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Federalism and Family Status

Courtney G. Joslin

University of California, Davis, cgjoslin@ucdavis.edu

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Federalism and Family Status

COURTNEY G. JOSLIN*

The myth of family law’s inherent localism is sticky. In the past, it was common to hear sweeping claims about the exclusively local nature of all family matters. In response to persuasive critiques, a narrower iteration of family law localism emerged. The new, refined version acknowledges the existence of some federal family law but contends that certain “core” family law matters—specifically, family status determinations—are inherently local. I call this family status localism. Proponents of family status localism rely on history, asserting that the federal government has always deferred to state family status determinations. Family status localism made its most recent appearance (although surely not its last) in the litigation challenging section 3 of The Defense of Marriage Act (DOMA).

This Article accomplishes two main goals. The first goal is doctrinal. This Article undermines the resilient myth of family law localism by uncovering a long history of federal family status determinations. Although the federal government often defers to state family status determinations, this Article shows that there are many circumstances in which the federal government instead relies on its own family status definitions.

The second goal of this Article is normative. Having shown that Congress does not categorically lack power over family status determinations, this Article begins a long-overdue conversation about whether the federal government should make such determinations. Here, the Article brings family law into the rich, ongoing federalism debate—a debate that, until now, has largely ignored family law matters. In so doing, this Article seeks to break down the deeply rooted perception that family law is a doctrine unto itself, unaffected by developments in other areas, and unworthy of serious consideration by others.

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INTRODUCTION

There is a widely held belief that there is something inherently local¹ about family law.² This intuition is remarkably resilient and sticky. In the past, it was not uncommon to hear claims that the whole domain of family law was reserved exclusively to the states.³ In response to such assertions, a number of leading scholars persuasively demonstrated that these broad claims are false.⁴ There is a rich and wide web of federal laws that deeply impact and regulate families. Federal tax law imposes special protections, or at times special burdens, on people because of their family relationships.⁵ Likewise, federal law extends additional benefits to the legally recognized family members of federal employees.⁶ And federal immigration law establishes who counts as a family member for purposes of immigration and citizenship.⁷

1. I use the term “local” here to refer to state as opposed to federal action. I realize that in other contexts, “local” is often used to refer to *substate* as opposed to state action. *See, e.g.*, Heather K. Gerken, *Federalism As the New Nationalism: An Overview*, 123 *YALE L.J.* 1889, 1906 (2014). My use of the term “local” here, therefore, may be confusing or even seem incorrect to some. That said, I use the term “local” and the phrase “family law localism” in this way because this piece builds on other literature that used these phrases in similar ways. *See, e.g.*, Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 *UCLA L. REV.* 1297, 1297 (1998) [hereinafter Hasday, *Family Reconstructed*] (“The family serves as the quintessential symbol of localism.”); Jill Elaine Hasday, *The Canon of Family Law*, 57 *STAN. L. REV.* 825, 870 (2004) [hereinafter Hasday, *Canon of Family Law*] (“The family law canon insists that family law is exclusively local.”). To be sure, however, other scholars have considered whether family law should be regulated at a substate level. *See, e.g.*, June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 *MICH. ST. L. REV.* 49, 55–56 (noting that if the point of family law is to reflect “different cultural values,” it may make sense to “further localize” the approaches).

2. *See infra* notes 56–77 and accompanying text; *see also, e.g.*, *Bostic v. Schaefer*, No. 14-1167, 2014 WL 3702493, at *11 (4th Cir. 2014) (“The Constitution does not grant the federal government any authority over domestic relations matters, such as marriage.”).

3. *See* Hasday, *Canon of Family Law*, *supra* note 1, at 874 (“[A]ssertions of family law’s exclusive localism are typical.”); *see also* *Trammel v. United States*, 445 U.S. 40, 50 (1980) (“[T]he laws of marriage and domestic relations are concerns traditionally reserved to the states.”); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (“[D]omestic relations [is] an area that has long been regarded as a virtually exclusive province of the States.”).

4. *See* Sylvia Law, *Families and Federalism*, 4 *WASH. U. J.L. & POL’Y* 175, 220 (2000) (arguing that sweeping claims “that family law is necessarily and inherently a matter of state rather than federal law [are] false”). *See generally* Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 *CARDOZO L. REV.* 1761 (2005); Hasday, *Family Reconstructed*, *supra* note 1; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947 (2002).

5. *See* Hasday, *Canon of Family Law*, *supra* note 1, at 878–79.

6. *Id.* at 879 (discussing the impact of federal military policy on families).

7. *See* Kerry Abrams & R. Kent Piacenti, *Immigration’s Family Values*, 100 *VA. L. REV.*

In addition to these critiques, there is also a growing recognition in other areas of law that “dual federalism”—the notion that there are some issues that are exclusively state based and others that are exclusively federal⁸—is dead.⁹ In many, if not most, other areas of law, scholars recognize that there is concurrent state and federal authority.¹⁰

One might think that either of these developments alone, or certainly taken together, would result in the demise of family law localism. But the myth lives on, albeit in a narrower form. The narrower version of family law localism acknowledges some federal involvement in the family law arena but posits that there remains a realm of core family law matters that are within the exclusive authority of the states.¹¹ Specifically, this more refined theory, what I call family status localism, posits that while states do not have exclusive power over *all* issues that impact families, they do have the exclusive authority to define and determine “family status,” including marital status and status as a parent or a child.¹² Proponents claim that this theory is supported by a long and consistent history of federal deference to state family status determinations.¹³

Family status localism played an important role in *Windsor* and in other cases challenging section 3 of DOMA.¹⁴ Advocates argued,¹⁵ and some courts agreed,¹⁶

629, 631 (2014) (“In its role as regulator of immigration and citizenship, the federal government has developed its own definitions of family through congressional action—the Immigration and Nationality Act (‘INA’)—and agency action and practice, including official regulations, the Foreign Affairs Manual, and memoranda of understanding.”).

8. Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243, 246 (2005) (defining dual federalism to mean the notion that the “state and national governments enjoy exclusive and non-overlapping spheres of authority”).

9. *See, e.g., id.* at 250 (noting that the notion of dual federalism “does not accurately characterize the current allocation of governmental authority in the United States”).

10. Robert A. Schapiro, *From Dualist Federalism to Interactive Federalism*, 56 EMORY L.J. 1, 5 (2006) (noting that “separating state from federal domains became impossible” after 1937).

11. *See infra* note 12 and accompanying text.

12. *See* Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor at 3–4, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) [hereinafter *Federalism Scholars’ Brief*] (“Our claim is not that family law is an exclusive field of state authority, but rather that certain powers within that field—such as the power to define the basic status relationships of parent, child, and spouse—are reserved to the States.”).

13. *See, e.g.,* Maura T. Healey, *A State’s Challenge to DOMA: Federalism and Constitutional Rights*, 5 ALB. GOV’T L. REV. 422, 428 (2012) (“Despite significant division and disagreement over these state marriage rules, many of which were politically and socially contentious at the time, the federal government had always deferred to state definitions of marriage.”); *see also* Brief of 172 Members of the U.S. House of Representatives and 40 U.S. Senators as Amici Curiae in Support of Respondent Edith Schlain Windsor, Urging Affirmance on the Merits at 32, *Windsor*, 133 S. Ct. 2675 (No. 12-307), [hereinafter *Brief of Members of Congress*] (“Congress consistently deferred to the States on issues of marriage and family law.”).

14. Section 3 of DOMA defined “marriage” as the union of one man and one woman for all federal purposes. 1 U.S.C. § 7 (2012) (held unconstitutional by *United States v. Windsor*, 133 S. Ct. 2675 (2013)).

15. *See supra* note 12.

16. *See, e.g.,* *Massachusetts v. U.S. Dep’t of Health & Human Servs.*, 698 F. Supp. 2d

that section 3 was an impermissible attempt by the federal government to regulate the “truly” local family law matter of family status determinations.¹⁷ Invocations of the theory of family status localism are not uncommon.¹⁸ In recent years, similar claims have been seen in judicial opinions,¹⁹ legislative histories,²⁰ and the mainstream media.²¹ This Article is the first to subject this more refined family status localism theory to careful scrutiny.

This Article has two primary goals. The first goal is doctrinal. This piece subjects the claim of the exclusively local nature of family status determinations to careful scrutiny. Is it true that family status determinations have been solely reserved to the states? To consider this question, this Article explores a largely unexamined history of federal involvement with one particular family status—the status of being someone’s “child.” For those unfamiliar with family law, who a particular person’s child is may seem obvious. And sometimes it is obvious and clear. This is usually the case when a married husband and wife are the genetic parents of a child they and they alone care for.²² But in a variety of circumstances, the answer is and has been a contested and politically fraught one.²³ Historically, for example, the genetic

234, 249 (D. Mass. 2010) (concluding that section 3 of DOMA violated the Tenth Amendment because it regulated an issue—“marital status determinations”—that was an “attribute of state sovereignty”), *aff’d*, 682 F.3d 1 (1st Cir. 2012).

17. To be clear, I think the Court’s conclusion in *United States v. Windsor* that section 3 of DOMA is unconstitutional is correct. Contrary to the arguments made by some advocates, however, it is my opinion that section 3’s constitutional infirmity was an equal protection one, not a federalism one. For a rich discussion of the equal protection and due process themes in the Court’s *Windsor* decision, see generally Douglas NeJaime, *Windsor’s Right to Marry*, 123 YALE L.J. ONLINE 219 (2013).

18. See, e.g., Margaret Ryznar & Anna Stepień-Sporek, *A Tale of Two Federal Systems*, 21 CARDOZO J. INT’L & COMP. L. 589, 595 (2013) (“As a result, family law has become firmly embedded in the states’ domain, although a minority of family issues have been viewed as a matter of national importance considered on the federal level.”).

19. *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321, 1326 (5th Cir. 1994) (“Federal respect for state domestic relations law has a long and venerable history.”).

20. As stated in the dissenting views of DOMA’s House Report:

[T]he Federal government has always relied on the states’ definition of marriage for Federal purposes, and . . . it is unwarranted and an intrusion on states[’] rights to change that practice now. The Federal government has no history in determining the legal status of relationships, and to begin to do so now is a derogation of states’ traditional right to so determine.

H.R. REP. NO. 104-664, at 43 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2946 (dissenting views).

21. George F. Will, *A Matter of Jurisprudence*, WASH. POST, Mar. 19, 2013, *available at* 2013 WLNR 6859988 (“As the scholars’ brief says, DOMA ‘shatters two centuries of federal practice’ by creating ‘a blanket federal marital status that exists independent of states’ family-status determinations.’”).

22. See Abrams & Piacenti, *supra* note 7, at 631.

23. For example, historically, the legal parentage of nonmarital children was a contested issue. See Zanita E. Fenton, *Bastards! . . . And the Welfare Plantation*, 17 J. GENDER RACE & JUST. 9, 9 (2014) (exploring how the legal status of illegitimate children “assisted in gender subordination” and “contributed to the maintenance of racial stratification”); Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital*

offspring of an unmarried man was often *not* considered his child for some or all purposes.²⁴

Consistent with the conventional narrative, many federal statutes do defer to state definitions of child.²⁵ But my historical analysis demonstrates that this is not always the case. The federal government often used, and continues to use, its own family status definitions.²⁶ In some cases, the federal government chose to override state family status determinations for what might be described as discriminatory reasons. DOMA, of course, is a contemporary example of this.²⁷ What has largely been ignored, however, are the many examples pointing in the other direction:²⁸ the federal statutes, regulations, and judicial opinions that utilize independent federal definitions of family status to ameliorate the effects of state-level discrimination against certain families.²⁹

The second goal of this Article is normative. To date, much of the discussion about federal family status determinations has focused on the structural question of whether the federal government *can* act in this area. This structural focus has obscured consideration of the normative questions of whether the federal government *should* be involved in making family status determinations and, if so, when.

A rich body of scholarship considers these normative questions as they apply to other areas of law, including immigration law,³⁰ environmental law,³¹ and education

Children, 63 FLA. L. REV. 345, 350–56 (2011) (exploring the historical treatment of nonmarital children).

24. See *infra* Part II; see also Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1489–90 (2013) (discussing the evolution of state family law rules regarding nonmarital children).

25. See *infra* notes 127–29 and accompanying text.

26. See *infra* Part II.

27. See *infra* Part II.

28. See *infra* Part II.

29. See *infra* Part II.

30. See, e.g., Clare Huntington, *The Constitutional Dimension of Immigration Federalism*, 61 VAND. L. REV. 787, 792 (2008) (arguing that the “constitutional mandate for federal exclusivity over pure immigration law is far more contestable than the traditional debate would suggest” and laying out the values that should be considered when considering state involvement in the area of immigration law). See generally Stella Burch Elias, *The New Immigration Federalism*, 74 OHIO ST. L.J. 703 (2013); Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609 (2012); Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567 (2008); Juliet P. Stumpf, *States of Confusion: The Rise of State and Local Power Over Immigration*, 86 N.C. L. REV. 1557 (2008); Michael J. Wishnie, *Laboratories of Bigotry? Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

31. See, e.g., David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1808, 1850 (2008) (detailing the “virtues that a dynamic system of overlapping federal-state jurisdiction has for environmental policymaking”); Kirsten H. Engel & Scott R. Saleska, *Subglobal Regulation of the Global Commons: The Case of Climate Change*, 32 ECOLOGY L.Q. 183, 189 (2005) (describing how the “domino effect” of state and federal regulation can produce positive results); Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 911 (2005) (proposing a “modular” conception of environmental regulation that involves, among other things, “multiple levels of government with differing capacities”).

law.³² For example, scholars vigorously debate the role states should play with regard to immigration reform, an area previously thought to be exclusively federal in nature.³³ But because scholars and courts tend to view family law issues as “exceptional,”³⁴ family law is frequently omitted from these discussions.³⁵

This Article seeks to bridge the gap between family law scholarship and the robust literature on the values of federalism.³⁶ Ultimately, this Article does not offer a simple road map for determining which level of government should make family status determinations in any particular circumstance. Instead, drawing upon federalism scholarship, the Article sets forth a number of considerations to guide a more vigorous consideration of this question going forward.

