, 36 HUM. RTS. 6, 6–9 (2009) (describing U.S. Supreme Court involvement in family law and the "multitude of federal laws [that] now regulate and impact families"); Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. (forthcoming 2015) (manuscript at 16), *available at* http://ssrn.com/abstract=2485595, *archived at* http://perma.cc/ZAJ8-TMHL ("[T]he federal government does not and has not always deferred to state family status determinations."); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 653–55 (2001) [hereinafter *Categorical Federalism*] ("[D]enominating an issue as about family life has not precluded federal legal regimes from imposing obligations, structuring sanctions, and creating incentives among individuals designated to be family members."); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1721–30, 1743–44, 1746–47 (1991) [hereinafter *"Naturally" Without Gender*] (concluding that "the idea that family law belongs to the states becomes problematic" after considering the "history of sporadic federal intervention . . . coupled with the many contemporary federal laws that affect and regulate family life").

5. *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12–13 (2004) (discussing the Court's "strong . . . deference" to state law in cases involving family members and its recognition of the domestic relations exception); United States v. Morrison, 529 U.S. 598, 615–16 (2000) (cautioning against congressional use of the commerce power in "family law and other areas of traditional state regulation"); United States v. Lopez, 514 U.S. 549, 565–68 (1995) (declining to provide Congress with a "general police power of the sort retained by the States" in part because it would extend to "subjects such as family law and direct regulation of education"); *see also* Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 201 (2009) (proposing that federal actors continue to defer to the states "in the *prescription* of the substance of core family law relationships" while federal courts "take the job (shared with state courts) of *proscribing* constitutional violations and other unwarranted state intrusions on personal autonomy"); Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 184 (2000) ("[S]tates have primary responsibility for the regulation of families, yet the federal government has considerable authority to intervene and often has done so.").

6. *See* F. H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 601–02 (2001) (arguing that "local laws can build on local preferences"); Dailey, *supra* note 3, at 1790 (defending "state sovereignty over family law . . . because of the fundamental role of localism in the federal design"); Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541, 558 (1998) ("Allocating a high level of discretion to local judges, subject to oversight by state legislatures and appellate courts, permits maximum flexibility in designing norms that are presented every day in local communities."); Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 333 (2009) (arguing that Congress should consider the "broad range of policy variation among the states" when enacting family law so that states may implement it according to their "traditions and circumstances"); Elizabeth G. Patterson, *Unintended Consequences: Why Congress Should Tread Lightly When Entering the Field of Family Law*, 25 GA. ST. U. L. REV. 397, 399–400, 406 (2008) (emphasizing that "nationally adopted rules will fail to capture local norms and practices"); Lynn D. Wardle, *Tyranny, Federalism and the Federal Marriage Amendment*, 17 YALE J.L. & FEMINISM 221, 253–54 (2005) (noting that early Americans embraced state regulation of marriage in order to prevent tyranny by the federal government).

7. Susan Frelich Appleton, *Domicile and Inequality by Design: The Case of Destination Weddings*, 2013 MICH. ST. L. REV. 1449, 1454–55; *see also* Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 390–92 (2007)

argue that deference to the states primarily insulates federal agencies and courts from the messiness of family life, thereby belittling the importance of family relationships, devaluing women and children, and inappropriately reinforcing the divide between the public and private spheres.[8] Critics also argue that the assignment of family law to the states obscures the multiple ways that family is already implicated in many substantive (and more uniform) areas of federal law, including tax law and the law of individual liberties.[9]

Despite these criticisms, the Court continued to defer to states' definitions of family in three recent cases concerning the definition of family for purposes of federal law. In *Astrue v. Capato*, the Court upheld the Social Security Administration's use of states' intestacy laws to determine whether posthumously conceived twins qualify as "children" for purposes of federal survivors benefits.[10] The next term, the Court turned to the other half of the parent-child relationship, assuming that states' definitions of "parent" applied to a contested adoption under the federal Indian Child Welfare Act.[11] Then, in *United States v. Windsor*, the Court emphasized "the state power and authority over marriage as a matter of history and tradition"[12] in ruling that the provision of the federal Defense of Marriage Act defining marriage as between one man

(acknowledging the inequality of nonuniform divorce laws); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479, 1489–91, 1520 (2001) (arguing that a uniform law requiring couples to select from among alternative forms of marriage is the best way to account for diverse norms and values).

8. *See, e.g.*, Adler, *supra* note 4, at 255–58 (arguing that "allocation of family matters to the states reflects the same ideals that placed family in the private sphere"); Cahn, *supra* note 3, at 1098–1111 (arguing that the domestic relations exception to diversity jurisdiction is in part rooted in federal courts' reluctance to confront "the emotional and dependent side of family life—the messy realities of divorce, children, and child abuse"); Jeffrey A. Redding, *Slicing the American Pie: Federalism and Personal Law*, 40 N.Y.U. J. INT'L L. & POL. 941, 988–91 (2008) (noting that feminists in the early twentieth century "viewed both 'family federalism' and state-premised federalism as opposed to women's interests" and arguing that "things have not improved much in the past seventy-five years"); *"Naturally" Without Gender*, *supra* note 4, at 1745–50 ("Women and the families they sometimes inhabit are not only assumed to be outside the federal courts, they also are assumed not to be related to the 'national issues' to which the federal judiciary is to devote its interests.").

9. *See, e.g.,* Adler, *supra* note 4, at 257 ("[T]he impossibility of extricating family law from so many substantive areas of federal law (*e.g.,* taxation, tort, constitutional liberties, *etc.*) leads to the conclusion that family is hardly handled as a trivial matter, but rather that family's importance is obscured when legal actors deny this inextricability."); Hasday, *supra* note 3, at 1370–76 (analyzing how the family law aspects of federal "laws about taxation, citizenship, social welfare, social security, or the like" have been "systematically overlooked").

10. 132 S. Ct. 2021, 2033–34 (2012).

11. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552 (2013). The Court ultimately assumed, without deciding, that the biological father at issue was a legal parent. *Id.* at 2560 & n.4.

12. 133 S. Ct. 2675, 2691 (2013).

and one woman unconstitutionally excluded same-sex marriages, recognized under some states' marriage laws, from federal benefits.[13]

Although the Court did not explicitly decide these cases on federalism grounds, each holding reaffirmed the Court's assignment of family status to the states. Pluralistic definitions of family therefore persist even as the federal government increasingly distributes benefits to, and imposes burdens on, family members. As discussed in more detail below, *Capato* and *Windsor* in particular illustrate the ways that the Court embraces states' diverse conceptions of family even for purposes of federal law.

A. Defining the Parent-Child Relationship

In *Capato*, a mother sought federal Social Security survivors benefits for twins that she conceived using her deceased husband's frozen sperm.[14] Prior to his death, the husband had deposited his semen in a sperm bank in anticipation of his upcoming treatment for esophageal cancer.[15] The couple conceived a child "naturally" during the husband's chemotherapy treatment, but the husband died before they were able to conceive a second child.[16] Thereafter, the surviving wife underwent in vitro fertilization, giving birth to twins eighteen months after her husband's death.[17] It was undisputed that the twins were the biological children of the deceased husband.[18]

The couple's first child was eligible for Social Security survivors benefits after his father died.[19] The mother sought similar benefits for the twins conceived after her husband's death, but the Social Security Administration denied her application. Invoking a definitional provision of the federal Social Security Act,[20] the Agency ruled that the

13. *Id.* at 2695–96.

14. 132 S. Ct. at 2025.

15. *Id.* at 2026.

16. *Id.*

17. *Id.*

18. *Id.* at 2026–27.

19. *Id.* In 1939, Congress amended the Social Security Act to provide a monthly benefit for "designated surviving family members" of deceased wage earners. *Id.* at 2027 (citing 42 U.S.C. § 402(d) (2012)).

20. Under a section entitled "Determination of family status," the Act provides:

> In determining whether an applicant is the child or parent of a fully or currently insured individual for purposes of this subchapter, the Commissioner of Social Security shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such insured individual is domiciled at the time such applicant files application, or, if such insured individual is dead, by the courts of the State in which he was domiciled at the time of his death, or, if such insured individual is or was not so domiciled in any State, by the courts of the District of

twins would qualify for benefits only if the intestacy law of the husband's domiciliary state recognized the twins as his legal children.[21] Because the husband died domiciled in Florida,[22] and Florida law recognizes after-born children as heirs only if they were conceived before a decedent's death,[23] the Agency concluded that the twins were not "children" and thus were ineligible for benefits.[24] The mother appealed the Agency's decision in federal court, and the district court agreed with the Agency's interpretation of the Social Security Act.[25]

The Third Circuit reversed, finding that "the undisputed biological children of a deceased wage earner and his widow" qualify for survivors benefits as a matter of federal law, without regard to state intestacy law.[26] The Third Circuit reasoned that the Social Security Act's invocation of state intestacy law comes into play only "when a claimant's status as a deceased wage-earner's child is in doubt."[27] Because "all parties agree[d] that the applicants here are the biological offspring of the Capatos," the Court found that there was no need to apply state law.[28]

Columbia. Applicants who according to such law would have the same status relative to taking intestate personal property as a child or parent shall be deemed such.

42 U.S.C. § 416(h)(2)(A) (2012).

21. *Capato*, 132 S. Ct. at 2029.

22. Although the Social Security Administration and the district court concluded that the decedent died domiciled in Florida, the Third Circuit initially did not reach the issue. *Id.* at 2026, 2027 n.2. The Supreme Court therefore emphasized that the issue of domicile could be considered on remand. *Id.* at 2027 n.2. Upon remand, the Third Circuit concluded that there was sufficient evidence for the administrative law judge to conclude that the decedent was domiciled in Florida at his death. Capato *ex rel.* B.N.C. v. Comm'r Soc. Sec., 532 Fed. Appx. 251, 253 (3d Cir. 2013). The decedent lived in Florida for three years before his death and manifested an intent to stay by conducting business in the state and validly executing a will under Florida law. *Id.*

23. FLA. STAT. ANN. § 732.106 (West 2014). Florida law also provides that "[a] child conceived from the eggs or sperm of a person or persons who died before the transfer of their eggs, sperm, or preembryos to a woman's body shall not be eligible for a claim against the decedent's estate unless the child has been provided for by the decedent's will." FLA. STAT. ANN. § 742.17(4) (West 2014). It was undisputed that the decedent in *Capato* validly executed a will making no provision for children conceived after his death. 132 S. Ct. at 2026.

24. 132 S. Ct. at 2026.

25. *Id.*

26. Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec., 631 F.3d 626, 631 (3d Cir. 2011). The Ninth Circuit had previously reached a similar conclusion, Gillett-Netting v. Barnhart, 371 F.3d 593, 596–98 (9th Cir. 2004), but other circuit courts had sided with the Agency's deference to state intestacy law, Beeler v. Astrue, 651 F.3d 954, 960–64 (8th Cir. 2011); Schafer v. Astrue, 641 F.3d 49, 54–63 (4th Cir. 2011).

27. *Capato ex rel. B.N.C.*, 631 F.3d at 631.

28. *Id.* Earlier in the opinion, the Third Circuit used slightly different language, emphasizing that there was no need to refer to the Act's definitional provisions when considering "the biological child of a married couple." *Id.* at 630.

A unanimous Supreme Court disagreed. Closely analyzing the interplay of the various provisions of the Social Security Act, the Court concluded that the Agency was reasonable in requiring applicants for survivors benefits to meet the definition of "child" either under the relevant state's intestacy law or under one of the three, relatively narrow definitions of child otherwise set forth in the Act.[29] Because the twins' mother did not (and likely could not) invoke any of those alternative criteria,[30] the Court concluded that the twins could receive survivors benefits only if they met the intestacy-based definition of "child." In reaching its holding, the Court considered and rejected the Third Circuit's position that there is no need to determine a child's status "whenever the claimant is 'the biological child of a married couple.' "[31] The Court emphasized that such an interpretation relies on words not found in the federal statute,[32] is inconsistent with dictionary and Restatement definitions of "child,"[33] inappropriately elevates the roles of both biology and marriage in determining parentage,[34] and provides no time constraints on a qualifying child's birth.[35]

Moreover, the *Capato* Court stressed that "[r]eference to state law to determine an applicant's status as a 'child' is anything but anomalous."[36] In fact, the Social Security Act "commonly refers to state law on matters of family status," including by relying on the law of the insured's domicile to define the terms "wife," "widow," "husband," and "widower."[37] Requiring most "child" applicants to meet state intestacy definitions therefore is not unusual and "avoid[s] congressional entanglement in the traditional state-law realm of family relations."[38] The Court thus concluded its opinion by refusing to "replace [the] reference [to state intestacy law] by creating a uniform federal rule the statute's text scarcely supports."[39]

The *Capato* Court thereby deferred to the Agency's reliance on state intestacy law to determine posthumously conceived children's eligibility for federal benefits. Given the variation in states' intestacy

29. 132 S. Ct. at 2030–33.
30. *Id.* at 2028 n.5.
31. *Id.* at 2029 (quoting *Capato ex rel. B.N.C.*, 631 F.3d at 630).
32. *Id.* at 2030.
33. *Id.* at 2029–30.
34. *Id.* at 2030.
35. *Id.* at 2032.
36. *Id.* at 2031.
37. *Id.*
38. *Id.*
39. *Id.* at 2034.

laws concerning posthumously conceived children, the Court's holding means that neither the Capato twins,[40] nor other posthumously conceived children whose biological fathers were domiciled in states with intestacy laws like Florida's,[41] will receive federal survivors benefits. Posthumously conceived children whose biological fathers were domiciled in other states, however, may be entitled to benefits. For example, posthumously conceived children whose biological fathers were domiciled in states that have adopted the relevant provisions of the Uniform Probate Code will be eligible for benefits if conceived within three years of their biological fathers' deaths.[42]

Many commentators, including Lawrence Waggoner,[43] have criticized this outcome, emphasizing that neither state nor federal law has kept up with changes in reproductive technologies.[44] These critiques implicitly assume that all posthumously conceived children should be treated alike for purposes of federal benefits, but they do not explain why uniformity is desirable. In fact, critics seem to assume that a better-developed law will also be a more uniform law.[45] Yet if the

40. Indeed, the Third Circuit held on remand that the Capato twins were not eligible for survivors benefits. Capato *ex rel.* B.N.C., 532 Fed. Appx. 251, 253 (3d Cir. 2013).

41. *See, e.g.*, Bosco *ex rel.* B.B. v. Astrue, No. 10 Civ. 07544, 2013 WL 3358016, at *7–12, 15 (S.D.N.Y. Feb. 19, 2013) (holding, after an extensive analysis of New York intestacy law, that posthumously conceived children are not eligible for survivors benefits), *adopted in relevant part by* Bosco *ex rel.* B.B. v. Colvin, No. 10 Civ. 07544(LTS), 2013 WL 3357161, at *1–2 (S.D.N.Y. July 3, 2013); Amen v. Astrue, No. 4:10-CV-3216, 2013 WL 274923, at *2–3 (D. Neb. Jan. 24, 2013) (holding that posthumously conceived children are not eligible for survivors benefits in light of the Nebraska intestacy statute).

42. *See* UNIF. PROBATE CODE § 2-120(k) (amended 2010) (providing that a posthumously conceived child is "treated as in gestation at the individual's death" if that child is "in utero within 36 months after the individual's death or born within 45 months after the individuals death").

43. Lawrence W. Waggoner, *The Creeping Federalization of Wealth-Transfer Law*, 67 VAND. L. REV. 1635, 1659–61 (2014).

44. *See, e.g.*, Arianne Renan Barzilay, *You're on Your Own, Baby: Reflections on* Capato*'s Legacy*, 46 IND. L. REV. 557, 575–80 (2013) (arguing that the *Capato* Court's analysis reinforced patriarchal, social, and biological assumptions and missed an opportunity to challenge those assumptions in light of new technology). Upon remand, Judge Vanaskie echoed some of these criticisms, issuing a concurring opinion that criticized Congress for failing to amend the Social Security Act in light of new reproductive technologies. *Capato ex rel. B.N.C.*, 532 Fed. Appx. at 254–55. Professor Waggoner similarly calls on Congress to "bring[ ] the Social Security Act's survivors benefits provisions up to date." Waggoner, *supra* note 43, at 1661.

45. *See, e.g.*, Kristine S. Knaplund, *Children of Assisted Reproduction*, 45 U. MICH. J.L. REFORM 899, 935 (2012) (arguing that adoption of the Uniform Probate Code or Uniform Parentage Act "would be a vast improvement for most states"); Waggoner, *supra* note 43, at 1661 ("Sometimes state law is neither uniform nor well-enough developed—and not likely to become so in the foreseeable future—to govern rights to federal benefits."); Louise Weinberg, *A General Theory of Governance: Due Process and Lawmaking Power*, 54 WM. & MARY L. REV. 1057, 1108–11 (2013) ("[The *Capato* opinion] did not explain how consulting fifty different state laws would be less burdensome than simply following the language of the existing federal law . . . .").

pluralism underlying federalism retains any value, then the *Capato* Court appropriately deferred to states' definitions of family. And, as the *Capato* Court emphasized, this general deference to states' authority is by no means anomalous when determining who counts as family.

During its next term, the Court turned to the other half of the parent-child relationship. Specifically, the Court considered whether a biological father who initially waived his rights to his newborn child was a "parent" for purposes of the federal Indian Child Welfare Act.[46] Although a five-four majority ultimately assumed, without deciding, that the father was a legal parent,[47] the Court emphasized that state law, rather than any federal common law, governs parentage and its incidents in the absence of specific federal language to the contrary.[48] The dissenting justices embraced a broader view of the statutory language at issue, but they also looked to states' laws protecting biological fathers' interests in adoption proceedings.[49]

The Supreme Court therefore continues to position the states as the primary arbiters of parental and child status, even for purposes of federal law. Although federal statutes may offer additions or refinements to states' definitions,[50] states generally remain the baseline for determining whether individuals qualify as legal children or parents. States' definitions overlap to a great extent, leading to much consistency across the states, but family pluralism, rather than uniformity, flourishes at the margins.

B. Defining Marriage

The states have also long defined marriage, specifying who may enter into the status and setting the terms for exit.[51] Until the passage of the Defense of Marriage Act ("DOMA") in 1996, the federal government almost wholly deferred to states' determinations of who was and was not married, even for purposes of federal law.[52] DOMA

46. Adoptive Couple v. Baby Girl, 133 S. Ct. 2552, 2557 (2013).

47. *Id.* at 2560 & n.4.

48. *Id.* at 2562 & n.7.

49. *Id.* at 2581–83 (Sotomayor, J., dissenting).

50. For another example, see the Family and Medical Leave Act, 29 U.S.C. §§ 2601–2654 (2012).

51. *See* sources cited *supra* note 3. For an overview of how states' regulation of marriage evolved over time, see NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION *passim* (2000).

52. One of the limited exceptions to this deference, continuing to this day, concerns Social Security benefits. The federal government recognizes some marriages that are not recognized under state law so long as the individual seeking spousal benefits "in good faith . . . went through

constituted a radical departure from that practice, promulgating independent definitions of "marriage" and "spouse" for all federal purposes.[53] DOMA specified that "[i]n determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."[54]

In *United States v. Windsor*, a surviving spouse challenged the constitutionality of DOMA after she was unable to claim the federal estate tax exemption for surviving spouses because she had been married to another woman.[55] The district court and Second Circuit concluded that the plaintiff qualified as a surviving spouse under the law of New York, where the couple had been domiciled at the time of the deceased spouse's death.[56] Yet even though her marriage had been valid under state law, the surviving same-sex spouse was required to

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a marriage ceremony with the insured that would have resulted in a valid marriage except for a legal impediment," defined to include "only an impediment which results because a previous marriage had not ended at the time of the ceremony or because there was a defect in the procedure followed in connection with the intended marriage." 20 C.F.R. § 404.346 (2014). In addition, the Social Security Administration recognizes common-law marriage "regardless of any particular State's view on [those] relationships." United States v. Windsor, 133 S. Ct. 2675, 2690 (2013) (citing 42 U.S.C. § 1382c(d)(2)). In all other instances, the Agency looks to the law of the state where the spouse died to determine the validity of the surviving spouse's marriage. *See, e.g.*, Weiner v. Astrue, No. 09 Civ. 7088(SAS), 2010 WL 691938, at *3–5 (S.D.N.Y. Mar. 1, 2010). For discussion of other exceptions in the context of immigration, see Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values,* 100 VA. L. REV. 629 *passim* (2014).

53. As the Second Circuit would later state, "DOMA was therefore an unprecedented intrusion 'into an area of traditional state regulation.' " Windsor v. United States, 699 F.3d 169, 186 (2d Cir. 2012) (quoting Massachusetts v. U.S. Dep't of HHS, 682 F.3d 1, 13 (1st Cir. 2012)); *see also* David B. Cruz, *The Defense of Marriage Act and Uncategorical Federalism*, 19 WM. & MARY BILL RTS. J. 805, 814–27 (2011) (explaining that DOMA, while purporting to protect states that did not want to recognize same-sex marriage, "disregards the very state definitions of marriage supposedly safeguarded . . . , substituting a national marriage definition for virtually any federal purpose").

54. 1 U.S.C. § 7. DOMA became law "as some States were beginning to consider the concept of same-sex marriage and before any State had acted to permit it." United States v. Windsor, 133 S. Ct. at 2682 (citation omitted). For more background, see *id.* at 2693 and Windsor v. United States, 833 F. Supp. 2d 394, 396–97 (S.D.N.Y. 2012).

55. 133 S. Ct. at 2675.