Part I of this Article examines the evolution of claims regarding family law’s inherent localism. As others (including Judith Resnik,³⁷ Jill Hasday,³⁸ and Kristin Collins³⁹) demonstrate, claims that the federal government lacks authority to act in family law are

32. See generally, e.g., Kimberly Jenkins Robinson, *The High Cost of Education Federalism*, 48 WAKE FOREST L. REV. 287 (2013); Shannon K. McGovern, Note, *A New Model of States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519 (2011).

33. See, e.g., Adrian J. Rodríguez, *Punting on the Values of Federalism in the Immigration Arena? Evaluating Operation Linebacker, a State and Local Law Enforcement Program Along the U.S.-Mexico Border*, 108 COLUM. L. REV. 1226 (2008).

34. See, e.g., JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 7 (2014) (examining “family law exceptionalism,” the notion that family law “rejects what the law otherwise embraces[,] and does what the law otherwise rejects”); Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 753 (2010) (introducing an issue of the journal devoted to “‘family law exceptionalism’: the myriad ways in which the family and its law are deemed, either descriptively or normatively, to be special”).

35. Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267, 273 (2009) (“Within the immense literature on federalism, a small subset centers on federalism questions concerning the family and family law.”).

36. See generally, e.g., Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499 (1995); Neil S. Siegel, *International Delegations and the Values of Federalism*, 71 LAW & CONTEMP. PROBS. 93 (2008).

37. Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 415 (2002) [hereinafter Resnik, *Reconstructing Equality*] (“First, although statements that family law ‘belongs’ to the states are often made, federal statutory regimes govern many facets of family life.”); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 621 (2001) [hereinafter Resnik, *Categorical Federalism*] (sketching an “empirical case against categorical federalism by showing that the very areas characterized in the [Violence Against Women Act] litigation as ‘local’—family life and criminal law—have long been subjected to federal lawmaking”); Judith Resnik, *“Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1697 (1991) [hereinafter Resnik, *Without Gender*] (exploring the “sources of this ideology of the absence of families and of women from the federal courts to examine how it is both true and false”).

38. Hasday, *Canon of Family Law*, *supra* note 1.

39. Collins, *supra* note 4, at 1764 (noting “the standard perception that there is a long-standing tradition of federal non-involvement in domestic relations law and policy”).

hardly new. To the contrary, such assertions are “typical.”⁴⁰ In response to persuasive critiques of sweeping family law federalism claims, recent invocations of the claim have become more refined. For example, in the litigation challenging section 3 of DOMA, advocates and scholars contended that there was one particular area of family law that was off-limits for the federal government—defining and determining family status.⁴¹

Using the lens of children, Part II demonstrates that this more refined family law federalism theory is belied by history. The federal government has long been in the business of defining and determining family status. While there has been some scholarship documenting federal involvement in the area of family status, this Part offers a novel contribution by documenting a previously untold part of this history. Specifically, this Part uncovers examples where the federal government provided its own family status determinations to mitigate the effects of state-level discrimination.

After demonstrating a long history of federal involvement in family status determinations, Part III considers the normative questions of whether and when the federal government should be involved in family status determinations. Given the incredible impact that family status determinations have on almost all aspects of a person’s life, it is critical to bring this normative question to the fore.

I. FAMILIES AND FEDERALISM

In recent decades, there has been increasing acknowledgement in most other areas of law that “dual federalism is dead.”⁴² Scholars generally recognize that it has become impossible to separate state from federal domains.⁴³ However, many scholars and judges continue to cling to the belief that family law is an exception to this rule.

In the wake of dual federalism’s general demise, many scholars consider how the various levels of government should share power. Robert Schapiro, for example, argues in favor of what he calls interactive federalism: “Rather than focusing on how to separate state and federal jurisdiction, interactive federalism explores how the federal and state governments can work together to advance a variety of policy goals.”⁴⁴ In a similar vein, Erwin Chemerinsky asserts that “federalism should be viewed as not being about limits on any level of government, but empowering each to act to solve difficult social issues.”⁴⁵ Others, including Ernest Young, believe that constraints on the power of the federal government are “both an integral principle of our Constitution and a critical element of our political community.”⁴⁶

40. Hasday, *Canon of Family Law*, *supra* note 1.

41. *See* Federalism Scholars’ Brief, *supra* note 12.

42. Schapiro, *supra* note 8; *see also* Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 51 (2013) (“Neither dual federalism nor latent exclusivity governs today. Instead, there is an appreciation that the authority of state and national governments pervasively overlaps.”). *See generally* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

43. Schapiro, *supra* note 10.

44. *Id.* at 8.

45. Erwin Chemerinsky, *Empowering States When it Matters*, 69 BROOK. L. REV. 1313, 1329 (2004).

46. Ernest A. Young, *What Does It Take To Make a Federal System? On Constitutional Entrenchment, Separate Spheres, and Identity*, 45 TULSA L. REV. 831, 844 (2010).

There is also a burgeoning body of literature considering the allocation of power between the states and the federal government in a variety of specific subject matter areas, including immigration law,⁴⁷ environmental law,⁴⁸ and education law.⁴⁹ For example, there has been a robust debate about the role of the states and local governments in an area historically understood to be reserved to the federal government⁵⁰—immigration law.⁵¹

Family law, however, is often omitted from these discussions.⁵² In contrast to other areas of law where overlapping state and federal power is the norm, family law is held out as an example of a “truly local” domain.⁵³ This is yet another example of what scholars have identified as family law exceptionalism.⁵⁴ As others have noted, family law is generally understood to depart from the rules that apply to other areas of law.⁵⁵

And it is not just legal scholars who subscribe to this understanding. On a number of occasions in recent decades, the Supreme Court made sweeping claims suggesting that all of family law is reserved to the states.⁵⁶ For example, in *Elk Grove Unified School District v. Newdow*, the Supreme Court declared, “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.”⁵⁷ Likewise, in *Sosna v. Iowa*, the Court stated, “domestic relations[is] an area that has long been regarded as a virtually exclusive province of the States.”⁵⁸

47. See *supra* note 30.

48. See *supra* note 31.

49. See *supra* note 32.

50. Wishnie, *supra* note 30, at 494 (considering “whether the federal power to regulate immigration, a power not specifically enumerated in the Constitution but universally recognized for over a century, is among those that are exclusively national and incapable of devolution to the states” (footnote omitted)).

51. See *supra* note 30.

52. See Estin, *supra* note 35. The omission of family law is not limited to the federalism literature. See, e.g., Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1674 (2011) (noting that contemporary scholarship on jurisdiction has largely “failed to subject the [anomalous jurisdictional rule that applies to divorce] to serious consideration and critique”).

53. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 509 (2000) (noting that in *Morrison*, the Supreme Court suggested that family law was one of the “truly local” spheres); see also *supra* note 3.

54. See HASDAY, *supra* note 34, at 15 (observing that “family law can be thought of as a system of exemptions from the everyday rules that would apply to interactions among people in a non-family law context” (internal quotation marks omitted) (citing Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1207 (1999))); Halley & Rittich, *supra* note 34.

55. See e.g., HASDAY, *supra* note 34.

56. Hasday, *Canon of Family Law*, *supra* note 1; see also Courtney G. Joslin, Windsor, *Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156, 159 (2013) (noting that “in a number of decisions in the last half-century, the Supreme Court has made rather sweeping statements about the lack of federal power or authority in the area of family law”).

57. 542 U.S. 1, 12 (2004) (alteration in original) (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)).

58. 419 U.S. 393, 404 (1975).

The perception that family law is inherently local is so sticky that it persists (albeit now in a slightly narrowed form) despite persuasive critiques to the contrary.⁵⁹ A handful of family law and women's rights scholars (including Judith Resnik,⁶⁰ Reva Siegel,⁶¹ Sylvia Law,⁶² Jill Hasday,⁶³ and Kristin Collins⁶⁴) convincingly demonstrate that broad claims "that family law is necessarily and inherently a matter of state rather than federal law [are] false."⁶⁵ On the contrary, for much of our history the federal government has regulated families both directly and indirectly through a vast and complex range of statutes and regulations.⁶⁶ A few of the many federal laws that regulate families include tax law, immigration law, Social Security law, federal employee benefits, and federal provisions related to adoption, child custody, and child support.⁶⁷ As Jill Hasday explains, these federal laws "establish what constitutes a family for their purposes, distribute privileges and burdens on the basis of marital status, and only recognize relationships of dependency if they exist within certain specified family groups."⁶⁸

And this federal involvement in the family is not new.⁶⁹ Ann Laquer Estin reminds us that "[t]he [federal] Comstock Act of 1873 outlawed the transportation of contraceptives across state lines."⁷⁰ This prohibition, of course, directly impacted the timing and size of families. "The [federal] Maternity Act of 1921 provided for appropriations to the states for a program designed to reduce maternal and infant mortality,"⁷¹ again, directly impacting the size of families as well as the health of their members. Looking even further back in time, Kristin Collins shows that

59. See *supra* notes 12–13 and accompanying text.

60. See, e.g., Resnik, *Reconstructing Equality*, *supra* note 37, at 415 ("First, although statements that family law 'belongs' to the states are often made, federal statutory regimes govern many facets of family life."); Resnik, *Categorical Federalism*, *supra* note 37, at 644–53 (describing "federal family lawmaking"); Resnik, *Without Gender*, *supra* note 37, at 1721, 1721–29 (cataloguing some of the many federal laws that "govern a host of legal and economic relations that do affect and sometimes define family life").

61. See, e.g., Siegel, *supra* note 4.

62. See, e.g., Law, *supra* note 4.

63. See, e.g., Hasday, *Canon of Family Law*, *supra* note 1; Hasday, *Family Reconstructed*, *supra* note 1.

64. See, e.g., Collins, *supra* note 4.

65. Law, *supra* note 4.

66. See, e.g., Collins, *supra* note 4; Hasday, *Family Reconstructed*, *supra* note 4; Siegel, *supra* note 4.

67. Hasday, *Canon of Family Law*, *supra* note 1, at 875 ("Whatever else they do and whatever other legal subjects they implicate, federal social security law, employee benefit law, immigration law, tax law, Indian law, military law, same-sex marriage law, child support law, adoption law, and family violence and abuse law are also forms of family law.").

68. Hasday, *Family Reconstructed*, *supra* note 1, at 1376.

69. See, e.g., Resnik, *Without Gender*, *supra* note 37, at 1743, 1743–44 (discussing "nineteenth century federal efforts to control polygamy and sexual relations, which in turn affect family relations, albeit nontraditional ones").

70. Estin, *supra* note 35, at 274.

71. *Id.* at 274–75.

during the pre-Civil War era all three branches of the federal government were actively engaged in creating and enforcing laws and policies that bore directly on families, whether it was the creation and administration of widows and orphans' war pensions, the regulation of married women's citizenship, or—perhaps most surprisingly—the resolution of an array of domestic relations issues in federal court, often pursuant to uniform federal standards.⁷²

In light of these critiques, it is now less common to see sweeping claims of family law's inherent localism.⁷³ Scholars and advocates now often concede that Congress can and has enacted statutes that deeply impact families.⁷⁴ But the underlying intuition that there is something inherently local about family law has proven to be very sticky. Thus, rather than being abandoned, the claim has instead been narrowed.⁷⁵ Proponents of this more refined family status localism claim posit that there are certain core family law matters⁷⁶—specifically determinations of family status, including marital status and status as a child—that are solely within the purview of the states.⁷⁷

Family status localism was foregrounded in the recent litigation challenging section 3 of DOMA.⁷⁸ Indeed, it was this family status localism argument that carried the day at the district court level in one of these challenges—*Massachusetts v. U.S. Department of Health and Human Services*.⁷⁹ Specifically, the district court in *Massachusetts* held that section 3 of DOMA violated the Tenth Amendment

72. Collins, *supra* note 4, at 1767–68.

73. While they are less common, such assertions have not disappeared altogether. See, e.g., Lauren Gill, Note, *Who's Your Daddy? Defining Paternity Rights in the Context of Free, Private Sperm Donation*, 54 WM. & MARY L. REV. 1715, 1736 (2013) (“Under the United States’ system of federalism, family law remains the domain of the states . . .”).

74. See, e.g., Federalism Scholars’ Brief, *supra* note 12, at 3–4 (acknowledging that family law is not an “exclusive field of state authority”).

75. Libby Adler predicted this would happen. Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 239 (1999) (“A defender of the axiom might grant that not all of family law is state law, but argue that some identifiable subset of family law truly is a matter of state law.”).

76. The more refined family status federalism theory avoids one of the critiques of the more sweeping claim that, if accepted, it “would undermine the constitutionality of wide swaths of federal regulatory programs and seriously constrict federal regulatory power.” Jack M. Balkin, *Be Careful What You Wish for Department: Federal District Court Strikes Down DOMA*, BALKINIZATION (July 8, 2010, 6:35 PM), <http://balkin.blogspot.com/2010/07/be-careful-what-you-wish-for-department.html>.

77. See, e.g., Federalism Scholars’ Brief, *supra* note 12; see also *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004) (“Newdow’s parental status is defined by California’s domestic relations law.”); Federalism Scholars’ Brief, *supra* note 12, at 27 (“This Court has frequently, and recently, echoed that determining family status remains a State power.”); *id.* at 29 (“[Federal law] does not legitimate children, perform adoptions, or terminate parental rights. Though federal legislation might promote, shape, or encourage those relationships, it cannot create or extinguish them wholesale.”).

78. See *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (holding section 3 of DOMA unconstitutional).

79. 698 F. Supp. 2d 234 (D. Mass. 2010).

because it regulated an issue—marital status determinations—that was an “attribute of state sovereignty.”⁸⁰

In *Windsor*⁸¹ itself, a group of federalism scholars pressed the family status localism argument. The federalism scholars argued that section 3 was unconstitutional because Congress did not have the authority to define or determine family status. “[T]he power to define the basic status relationships of parent, child, and spouse . . .” the scholars asserted in their brief to the Supreme Court, “[is] reserved to the States.”⁸² Similar statements were made about section 3 in legal scholarship as well as in the mainstream media.⁸³ Proponents of this position contend that it is supported by an unbroken historical practice: “[Congress] has never . . . jettisoned its longstanding deference to state determinations of marital status.”⁸⁴ Family status localism had such rhetorical power that Justice Kennedy seemed poised to embrace it.⁸⁵ In the end, however, the Court declined either to embrace or reject the theory.⁸⁶

Despite the Court’s failure to do so, there are a number of reasons why it is nonetheless important to subject this claim of family status localism to careful scrutiny. First, as noted above, beliefs about family law’s inherent localism have proven to be extremely sticky. Even though a number of prominent scholars have convincingly documented a long history of federal involvement in family law, the notion that family law is reserved to the states lives on.⁸⁷

80. *Id.* at 249; *see also id.* at 250 (“The history of the regulation of marital status determinations therefore suggests that this area of concern is an attribute of state sovereignty, which is ‘truly local’ in character.”).

81. *Windsor*, 133 S. Ct. 2675.

82. Federalism Scholars’ Brief, *supra* note 12, at 4.

83. *See, e.g.,* Healey, *supra* note 13, at 435 (“For more than one hundred years in a long line of cases, the Supreme Court has consistently recognized that domestic relations are the paradigmatic area of state, not federal, concern, and that marital status lies at the core of domestic relations law.”); Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 HASTINGS CONST. L.Q. 419, 421 (1999) (arguing that section 3 violates the Tenth Amendment because it “seriously impairs a state’s power to define the ‘marriage’ relationship”).

84. Brief on the Merits of Amici Curiae Family Law Professors and the American Academy of Matrimonial Lawyers in Support of Respondent Edith Schlain Windsor at 14, *Windsor*, 133 S. Ct. 2675 (No. 12-307) [hereinafter Family Law Scholars’ Brief]; *see also id.* at 18 (“[T]here are no ‘uniform’ federal definitions of marital or parental status.”).

85. For example, during oral argument in *Windsor*, Justice Kennedy repeatedly declared that the question presented by *Windsor* was “whether or not the Federal government, under our federalism scheme, has the authority to regulate marriage.” Transcript of Oral Argument at 76, *Windsor*, 133 S. Ct. 2675 (No. 12-307).

86. *See Windsor*, 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.”); *see also* Neomi Rao, Essay, *The Trouble with Dignity and Rights of Recognition*, 99 VA. L. REV. ONLINE 29, 31 (2013) (“Nor does the Court find that DOMA exceeds the scope of federal power.”). Elsewhere, I argue that while the Court declined to explicitly address the accuracy of this claim in *Windsor*, aspects of the *Windsor* opinion suggest that the Court would reject the claim if pressed. Joslin, *supra* note 56, at 165 (arguing that “the Court appeared to concede that at least a sweeping categorical family status federalism theory is belied by history”).

87. *See* Brief on the Merits for Amicus Curiae the Partnership for New York City in Support of Respondent Windsor and Affirmance of the Second Circuit at 3, *Windsor*, 133 S.

Second, despite the growing recognition that dual federalism is dead, there have been a variety of attempts in the last several decades to reverse this trend and to return power to the states.⁸⁸ As Rena Steinzor has explained, “The Reagan administration popularized the so-called ‘new Federalism’—a political doctrine that calls for radical downsizing of the federal government and the return of power to the states.”⁸⁹ Returning power to the states was also a strong theme undergirding the Republican Party’s 1994 *Contract with America*,⁹⁰ and is likewise a guiding principle of the Tea Party.⁹¹ In addition to these political movements, some members of the Supreme Court have expressed interest in revitalizing older notions of federalism.⁹² Thus, it is likely that variations of family law localism will appear again.

II. FEDERAL FAMILY STATUS DETERMINATIONS: A MORE COMPLETE HISTORY

As noted above, in the wake of persuasive critiques, family law localism claims have become more refined. Instead of asserting that all family law matters are exclusively local, proponents are now more likely to argue that there are certain core family law matters—specifically family status determinations—that are outside the scope of Congress’s power. To date, there has been no careful analysis of the accuracy of the more refined family status localism claim.

This Article seeks to fill the gap in the literature. Consistent with the conventional narrative,⁹³ it is true that the federal government often defers to or incorporates state family status rules. For example, many federal statutes explicitly provide that whether a person is married for federal purposes is based on whether the person is considered married under state law.⁹⁴ And in other contexts, even when the statute

Ct. 2675 (No. 12-307) (“DOMA’s creation of a federal definition of marriage must be carefully reviewed because it is fundamentally inconsistent with basic principles of federalism. Since our nation was founded, the institution of marriage has been regulated by the States, not by Congress.”); see also Hasday, *Canon of Family Law*, *supra* note 1.

88. See Rena I. Steinzor, *Unfunded Environmental Mandates and the “New (New) Federalism”*: *Devolution, Revolution, or Reform?*, 81 MINN. L. REV. 97, 111–12 (1996).

89. *Id.*

90. *Id.* at 123–24 (“The *Contract with America* is in many ways an eerie reprise of the most popular Reagan rhetoric. It hails federalism as the centerpiece of a revolution that would restore the health of the nation by cutting big government, turning power and responsibility back to the states, and deregulating in the areas important to American industry.”).

91. See Rebecca E. Zietlow, Essay, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 510 (2012) (noting that the “long-term goal of the Tea Party movement is to shrink the size and power of the federal government and thus alter our system of federalism”).

92. See Schapiro, *supra* note 8, at 280 (noting the Court’s “renewed interest in federalism”). See generally Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503 (2007) (describing and critiquing recent emphasis on the need for mutual exclusivity in state and federal powers).

93. See Brief of Members of Congress, *supra* note 13, at 33–34 (“To this day, with full understanding that married couples may be treated differently in different States, the federal government continues to defer to state law to determine marital status . . .”).

94. See, e.g., 42 U.S.C. § 416(h)(1)(A)(i) (2012) (providing that “[a]n applicant is the wife, husband, widow, or widower . . . if the courts of the State in which such insured

does not explicitly defer to state law, it is done as a matter of practice.⁹⁵ But, as this Article documents, the federal government does not and has not always deferred to state family status determinations.

There is a small body of literature considering federal involvement with family status determinations.⁹⁶ These explorations, however, have been limited to consideration of particular instances of federal involvement.⁹⁷ More importantly, the existing literature examines only one side of the equation—instances in which the federal government overrode state rules for what might be described as “discriminatory purposes.”⁹⁸ These examples tend to reinforce the intuition that we should be wary of federal involvement in family law.⁹⁹ To adequately assess the

individual is domiciled . . . would find that such applicant and such insured individual were validly married”); *see also* Family Law Scholars’ Brief, *supra* note 84, at 25–26 (providing examples of federal statutes that explicitly rely on state determinations of status).

95. *See, e.g.*, Family Law Scholars’ Brief, *supra* note 84, at 20–24 (providing examples of federal statutes that implicitly rely on state determinations of status). *See generally* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 *STAN. L. REV.* 1371, 1423 (2012) (exploring choice of law questions that arise when federal law relies implicitly or explicitly on the “state-defined institution of marriage”).

96. *See, e.g.*, Lynn D. Wardle, *Involuntary Imports: Williams, Lutwak, the Defense of Marriage Act, Federalism, and “Thick” and “Thin” Conceptions of Marriage*, 81 *FORDHAM L. REV.* 771, 784 (2012) (“At present, Congress has chosen to reject, limit, and qualify the transportability of marital status created by the states into federal law in some cases, based on consideration of such factors as the need for national uniformity, ease of application, concerns over federalism (including the controversial or negative impact upon the federal government or program, or upon other states), and the attainment of numerous substantive national policy objectives.”).

97. *See infra* Part II.A; *see also* Wardle, *supra* note 96; Lynn D. Wardle, *Section Three of the Defense of Marriage Act: Deciding, Democracy, and the Constitution*, 58 *DRAKE L. REV.* 951, 953 (2010) (exploring “[w]hether Congress, the judiciary, or the executive branch decides whether, when, where, or how same-sex marriages created in a state will be recognized in federal laws, regulations, and programs”).

98. There is also a small body of literature examining federal laws that impose additional requirements on top of state family status rules, usually to guard against fraud. For example, federal law defines marriages for certain immigration purposes to exclude marriages entered into “for the purpose of procuring an alien’s admission” to the United States even if the marriage was valid for state law purposes. 8 U.S.C. § 1186a(b)(1)(A)(i) (2012). The federal tax code similarly treats unmarried people as married if they divorced for the purpose of gaining tax benefits. *See, e.g.*, Rev. Rule. 76-255, 1976-2 C.B. 40. For a rich discussion of the many different meanings of marriage fraud, including marriage fraud in the contexts of immigration and tax law, *see generally* Kerry Abrams, *Marriage Fraud*, 100 *CALIF. L. REV.* 1 (2012). There are similar rules with regard to children. For example, while adopted children are considered children under state family status law, the Social Security Act places some additional limitations on the rights of adopted children to seek Social Security benefits. For children adopted by an insured individual who is already receiving benefits, the child is entitled to children’s Social Security benefits only if the adoptive parent was previously a stepparent to the child or had been living with or supporting the child for the year prior to the adoption. 42 U.S.C. § 402(d)(8) (2012). This requirement was likely added to “prevent[] abuse of the secondary benefit scheme by denying benefits to children who might be adopted solely to qualify them for such benefits.” *Clayborne v. Califano*, 603 F.2d 372, 377 (2d Cir. 1979).

99. *See, e.g.*, Elizabeth G. Patterson, *Unintended Consequences: Why Congress Should*

normative question considered in Part III, it is important to have a full and complete understanding of when and under what circumstances the federal government has participated in defining family status.

What has largely been omitted from the limited scholarship that is available on this issue is consideration of the many examples pointing in the other direction—that is, the many federal programs that disregard state family status rules in order to mitigate state-level discrimination against certain family forms.

Using children as the lens, this Article fills this gap in the literature. This Article shows that throughout our history, there have been numerous programs in which the federal government overrode or disregarded state definitions of child because those state definitions were insufficiently protective.¹⁰⁰ This history is critical, both to the doctrinal question of whether the federal government has the power to act in this area of law as well as to the normative question of whether it should.

A. Federal Efforts To Deny Family Status Benefits

As noted above, while the federal government often defers to state family status determinations, it does not and has not always done so. Some of the instances in which the federal government refused to defer to state family status determinations were situations in which the federal government sought to *deny* family-based benefits or protections to people who were considered family members under state law.¹⁰¹ And in many if not all instances, these laws were prompted by a congressional determination that these family members were unworthy or undesirable.¹⁰²

The contemporary example of such a law is section 3 of DOMA.¹⁰³ Section 3 denied federal recognition to all same-sex spouses, even if their home states

Tread Lightly When Entering the Field of Family Law, 25 GA. ST. U. L. REV. 397, 399 (2008) (“The federal attention can become pernicious, however, if federal program requirements demand changes in state law that could disrupt the fabric of family law and policy in a state. Because family policy is closely connected to community norms and local social cohesion, such disruptions can have deleterious social effects that were neither anticipated nor desired by Congress.”).

100. See *infra* Part II.B.1.

101. See generally, e.g., Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134 (2014) (describing efforts by federal officials to deny *jus sanguinis* citizenship to certain nonwhite children born abroad).

102. See, e.g., *id.* at 2232 (“[I]t reveals the limitation of citizenship transmission between the American father and his nonmarital foreign-born child as the product of choices of [federal] officials charged with enforcing and developing the rules that governed membership in the polity—rules that were constructed and construed in ways that tended to exclude nonwhite children from citizenship.”); Rose Cuison Villazor, *The Other Loving: Uncovering the Federal Government’s Racial Regulation of Marriage*, 86 N.Y.U. L. REV. 1361, 1367 (2011) (“Yet state laws and actors were not the only legal bulwarks that pursued racist goals by restricting individuals’ right to marry their partners of choice. As *Bouiss* illuminates, in the decades before *Loving*, a different and overlooked type of racial regulation of marriage occurred . . . at the federal level . . .”).

103. 1 U.S.C. § 7 (2006) (limiting the definition of marriage and spouse for all federal purposes to opposite-sex marriages and spouses); see also *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013) (holding section 3 of DOMA unconstitutional).

considered them to be validly married.¹⁰⁴ A small number of scholars have considered other examples.¹⁰⁵ Rose Cuison Villazor, for example, documents how the federal government refused to allow certain interracial couples to marry, even if the parties would have been entitled to marry as a matter of state family law.¹⁰⁶ Specifically, she shows how a “system of federal race-based marriage restrictions . . . comprised of immigration, citizenship, and military laws and regulations” collectively restricted who U.S. military servicemembers could marry.¹⁰⁷ Thus, Villazor demonstrates that it simply is not true that the states have always had complete control over entry into marriage.