56. Although New York did not yet issue marriage licenses to same-sex couples at the time of the deceased spouse's death, it recognized same-sex marriages valid in other jurisdictions, and the couple had been legally married in Toronto. *See id.* at 2689; *Windsor*, 699 F.3d at 177–78; *Windsor*, 833 F. Supp. 2d at 398–99.

pay $363,053 in federal estate taxes that a similarly situated surviving mixed-sex spouse would not have been required to pay.[57]

The Supreme Court ultimately ruled in the surviving spouse's favor, concluding that "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal,"[58] thereby violating "basic due process and equal protection principles applicable to the Federal Government."[59] Like the *Capato* Court, the *Windsor* Court did not explicitly rely on federalism in reaching its holding.[60] Instead, the Court ultimately concluded in a five-four opinion that DOMA "was motivated by an improper animus or purpose."[61]

Even though the *Windsor* Court did not frame its decision in federalist terms, the Court relied heavily on states' authority to define marriage.[62] The Court proceeded in three steps. First, the Court emphasized states' "historic and essential authority to define the marital relation."[63] The Court explained that this authority remains essential because it confers dignity on couples; New York's recognition of same-sex marriage gave same-sex couples "a dignity and status of

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57. 133 S. Ct. at 2684–85. Prior to the passage of DOMA, Congress had never "refused to recognize a state-law determination of marital status" for purposes of tax law. Christopher J. Hayes, Note, *Married Filing Jointly: Federal Recognition of Same-Sex Marriages Under the Internal Revenue Code*, 47 HASTINGS L.J. 1593, 1602 (1996).

58. 133 S. Ct. at 2694; *see also* Patricia A. Cain, *DOMA and the Internal Revenue Code*, 84 CHI.-KENT L. REV. 481, 494 (2009) ("[T]he intent of DOMA was to reject same-sex marriages even when a duly elected and representative state legislature might approve of such marriages.").

59. 133 S. Ct. at 2693. For a fuller discussion of the Court's due process and equal protection analyses, see David B. Cruz, *"Amorphous Federalism" and the Supreme Court's Marriage Cases*, LOY. L. REV. (forthcoming 2014) (manuscript at 29–37), *available at* http://ssrn.com/abstract=2352038, *archived at* http://perma.cc/F7VZ-F23Y; Nancy C. Marcus, *Deeply Rooted Principles of Equal Liberty, Not "Argle Bargle": The Inevitability of Marriage Equality After Windsor*, 23 TUL. J.L. & SEXUALITY 17, 25–29 (2014).

60. 133 S. Ct. at 2692 ("[I]t is unnecessary to decide whether this federal intrusion on state power is a violation of the Constitution because it disrupts the federal balance."). Some commentators argue, however, that federalism played a larger role than the Court acknowledged. *See* Heather Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1991 (2014) ("*Windsor* is neither an equality opinion nor a federalism opinion. It is both."); Courtney G. Joslin, *Windsor, Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 159–68 (2013) (summarizing various commentators' arguments before ultimately concluding that "it is misleading to describe *Windsor* as a federalism-based opinion").

61. 133 S. Ct. at 2693 (citing Romer v. Evans, 517 U.S. 620, 633 (1996); Dep't of Agric. v. Moreno, 413 U.S. 528, 534–35 (1973)). For more discussion of the Court's reliance on, and development of, this constitutional anti-animus principle, see Dale Carpenter, Windsor *Products: Equal Protection from Animus*, 2013 SUP. CT. REV. 183, 215–21.

62. 133 S. Ct. at 2692 ("The State's power in defining the marital relation is of central relevance in this case quite apart from principles of federalism."). For a critical perspective on the use of federalism in *Windsor*, see Andrew Koppelman, *Why Scalia Should Have Voted to Overturn DOMA*, 108 NW. U. L. REV. COLLOQUY 131, 138–42 (2013).

63. 133 S. Ct. at 2692.

immense import . . . enhanc[ing] the recognition, dignity, and protection of the class in their own community."[64] The Court thereby emphasized that "marriage is more than a routine classification for purposes of certain statutory benefits."[65] Rather, marriage is a "far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages."[66]

Second, the Court identified DOMA's departure from the "history and tradition of reliance on state law to define marriage" as a type of " 'discrimination[] of an unusual character,' " thus warranting " 'careful consideration to determine whether [it is] obnoxious to the constitutional provision.' "[67] The Court proceeded to scrutinize the effects of "DOMA's unusual deviation from the usual tradition of recognizing and accepting state definitions of marriage."[68] The Court concluded that this departure "operates to deprive same-sex couples of the benefits and responsibilities that come with the federal recognition of their marriages."[69] In turn, the Court classified the departure from state law as "strong evidence of a law having the purpose and effect of disapproval" of same-sex marriages.[70]

Finally, the Court resisted any suggestion that DOMA was necessary for federal uniformity, instead focusing on uniformity of another sort. Although it recognized that "marriage laws vary in some respects from State to State,"[71] the Court emphasized that the states'

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64. *Id.* at 2681, 2692. The Court arguably invoked a relatively weak form of dignity, however. *See* Noa Ben-Asher, *Conferring Dignity: The Metamorphosis of the Legal Homosexual*, 37 HARV. J.L. & GENDER 243, 276–80 (2014) (criticizing *Windsor* for embracing a conception of dignity that is conferred "at each state's direction," is "much narrower in scope than contemporary theories of dignity promoted by legal and moral philosophers," and "comes with unnecessary rhetoric of injured subjects, a rhetoric that could perpetuate an attachment to injury by homosexual couples and other rights-seeking legal subjects"). For a critique of the Court's reliance on dignity, see Neomi Rao, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. IN BRIEF 29, 32–36 (2013).

65. 133 S. Ct. at 2692.

66. *Id.*

67. *Id.* (quoting Romer v. Evans, 517 U.S. 620, 633 (1996)). Courtney Joslin refers to this aspect of the Court's reasoning as the "unusualness trigger argument." Joslin, *supra* note 60, at 166. Abbe Gluck refers to it as a "resistance norm – a feature requiring special consideration when judging Congress's intervention." Abbe Gluck, *Our [National] Federalism*, 123 YALE L.J. 1996, 2013 (2014).

68. 133 S. Ct. at 2693.

69. *Id.*

70. *Id.*

71. *Id.* at 2691; *see also* Joanna L. Grossman*, Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 437–45 (2005) (detailing historical and contemporary differences in age and consanguinity restrictions).

various marriage rules "are in every event consistent within each State."[72] Accordingly, "DOMA rejects the long-established precept that the incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."[73] Moreover, that rejection "ensure[s] that if any State decides to recognize same-sex marriages, those unions will be treated as second-class marriage for purposes of federal law."[74] Therefore, "DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal."[75]

In this tripartite manner, the *Windsor* Court rejected a federal definition of marriage and embraced states' diverse definitions of marriage without explicitly relying on federalism. In contrast to the criticism of *Capato*, many commentators have embraced this pluralistic approach.[76] Like the reactions to *Capato*, however, most commentators appear to embrace pluralism as a first step toward uniform recognition of same-sex marriage by all fifty states.[77] Neil Seigel explicitly argues that such uniformity is the Court's ultimate goal, with the Court's federalism rhetoric "reflecting a statesmanlike effort to encourage but

72. 133 S. Ct. at 2692.

73. *Id.*

74. *Id.* at 2693–94.

75. *Id.* at 2694.

76. *See, e.g.*, Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1482–83 (2014) (situating *Windsor* as part of a trajectory within family law that increasingly embraces "liberty, autonomy, and self-determination"); Gerken, *supra* note 60, at 1990–91 (highlighting "Kennedy's ringing endorsement of the instrumental and expressive benefits federalism has conferred on supporters of same-sex marriage"); Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in* United States v. Windsor, 2013 CATO SUP. CT. REV. 117, 133 (2013) (praising *Windsor* as "the best illustration we have of how structural analysis," including federalism, "can—and should—inform individual rights"); Ernest A. Young, United States v. Windsor *and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39, 45–47 (2013) ("[T]he crucial point is that in *Windsor*, the choice among competing claims was made by the state of New York – not the U.S. Supreme Court. What the Court said was simply that once New York had made its choice, Congress could not validly set that choice aside by enacting DOMA."). For defenses of pluralism that go far beyond *Windsor*, see William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1890–91, 1971–85 (2012); Jeffrey A. Redding, *Dignity, Legal Pluralism, and Same-Sex Marriage*, 75 BROOK. L. REV. 791, 832–39 (2010).

77. *See, e.g.*, Cruz, *supra* note 59, at 44–47 (arguing that *Windsor*'s invocation of federalism would not prohibit the Court from striking down state marriage laws that discriminate against same-sex couples); Joslin, *supra* note 60, at 168–72 (praising *Windsor* for not embracing categorical family law federalism, which would have prevented federal attacks on state same-sex marriage bans); Marcus, *supra* note 59, at 39–57 (arguing that the Court ultimately will rely on *Windsor* to strike down state bans on same-sex marriage under the Fourteenth Amendment); Douglas NeJaime, Windsor's *Right to Marry*, 123 YALE L.J. ONLINE 219, 236–47 (2013) (analyzing the ways *Windsor* is consistent with a fundamental right to marry for both same-sex and mixed-sex couples).

not to coerce for the time being—to allow continued deliberation and litigation over same-sex marriage in the states, and to move that deliberation toward greater equality for same-sex couples and their children."[78] Commentators have thus embraced family pluralism not as a good in and of itself but instead as a tool in the fight for marriage equality. Despite the Court's reliance on states' diverse definitions of family in both *Capato* and *Windsor*, family pluralism increasingly sits in tension with the desire for more uniform and expansive definitions of family across the states.

III. FEDERAL INTERVENTIONS

Although *Capato* and *Windsor* reveal some of the ways that states continue to dictate family status, the federal government has also increasingly regulated many of the incidents of family life. The Supreme Court recognized this trend in *Windsor*, emphasizing that "Congress, in enacting discrete statutes, can make determinations that bear on marital rights and privileges."[79] At times, such determinations rest relatively easily alongside states' definitions of family. For example, Congress has determined that otherwise valid state marriages will not qualify a noncitizen spouse for legal immigration status if the marriage was entered into for that purpose.[80] Congress has also decided to extend Social Security benefits to surviving spouses in common-law marriages even if their domiciliary states did not recognize those marriages.[81] In each of these instances, the federal government confers a uniquely federal benefit, minimizing conflict with states' conceptions of family status.

At other times, however, federal law more directly conflicts with state law, making it difficult to reconcile the federal approach with states' conceptions of family formation and exit. As discussed in more detail below, these conflicts existed before *Capato* and *Windsor*, and

78. Neil Siegel, *Federalism as a Way Station:* Windsor *as Exemplar of Doctrine in Motion*, 6 J. LEGAL ANALYSIS (forthcoming 2014) (manuscript at 7), *available at* http://ssrn.com/abstract=2396179, *archived at* http://perma.cc/79DN-KRDS; *see also* Michael J. Klarman, *The Supreme Court, 2012 Term—Comment:* Windsor *and* Brown*: Marriage Equality and Racial Equality*, 127 HARV. L. REV. 127, 129, 158 (2013) (arguing that the Justices in both *Brown* and *Windsor* "hedged their decisions out of concern that broader rulings would have ignited political backlash," but predicting that the Court will ultimately "extend [*Windsor*] to forbid the states from excluding same-sex couples from marriage").