In the context of children, Kristin Collins demonstrates how federal officials sometimes disregarded state family status standards in the context of citizenship determinations for nonwhite or mixed-race nonmarital children born abroad.¹⁰⁸ Her examination reveals that whether or how federal officials deferred to state family status standards often depended on the perceived appropriateness of the family.¹⁰⁹ Her close review of the historical records suggests that even when federal officials purported to look to and rely upon state domestic relations rules: “[Federal] immigration officials were far less rigid in their conception of ‘legitimacy’ in cases involving foreign-born children of white American Mormons than in cases involving foreign-born children of Chinese Americans.”¹¹⁰

As in the case of DOMA, Villazor and Collins document instances when the federal government disregarded or altered state family status rules to further discriminatory ends.¹¹¹

B. Federal Efforts To Extend Family Status Benefits

Little or no existing scholarship examines federal programs or policies that departed from state family status rules in order to override state-level discrimination.

104. Joslin, *supra* note 24, at 1471 (“Due to Section 3, validly married same-sex spouses are denied an estimated 1138 federal rights and responsibilities extended to heterosexual spouses by virtue of their marital status.”).

105. Although there are other examples of federal involvement in family status for the purpose of denying benefits to persons considered family members as a matter of state law, Congress had never adopted a federal family status standard prior to DOMA that applied to *all* federal benefits or protections.

106. Villazor, *supra* note 102, at 1366.

107. *Id.* at 1367.

108. Collins, *supra* note 101.

109. *Id.* at 2175 (“Nevertheless, a closer examination of these cases helps underscore that, in the hands of administrative officials charged with gatekeeping for the American polity, domestic relations laws could be, and were, used to further the racially nativist policies of contemporary nationality law.”).

110. *Id.* at 2180.

111. On their face, the examples documented by Villazor, *supra* note 102, and Collins, *supra* note 101, could be seen as undercutting the conventional narrative in that they document examples of federal involvement in family status. On the other hand, by documenting discriminatory federal involvement, these histories simultaneously support the conventional narrative’s wariness of federal intervention in family law generally or in family status determinations specifically.

Moreover, because the limited existing scholarship on family status determinations focuses on individual federal programs, it does not provide a sense of the extent of federal involvement.¹¹² Has the federal government's involvement been limited to a few isolated programs? Or was its involvement more pervasive?

Using children as the lens, this Part addresses both issues. This Article focuses on the family status of child, both because federal involvement in this area has been particularly extensive¹¹³ and because examination of these efforts has been overlooked. Specifically, this Part documents a few of the *many* federal programs that include federal definitions of child that do not track or at least are not limited to state family status rules. Moreover, in many (although not all) of these programs, the purpose of adding these additional federal definitions was to extend protections to people who, in the assessment of the federal government, would be *unfairly* denied benefits if the program deferred to state family status definitions.

To understand the history of federal involvement in the family status of child, it is necessary to have at least a basic understanding of state family law. For one not immersed in family law, the determination of who is a child may seem obvious. But throughout American history, the status of child has been heavily contested, at least for some groups of children.¹¹⁴ It is also important to note that the determination that one is a child can have immense implications.¹¹⁵ Thus, the status may determine whether a minor has a right to maintain a relationship with his or her parent,¹¹⁶ the

112. See, e.g., Collins, *supra* note 101; Villazor, *supra* note 102.

113. To be clear, although the federal government arguably has been more involved in determining the family status of child than it has been with regard to other family statuses, its involvement has not been limited to that issue. For example, during and after the Civil War, the federal government took steps to recognize the intimate adult relationships between former slaves, even when these relationships were not recognized by the states. See, e.g., W. Burlette Carter, *The "Federal Law of Marriage": Deference, Deviation, and DOMA*, 21 AM. U. J. GENDER SOC. POL'Y & L. 705, 728 (2013). More recently, prior to the demise of section 3 of DOMA, the federal government took a number of steps to extend benefits to the same-sex partners of federal employees and service members, even when these relationships were not recognized as a matter of state law. See, e.g., Memorandum from John Berry, Director of U.S. Office of Pers. Mgmt. to Heads of Exec. Dep'ts & Agencies (June 2, 2010), available at <http://www.chcoc.gov/Transmittals/TransmittalDetails.aspx?TransmittalId=2982>.

114. In the past, husbands were almost always considered the legal parents of the children born to their wives. See, e.g., Joslin, *supra* note 24, at 1491–92 (discussing the strength of the marital presumption historically). Thus, historically, most of the controversy regarding the child status concerned nonmarital children. See generally, e.g., Maldonado, *supra* note 23 (discussing the legal treatment of nonmarital children). Today, with the advent and greater use of DNA testing, as well as reproductive technology, questions and controversy regarding the child status are no longer confined to the context of nonmarital children. Courtney G. Joslin, *Interstate Recognition of Parentage in a Time of Disharmony: Same-Sex Parent Families and Beyond*, 70 OHIO ST. L.J. 563, 607–16 (2009); see also June Carbone, *The Legal Definition of Parenthood: Uncertainty at the Core of Family Identity*, 65 LA. L. REV. 1295, 1295 (2005) (“The definition of parentage—and with it the determination of which adults receive legal recognition in children’s lives—has become the most contentious issue in family law.”).

115. See Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 34 (2010) (listing harms a child may experience if he or she lacks a legally recognized parent-child relationship).

116. See, e.g., *Alison D. v. Virginia M.*, 572 N.E.2d 27, 28 (N.Y. 1991) (rejecting the

minor is entitled to inherit intestate through a particular adult,¹¹⁷ the minor is entitled to child support from a particular adult,¹¹⁸ or the minor is entitled to a vast array of both state and federal benefits intended to help minors in the event of the death or disability of his or her parent.¹¹⁹

Throughout most of our history, state rules treated children born outside of marriage very harshly.¹²⁰ Under the common law, children born to unmarried women were *filius nullius*—literally the child of no one.¹²¹ At common law, a nonmarital father had no legal relationship with his biological child, even if his biological parentage was clear and uncontested.¹²² Indeed, at common law, biological mothers also lacked parental rights.¹²³ By the late nineteenth century, these rules had been modified to extend legally recognized parent-child relationships to nonmarital mothers.¹²⁴ But through the late twentieth century, many states continued to discriminate against nonmarital children with regard to their rights by and through their fathers. For example, in 1966, many states still permitted a nonmarital child to inherit through his father only if the father married the child’s mother.¹²⁵ In these jurisdictions, intestacy rights were denied even if the man admitted he was the father and, in many states, even if the man was under court order to pay for the child’s support.¹²⁶

visitation claim brought by a woman who was not considered the child’s legal parent as a matter of state law).

117. See Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1211 (2010) (“For the most part, a child is not entitled to intestate succession unless he or she has a legally recognized parent-child relationship with the decedent.”).

118. See *id.* at 1198–1209 (discussing how children may be denied child support through persons who are not considered legal parents).

119. See *id.*

120. See Maldonado, *supra* note 23, at 346 (“No one would dispute that for most of U.S. history, ‘illegitimate’ children suffered significant legal and societal discrimination.” (footnote omitted)).

121. *Id.* at 350.

122. See MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 197–98, 234–36 (G. Edward White ed., 1988); Mary L. Shanley, *Unwed Fathers’ Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 67 (1995) (“Under the common law a man had . . . no legal relationship at all to children he sired out of wedlock.”).

123. Today, of course, it is possible for a woman to give birth to a genetically unrelated child through the use of in vitro fertilization (IVF). See Janet L. Dolgin, *The Law Debates the Family: Reproductive Transformations*, 7 YALE J.L. & FEMINISM 37, 38 n.4 (1995). But IVF has only been possible since the late twentieth century. Theresa Glennon, *Choosing One: Resolving the Epidemic of Multiples in Assisted Reproduction*, 55 VILL. L. REV. 147, 198 (2010).

124. See Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81 (2003) (noting that “by the late nineteenth century, mothers were generally accorded a formal legal connection to their out-of-wedlock children”).

125. See HARRY D. KRAUSE, *ILLEGITIMACY: LAW AND SOCIAL POLICY* 26 (1971) (“In most states, however, the illegitimate child still cannot inherit from his father, other than by will.”); *id.* at 19 (“[M]ost states permit full legitimation to be accomplished through the marriage of the parents of the illegitimate child, although numerous states even then require a specific acknowledgement.”).

126. In *Labine v. Vincent*, for example, the Supreme Court acknowledged that the child at issue would have been entitled to federal Social Security and veterans benefits even though

Many (although not all)¹²⁷ federal benefits programs incorporate state definitions of child as *one* means of establishing eligibility for some federal children's benefit. For example, when children were added as beneficiaries to the Social Security Act in 1939, the primary way to establish eligibility as a child was by reference to state family status standards—specifically the right to inherit intestate under state probate law.¹²⁸ Many other federal benefits programs likewise incorporate state intestacy standards.¹²⁹

But as Kristin Collins shows, federal officials have not always deferred to state family status rules regarding children: In citizenship determinations, federal officials sometimes declined to extend children's benefits to persons who would have been considered children as a matter of state law.¹³⁰ Specifically, when children born abroad would have been considered "legitimate" under the relevant state standards, federal immigration officials sometimes disregarded these rules in cases involving mixed-race or nonwhite children.¹³¹

she would not have been entitled to intestate succession through her father under Louisiana law. 401 U.S. 532, 535 n.3 (1971). In *Labine*, the Supreme Court ultimately held that the Louisiana statutory scheme was constitutional. *Id.* at 539–40.

127. An example of a scheme that arguably does not defer to or incorporate state family status standards regarding children *at all* is the Copyright Act. 17 U.S.C. § 101 (2012) (defining a "person's 'children'" to mean "that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person"). This is ironic given that the Supreme Court's decision interpreting child in an earlier version of the Act is often cited to support the proposition that the federal government always defers to state family status determinations. *See infra* notes 167–68 and accompanying text.

128. Social Security Act Amendments of 1939, Pub. L. No. 76-379, §209(m), 53 Stat. 1360, 1378 (codified as amended at 42 U.S.C. § 416(h)(2)(A) (2012)) (providing that a person is entitled to child's Social Security benefits if he or she "would have the same status relative to taking intestate personal property as a . . . child"); *see also* Joslin, *supra* note 24, at 1488 ("Under the original 1939 amendments [to the Social Security Act], the primary way a child could demonstrate eligibility was by showing she was entitled to intestate succession as a child under state intestacy law."). It is important to note, however, that even in 1939, the Social Security Act included one independent federal eligibility standard. The Act provided that a child was eligible for children's Social Security benefits if the child was born to a couple whose marriage was later declared to be void. 42 U.S.C. § 416(h)(2)(B) (2012) (providing that a child is eligible for Title II benefits if, before the child was born, the "insured individual and the mother or father . . . went through a marriage ceremony resulting in a purported marriage between them which, but for a legal impediment . . . would have been a valid marriage"). Today, most if not all states would treat such a child as a "legitimate" child of the couple under state family and probate law, but this was not true in many states in 1939. *See* ERNST FREUND, *ILLEGITIMACY LAWS OF THE UNITED STATES AND CERTAIN FOREIGN COUNTRIES* 13 (1919) (noting that "[l]egislation legitimating the issue of void or annulled marriages is common in America"); KRAUSE, *supra* note 125, at 11 ("Whereas the offspring of a defective marriage, annulled with *ab initio* effect, used to be illegitimate, a number of states today give legitimate status to the child of almost any alliance that resembles a formal marriage.").

129. *See, e.g.*, 45 U.S.C. § 231e(a)(7) (2012) (lump sum payments under the Railroad Retirement Act of 1974); 20 C.F.R. § 725.220(d) (2014) (claims for benefits under the Federal Mine Safety and Health Act); 20 C.F.R. § 222.32(a) (2014) (claims for family-based benefits under the Railroad Retirement Act).

130. Collins, *supra* note 101, at 2187.

131. *Id.* at 2187 (arguing that federal officials "sometimes borrowed, sometimes ignored,

This type of example—where the federal government refused to defer to state family status rules in order to deny federal family-based benefits—is not the only type of federal involvement in family status determinations. Indeed, when one looks specifically at federal benefits targeted at children, one can find numerous examples of federal laws and programs that either do not incorporate state family status rules at all, or include more inclusive, independent federal definitions. And in many circumstances, these independent federal definitions of child were deliberately added in order to mitigate the effects of state laws that discriminated against nonmarital children.¹³²

1. Federal Legislative Efforts

The definitions of child in federal law are varied. As noted above, many federal statutes and regulations do continue to defer to and incorporate state law, at least in part.¹³³ But some do not explicitly refer to state family status rules at all.¹³⁴

Some of the federal programs included independent federal definitions of “child” from their inception.¹³⁵ Other federal programs initially incorporated only state standards but were later amended to include additional, more inclusive federal standards.¹³⁶ In at least some instances, the available evidence suggests that federal officials chose to incorporate independent federal definitions of “child” after finding that reliance solely on state standards produced unfair results.¹³⁷ In other instances, federal officials concluded that it was important to have a uniform federal standard that did not vary depending on what state a person was from.¹³⁸

With regard to some federal programs, Congress decided very early on to be more inclusive of nonmarital children than was the case under prevailing state standards at the time. For example, in 1917, Congress amended the War Risk Insurance Act.¹³⁹

and often adapted domestic relations law principles from state law or general law sources . . . in response to the pressure created by particular [racially nativist] policy objectives”).

132. See Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337, 341 (1962) (Adopting state laws of descent for purposes of establishing eligibility for federal benefits has resulted in “a great majority of illegitimate children cannot obtain benefits upon the death or disability of their fathers; this is so even when those same children were entitled by state law to receive full support from the father while he was able to provide it.”).

133. See, e.g., Social Security Act, 42 U.S.C. § 416(h)(2)(A) (2012); Railroad Retirement Act of 1974, 45 U.S.C. § 231e(a)(7) (2012); Immigration Reform and Control Act of 1986, 8 U.S.C.A. § 1101(b)(1)(C) (2014).