79. 133 S. Ct. at 2690.

80. 8 U.S.C. § 1186a(b)(1) (2012).

81. 42 U.S.C. § 1382c(d)(2) (2012).

they will likely continue to persist in the future. The *Windsor* decision may even generate such conflicts, at least in the short run.

A. Federal Conflicts Before Capato *and* Windsor

One of the most perplexing conflicts between federal and state regulation of family arises in the context of beneficiary designations for pensions and certain life insurance policies governed by federal law. As Robert Sitkoff has emphasized, "most pensions and life insurance policies that are obtained as a benefit of employment are governed by federal law, which preempts state law."[82] This generally means that some portion of a decedent's property will be distributed pursuant to state law with the remainder distributed pursuant to federal law, often the Employee Retirement Income Security Act (ERISA).[83]

This mix of state and federal law may lead to particularly inconsistent results when a decedent divorced a spouse but failed to revise beneficiary designations in the ex-spouse's name before death.[84] Relying on the UPC,[85] sixteen states have adopted divorce revocation statutes, applicable to both probate and nonprobate property, that revoke any predivorce designations to the ex-spouse.[86] These statutes are thought to reflect the decedent's presumed intent to sever all support obligations upon divorce other than those mandated by divorce decrees.[87] ERISA and other federal statutes that create or regulate beneficiary designations do not contain similar divorce revocation provisions, however.

In 2001, in *Egelhoff v. Egelhoff*, the Supreme Court held that ERISA preempts states' divorce revocation statutes notwithstanding ERISA's silence about the effects of divorce.[88] The Court reasoned, in a

82. Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 655 (2014).

83. Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 and 29 U.S.C.).

84. John F. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases:* Hillman *Doubles Down on* Egelhoff, 67 VAND. L. REV. 1665, 1666–84 (2014); Waggoner, *supra* note 43, at 1638–42.

85. UNIF. PROBATE CODE § 2-804 (amended 2010).

86. Langbein, *supra* note 84, at 1669–70.

87. *Id.* at 1669 ("What motivates the rule is the understanding that divorce commonly entails a sufficiently traumatic breach in the relations of the former spouses that they are not likely thereafter to intend to benefit each other by means of wealth transfer on death."). For all donative instruments, the Restatement (Third) of Property emphasizes that "[t]he controlling consideration in determining the meaning of a donative document is the donor's intention." RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (2003).

88. 532 U.S 141, 147–50 (2001).

seven-two decision, that the application of a state divorce revocation statute would require plan administrators to "pay benefits to the beneficiaries chosen by state law, rather than to those identified in the plan document."[89] Accordingly, the Court determined that the state statute at issue would not operate in a gap of federal law but instead would interfere with the payment of benefits, a central aspect of ERISA. Because of this perceived conflict, the Court held that ERISA's silence about divorce preempted the state divorce revocation statute otherwise applicable to the decedent's estate.[90] The pension at issue in *Egelhoff* was therefore paid to the ex-spouse even though she was not eligible to inherit the remainder of the decedent's estate governed by state law.

Commentators have extensively criticized *Egelhoff* for usurping states' authority over family formation and exit,[91] whether exit occurs through divorce or death.[92] As John Langbein writes, "[b]y treating ERISA as preempting the state-law solution to a traditional state-law issue, *Egelhoff* disrespects the long-standing allocation of responsibility between the two legal systems."[93] Moreover, "[b]y preventing state law from doing its customary work of interpreting the meaning of beneficiary designations, federal preemption needlessly defeats the core policy of wealth transfer law, to implement transferor's intent."[94]

Last term, the Court returned to a similar issue. In *Hillman v. Maretta*, the Court considered whether a decedent's surviving spouse could bring a state court postdistribution action against the decedent's ex-spouse who remained the beneficiary of the decedent's federally regulated life insurance policy.[95] The UPC, responding to *Egelhoff*,

89. *Id.* at 147.

90. *Id.* at 148.

91. *See, e.g.*, T.P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185, 188–89 (2004) (finding *Egelhoff* troubling because it "opened the door to the wholesale nullification of attempts at the state level to unify the law of probate and nonprobate transfers"); Susan N. Gary, *Applying Revocation-on-Divorce Statutes to Will Substitutes*, 18 QUINNIPIAC PROB. L.J. 83, 113 (2004) (criticizing *Egelhoff* for confusing the preemption analysis, impeding state legislatures' attempts to unify probate and nonprobate transfer-at-death laws, and "creat[ing] a significant gap in the application of revocation-on-divorce statutes"); John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 19–20 (2012) (asserting that the *Egelhoff* Court incorrectly interpreted the language of ERISA and "ignored an easy way to get the right result"); Langbein, *supra* note 84, at 1677 ("*Egelhoff* disrespects the long standing allocation of responsibility between the two legal systems.").

92. *See* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227 *passim* (emphasizing that states' default property distribution rules often differ greatly depending on whether a marriage ends by divorce or death).

93. Langbein, *supra* note 84, at 1677.

94. *Id.* at 1677.

95. 133 S. Ct. 1943, 1949 (2013).

contemplates such an action grounded in principles of restitution, specifying that an ex-spouse who receives a payment regulated by federal law is "personally liable for the amount of the payment . . . to the person who would have been entitled to it were [the state divorce revocation statute] not preempted."[96] The UPC provision therefore assumes that "once account-level distribution has been made to the person named in the federally regulated beneficiary designation, the federal interest is satisfied, and there is no federal interest in intruding on the operation of state wealth transfer law as regards the ultimate entitlement to the asset."[97] At issue in *Hillman* was a Virginia state statute modeled after the UPC approach.[98]

A unanimous Supreme Court held, however, that the relevant federal law preempted such postdistribution relief even though the law, like ERISA, is silent about the effects of divorce upon plan distribution.[99] The Court agreed with the drafters of the UPC that preemption would be inappropriate if administrative convenience had been Congress's only concern in regulating the payment of the insurance policy benefits at issue.[100] Yet the Court determined that Congress also had an implicit interest in ensuring that "the insurance proceeds will be paid to the named beneficiary and that the beneficiary can use them."[101] The Court therefore held that Virginia's postdistribution law "interfere[d] with Congress's objective that insurance proceeds belong to the named beneficiary."[102]

To date, the reaction to *Hillman* has been similar to that of *Egelhoff*. Commentators have deeply criticized *Hillman* as improperly interpreting congressional silence and frustrating testator intent.[103]

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96. UNIF. PROBATE CODE § 2-804(h)(2) (amended 2010).

97. Langbein, *supra* note 84, at 1678.

98. Like the Uniform Probate Code, the relevant Virginia statute specifies that an ex-spouse who receives such a payment is "personally liable for the amount of the payment to the person who would have been entitled to it" but for preemption. VA. CODE ANN. §20-111.1(D) (2012).

99. 133 S. Ct. at 1955.

100. *Id.* at 1950.

101. *Id.* at 1953.

102. *Id.* at 1955.

103. *See* Langbein, *supra* note 84, at 1684 (criticizing Justice Thomas's concurrence for characterizing the majority's interpretation of the statute as the "ordinary meaning" when in fact that meaning "has been rejected by every American legislature that has considered the question" of testator intent); Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 199 (2014) (discussing *Hillman* as an impediment to correcting testators' mistakes); Waggoner, *supra* note 43, at 1642 ("By adopting the dubious 'belong to no other' interpretation of federal law, the Supreme Court has destroyed the UPC's intent-effecting divorce-revocation rule for federally authorized or regulated nonprobate payments.").

Even more so, *Hillman* obstructs state legislative attempts to better effectuate testator intent, no matter the form of the transfer upon death. As Lawrence Waggoner bemoans, "the Court seemed unaware of the decades-long movement toward unifying the law of probate and nonprobate transfers, of which the divorce-revocation and post-distribution rules are parts."[104]

Many commentators thus characterize *Egelhoff* and *Hillman* as inappropriate federal interference with states' authority to govern the distribution of family property at death, but the Supreme Court has yet to agree. To the contrary, the *Windsor* Court cited *Hillman* as "one example of the general principle that when the Federal Government acts in the exercise of its own proper authority, it has a wide choice of the mechanisms and means to adopt."[105] In particular, "Congress has the power both to ensure efficiency in the administration of its programs and to choose what larger goals and policies to pursue."[106] In contrast to both *Capato* and *Windsor*, then, *Egelhoff* and *Hillman* hold that the federal government need not defer to states' judgments concerning family formation and exit. Indeed, when distributing assets regulated by federal law, Congress may alter the terms of family exit, producing outcomes in direct conflict with states' probate laws.

B. Federal Action After Capato *and* Windsor

Since *Capato* and *Windsor*, Congress has not further acted to regulate family in any meaningful way. Yet the Obama Administration and lower federal courts have seized upon the *Windsor* decision, relying upon it to alter the balance between state and federal regulation of marriage. Many federal benefits are now available to same-sex married couples even if the couples' states of residence do not recognize their marriages.[107] And several lower federal courts have relied on *Windsor*'s reasoning to invalidate state laws that fail to recognize same-sex marriage.[108] To varying extents, both of these developments challenge the role of the states in determining who is married and who is not.

The Obama Administration's post-*Windsor* strategy represents a relatively modest shift in the balance between state and federal regulation of marriage. Where possible, the Administration now

104. Waggoner, *supra* note 43, at 1642.

105. 133 S. Ct. at 2690.

106. *Id.* For a brief discussion of *Windsor*'s reliance on *Hillman*, see Mark Strasser, Windsor*, Federalism and the Future of Marriage Litigation*, 37 HARV. J.L. & GENDER ONLINE 1, 2–3 (2013).

107. *See infra* text accompanying notes 109–16.

108. *See infra* text accompanying notes 119–48

bestows federal benefits on same-sex couples who travelled to another state to legally marry because their states of residence continued to limit marriage to mixed-sex couples.[109] The only exceptions involve the few federal statutes that expressly limit federal benefits to couples validly married in their states of domicile.[110] This "place-of-celebration" approach thus permits same-sex couples to claim many of the federal benefits attached to marriage even if the couples are not eligible for state benefits.[111] A federal bankruptcy court recently endorsed the Administration's choice to focus on the place of celebration, finding a same-sex couple to be spouses for purposes of federal bankruptcy law even though their state of residence did not recognize their marriage.[112] To date, no court has found fault with this method of determining marital status for purposes of federal law.

The Administration's reliance on the place of celebration is a change from past practice,[113] but it still defers to state law, as couples generally must be in a marriage considered valid by some state before receiving federal benefits attaching to marriage.[114] States' control of marriage is thus preserved *writ large*, but states do not control the validity of their residents' marriages for all purposes. Instead, other states' views of marriage may provide a conduit for federal benefits, undermining the domicile state's traditional authority to define marriage[115] but not states' authority in general. The proposed "Respect

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109. For recent articles detailing the Administration's approach and analyzing its rationales for doing so, see Joslin, *supra* note 60, at 171; Joseph Landau, *Presidential Constitutionalism and Civil Rights*, 55 WM. & MARY L. REV. 1719, 1760–61 (2014); Meg Penrose, *Something to [Lex Loci] Celebrationis?: Federal Marriage Benefits Following* United States v. Windsor, 41 HASTINGS CONST. L.Q. 41, 44–45 (2013); Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43, 51–54 (2014).