134. See, e.g., 5 U.S.C. § 8341(a)(4) (2012) (describing survivor annuities for civil service members); Civil Liberties Act Redress Provision, 28 C.F.R. § 74.2(d) (2013); Retired Federal Employees Health Benefits, 5 C.F.R. § 891.102 (2014).

135. See *infra* notes 139–42 and accompanying text.

136. See *infra* notes 145–55 and accompanying text.

137. See *infra* notes 151–55 and accompanying text.

138. As one federal advisory group put it, with regard to programs that are national in scope, whether a particular person is entitled to critical benefits “should not depend on . . . the laws of the State in which the person happens to live.” 1965 ADVISORY COUNCIL ON SOC. SEC., PART 3: IMPROVEMENTS IN THE CASH-BENEFIT PROVISIONS, available at <http://www.ssa.gov/history/reports/65council/65part3.html>.

139. Act of Oct. 6, 1917, Pub. L. No. 65-90, § 22, 40 Stat. 398, 401. For a comprehensive overview of the modern veterans’ benefits system, see James D. Ridgway, *Recovering an*

The Act governed “salary, benefits, and insurance for all American service members in World War I, along with the treatment of disabled veterans.”¹⁴⁰ In the original enactment of children’s benefits under the Act, the term child was defined by an entirely independent federal standard, which included some illegitimate children. Specifically, the Act defined the term child to include, among others, “[a]n illegitimate child . . . if [the father] acknowledged by instrument in writing signed by him, or if he has been judicially ordered or decreed to contribute to such child’s support.”¹⁴¹ Notably, in the vast majority of states at that time, nonmarital children were considered the children of their fathers under state family law *only* if the child’s parents married.¹⁴² As a result, under this federal definition, some nonmarital children were eligible for benefits even though they were not considered children as a matter of state family law.

A number of federal military benefits programs that were adopted during the same time period did not incorporate such an expansive definition of child.¹⁴³ Thus, there was not a concerted, across-the-board attempt by the federal government to be more inclusive of nonmarital children.¹⁴⁴ But, as the War Risk Insurance Act of 1917 illustrates, Congress, at times, was more protective than the states.

In other instances, Congress initially chose to follow state family status standards (or simply failed to include definitions at all and the practice became to defer to state law). But Congress thereafter amended the statutes to include additional, independent federal standards that were more inclusive of nonmarital children after determining that solely deferring to state law produced unfair results. For example, the original provisions of the Social Security Act governing children’s benefits largely, although not entirely, deferred to state intestacy law.¹⁴⁵ But in 1965, drawing upon earlier federal statutes governing benefits for the family members of veterans,¹⁴⁶ Congress

Institutional Memory: The Origins of the Modern Veterans’ Benefits System from 1914 to 1958, 5 VETERANS L. REV. 1, 7–8 (2013).

140. Ridgway, *supra* note 139, at 8.

141. § 22, 40 Stat. at 401.

142. For example, writing in 1919, Professor Ernst Freund found that “most American States provide for legitimation of illegitimate children by the marriage of the parents, [but] only a minority of States permit legitimation without such marriage.” FREUND, *supra* note 128, at 22. And again, under the law at that time, “the father and the illegitimate child are by the common law strangers to each other.” *Id.* at 21–22.

143. See, e.g., Pay Readjustment Act of 1922, Pub. L. No. 67-235, § 4, 42 Stat. 625, 627 (containing no definition of the term “child”).

144. See Collins, *supra* note 101, at 2188 (describing how federal “officials made determinations regarding the father-child relationship in different cases for different reasons, but the very pliability of the definitions of marriage and legitimacy made them useful in the enforcement of various policy goals, including the nativist aspirations of American nationality laws at the time”).

145. See Joslin, *supra* note 24, at 1488 (“Under the original 1939 amendments, the primary way a child could demonstrate eligibility was by showing she was entitled to intestate succession as a child under state intestacy law.”); see also Social Security Act Amendments of 1939, 42 U.S.C. § 416(h)(2)(A) (2012)) (providing that a person is entitled to child’s Social Security benefits if he or she “would have the same status relative to taking intestate personal property as a . . . child”).

146. 1965 ADVISORY COUNCIL ON SOC. SEC., *supra* note 138 (noting that there were earlier

amended the Social Security Act to include additional means of establishing eligibility for children's Social Security benefits. And notably, while these additional standards drew from state law, they were not dependent upon state law or the state in which the child or the insured resided.¹⁴⁷ Specifically, Congress permitted nonmarital children to establish eligibility for children's Social Security benefits if the insured had

acknowledged in writing that the applicant is his or her son or daughter, . . . been decreed by a court to be the mother or father of the applicant, . . . been ordered by a court to contribute to the support of the applicant because the applicant [was] his or her son or daughter, . . . or . . . [was] shown by evidence satisfactory to the Commissioner of Social Security to [have been] the mother or father of the applicant.¹⁴⁸

In some states at this time, one or more of these acts would be sufficient to enable the nonmarital child to inherit through his father; but, even in 1965, it remained the case in some states that nothing short of marriage to the child's mother would suffice.¹⁴⁹ Thus, by adopting these eligibility standards across the board without regard to the law in the child's or the father's domicile, some children were eligible for Social Security benefits through their fathers even though they were not considered their fathers' children as a matter of state law.¹⁵⁰

With regard to the 1965 amendments of the Social Security Act, the legislative history makes clear that the decision to override state law and adopt a uniform, more inclusive federal definition of child was deliberate. After studying the issue, the 1965 Advisory Council on Social Security stated that the then-existing definition in the Social Security Act, which relied almost exclusively on state family status standards, excluded some clearly deserving children from eligibility.¹⁵¹ To resolve this unfairness, the Advisory Council recommended adding some independent federal family status

examples of federal acts that extended benefits to "children who [did] not meet the definition of 'child' under State law"); *see also* Act of Sept. 2, 1958, Pub. L. No. 85-857, § 101(4), 72 Stat. 1105, 1106 (defining "child").

147. Social Security Act Amendments of 1965, Pub. L. No. 89-97, § 339(a), 79 Stat. 286, 40910 (codified as amended at 42 U.S.C. § 416(h)(3)(C)(i) (2012)); *see also* Joslin, *supra* note 24, at 1488-89.

148. 42 U.S.C. § 416(h)(3)(C) (2012).

149. *See* KRAUSE, *supra* note 125, at 19-20; *see also* S. REP. NO. 89-404, at 109-10 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2049-50 ("The States differ considerably in the requirements that must be met in order for a child born out of wedlock to have inheritance rights. In some States a child whose parents never married can inherit property just as if they had married; in others such a child can inherit property as the child of the man only if he was acknowledged or decreed to be the man's child in accordance with requirements specified in the State law; and in several States a child whose parents never married cannot inherit his father's intestate property under any circumstances."); FREUND, *supra* note 128, at 22 ("While most American states provide for legitimation of illegitimate children by the marriage of the parents, only a minority of States permit legitimation without such marriage.").

150. *See supra* note 126.

151. 1965 ADVISORY COUNCIL ON SOC. SEC., *supra* note 138 (concluding that because the program is national in scope, eligibility should not be dependent on whether the child would be protected as a matter of state law).

standards to the Act.¹⁵² Moreover, federal officials clearly understood that in doing so, they were establishing and adopting a federal standard of who qualified as a child.¹⁵³ As the Advisory Council explained:

The social security program is national in scope . . . and the program is intended to pay benefits as a partial replacement of lost support to those relatives of the worker who normally look to him for support. The Council believes that in such a program whether a child gets benefits on the earnings record of a person who has been determined to be his father and who has an obligation to support him *should not depend on whether he can inherit that person's intestate personal property under the laws of the State in which the person happens to live.*¹⁵⁴

Congress ultimately accepted the Council's recommendation. As a result of the addition of these new federal standards, some people who were not considered children as a matter of state intestacy law were entitled to children's Social Security benefits.¹⁵⁵ To be clear, although there was a growing concern at the time about the legal treatment of nonmarital children,¹⁵⁶ greater protection was yet mandated as a matter of constitutional law.¹⁵⁷ It was not until three years later—in 1968—that the Supreme Court issued the first in a series of decisions striking down state laws that

152. *Id.*

153. See Recent Development, *Illegitimates: Definition of "Children" Under Federal Welfare Legislation*, 67 COLUM. L. REV. 984, 989–90 (1967) ("Congress seems to have recognized recently the irrationality of referring to restrictive state law under a statutory scheme designed to benefit dependents. . . . The legislative history of the [1965] amendments indicates a congressional belief that, in a program designed to benefit children handicapped by the loss of a father's earning capacity, a child's recovery 'should not depend on whether he can inherit his father's intestate personal property under the laws of the state in which the father happens to live.'" (quoting S. REP. NO. 404, 89th Cong., 1st Sess. 110 (1965))).

154. 1965 ADVISORY COUNCIL ON SOC. SEC., *supra* note 138 (emphasis added); see also 1965 ADVISORY COUNCIL ON SOC. SEC., SUMMARY OF MAJOR FINDINGS AND RECOMMENDATIONS, available at <http://www.ssa.gov/history/reports/65council/65summary.html> ("A child should be paid benefits based on his father's earnings without regard to whether he has the status of a child under State inheritance laws if the father was supporting the child or had a legal obligation to do so."); S. REP. NO. 89-404, at 110 (1965), reprinted in 1965 U.S.C.C.A.N. 1943, 2050 ("The committee believes that in a national program that is intended to pay benefits to replace the support lost by a child when his father retires, dies, or becomes disabled, whether a child gets benefits should not depend on whether he can inherit his father's intestate personal property under the laws of the State in which his father happens to live.").

155. See *supra* note 126.

156. See Harry D. Krause, *Bringing the Bastard into the Great Society—A Proposed Uniform Act on Legitimacy*, 44 TEX. L. REV. 829, 830 (1966) ("Progressive legislation has sought to abolish the concept of illegitimacy to the extent that it disadvantages the child of known parents.").

157. See Laurence C. Nolan, "Unwed Children" and Their Parents Before the United States Supreme Court from Levy to Michael H.: *Unlikely Participants in Constitutional Jurisprudence*, 28 CAP. U. L. REV. 1, 1 (1999) ("Between 1968 and 1989, the United States Supreme Court decided more than thirty cases involving unwed parents and their children.").

discriminated against illegitimate children.¹⁵⁸

As is true with the Social Security Act, some military benefits programs initially were less inclusive of nonmarital children. But again, in some instances, Congress later recognized the unfairness of using only state law definitions of child and added independent, more inclusive federal definitions. In 1971, for example, Congress amended the Servicemen's Group Life Insurance (SGLI) program to be more (although not fully) inclusive of nonmarital children.¹⁵⁹ SGLI is a low-cost insurance program for, among others, active duty members of the U.S. Army, Navy, Air Force, Marines, and Coast Guard.¹⁶⁰ Initially, the provisions governing the program did "not define the terms widow, widower, child, or parent for SGLI purposes, thus presumably leaving such definitions to local State law."¹⁶¹ Over time, however, Congress concluded that relying on state law resulted in the denial of benefits to some children who were deserving of the protection of the program. Moreover, as the Social Security Advisory Council concluded,¹⁶² Congress determined that relying on state definitions resulted in unfair results; a child's eligibility may depend on which state's law applied. This, Congress determined, was inappropriate. As explained in the Senate Report, "The greatest need for uniformity is in the area of children and parents."¹⁶³ To remedy this unfairness, Congress replaced a rule that deferred to the relevant state's definition of child to an independent and uniform federal definition.¹⁶⁴ This new federal definition drew upon various states' definitions,¹⁶⁵ but whether a particular child was eligible did not depend on whether the child or the father was living in one of the states that followed these standards.¹⁶⁶

158. See Maldonado, *supra* note 23, at 351–52 ("Starting in 1968, the Court recognized that 'illegitimate children . . . are clearly "persons" within the meaning of the Equal Protection Clause' and later held that it is 'illogical and unjust' to punish children for their parents' actions. In a series of decisions over the next twenty years, the Court struck down numerous laws denying nonmarital children many of the rights available to marital children, including the right to damages for the wrongful death of a parent, the right to paternal support, intestate succession, and government benefits." (alteration in original) (footnotes omitted)).

159. Act of Dec. 15, 1971, Pub. L. No. 92-185, 85 Stat. 642 (codified at 38 U.S.C. § 1965(8) (2012)).

160. *Servicemembers Group Life Insurance (SGLI)*, U.S. DEP'T OF VETERANS AFFAIRS, <http://benefits.va.gov/insurance/sgli.asp>.

161. S. REP. NO. 92-545, at 1 (1971).

162. 1965 ADVISORY COUNCIL ON SOC. SEC., *supra* note 138.

163. S. REP. NO. 92-545, at 2.

164. *Id.* ("[T]here should be . . . uniformity in determining the appropriate beneficiaries under that program."); see also Pub. L. No. 92-185, 85 Stat. 642 (codified at 38 U.S.C. § 1965(8) (2012)) (defining the term "child").

165. S. REP. NO. 92-545, at 2 (adopting "the most widely accepted criteria established by State law and the judicial precedents for establishing that an illegitimate child is the child of his alleged father").

166. Among other standards, a person would be considered a child for purposes of Servicemen's Group Life Insurance if "proof of paternity is established from service department . . . records . . . which show that with his knowledge the insured was named as the father of the child." Act of Dec. 15, 1971, Pub. L. No. 92-185, 85 Stat. 642 (codified at 38 U.S.C. § 1965(8) (2012)).