110. The Social Security Act limits benefits to couples legally married in their states of domicile unless they meet the limited exceptions set forth in note 52, *supra*. *See* Astrue v. Capato, 132 S. Ct. 2021, 2031 (2012) ("The Act commonly refers to state law on matters of family status."); Joslin, *supra* note 60, at 171 n.98 ("Benefits that likely will be denied to same-sex spouses who live in nonrecognition states include Social Security spousal benefits.").

111. *See* Widiss, *supra* note 109, at 53–54 (noting that, as a result of the place-of-celebration rule, "many key federal marriage benefits are now available to same-sex married couples even if they live in states with marriage bans").

112. *In re* Matson, 509 B.R. 860, 863–64 (Bankr. E.D. Wis. 2014).

113. For extensive background discussion, see William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371, 1390–92 (2012).

114. *See* Joslin, *supra* note 60, at 173 (emphasizing that a place of celebration approach "still looks to and defers to state law—it just directs to which state law the federal government should defer"). The primary exception would be the limited instances, discussed *supra* note 52, in which a surviving spouse may be eligible for Social Security benefits even in the absence of a marriage recognized by a state.

115. *See* Joslin, *supra* note 60, at 173 (positing that because "the domicile state is the state that was historically understood to have the greatest interest in any particular marriage, . . . one

for Marriage Act" would extend this approach even further by amending the U.S. Code to define a person as "married" for all federal purposes "if that individual's marriage is valid in the State where the marriage was entered into."[116] The Respect for Marriage Act would thus impose a place-of-celebration rule for all federal purposes, supplanting the few statutes that currently mandate a domicile approach to marital recognition, but it too would require couples to be in a marriage recognized by some state.

One scholar, Deborah Widiss, has proposed a somewhat more radical change to existing law. Widiss argues that the federal government could better, and more equally, address the needs of same-sex couples by developing a federal marriage registry.[117] Under this approach, couples seeking federal marriage benefits would need to meet the requirements of the federal registry, but they would not need to be in a marriage recognized by a state. The registry would therefore bypass the states altogether, looking solely to federal law to determine marriage validity. The registry, however, would do so for purposes of federal law only; states would retain the ability to define and regulate marriage for purposes of state law. Widiss's proposal is thus more radical than place-of-celebration approaches, but it would not usurp the states' traditional role in defining marriage for many purposes.

Lower federal courts have gone much further post-*Windsor*, requiring many states to recognize same-sex marriage on the same terms as mixed-sex marriage for purposes of state law. Indeed, only one of the many federal courts that have considered the issue of same-sex marriage since *Windsor* has deferred to states' authority to define marriage or otherwise upheld the validity of mixed-sex marriage requirements.[118] Every other federal court to date has required states to recognize same-sex marriage despite state legislation, referenda, or constitutional language defining marriage as between one man and one woman. These cases therefore represent an unprecedented federal foray into marriage law.

Relying on *Windsor*'s anti-discrimination rhetoric, these federal court decisions have taken multiple forms, with several district courts

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certainly could at least argue that adopting a place of celebration rule for purposes of all federal benefits 'undermines the [domicile] States' sovereign authority to define, regulate, and support family relationships' ").

116. *Id.* at 171–73; *see also* Baude, *supra* note 113, at 1417–18 (endorsing passage of the act).

117. Widiss, *supra* note 109, at 56–61.

118. Robicheaux v. Caldwell, 2 F. Supp. 3d 910, 927–28 (E.D. La. 2014) (holding that Louisiana's mixed-sex marriage requirements do not violate the U.S. Constitution). The court emphasized that "[f]ederalism is not extinct. Federalism remains a vibrant and essential component of our nation's constitutional structure." *Id.* at 927.

ruling before circuit courts issued binding precedent. First, federal district courts ordered states to extend partial benefits to some same-sex couples. In the earliest case, a federal district court in Ohio[119] required that state to extend certain marriage-based inheritance benefits to a petitioning same-sex couple that had legally wed in Maryland. Federal district courts in Michigan[120] and Arizona[121] subsequently issued similar rulings.

Second, the federal district court in Ohio thereafter held,[122] as did federal district courts in Indiana,[123] Kentucky,[124] and Tennessee,[125] that each of those states must generally recognize at least some same-sex marriages validly celebrated in other states. These holdings were not limited to specific benefits related to marriage; instead, they mandated recognition of valid same-sex marriages for all state purposes. Third, federal district courts in Illinois,[126] Kentucky,[127]

119. Obergefell v. Kasich, No. 1:13-cv-501, 2013 WL 3814262, at *7 (S.D. Ohio July 22, 2013), *aff'd sub nom*. Obergefell v. Wymyslo, 962 F. Supp. 2d 968, 997–98 (S.D. Ohio 2013). In the case, the Southern District of Ohio issued a restraining order requiring Ohio to recognize the out-of-state marriage of James Obergefell and John Arthur for purposes of Arthur's death certificate. Shortly after *Windsor*, the couple traveled to Maryland in a medically equipped aircraft (required by Arthur's advanced amyotrophic lateral sclerosis), got married on the tarmac without leaving the jet, and then immediately flew back to Ohio. Despite Ohio law prohibiting the recognition of same-sex marriages, the district court ordered that, upon Arthur's impending death, his death certificate record his status as "married" and name Obergefell as his "surviving spouse." Arthur died several weeks later, and Ohio issued his death certificate in accordance with the court's order. For more discussion and criticism of the case, see Appleton, *supra* note 7, at 1451–53. For additional criticism, see William Baude, *Interstate Recognition of Same-Sex Marriage After* Windsor, 8 N.Y.U. J.L. & LIBERTY 150, 159 (2013) ("[W]hen a couple lives in a state that does not recognize same-sex marriage, they do not have a constitutional right to force that state to recognize a marriage celebrated during a brief trip.").

120. Bassett v. Snyder, 951 F. Supp. 2d 939, 962–73 (E.D. Mich. 2013) (enjoining the enforcement of a state law that prohibited public employers from offering medical and other fringe benefits to the same-sex partners of employees).

121. Majors v. Jeanes, No. 2:14-cv-00518, 2014 WL4541173, at *6 (D. Ariz. Sept. 12, 2014) (temporarily restraining the state of Arizona from enforcing its mixed-sex marriage requirements with respect to the plaintiff and ordering the state to issue a death certificate listing the plaintiff as the surviving spouse of his deceased husband).

122. Henry v. Himes, No. 1:14–cv–129, 2014 WL 1418395, at *18 (S.D. Ohio Apr. 14, 2014).

123. Baskin v. Bogan, 983 F. Supp. 2d 1021, 1029–30 (S.D. Ind. 2014).

124. Bourke v. Beshear, 996 F. Supp. 2d 542, 552–53 (W.D. Ky. 2014).

125. Tanco v. Haslam, 7 F. Supp. 3d 759, 768–72 (M.D. Tenn. 2014) (enjoining the enforcement of Tennessee's anti-recognition law with respect to the named plaintiffs).

126. Gray v. Orr, 4 F. Supp. 3d 984, 993–94 (N.D. Ill. 2013), *aff'd on other grounds*, Lee v. Orr, No. 13–cv–8719, 2014 WL 683680, at *2 (N.D. Ill. Feb. 21, 2014). The state of Illinois had already passed legislation recognizing same-sex marriage, but it was not scheduled to go into effect until June 1, 2014. The federal court rulings required Cook County to issue marriage licenses to same-sex couples prior to that date.

127. Love v. Beshear, 989 F. Supp. 2d 536, 550 (W.D. Ky. 2014).

Michigan,[128] Oklahoma,[129] Oregon,[130] Utah,[131] Virginia,[132] and Wisconsin[133] held that those states must issue marriage licenses to same-sex couples on the same terms available to mixed-sex couples. Once again, these holdings were not limited to specific marriage-related benefits; instead, the district courts mandated that those states set the same threshold requirements for marriage for same-sex and mixed-sex couples and treat those couples identically once those requirements are met. Finally, federal district courts in Colorado,[134] Florida,[135] Idaho,[136] Pennsylvania,[137] and Texas[138] adopted a combination of the last two paths just discussed, requiring those states both to recognize same-sex marriages validly celebrated in other states and to issue their own marriage licenses without regard to sex.

To date, the Fourth, Seventh, Ninth, and Tenth Circuits have upheld the rulings governing Virginia,[139] Indiana,[140] Wisconsin,[141] Idaho,[142] Oklahoma,[143] and Utah,[144] while appeals are pending in the other circuits. In striking down each state's mixed-sex marriage

128. DeBoer v. Snyder, 973 F. Supp. 2d 757, 775 (E.D. Mich. 2014).

129. Bishop v. U.S. *ex rel.* Holder, 962 F. Supp. 2d 1252, 1296–97 (N. D. Okla. 2014).

130. Geiger v. Kitzhaber, 994 F. Supp. 2d 1128, 1147–48 (D. Or. 2014).

131. Kitchen v. Herbert, 961 F. Supp. 2d 1181, 1215–16 (D. Utah 2013).

132. Bostic v. Rainey, 970 F. Supp. 2d 456, 484 (E.D. Va. 2014).

133. Wolf v. Walker, 986 F. Supp. 2d 982, 1028 (W.D. Wis. 2014).

134. Burns v. Hickenlooper, No. 14scv–01817, 2014 WL 3634834, at *4 (D. Colo. July 23, 2014).

135. Brenner v. Scott, 999 F. Supp. 2d 1278, 1293 (N.D. Fla. 2014).

136. Latta v. Otter, No. 1:13–cv–00482, 2014 WL 1909999, at *29 (D. Idaho May 13, 2014).

137. Whitewood v. Wolf, 992 F. Supp. 2d 410, 431–32 (M.D. Pa. 2014).

138. De Leon v. Perry, 975 F. Supp. 2d 632, 665–66 (W.D. Tex. 2014).

139. Bostic v. Schaefer, 760 F.3d 352, 384 (4th Cir. 2014). After the Fourth Circuit's mandate was issued, a federal district court in North Carolina required that state to recognize same-sex marriages validly celebrated in other states and to issue marriage licenses without regard to sex. Gen. Synod of the United Church of Christ v. Cooper, No. 3:14–cv–00213, 2014 WL 5092288, at *1 (W.D.N.C. Oct. 10, 2014).

140. Baskin v. Bogan, 766 F.3d 658, 671–72 (7th Cir. 2014).

141. *Id.*

142. Latta v. Otter, Nos. 14–35420, 14–35421, 12–17668, 2014 WL 4977682, at *10–11 (9th Cir. Oct. 7, 2014). The Ninth Circuit also reversed a holding from the District of Nevada, decided before *Windsor*, upholding Nevada's mixed-sex marriage requirement. *Id.* at *1, 11. After the Ninth Circuit's ruling, federal district courts in Alaska and Arizona required those states to recognize same-sex marriages validly celebrated in other states and to issue their own marriage licenses without regard to sex. Hamby v. Parnell, No. 3:14–cv–00089, 2014 WL 5089399, at *5–8 (D. Alaska, Oct. 12, 2014); Connolly v. Jeanes, No. 2:14–cv–00024, 2014 WL 5320642, at *1 (D. Ariz. Oct. 17, 2014).

143. Bishop v. Smith, 760 F.3d 1070, 1081–82 (10th Cir. 2014).

144. Kitchen v. Herbert, 755 F. 3d 1193, 1229–30 (10th Cir. 2014). After the Tenth Circuit's rulings, a district court in Wyoming enjoined that state from enforcing its mixed-sex marriage requirements. Guzzo v. Mead, No. 14–CV–200, 2014 WL 5317797, at *9 (D. Wyo. Oct. 17, 2014).

requirements, the majority opinions from these circuits have not expressed concern about usurping states' authority to define marriage. The Fourth Circuit rejected Virginia's argument that federalism protected the right of its citizens to make a "policy choice in a legal arena that is fraught with intense social and political debate."[145] The Tenth Circuit similarly rejected any federalism concerns, emphasizing that *Windsor* was decided on liberty rather than federalism grounds.[146] As such, the court stressed that "the experimental value of federalism cannot overcome plaintiffs' rights to due process and equal protection."[147] Dissenting judges in the Fourth and Tenth Circuits criticized the majorities for failing to grapple with the resulting shift in the balance between state and federal power. As Judge Kelly of the Tenth Circuit wrote, "[i]f the States are the laboratories of democracy, requiring every state to recognize same-gender unions—contrary to the views of its electorate and representatives—turns the notion of a limited national government on its head."[148] The unanimous Seventh and Ninth Circuit opinions ignored these concerns altogether.

All of these decisions endorse a greater federal role in marriage regulation than *Windsor* expressly contemplated. Most saliently, they substitute a uniform definition of marriage for those promulgated through state referenda or state legislative processes. *Windsor* acknowledged that "[s]tate laws defining and regulating marriage, of course, must respect the constitutional rights of persons,"[149] and many of the federal court opinions have seized upon that language.[150] Yet the

145. Bostic v. Schaefer, 760 F.3d 352, 379 (4th Cir. 2014).

146. *Kitchen*, 755 F.3d at 1206–08.

147. *Id.* at 1228.

148. *Id.* at 1231 (Kelly, J., concurring in part, dissenting in part); *see also id.* at 1240 (criticizing the majority's approach for nationalizing the regulation of marriage, "in direct contravention of the law of comity between states and its uncontroversial corollary that marriage laws necessarily vary from state to state"). Judge Niemeyer of the Fourth Circuit expressed a similar viewpoint: "The U.S. Constitution does not, in my judgment, restrict the States' policy choices on this issue. If given the choice, some States will surely recognize same-sex marriage and some will surely not. But that is, to be sure, the beauty of federalism." *Bostic*, 760 F.3d at 398 (Neimeyer, J., dissenting).

149. United States v. Windsor, 133 S. Ct. 2675, 2691 (2013) (citing Loving v. Virginia, 388 U.S. 1 (1967)). As such, the federal oversight of marriage may be rooted in the principle of coextensivity, which extends federal court authority "to all questions of federal law, including those that implicate constitutional guarantees," including those that arise in the probate or domestic relations context. James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533, 1548–52 (2014).

150. *See, e.g.*, *Bostic*, 760 F.3d at 379 ("*Windsor* does not teach us that federalism principles can justify depriving individuals of their constitutional rights; it reiterates *Loving* 's admonition that the states must exercise their authority without trampling constitutional guarantees."); *Kitchen*, 755 F.3d at 1228 (relying on *Windsor* to support its statement that "the experimental

Windsor majority followed that statement with three additional paragraphs affirming the states' role in defining marriage.[151] Among other things, the Court emphasized that "[t]he definition of marriage is the foundation of the State's broader authority to regulate the subject of domestic relations."[152]

The federal court opinions issued after *Windsor* call that foundation into doubt. Because *Windsor* concerned a federal statute, the Supreme Court did not consider the validity of variations in states' marriage laws. Instead, after briefly reviewing differences in states' minimum age requirements and consanguinity limits, the Court emphasized that "these rules are in every event consistent within each State."[153] The Court's focus was thus on DOMA's disruption of intra-state uniformity. Since *Windsor*, federal courts have shifted the focus from intrastate uniformity to inter-state uniformity, invoking the Constitution to force states to adopt a particular definition of marriage even though *Windsor* did not expressly mandate that result.[154] With these opinions, states' abilities to promote pluralistic conceptions of marriage are now in great doubt.[155] As the Western District of

value of federalism cannot overcome plaintiffs' rights to due process and equal protection"); DeBoer v. Snyder, 973 F. Supp. 2d 757, 774 (E.D. Mich. 2014) ("Taken together, both the *Windsor* and *Loving* decisions stand for the proposition that, without some overriding legitimate interest, the state cannot use its domestic relations authority to legislate families out of existence."); De Leon v. Perry, 975 F. Supp. 2d 632, 657 (W.D. Tex. 2014) ("While Texas has the 'unquestioned authority' to regulate and define marriage, the State must nevertheless do so in a way that does not infringe on an individual's constitutional rights." (quoting *Windsor*, 133 S. Ct. at 2693)).

151. 133 S. Ct. at 2691–92.

152. *Id.* at 2691.

153. *Id.* at 2692.

154. *Id.* at 2696 (purporting to confine its holding to those already in "lawful marriages").

155. Of course, pluralism means that some states, like New York, may decide to recognize same-sex marriage on their own. Since *Windsor*, the Supreme Court of New Mexico and lower state courts in Arkansas, Colorado, Florida, Louisiana, Missouri, and New Jersey have struck down state laws limiting marriage to mixed-sex couples or enjoined state officials from enforcing them. Griego v. Oliver, 316 P.3d 865, 888–89 (N.M. 2013); Wright v. State, No. 60CV-13-2662, 2014 WL 1908815, at *8 (Ark. Cir. Ct. May 9, 2014); Brinkman v. Long, No. 13-CV-32572, 14-CV-30731, 2014 WL 3408024, at *26 (Colo. Dist. Ct. Jul. 9, 2014); In re Estate of Bangor, No. 502014CP001857XXXXMB (Fla. Cir. Ct. Palm Beach Cnty. Aug. 5, 2014), *available at* https://www.scribd.com/doc/235973877/Palmbeach-Order, *archived at* http://perma.cc/UC52-UP84; Costanza v. Caldwell, No. 2013-0052 D2 (La. Dist. Ct. Sept. 22, 2014), *available at* http://www.afer.org/wp-content/uploads/2014/09/Louisiana-Costanza.pdf, *archived at* http://perma.cc/4GFV-3VBT; Barrier v. Vasterling, No. 1416-CV-03892, 2014 WL 4966467, at *9 (Mo. Cir. Ct. Oct. 3, 2014); Garden State Equal. v. Dow, 82 A.3d 336, 368–69 (N.J. Super. Ct. 2013). The Hawaii state legislature also passed a Marriage Equality Act, authorizing same-sex marriage, which has survived constitutional challenges in state court. *See* Derrick DePledge, *Challenge to Marriage Equality Law Rejected*, HONOLULU STAR-ADVERTISER (Jan. 30, 2014), http://www.staradvertiser.com/newspremium/20140130_samesex_marriage_Challenge_to_new_l

Wisconsin emphasized, "[s]tates may not 'experiment' with different social policies by violating constitutional rights."[156]

IV. VISIONS OF PRIVATE FAMILY SUPPORT

Especially after *Windsor*, questions remain about when the federal government will defer to states' definitions of family and when it will impose its own definitions. The balance between state and federal authority over family matters is therefore in flux. The Court may have endorsed states' diverse approaches to defining family in both *Capato* and *Windsor*, but federal agencies and courts are moving toward national uniformity on the issue of same-sex marriage. Moreover, critics of *Capato* argue that the federal government should similarly adopt a uniform approach to posthumously conceived children regardless of the intestacy laws of their deceased parents' domiciliary states. States' authority to define family is thus in doubt.

It is too soon to tell whether this flux portends a permanent shift in the allocation of authority to define family. The contested terrain provides an opportunity, however, to examine why the federal government might continue to defer to states' definitions of family and why it might not. A hierarchy of values emerges, one that ultimately may better elucidate why the government—whether federal or state—recognizes family at all. At the top of this hierarchy lies neither state sovereignty nor principles of equality or dignity. Instead, as set forth below, government recognition of family ultimately appears rooted in the desire to privatize the dependencies of family members, encouraging families to "take care of their own" with minimal financial assistance from the state.

A. A Hierarchy of Values

The rhetoric in *Windsor* suggests that federalism continues to play an important role in legal recognition of family. This importance is, in part, a "matter of history and tradition,"[157] but deference to states' authority to define family also does more than preserve the status quo.

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aw_is_rejected.html?id=242717861. A lower state court in Tennessee, however, refused to require the state to recognize same-sex marriages validly celebrated in other states. Borman v. Pyles-Borman, No. 2014CV36, 2014 WL 4251133, at *6 (Tenn. Cir. Ct. Aug. 5, 2014).

156. Wolf v. Walker, 986 F. Supp. 2d 982, 994 (W.D. Wis. 2014).

157. 133 S. Ct. at 2691. As discussed in the sources cited *supra* note 4, however, the history of family regulation is in fact more nuanced, with the federal government sporadically intervening since the founding and increasingly intervening over the past century.

Proponents of federalism emphasize that deference to states' authority honors local values, furthering both family pluralism and the presumed intent of family members in diverse communities.[158] As *Windsor* stressed, "[t]he dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other."[159] The federalist approach to family definition thereby contemplates that the different states may adopt different approaches to family status, fostering diversity, pluralism, and respect for local norms.

Yet *Windsor* twice emphasized that these values of federalism must give way to "constitutional guarantees."[160] Of course, the general principle of federalism is also set forth in the Constitution.[161] The *Windsor* Court's qualification of the federalist approach to defining family thus suggests that some constitutional guarantees are more important than others. As a matter of constitutional doctrine, the Court might have viewed the "rights of persons" as trumping the rights of states.[162] Alternatively, the Court might have been responding to "enormous changes in the surrounding social and political contexts," fashioning an approach with little concern for doctrine—federalist or otherwise.[163]

In either event, the *Windsor* Court's subsequent descriptions of the "dignity" of the marital relationship provide a basis to prioritize equal access to marital status and benefits over states' diverse definitions of family. In just four pages, the Court used the word "dignity" eight times and other variations of the word three times.[164] In

158. *See* sources cited *supra* note 6.

159. 133 S. Ct. at 2692.

160. *Id.* at 2692 ("[T]he incidents, benefits, and obligations of marriage are uniform for all married couples within each State, though they may vary, subject to constitutional guarantees, from one State to the next."); *id.* ("The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits.").