The Copyright Act is another federal program that was later amended to include an independent federal definition of child. The Copyright Act ironically is a federal law that is often cited to support the conventional narrative that family status determinations are matters exclusively reserved to the states. Numerous briefs and law review articles cite the copyright case *De Sylva v. Ballentine*¹⁶⁷ for this proposition. For example, in their Brief to the Supreme Court, the Federalism Scholars asserted that the Supreme Court in *De Sylva* relied on the principle that “determining family status remains a State power.”¹⁶⁸

While it is true that the Court did defer to state family status rules in *De Sylva*, it did so because the statute at that time did not contain a definition of child or children.¹⁶⁹ But a more complete history of the Copyright Act actually undermines the conventional narrative. In 1976, twenty years after the Court’s *De Sylva* decision, Congress amended the Copyright Act to include an independent federal definition of children.¹⁷⁰

Moreover, these federal definitions of child are not a thing of the past. Many of the federal definitions discussed herein are still in effect today.¹⁷¹ And it is not just that we continue to feel the effects of long-ago enacted provisions. On the contrary, new federal definitions of child continue to be drafted by Congress and enacted into law. For example, when Congress enacted the Family Medical Leave Act of 1993, it included a very broad definition of child.¹⁷² Specifically, the statute defines “son or daughter” to include the “child of a person standing in loco parentis” even if that parent-child relationship is not recognized as a matter of state law.¹⁷³

In sum, while many federal statutes do in fact defer solely or primarily to state family status rules,¹⁷⁴ there are many that do not; many federal statutes contain independent

167. 351 U.S. 570 (1956).

168. Federalism Scholars’ Brief, *supra* note 12, at 27–28.

169. *De Sylva*, 351 U.S. at 580 (noting that under the “general scheme of the statute,” Congress must look to state law to determine whether various family relationships exist).

170. See Pub. L. No. 94-553, § 101, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2012)) (defining “a person’s children” to mean a “person’s immediate offspring, whether legitimate or not, and any children legally adopted by that person”); *cf.* Recent Development, *supra* note 153, at 987–88 (“The *De Sylva* decision is often cited for the proposition that state intestacy law must be consulted in construing the term ‘children’ in an act of Congress. Many courts have accepted this doctrine; in all but one of the recent cases, however, the state law treated illegitimates as ‘children’ for purposes of intestacy. Where reference to state law would deny benefits to the illegitimate child, the lower federal courts have often departed from the strictures of the *De Sylva* rule. *Middleton v. Luckenbach Steamship Co.*, for example, espoused an independent standard permitting illegitimates to recover under the Death on the High Seas Act.” (footnotes omitted)).

171. To name just two, the Social Security Act still contains a number of independent federal definitions of child, see 42 U.S.C. §§ 416(h)(2)–(3) (2012), as does the Copyright Act, see 17 U.S.C. § 101.

172. Pub. L. No. 103-3, 107 Stat. 6 (codified as amended at 29 U.S.C. § 2601 (2012)); see also Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 407–08 (2008) (discussing the scope of the child definition and arguing that it is not broad enough).

173. 29 U.S.C. § 2611(12). The term “in loco parentis” includes “those with day-to-day responsibilities to care for and financially support a child.” 29 C.F.R. § 825.113(c)(3) (2007).

174. See *supra* notes 127–29 and accompanying text.

federal family status definitions.¹⁷⁵ And, particularly with regard to children, in many instances, Congress intentionally added independent federal definitions in order to mitigate the effects of discriminatory state laws.

2. Federal Judicial Efforts

The federal legislative branch was not alone in adopting and applying independent federal definitions of family status. This was certainly not the majority rule, but in a range of cases interpreting a number of different federal statutes, courts declared that the word child need not be interpreted consistent with state law.

This was and remains true, for example, under the Longshoremen's and Harborworker's Compensation Act (LHWCA), which "provides employment-injury and occupational-disease protection" to workers injured as a result of their work on "navigable waters of the United States, or in adjoining areas."¹⁷⁶ In assessing whether a particular person was a child within the meaning of the LHWCA, the Ninth Circuit declared in *Weyerhaeuser Timber Co. v. Marshall* that it need not be "influenced by provisions of state law."¹⁷⁷ In *Weyerhaeuser*, the court concluded that the minor was a child within the meaning of the federal statute and therefore entitled to benefits even though the minor would not have been considered a child under Washington state law.¹⁷⁸ The court's holding in *Weyerhaeuser*, that eligibility under the LHWCA is not dependent upon one's status as a child under state law, remains good law.¹⁷⁹ As the Fifth Circuit explained in a more recent case applying the statute:

Application of rigorous state law schemes for proof of paternity, designed to serve various state interests such as the orderly devolution of property, especially immovable property, is inconsistent with the history and tradition of liberal administration of benefits under the LHWCA.¹⁸⁰

The court continued, "While state law may prove helpful in that a child under state law would likely be a child under the LHWCA, the converse would not necessarily follow."¹⁸¹

175. *See supra* note 134.

176. *The Longshore and Harbor Workers' Compensation Act (LHWCA)*, U.S. DEP'T OF LABOR, <http://www.dol.gov/compliance/laws/comp-lhwca.htm>.

177. 102 F.2d 78, 81 (9th Cir. 1939) (The Act, the court explained, "provided all definitions necessary to the determination of whether claimant is a 'child' and its authority being paramount and exclusive as to the subjects on which it has legislated, it is not allowable to go beyond the Act provisions. Consequently we hold that claimant was a 'child' entitled to recovery of compensation.").

178. *Id.*

179. For example, the Longshore Deskbook, published by the U.S. Department of Labor, explains, "It is not necessary to look to state law to define these terms [related to the term 'child']". As the definition in the federal statute is complete, it controls." U.S. DEP'T OF LABOR, LONGSHORE DESKBOOK, pt. IV, at 22-23 (2014), available at http://www.dol.gov/brb/References/Reference_works/lhca/lshdesk/DBMISC.pdf.

180. *St. John Stevedoring Co. v. Wilfred*, 818 F.2d 397, 399 (5th Cir. 1987).

181. *Id.*

Similarly, in a series of cases applying the Death on the High Seas Act, federal courts declared that they need not look to state law to determine whether a particular person was a child within the meaning of the Act. Eligibility should not be based on state law, the courts explained, because this “would result in diversity and lack of uniformity” with regard to who is eligible under the provisions.¹⁸² Or, to use the words of the Second Circuit, “To allow the law of the state of the decedent’s domicile to prevail would permit and deny for the same accident a right of recovery to relatives who were similarly related to persons killed because of residence in different jurisdictions. . . .”¹⁸³ Such a result, the court continued, would be contrary to the purpose of the statute, which was to “continue the support of dependents after a casualty.”¹⁸⁴

C. Federal Efforts To Shape State Family Status Determinations

In the sections above, I document examples in which the federal government extended federal benefits to people not considered to be legal family members under state law. But federal involvement in family status determinations is not limited solely to the distribution of federal benefits. Recent years have also seen numerous examples of federal attempts to shape state family status rules themselves, including rules governing the determination of child status.

As others have documented, the federal government began to take a more active role in child support enforcement in the 1970s. In 1974, for example, Congress added Title IV-D to the Social Security Act.¹⁸⁵ Among other things, these new provisions required all states to establish child support enforcement programs as a condition of designated federal funding.¹⁸⁶ “Since 1974, Congress has returned repeatedly to this subject. . . .”¹⁸⁷ In particular, federal law now requires (among other things) all states to have and implement guidelines for setting child support amounts, to have certain child support enforcement mechanisms in place, and to recognize and enforce out-of-state child support orders.¹⁸⁸

This federal involvement has not been limited to procedural or administrative rules with respect to child support collection. To the contrary, the federal government has increasingly taken steps to shape state laws regarding who is a child and who is a parent.¹⁸⁹

182. *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326, 329 (2d Cir. 1934).

183. *Id.* at 329.

184. *Id.* at 330.

185. Social Security Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975) (codified as amended at 42 U.S.C. §§ 651–665 (2012)).

186. Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL’Y & L. 541, 542 (1998).

187. Estin, *supra* note 35, at 284.

188. *Id.*

189. See Kerry Abrams & Brandon L. Garrett, *DNA and Distrust: Reexamining the Regulation of Genetic Identity* 34 (Univ. of Va. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 2014-41, 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2473728 (noting that the federal government has “condition[ed] federal funding on the adoption of particular state family law rules”).

Historically, state parentage rules relied primarily on marriage as a basis for assigning legal parentage.¹⁹⁰ Outside of the marital context, there were some bases for assigning parentage to nonmarital fathers.¹⁹¹ This was true due in part to the fact that, until recently, “there was no way to determine a man’s parentage with any degree of certainty.”¹⁹² In the last few decades, however, accurate and relatively inexpensive DNA testing has become widely available.¹⁹³ But “[j]ust about the time when states had the opportunity to decide what role newly-available DNA testing should play in parentage determinations, the federal government intervened,” hamstringing its choices.¹⁹⁴ Over the past four decades or so, Congress passed “a series of acts that increasingly conditioned states’ receipt of welfare funds to the identification of genetic fathers”¹⁹⁵ and, in turn, the assignment of legal parentage to them.

For example, in the 1974 amendments to the Social Security Act, Congress required unwed mothers seeking welfare benefits to participate in the process of identifying the child’s genetic father and establishing his paternity and child support obligations.¹⁹⁶ In 1988, Congress enacted the Family Support Act of 1988,¹⁹⁷ which allowed for genetic testing in paternity cases,¹⁹⁸ and “required that each state establish a minimum number of paternity declarations or face financial penalties.”¹⁹⁹

Another way in which the federal government has shaped the substance of state parentage rules is by mandating that states adopt voluntary acknowledgement of paternity (VAP) programs.²⁰⁰ “[S]tarting in the 1990s, Congress passed a series of statutes that require states to adopt a simple, administrative registration system

190. See NANCY E. DOWD, *REDEFINING FATHERHOOD*, 133 (2000) (“[B]iological fatherhood was never sufficient to establish fatherhood in the past. Marriage was the key status for defining fatherhood.”); Katharine K. Baker, *Bargaining or Biology? The History and Future of Paternity Law and Parental Status*, 14 CORNELL J.L. & PUB. POL’Y 1, 22 (2004) (“For most of western history, marriage, not blood, determined fatherhood.”).

191. See Davis, *supra* note 124, at 82 (“But while illegitimate children gained a formal connection to their mothers, non-marital fathers remained free of the legal burdens and benefits of parenthood. Though more solicitous of children’s plight than the earlier British common law, the American system perpetuated the discriminatory regime of illegitimacy, since both the child and father were typically barred from gaining any benefit from the paternal relationship . . . absent an act of formal legitimation.”).

192. Joslin, *supra* note 114, at 603.

193. *Id.* at 604.

194. Abrams & Garrett, *supra* note 189, at 36.

195. *Id.*

196. 42 U.S.C. § 654(29)(A) (2012); see also Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 345 (2005) (noting that the Act requires “welfare recipients . . . to cooperate in identifying the noncustodial parent”).

197. Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (codified as amended in scattered sections of 42 U.S.C. (2012)).

198. 42 U.S.C. § 666(a)(5)(B)(i) (2012) (corresponds to Family Support Act of 1988, § 111(b)(2), 102 Stat. 2343, 2349).

199. Murphy, *supra* note 196, at 346.

200. Leslie Joan Harris, *Voluntary Acknowledgments of Parentage for Same-Sex Couples*, 20 AM. U. J. GENDER SOC. POL’Y & L. 467, 469 (2012).

establishing the legal parentage of children born to unmarried women.”²⁰¹ A VAP is essentially a form signed by the woman and the man alleged to be the child’s father; if the form is properly filled out, filed, and not rescinded, federal law provides that it establishes the legal paternity of the man.²⁰² Although the provisions are part of state family law parentage schemes, VAPs are a “creature of federal . . . law.”²⁰³

Through these and other provisions, federal law directly impacted state family status rules. As Kerry Abrams and Brandon Garrett argue, “Had Congress not exercised its federal muscle, states quite likely would have developed . . . different approaches to establishing parentage than they currently do.”²⁰⁴

III. PLACING FAMILIES IN THE FEDERALISM DISCUSSION

Perhaps one of the reasons that the myth of family law federalism is so resilient is that it appears to make things easier. One knows which level of government is supposed to act when it comes to matters of the family—the states. Once the myth of family law’s inherent localism is dispelled, one is then left with a set of more complicated questions that, to date, have largely been overlooked.²⁰⁵ If Congress is not precluded from acting, should it act, and if so, when and how?

When questions of federal involvement in family law are considered, the analysis largely focuses on the boundaries of Congress’s power.²⁰⁶ This focus on structural limitations obscures not only a long history of federal involvement, but also consideration of these underlying normative questions.²⁰⁷ As Rena Steinzor explains, the focus on whether there is an across-the-board limit to Congress’s power distracts commentators and policymakers from grappling with “the appropriate question: whether there are compelling reasons why a particular level of government is best suited to grapple with a specific problem.”²⁰⁸

Just because the federal government is not completely precluded from making family status determinations does not mean that the federal government has unlimited powers in this area. Congress, of course, must act in ways “that [are]

201. Joslin, *supra* note 115, at 44.

202. Harris, *supra* note 200, at 475.

203. *Id.*

204. Abrams & Garrett, *supra* note 189, at 42.

205. There is a small body of scholarship engaging these questions. *See generally, e.g.*, Estin, *supra* note 35; Resnik, *Categorical Federalism*, *supra* note 37.

206. *See generally, e.g.*, Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, CATO SUP. CT. REV., 2012–2013, at 117.

207. Estin, *supra* note 35, at 271 (noting that “the federalism tropes that pervade our political and judicial discourse” about family law have obscured more careful analysis of these questions). Of course, family law is not the only area of law in which invocations of federalism are used to avoid grappling with more difficult normative questions. *See, e.g.*, Chemerinsky, *supra* note 36, at 534 (“[T]he critical question is: When is it necessary or preferable to regulate at the national level rather than on a decentralized basis? Unfortunately, too often careful analysis has been absent and federalism has been used as a slogan or as a guise to hide the real issue in dispute. For example, during the debate over civil rights in the 1950s and 1960s, opponents talked about federalism and states’ rights rather than the real issue: racial equality.”).