161. U.S. CONST. Amend. X.

162. 133 S. Ct. at 2691 ("State laws defining and regulating marriage, of course, must respect the constitutional rights of persons."). For more discussion of this possibility, see Young, *supra* note 76, at 41–43, 47.

163. Klarman, *supra* note 78, at 130.

164. 133 S. Ct. at 2692–96. For additional discussions of Justice Kennedy's deployment of dignity, see Ben-Asher, *supra* note 64, at 258–70 ("*Windsor* is a pivotal moment in the metamorphosis of the legal homosexual. The legal homosexual, at least in states where same-sex marriage is legally recognized, is portrayed as a *morally dignified person*."); Rao, *supra* note 64, at 33–38 ("In *Windsor*, however, the dignitary harm *is* the harm – the harm of not being properly recognized and of lacking the proper federal status."); Kenji Yoshino, *The Anti-Humiliation*

doing so, the Court emphasized the importance of marriage to individual liberty and personhood without articulating, or even mentioning, a fundamental right to marry.[165] In the Court's analysis, the importance of equal access to marriage instead naturally flows from marriage's dignity-conferring effects.[166]

Because *Windsor* concerned a federal statute, this dignity and equality analysis could rest easily alongside the Court's federalism rhetoric. Indeed, the Court explicitly linked the two values:

> By its recognition of the validity of same-sex marriages performed in other jurisdictions and then by authorizing same-sex unions and same-sex marriages, New York sought to give further protection and dignity to that bond. For same-sex couples who wished to be married, the State acted to give their lawful conduct a lawful status. This status is a far-reaching legal acknowledgment of the intimate relationship between two people, a relationship deemed by the State worthy of dignity in the community equal with all other marriages. It reflects both the community's considered perspective on the historical roots of the institution of marriage and its evolving understanding of the meaning of equality.[167]

But lower federal courts and most commentators have seen little reason to limit *Windsor*'s dignity analysis to the context of federal benefits. The Court itself categorized its federalism discussion as "background" and emphasized that "[t]he State's power in defining the marital relation is of central relevance in the case quite apart from principles of federalism."[168]

Windsor thereby creates the conditions for federal agencies and lower federal courts to prioritize individual liberty and equality over

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Principle and Same-Sex Marriage, 123 YALE L.J. 3076, 3082–88 (2014) ("In *Windsor*, Justice Kennedy doubled down . . . mentioning the word "dignity" or "indignity" almost a dozen times.").

165. In this way, *Windsor* differs from *Loving v. Virginia*, 388 U.S 1, 12 (1967), and other Supreme Court cases deploying the language of fundamental rights when considering marriage restrictions. *See* Turner v. Safley, 482 U.S. 78, 94–99 (1987) ("[Petitioners] concede that the decision to marry is a fundamental right under *Zablocki* . . . ."); Zablocki v. Redhail, 434 U.S. 374, 387 (1978) (noting the "fundamental character" of the right to marry).

166. For discussions of how the Court has previously promoted equality through analyses of dignity and liberty, see Laurence H. Tribe, Lawrence v. Texas: *The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1902–16 (2004) (analyzing "[t]he *Lawrence* Court's blend of equal protection and substantive due process themes"); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749–50 (2011) (describing how the Court has "long used the Due Process Clauses to further equality concerns" and, more recently, "has shut doors in its equality jurisprudence in the name of pluralism anxiety and opened doors in its liberty jurisprudence to compensate").

167. 133 S. Ct. at 2692–93. In this way, the Court also builds upon the intimacy rhetoric of *Lawrence v. Texas*, 539 U.S. 558, 567 (2003). For a critique of that rhetoric, see Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 811, 823–35 (2010) (challenging "the underlying assumption in *Lawrence* that sex is valuable only when potentially in service to emotional intimacy").

168. 133 S. Ct. at 2692.

federalism. When considering challenges to states' definitions of family, the values of federalism and dignity can no longer easily coexist. Instead, a choice must be made. Although federalism remains important, developments since *Windsor* suggest that federalism is no match for the "recognition, dignity, and protection" that flow from equal access to legal marital status.[169] As the Eastern District of Virginia emphasized, "[n]otwithstanding the wisdom usually residing within proper deference to state authorities regarding domestic relations, judicial vigilance is a steady beacon searching for an ever-more perfect justice and truer freedoms for our country's citizens."[170]

Yet if the dignity and equality of potential family members are more important than the values underlying federalism, the Court's holding in *Capato* becomes suspect. There, the Court prioritized states' ability to determine family status over the equal treatment of posthumously conceived children. Most commentators believe that *Capato* was wrongly decided,[171] arguing that children should not receive different treatment based on the circumstances of their births.[172] Such criticism builds upon Supreme Court precedent holding that children should not be punished for the sins of their parents,[173] including in the context of childbirth outside of marriage.[174] Commentators thus argue that both state and federal law should employ expansive and uniform definitions of "child," making virtually all posthumously conceived offspring equally eligible for state and federal benefits.[175]

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169. *Id.*

170. Bostic v. Rainey, 970 F. Supp. 2d 456, 477 (E.D. Va. 2014).

171. *See supra* text accompanying notes 43–45.

172. *See, e.g.*, Weinberg, *supra* note 45, at 1112 ("[I]t is hard to see why discrimination against a subclass of posthumously born infants is more justifiable than discrimination against all posthumously born infants, when the subclass has no rational relation to the child. No amount of creative subclassing can save [*Capato*] from its denial of equal protection.").

173. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 220 (1982) ("Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.").

174. *See* Weber v. Aetna Cas. & Sur., 406 U.S. 164, 172–75 (1972) ("[N]o child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent."); Levy v. Louisana, 391 U.S. 68, 72 (1968) (holding that "it is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant to" their claims for damages for the wrongful death of their mother); *see also Windsor*, 133 S. Ct. at 2694 (asserting that DOMA "humiliates tens of thousands of children now being raised by same-sex couples").

175. *See, e.g.*, UNIF. PROBATE CODE § 2-120 (amended 2010) (setting forth broad definitions of "parent" and "child" when women who are not gestational carriers conceive children by means of assisted reproduction, including when they conceive using the sperm of deceased husbands or

Few have heeded such calls for reform, however. *Capato*, unlike *Windsor*, has not inspired litigation or proposed legislation seeking to promulgate a nationally uniform definition of "child." Several possible explanations exist for this inaction. From a political-economy and social-movement perspective, children have less access to the legislative process, and their interests have not generally inspired large-scale support for change, particularly in the United States.[176] From a doctrinal perspective, although the Supreme Court has held that state classifications on the basis of illegitimacy are unconstitutional,[177] many federal and state laws continue to tie benefits for children to the ongoing marriage of their parents.[178] The failure to promulgate a uniform definition of "child" post-*Capato* therefore could have very little to do with the hierarchy of values underlying family recognition.

Yet even if these possibilities explain the dearth of litigation and proposed legislation post-*Capato*, *Capato* still reveals that the values of equality and dignity do not always trump the values of federalism. In accordance with the federal Social Security Act, the Social Security

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partners within a certain period of time after death); Benjamin C. Carpenter, *A Chip Off the Old Iceblock: How Cryopreservation Has Changed Estate Law, Why Attempts to Address the Issue Have Fallen Short, and How to Fix It*, 21 CORNELL J.L. & PUB. POL'Y 347, 404–30 (2011) (recommending that legislatures recognize posthumously conceived children for purposes of class gifts and probate); Jennifer Matystik, *Posthumously Conceived Children: Why States Should Update Their Intestacy Laws After* Astrue v. Capato, 28 BERKELEY J. GENDER L. & JUST. 269, 279–92 (2013) ("It does seem problematic, if not absurd, to give benefits to a child conceived by a terminally ill father shortly before his death, but not if the child were conceived the day after his death . . . ."); Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y 332, 366–85 (2009) (analyzing and praising the Model Act Governing Assisted Reproductive Technology approved by the American Bar Association in 2008, which, among other things, provides a mechanism for recognizing posthumously conceived children).

176. Indeed, the United States is one of only two nations (along with Somalia) that have refused to adopt the United Nations Convention on the Rights of the Child.

177. *See Weber*, 406 U.S. at 175–76; *Levy*, 391 U.S. at 71–72.

178. *See, e.g.*, Susan Appleton, *Illegitimacy and Sex: Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 349, 365–83 (2012) (analyzing "doctrinal differences between the parentage rules for children conceived sexually outside marriage and those for children conceived without sex, by assisted reproductive technologies (ARTs), outside marriage"); Cynthia Grant Bowman, *The New Illegitimacy: Children of Cohabitating Couples and Stepchildren*, 20 AM. U. J. GENDER SOC. POL'Y & L. 437, 437–40 (2012) ("Historically, illegitimate children were punished because their parents were unmarried. The children of opposite-sex cohabiting couples are disadvantaged in similar ways today, and, to a lesser extent, so are stepchildren."); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 307, 357–59 (2004) (analyzing the "use of marriage as a proxy for desirable outcomes in social policy"); Melissa Murray, *What's So New About the New Illegitimacy*, 20 AM. U. J. GENDER SOC. POL'Y & L. 387, 389–99, 412–20 (2012) ("debunk[ing] the inherited legal progress narrative that claims that law abandoned the common law's treatment of illegitimacy and its many legal disadvantages in favor of a more liberal legal regime in which those of illegitimate birth were no longer legally disfavored" and highlighting ongoing "legal disadvantages for non-marital births").

Administration continues to defer to states' definitions of "child" despite the unequal treatment that results. This outcome does not mean that federalism is the ultimate value in this context, however. Instead, when read in conjunction with *Windsor*, *Capato* suggests that legal recognition of family hinges on a third interest, above and beyond both federalism and individual rights. As set forth below, both *Windsor* and *Capato* are consistent with the long-standing goal of privatizing the dependencies of family members.