208. Steinzor, *supra* note 88, at 131.

rationally related to the implementation of a constitutionally enumerated power.”²⁰⁹ That said, contrary to the conventional narrative, Congress’s discretion here is quite wide.²¹⁰ First, Congress certainly can, and long has, decided who are family members for purposes of federal benefits (or the imposition of federal obligations). Moreover, as described in Part II.C, at times the federal government has shaped some *state* family status rules.

Turning back to the normative questions, this Article does not offer a simple rubric for answering them. It does, however, provide a set of values or factors that should guide the assessment of when and how the federal government should participate in the realm of family status determinations.

These factors draw from the work of federalism scholars. These scholars identify a number of values associated with local action on the one hand and with federal or centralized action on the other.²¹¹ Other academics apply these values to a range of specific substantive areas of law.²¹² For example, even though immigration is historically understood as a federal issue, there is a burgeoning body of literature examining the role of the state and local governments in that area.²¹³ However, because “the family and its law are deemed, either descriptively or normatively, to be special,”²¹⁴ family law has largely been absent from this discussion. This Part bridges the family law exceptionalism divide by bringing family law into this important conversation.

209. *United States v. Comstock*, 130 S. Ct. 1949, 1956 (2010).

210. To be clear, it is certainly true that the definition of spouse in DOMA differs in critical respects from the examples discussed above. None of the federal family status standards discussed above apply across all federal benefits schemes. Indeed, some of the federal family status definitions examined herein apply to only one particular benefit. That said, some of the federal definitions of child discussed above are used across a fairly broad range of federal benefits programs. For example, in the military and veterans benefits contexts, some federal definitions of child apply across a range of military and veterans benefits programs. *See* Joslin, *supra* note 24, at 1504 (noting that in 1929, Congress adopted a definition of child for purposes of a number of military benefits provisions and that this definition, “as slightly broadened in 1942, [has] since been carried over into a range of federal military and veterans’ benefits provisions” (footnote omitted)); *see also* *Frontiero v. Richardson*, 411 U.S. 677, 681 n.6 (1973) (noting that the housing provisions of the Career Compensation Act of 1949 “retained in substance the dependency definitions of §4 of the Pay Readjustment Act of 1942 (56 Stat. 361)” and that “this provision was itself derived from unspecified earlier enactments”).

211. *See* Huntington, *supra* note 30, at 827 (“[The federalism] debate has yielded certain core values that scholars and courts use to try to answer questions of institutional structure and allocation of authority.”). *See generally, e.g.*, Chemerinsky, *supra* note 36 (discussing the values associated with federalism).

212. *See supra* notes 30–32.

213. *See supra* note 30.

214. Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 753 (2010); *see also* HASDAY, *supra* note 34, at 15 (observing that “‘family law’ can be thought of as a system of exemptions from the everyday rules that would apply to interactions among people in a non-family context” (quoting Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1207 (1999))).

A. The Values of Federalism: For and Against

To begin this engagement, this Subpart provides an overview of the values of local or state assertions of power on the one hand,²¹⁵ and of federal action or “centralization” on the other. Then I apply these interests to the issue of family status determinations.

An important factor favoring local or more decentralized action is experimentation.²¹⁶ Allowing states to act, rather than the federal government, can foster innovation because there are more actors.²¹⁷ In addition, because any decision impacts a smaller portion of the overall population, state or local governments may be more likely to try out new ideas or solutions. As Justice Brandeis once said, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²¹⁸ Local action can also result in competitive innovation since there are fifty jurisdictions competing for citizens.²¹⁹ And this competition can produce a number of positive benefits including efficiency and effectiveness.²²⁰

At times, this experimentation may further individual liberties,²²¹ which is another important value that should be considered. As Erwin Chemerinsky explains, “Federalism is most likely to enhance liberty when state governments are expanding the scope of individual rights beyond those protected by the federal government.”²²²

And because state governments and their decisions are (arguably) more reflective of the local population,²²³ state action promotes a sense of community and community buy-in.²²⁴ In this way, localism can “enhance[] democratic rule by providing

215. See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2213–14 (1998) (noting that asserted values of state or local action include: “increasing opportunities for political participation; maximizing choice and utility through state or local government competition and citizens’ rights of exit; maintaining opportunities for creation or preservation of diverse cultures; providing opportunities for experiment and beneficial innovation; maintaining the possibility of checks on oppression by the federal government; and enhancing personal and group liberty or empowerment, by providing multiple layers of government to which citizens may appeal” (footnotes omitted)).

216. Huntington, *supra* note 30, at 827; see also Chemerinsky, *supra* note 36, at 525 (describing one of the values of federalism as “allowing states to be laboratories for new ideas”).

217. See Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 97 (2002) (“Admirers of federalism often point to the autonomy accorded to the states as a source of beneficial creativity and experimentation.”).

218. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

219. Goldfarb, *supra* note 217, at 101–05 (noting the value of competition).

220. See Huntington, *supra* note 30, at 827.

221. See SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 387 (1993).

222. Chemerinsky, *supra* note 36, at 538.

223. Goldfarb, *supra* note 217, at 99–100 (noting that local laws may better “reflect . . . local conditions and culture”).

224. See BEER, *supra* note 221, at 386.

government that is closer to the people.”²²⁵ Some argue that when government is closer to the people,²²⁶ citizens are more likely to participate, and, in turn, there is more “political accountability.”²²⁷ This more accountable state government places a “check[] against national power, protecting both states’ rights and individual rights.”²²⁸ It helps “prevent[] national tyranny,”²²⁹ and promote liberty.²³⁰

On the other hand, there are other values that can be furthered by national, as opposed to local, action. Centralization can promote uniformity; there is one set of rules governing all citizens.²³¹ At times, uniformity is necessary to ensure fairness and equality.²³² And while localism can prevent national tyranny, special interests can also take over local governments.²³³ Where this is true, centralized action at the national level may be necessary to “correct for market imperfections and failures.”²³⁴ This national correction may also be necessary when local action thwarts rather than furthers the goal of protecting individual liberties. Other values of centralized action can include “speed, coordination, and expertise.”²³⁵

B. Applying the Values of Federalism to Family Status Determinations

In thinking about how these values of federalism apply in the context of family law, there are lessons we can draw from history. One value that is particularly significant in the context of families is liberty. Questions of family status are critically important. A person’s status as a child or a spouse may entitle her to a wide array of important rights and protections.²³⁶ People who are “children” generally are

225. Chemerinsky, *supra* note 36, at 525.

226. Goldfarb, *supra* note 217, at 105–07.

227. Huntington, *supra* note 30, at 828.

228. *Id.*; see also Goldfarb, *supra* note 217, at 107–09.

229. Chemerinsky, *supra* note 36, at 503.

230. See BEER, *supra* note 221, at 386.

231. Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1845 (2005) (“National policies are obviously better where uniformity is a prime virtue . . .”).

232. See Huntington, *supra* note 30, at 828–29. See generally DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995).

233. Young, *supra* note 231, at 1845 (“[N]ational action has been thought to mitigate the problem of faction in smaller political communities and, in consequence, to provide a good vehicle for the protection of individual rights.”).

234. Huntington, *supra* note 30, at 829. See generally SHAPIRO, *supra* note 232.

235. Daniel Abebe & Aziz Z. Huq, *Foreign Affairs Federalism: A Revisionist Approach*, 66 VAND. L. REV. 723, 786 (2013); see also Young, *supra* note 231, at 1845 (noting that “the national government may also enjoy advantages of administrative efficiency and the concentration of expertise”).

236. With regard to adult relationships, the federal General Accounting Office identified over 1000 federal rights and responsibilities that are extended to people because they are legal spouses. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Hon. Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>; see also Catherine E. Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1603–08 (2013) (discussing important benefits that a child may be denied if she lacks a legally recognized parent-child relationship).

entitled to receive financial support from their parents,²³⁷ to receive Social Security benefits in the event of the death or disability of a parent,²³⁸ to inherit intestate through their parents,²³⁹ and to sue for the wrongful death of a parent.²⁴⁰ People who are considered “spouses” are extended hundreds of protections because they are spouses.²⁴¹ Among many other rights, spouses get property protections in the event of divorce²⁴² or the death of a spouse,²⁴³ and the right to access a spouse’s Social Security benefits in the event of the death or disability of a spouse.²⁴⁴ Moreover, forming families and having children may be decisions that are important to a person’s own identity or sense of him or herself. As the Supreme Court has explained, “[D]ecisions relating to marriage, procreation, contraception, family relationships, [and] child rearing”²⁴⁵ are important, indeed, fundamental interests in part because these decisions concern some of the “most intimate and personal choices . . . central to personal dignity and autonomy.”²⁴⁶ For these and other reasons, these issues are of constitutional dimension and import.²⁴⁷

But, as the history described above reminds us, there is no one level of government that always or best protects these important interests or liberties.²⁴⁸ Despite the deeply held wariness of federal involvement in family law,²⁴⁹ the federal

237. Joslin, *supra* note 117, at 1198–99 (noting that “in all fifty states, all legal parents—including nonmarital parents—are required to provide financial support for their children” (footnote omitted)).

238. *Id.* at 1210 (noting the various ways a person can establish he or she is entitled to children’s Social Security benefits).

239. Maldonado, *supra* note 23, at 357–58 (noting that nonmarital children are entitled to intestate succession through their fathers if the fathers’ parentage was established).

240. See Joslin, *supra* note 24, at 1486–99.

241. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955 (Mass. 2003) (“The benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death. The department states that ‘hundreds of statutes’ are related to marriage and to marital benefits.”).

242. Laura A. Rosenbury, *Two Ways To End a Marriage: Divorce or Death*, UTAH L. REV., 2005, at 1227, 1230 (“Although variations exist among the states, every state’s default approach is now designed to effectuate an equal or equitable division of all property accumulated from wages during marriage, regardless of the title of that property.” (footnotes omitted)).

243. Joslin, *supra* note 52, at 1686 (“[I]n the event that one of the spouses dies prior to obtaining a divorce, the surviving spouse in almost every state will be entitled to a share of the deceased’s estate.”).

244. Joslin, *supra* note 24, at 1488 (“[H]eterosexual spouses are entitled to Social Security spousal derivative benefits upon certain triggers—death, retirement, or disability of the wage earner.” (footnote omitted)).

245. *Lawrence v. Texas*, 539 U.S. 558, 574 (2003).

246. *Id.* (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

247. See *id.*; see also *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding unconstitutional Illinois’ failure to recognize and protect a nonmarital father’s relationship with his children).

248. Cf. Resnik, *Categorical Federalism*, *supra* note 37, at 417 (“Equality is not an artifact of the level of a court or of a government body but of who has power within it and what their commitments are.”).

249. See Patterson, *supra* note 99, at 399 (“Because family policy is closely connected to community norms and local social cohesion, such [federal] disruptions can have deleterious social effects that were neither anticipated nor desired by Congress.”); see also David B. Cruz,

government has, at times, intervened in the name of greater protection and fairness. For example, when some states resisted extending greater protection to nonmarital children, the federal government amended a variety of statutes, including the Social Security Act,²⁵⁰ to override this state-level discrimination against certain families.²⁵¹ As Collins and Villazor show us, however, there are contrary examples as well—instances where the federal government refused to apply and enforce family status rules in order to further racially discriminatory ends.²⁵² Thus, at times, the states have led the way, and at other times, federal intervention has been necessary in order to move states that were slow to act. Policymakers should remain attuned to this value of liberty, but as the history detailed herein reminds us, no one level of government consistently best protects this end.²⁵³

Experimentalism is also particularly important in the area of family law. Family law is dynamic.²⁵⁴ Families are constantly changing. More and more families are forming and living outside of marriage.²⁵⁵ Increasing numbers of families are blended families.²⁵⁶ There are also many intergenerational families living together.²⁵⁷ Technology is changing as well; it is now possible to create families through in vitro fertilization and surrogacy.²⁵⁸ And the law needs to adapt to fit these new realities.²⁵⁹

The Defense of Marriage Act and Uncategorical Federalism, 19 WM. & MARY BILL RTS. J. 805, 807 (2011) (critiquing claims that the federal government categorically lacks power to act in the area of family law and instead offering “a more nuanced, uncategorical approach relying not on ‘traditional government functions’ analysis but instead on the coincidence of a number of factors arguably rendering DOMA section 3 improper on federalism grounds” (footnote omitted)).

250. See *supra* notes 146–55 and accompanying text.

251. See *supra* Part II.B.

252. See *supra* notes 106–11 and accompanying text.

253. Cf. Resnik, *Categorical Federalism*, *supra* note 37, at 417 (“I am opposed to what I have termed ‘categorical federalism,’ to rigid equation of any particular level of governance with a particular set of problems or a particular view of them.” (footnote omitted)).

254. See David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. 125, 125 (2006) (“For at least four decades, family law in the United States has been undergoing a most dramatic transformation.”).

255. See Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1384 (2001) (“Statistics show that the number of cohabiting opposite-sex couples has continued to increase dramatically. . . .”); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 313 (2008) (“Between 1970 and 2000, the number of U.S. unmarried-cohabitant households rose almost ten-fold, from 523,000 to 4,880,000 [sic].”).

256. Robert H. Binstock, *Public Policies on Aging in the Twenty-First Century*, 9 STAN. L. & POL’Y REV. 311, 320 (1998) (noting that “[a]lready . . . blended families constitute about half of all households with children” and that this number will only increase).

257. See Shelly Kreiczler-Levy, *Intergenerational Relations and the Family Home*, 8 LAW & ETHICS HUM. RTS. 131, 138 (2014) (examining the “increasingly important multigenerational family”).