B. The Ultimate Value of Private Family Support

Legal family recognition involves more than a negative right to be free from government intrusion. If equal rights to liberty were the only value at stake, the Supreme Court's analysis in *Lawrence v. Texas*, invalidating criminal prohibitions on same-sex sodomy, would have logically controlled the outcome in *Windsor*.[179] That *Lawrence* did not control *Windsor*'s outcome highlights the ways that legal family recognition involves not only equal liberty and dignity but also an affirmative right to preferential government treatment.[180] Given the rarity of affirmative rights in the United States, it behooves us to ask why the government, whether state or federal, recognizes particular family statuses at all, rather than simply permitting individuals to form

179. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003) (holding that same-sex petitioners' "right to liberty under the Due Process Clause gives them the full right to engage in their [sexual] conduct without intervention of the government" while also emphasizing that the case did "not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

180. *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 426 (Cal. 2008) ("[T]he constitutional right to marry . . . goes beyond what is sometimes characterized as simply a 'negative' right insulating the couple's relationship from overreaching governmental intrusion or interference, and includes a 'positive' right to have the state take at least some affirmative action to acknowledge and support the family unit."); Carlos A. Ball, *The Positive in the Fundamental Right to Marry: Same-Sex Marriage in the Aftermath of* Lawrence v. Texas, 88 MINN. L. REV. 1184, 1204 (2004) (arguing that an affirmative right to state recognition of marriage is an "important exception" to the usual understanding of the Constitution as conferring only negative rights); Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L. Q. 537, 545 (2007) (stressing that, unlike "negative rights that protect citizens from excessive intrusion by the state in protected activities, such as the right of free speech, religion, or family privacy, . . . the right to enter civil marriage is an affirmative right, defined solely by the government's creation of the licensing system and of the status with its attendant legal attributes"); *see also* Pamela S. Karlan, *Let's Call the Whole Thing Off: Can States Abolish the Institution of Marriage?*, 98 CALIF. L. REV. 697, 707 (2010) (arguing that "the 'right to marry' has come to be at least a quasi-affirmative right: one which the state has some obligation at least to record").

the intimate associations of their choice without government interference.[181]

This inquiry reveals the ultimate value underlying legal recognition of family: the value of private family support. The government affirmatively recognizes certain intimate relationships, to the exclusion of others, in order to incentivize individuals to privately address the dependencies that often arise when adults care for children and for one another. Indeed, states originally recognized marriage and the parent-child relationship as a means to encourage men to assume responsibility for women's and children's dependencies.[182] Today, "the state incentivizes marriage and ensures that marital partners provide care and support for one another"[183] in a less obviously gendered manner. As post-*Windsor* developments reveal, one man and one woman are increasingly not required; instead, almost any two consenting adults will do. Yet even as our understandings of family roles and composition have changed, legal recognition of family status remains rooted in the privatization of dependency.[184]

The government therefore recognizes and bestows benefits on families so that they will serve a private welfare function, minimizing

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181. *Cf.* Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667, 695 (2010) (arguing that there is a negative right to "(equal) liberty in setting up households" but not an affirmative right to state recognition of marriage).

182. *See* COTT, *supra* note 51, at 7 ("[A] man's full civil and political status consisted of his being a husband and father and head of a household unit . . . his taking the responsibility for dependent wife and children, qualified him to be a participating member of a state."); Melissa E. Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 22 (2012) ("[M]arriage would absolve the state of the responsibility for supporting those ruined by seduction and any illegitimate offspring resulting from such liaisons."); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498–503 (1992) (analyzing how family law channels individuals into marriage in order to serve multiple normative goals, including the marital "duty of support" and the support and protection of children).

183. NeJaime, *supra* note 77, at 230.

184. Although recent same-sex marriage cases rarely make this point explicitly, the privatization of dependency pervades court's descriptions of marriage and its functions. For two examples, see Baskin v. Bogan, 766 F.3d 648, 661 (7th Cir. 2014) ("[E]ncouraging marriage is less about forcing fathers to take responsibility for their unintended children—state law has mechanisms for determining paternity and requiring the father to contribute to the support of his children—than about enhancing child welfare by encouraging parents to commit to a stable relationship in which they will be raising the child together."); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 961 (N.D. Cal. 2010) ("Marriage is the state recognition and approval of a couple's choice . . . to remain committed to one another and to form a household based on their own feelings about one another and to join in an economic partnership and support one another and any dependents."). Earlier cases concerning children born outside of marriage more explicitly embraced the privatization of dependency. *See* Appleton, *supra* note 178, at 360–64; Murray, *supra* note 178, at 400–09.

reliance on state and federal coffers.[185] Family law in the United States is a "neoliberal family law," in the words of Anne Alstott, rooted in the "three core ideals" of "negative liberty, laissez-faire market distributions, and the minimal state."[186] Instead of bestowing positive rights "to cash welfare, to housing, or to education,"[187] states bestow the status of spouse, parent, or child and attach limited benefits to them. Indeed, the most robust benefit may be the right to family privacy, a negative right available only to those who opt into legal family status.[188] In exchange for this privacy, families are largely expected to address their own needs; if they do not, the state often intervenes in a punitive fashion.[189]

Both *Capato* and *Windsor* reinforce this relationship between legal family status and private family support. In *Capato*, the unanimous Court emphasized that its statutory approach conformed to "Congress'[s] perception of the core purpose" of the Social Security Act.[190] That purpose "was not to create a program 'generally benefiting needy persons,' " but instead was to "provide . . . dependent members of [a wage earner's] family with protection against the hardship occasioned by [the] loss of [the insured's] earnings."[191] In other words, benefits are available only after a wage earner takes on the obligations of dependency through legal family status and then is unable to meet those obligations because of death. The Court then linked states'

185. *See* Janet E. Halley, *What is Family Law? A Genealogy, Part II*, 23 YALE J.L. & HUMAN. 189, 259, 290 (2011) (describing how family law casebooks in the nineteen-sixties emphasized that "the family is a crucial private welfare system," and analyzing the ways modern family law casebooks, by distinguishing family law from poverty law or welfare law, "obscure[ ] the state's constant, conscious use of the family as a private welfare system"); Murray, *supra* note 178, at 433 (describing marriage as "the de facto social safety net through which the needs of vulnerable individuals are accommodated").

186. Anne Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, L. & CONTEMP. PROBS. (forthcoming 2014) (manuscript at 1), *available at* http://ssrn.com/abstract=2459972, *archived at* http://perma.cc/5AW8-SEEG.

187. *Id.* at 5.

188. *See, e.g.*, Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 864–86 (2007) (analyzing how the state regulates the legal family upon formation and perceived breakdown, "removing the [legal] family as an entity from the zone of state power" at all other times).

189. *See, e.g.*, Khiara M. Bridges, *Privacy Rights and Public Families*, 34 HARV. J.L. & GENDER 113, 153 (2011) ("Economic self-sufficiency is the unspoken condition of possibility upon which state noninterference rests.").

190. Astrue v. Capato, 132 S. Ct. 2021, 2032 (2012).

191. *Id.*; *see also* Bowman, *supra* note 178, at 455 (emphasizing that "children of unmarried parents are required to demonstrate actual dependency upon the wage earner at the time of death" in order to receive Social Security benefits, whereas such dependency "is presumed in the case of legitimate children who are minors").

intestacy laws to states' judgments about a child's presumed dependency, characterizing "eligibility to inherit under state intestacy law as a workable substitute for burdensome case-by-case determinations [of] whether the child was, in fact, dependent on her father's earnings."[192]

Dependency, rather than a child's dignity or equality, or a deceased parent's presumed intent, was thus the *Capato* Court's primary focus. Once the Court so framed its inquiry, it could more easily defer to states' own methods for incentivizing private family support by setting the terms of legal family status. States' choices about recognizing posthumously conceived children as legal "children" therefore do not simply reflect equal, or unequal, treatment or the ability to keep up with technological change. Instead, those choices also reflect states' reasoned opinions about children's dependencies and the best ways to allocate responsibility for those dependencies between private family members and government coffers.

In *Windsor*, the Court also acknowledged the role of family members in providing support to one another, thereby privatizing dependency. The Court viewed marriage as "more than a routine classification for purposes of certain statutory benefits."[193] Instead, "duties and responsibilities" are also "an essential part of married life."[194] Indeed, the *Windsor* Court explicitly tied legal family status to family responsibilities, emphasizing that "[t]he definition of family is the foundation of the State's broader authority to regulate the subject of domestic relations with respect to the '[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.' "[195] Doug NeJaime thus characterized *Windsor* as emphasizing legal "marriage's distributive function; marriage serve[s] as a gateway to rights and benefits that provide stability and support" through limited tangible goods and the conferral of an easily understood label of commitment.[196] This distributive function cannot be achieved through negative liberty alone, as "public recognition contributes to the preservation of the private support function of marriage."[197] Several

192. 132 S. Ct. at 2032. The Court also stressed that "[w]e have recognized that 'where state intestacy law provides that a child may take personal property from a father's estate, it may reasonably be thought that the child will more likely be dependent during the parent's life and at his death.' " *Id.* (quoting Mathews v. Lucas, 427 U.S. 495, 514 (1976)).

193. United States v. Windsor, 133 S. Ct. 2675, 2692 (2013).

194. *Id.* at 2695.

195. *Id.* at 2691 (quoting Williams v. North Carolina, 317 U.S. 287, 298 (1942)).

196. NeJaime, *supra* note 77, at 228.

197. *Id.* at 241.

lower federal courts have similarly emphasized legal marriage's support function post-*Windsor*.[198]

Both *Capato* and *Windsor* therefore make visible the role of the legal family in incentivizing private support and care. Once in view, the value of private family support appears to lurk behind many other decisions as well. In particular, both *Egelhoff* and *Hillman* suggest that the legal status of marriage should entail lifelong support unless a spouse takes affirmative steps to end both the legal relationship *and* all provisions for support made during the relationship. In other words, divorce is not enough to sever the support function; federal support obligations remain unless expressly revoked. Although such a conception of marriage may thwart both individual intent and state sovereignty, it furthers the neoliberal interest in privatizing the dependencies of family members.[199]

The value of private family support thereby sits at the top of the hierarchy of values underlying legal recognition of family. The private support function does not extinguish the other values comprising this hierarchy, however. Those values instead remain vitally important so long as they do not disturb the private support function. Accordingly, as set forth in *Capato*, federal courts value the pluralism that flows from state sovereignty so long as that pluralism does not displace the support function. Federal courts also value the equality and dignity of individual family members, particularly if such dignity and equality bolsters private family support, as *Windsor* and developments after *Windsor* reveal. In fact, support and dignity may often be intertwined, with dignity flowing from the formal decision to care for others. Yet if principles of equality and dignity potentially thwart the legal family's private support function, federal courts may embrace unequal approaches to legal family recognition like those at issue in *Capato*. Federal visions of family dependency and support thereby trump untethered appeals to equality, individual intent, or states' authority to define family.

198. *See* cases cited *supra* note 184.

199. *Cf.* Nancy Polikoff, *A Supreme Court Ruling That's About Way More Than Preemption*, 70 NAT'L LAW. GUILD REV. 188, 190 (2013) ("But maybe effectuating the employee's intent isn't the right purpose of a benefit that's payable upon an employee's death. If there's someone who depended upon the wages earned by the employee, I would argue, that's who should get the money.").

V. CONCLUSION

The contours of the legal family may remain in flux for quite some time, as states, federal agencies, and federal courts continue to respond to new reproductive technologies and evolving social norms. In the process, new understandings of both family and federalism may emerge. Up until now, however, federalism has not dictated family status. Instead, as this Article has argued, understandings of family formation and exit have become increasingly federalized.

These understandings of family serve multiple goals, but they are rooted in the underlying rationale for legal recognition of family in the neoliberal state: encouraging the private support of dependency. Other relationships between family and the state are possible and likely desirable. Indeed, a more attentive, supportive state might help children and families flourish. The goal of private family support crowds out these possibilities, however. This Article has analyzed this dynamic as a descriptive matter, highlighting the ways that private family support intersects with, and is often obscured by, appeals to equality, dignity, and the pluralism that is thought to flow from federalism. Excavating the privatization of dependency in this fashion is a necessary first step for more robust examinations of the current regime of family recognition, whether state or federal. In turn, such examinations may ultimately inspire the development of viable alternative forms of state support for families.