258. Joslin, *supra* note 114, at 602 (“The increasing availability of alternative insemination and IVF has in turn resulted in greater numbers of families created through surrogacy.”).

259. JOANNE L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 6 (2011) (chronicling the “massive evolution” of family law in the twentieth century).

Often, the direction in which family law should go is not simple or entirely clear. And in these circumstances, local experimentation can be particularly valuable. As Ann Laquer Estin explains, “Sometimes experimentation is useful in finding policy solutions to our most difficult family policy problems, and a single national approach may unduly limit those possibilities.”²⁶⁰

One current example of an issue on which local experimentation arguably is (and has been) helpful is surrogacy. Currently, the law around the country is mixed on the issue. “Some states expressly prohibit surrogacy agreements, other states permit surrogacy in certain, delineated circumstances.”²⁶¹ Of the states that permit surrogacy, the rules governing enforceable arrangements vary significantly.²⁶² Some jurisdictions very tightly regulate the process of surrogacy, requiring court intervention at multiple points in the process and, for example, requiring a home study of the intended parents unless waived by the parties.²⁶³ Other states that permit surrogacy impose fewer requirements on the parties involved in the process.²⁶⁴ Given the lack of consensus about surrogacy generally²⁶⁵ and the best way to regulate it specifically, there may be significant value in allowing state-level experimentation to play out.²⁶⁶

Another family status issue that may benefit from local experimentation is the legal status of posthumously born children²⁶⁷—that is, children who are conceived “*after* the death of one or both of their genetic parents.”²⁶⁸ States are still grappling with the questions of whether and under what circumstances posthumously born children are the legal children of their deceased, biological parent. Many states have yet to address the issue statutorily.²⁶⁹ In states that have addressed the legal status of

260. Estin, *supra* note 35, at 334.

261. COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, *LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW* § 4:1, at 249 (2014).

262. *See id.* at § 4:2 (describing statutory requirements).

263. *See id.*

264. The statutory provisions in California and Illinois arguably fall into this category. *See id.*

265. *See generally* Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 *LAW & CONTEMP. PROBS.* 109 (2009) (describing the political debate about surrogacy).

266. On the other hand, however, given the great number of cases that involve some interstate component, it also may be an issue on which uniformity of treatment is important if not critical. *See, e.g.*, Katherine Drabiak, Carole Wegner, Valita Fredland & Paul R. Helft, *Ethics, Law, and Commercial Surrogacy: A Call for Uniformity*, 35 *J.L. MED. & ETHICS* 300, 306 (2007) (arguing that “federal legislation [with regard to surrogacy would] provide[] some uniformity to temper disparate state legislation”).

267. Currently, at least some federal statutes (including the Social Security Act) look to state law to decide this question. *See Astrue v. Capato*, 132 S. Ct. 2021, 2034 (2012) (“[T]he law Congress enacted calls for resolution . . . by reference to state intestacy law. We cannot replace that reference by creating a uniform federal rule the statute’s text scarcely supports.”). In the wake of the *Capato* decision, however, some commentators have called for the adoption of a uniform federal rule. *See, e.g.*, Alycia Kennedy, Note, *Social Security Survivor Benefits: Why Congress Must Create a Uniform Standard of Eligibility for Posthumously Conceived Children*, 54 *B.C. L. REV.* 821, 823 (2013) (arguing that “posthumously conceived children should not have to rely on state intestacy statutes to qualify for benefits”).

268. Charles P. Kindregan, Jr. & Maureen McBrien, *Posthumous Reproduction*, 39 *FAM. L.Q.* 579, 579 (2005) (emphasis in original).

269. Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath*

these children, the rules vary.²⁷⁰ Here again, given the newness of the issue, there may be value in allowing experimentation to occur before adopting a single, uniform rule.

This is not to say that the states will always move in what we consider to be the “right” direction. But because what the “right” direction is may remain unclear at a given moment in time, it may be beneficial to allow states to develop a variety of approaches and to be able to see those approaches in action.

Our past reveals other instances when some benefit was derived from local experimentation with parentage rules. One past example relates to the legal treatment of nonmarital children. As noted above, historically, children born outside of marriage were subjected to harsh treatment under the law.²⁷¹ Initially much (although not all)²⁷² of the work to mitigate historic discrimination against nonmarital children was at the state level.²⁷³ For example, in the first half of the twentieth century, both Arizona and Oregon formally eliminated the distinction between marital and nonmarital children.²⁷⁴ Other states followed, although many did so in a much slower and more piecemeal fashion.²⁷⁵

The federal government drew upon this state-level experimentation. When Congress amended the Social Security Act in 1965 to extend greater protection for some nonmarital children, it borrowed from the more inclusive state standards that existed at the time.²⁷⁶ Similarly, when Congress amended the Servicemen’s Group Life Insurance program in 1971 to include a definition of child, it drew from more protective state-based examples.²⁷⁷ Indeed, as the Senate report on the bill notes, the amendment “adopt[ed] the most widely accepted criteria established by State law.”²⁷⁸

Children, 16 GEO. MASON L. REV. 403, 412 (2009) (“Most state legislatures have not enacted statutes that specifically deal with the inheritance rights of posthumously conceived children.”).

270. *Id.* at 426 (“Some variations exist, however, among these statutes.”).

271. See Maldonado, *supra* note 23, at 346 (“No one would dispute that for most of U.S. history, ‘illegitimate’ children suffered significant legal and societal discrimination.” (footnote omitted)).

272. See *supra* Part II for examples of federal experimentation on this issue.

273. See KRAUSE, *supra* note 125, at 5 (noting that some states had adopted a “highly progressive” approach to nonmarital children with “some states having sought to abolish the status of illegitimacy by legislative fiat”); see also Note, *Status of Issue of Void Marriages*, 56 HARV. L. REV. 624, 625 (1943) (noting that “statutes have been enacted in nearly all the jurisdictions with the purpose of alleviating the predicament of the illegitimate child”). That said, progress on this front was admittedly slow.

274. See Krause, *supra* note 156, at 845 (noting that Arizona and Oregon statutes extended to illegitimate children the “same legal status as children of divorced parents”); see also H. Paul Breslin, Note, *Liability of Possible Fathers: A Support Remedy for Illegitimate Children*, 18 STAN. L. REV. 859, 866 (1966) (“Only two states (Arizona and Oregon) have statutes that give an illegitimate child the status rights to which a legitimate child is entitled.”).

275. See Peter Wendel, *Inheritance Rights and the Step-Partner Adoption Paradigm: Shades of the Discrimination Against Illegitimate Children*, 34 HOFSTRA L. REV. 351, 389 n.205 (2005) (noting the partial attempts by the state of Illinois to reduce the harshness of the law’s treatment of illegitimate children).

276. See *supra* notes 151–55 and accompanying text.

277. See *supra* notes 164–65 and accompanying text.

278. S. REP. NO. 92-545, at 2.

Over time, however, there may be diminishing returns from state experimentation. This may be the case where there has been sufficient airing of the issue and a general consensus or trend has emerged. At this point, the value of experimentation may be outweighed by other concerns, including liberty concerns, as well as a desire to provide families with a greater degree of uniformity. When this is the case, (more) federal involvement may be appropriate.

While there is benefit to uniformity in almost all areas of law, uniformity and certainty are particularly salient in the context of family status.²⁷⁹ Even if people do not have a clear sense of all of the rights they are entitled to by virtue of being a spouse or child, they nonetheless structure their lives around the understanding that if something were to happen, there would be some safeguards in place because they are legally recognized family members. Having certainty about one's family status helps people plan for and protect their family members.²⁸⁰ For example, a person may not get around to writing a medical directive because she knows her spouse (who she trusts) will have the right to make medical decisions for her should she become incapacitated.²⁸¹

Moreover, psychologically, it may be important to people to have a sense that their family ties are secure. Indeed, it is for this reason that many people choose to get married; for many, getting married provides a sense of permanence and emotional security.²⁸² Professor Elizabeth Scott writes, "The social norms and conventions surrounding marriage influence spousal behavior in a variety of ways that reinforce the stability of the relationship."²⁸³ There is something deeply unsettling about a world in which one is considered a child or a parent for some purposes and in some places but not others. For these and other reasons, June Carbone argues, "[T]he importance of certainty about family status makes uniformity valuable for reasons that have only increased with time."²⁸⁴

The current experience with same-sex married spouses serves as a compelling illustration of how it can be confusing and practically difficult for people to have family statuses that flicker on and off as they cross various borders.²⁸⁵ Today, a

279. See Joslin, *supra* note 115, at 42 ("Parents must have assurance that, once established as legal parents as a matter of state law, their status is final and certain and will travel with them as they move about the country. . . . [F]ailure to provide certainty about a child's legal status can result in profound emotional harms for the child involved."); see also Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43, 47–48 (2014) (discussing the harms incurred by couples whose marital status is not recognized by the federal government).

280. Cf. Smith, *supra* note 236, at 1593–94 (discussing challenges families face if their family status is not recognized by other states or the federal government).

281. See *Hernandez v. Robles*, 855 N.E.2d 1, 31 (N.Y. 2006) (Kaye, C.J., dissenting) (noting that one of the "protections that the State gives to couples who do marry" is the right "to make medical decisions for each other").

282. See Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 241–42 (2004) ("Symbolically at least, this represents an expression of each spouse's willingness to be held accountable for the faithful performance of marital duties, not only by the other spouse, but also by the broader community.").

283. *Id.* at 241.

284. Carbone, *supra* note 1, at 59.

285. See Joslin, *supra* note 115, at 33 (discussing the challenges facing same-sex parent families due to the "inability for same-sex parents to maintain their legal parental status as

couple may be spouses in their home state of Iowa²⁸⁶ but legal strangers when they cross the border into Nebraska.²⁸⁷ As a result, one party may be unable to make medical decisions for his or her spouse should something happen in Nebraska while on their way home.

If and when the federal government considers becoming involved in family status determinations, there are a variety of ways in which it can act. Choosing among these various options can help the federal government weigh and balance these (sometimes) competing values.

After review, the federal government may determine that there is value in further innovation and experimentation, and that the states are generally moving in the right direction. In such circumstances, the federal government may choose to defer to state family status determinations. Such deference furthers the goal of experimentation. Moreover, because state laws determine a host of critical rights and obligations extended or owed to family members, consistent federal deference to state family status standards can ensure at least some level of uniformity. When federal law defers to state family status, it means that if one is a spouse or child for state purposes, one is also a spouse or child for federal purposes.

That said, even if federal law *always* defers to or incorporates state family status determinations, there nonetheless may be some disuniformity of family status.²⁸⁸ Again, the current experience of same-sex spouses provides a useful illustration of this point. Today, as a result of the Supreme Court's decision in *United States v. Windsor*²⁸⁹ striking down section 3 of DOMA,²⁹⁰ the federal government generally defers to a person's marital status under state law.²⁹¹ But despite this federal

they move about the country"); Steve Sanders, *The Constitutional Right to (Keep Your) Same-Sex Marriage*, 110 MICH. L. REV. 1421, 1425 (2012) ("[M]igratory same-sex couples face the prospect of wrenching disruption in their lives, loss of parental and property rights, and an array of other problems and indignities, large and small [as a result of nonrecognition laws], that a rational legal regime should not tolerate.").

286. Iowa began permitting same-sex couples to marry in 2009 as the result of a unanimous decision of that state's high court in *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

287. Nebraska's constitution provides that it both does not permit same-sex couples to marry and that it will not recognize marriages between two people of the same sex entered into in other jurisdictions. NEB. CONST. art. I, § 29 ("Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska."). This provision was upheld in *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006).

288. See Estin, *supra* note 35, at 278 (noting that "even with respect to family law matters regulated exclusively by the states, there may be horizontal or interstate conflicts").

289. 133 S. Ct. 2675 (2013).

290. 1 U.S.C. § 7 (2012) ("In 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.").

291. While the federal government does defer to state law, it is not consistent with regard to which state's law it defers. For some benefits, the federal government defers to the state of celebration; for other benefits, the federal government looks to the state of domicile. See Joslin,

deference, same-sex spouses still do not have complete certainty about their status. Instead, every time same-sex spouses or their child crosses a state line, their family status may be uncertain. This is true because even where there is vertical (that is, federal-state) recognition, there might not be horizontal or interstate recognition. At least as a matter of full faith and credit,²⁹² it has long been the case that states are not required to recognize marriages entered into in other jurisdictions.²⁹³ And today, over one-half of states still purport to refuse to recognize the marital status of same-sex spouses.²⁹⁴

Thus, while localism in the area of family status determinations may ensure vertical uniformity, it does not necessarily ensure horizontal or interstate uniformity of family status.²⁹⁵ And the reality is that families are increasingly mobile, frequently crossing state borders either on temporary trips or on a more permanent basis.²⁹⁶ Because recognition of family status raises both vertical and horizontal recognition issues, the only way to achieve complete certainty and uniformity of family status would be to have family status rules determined at the federal level, and only at that level.²⁹⁷

If the federal government believes the states are moving too slowly towards the proper rule but that further experimentation could be valuable, it could intervene in a relatively limited way. The federal government could adopt its own family status rules for a specific federal purpose, but it could continue to allow the states to use their own definitions for other purposes. One can see this type of limited, early federal intervention in the history of treatment of nonmarital children. The federal government initially did not sweep in and demand that the states adopt a particular parentage rule. Instead, for example, the federal government chose to add a more inclusive definition of child to the 1917 War Risk Insurance Act.²⁹⁸ At the time, some states were already moving in the direction of greater protection for nonmarital children; by the early twentieth century, both Arizona and Oregon formally eliminated the distinction between legitimate and illegitimate children.²⁹⁹ By following the lead of more inclusive states like Arizona and Oregon, the federal

supra note 56, at 170–71; *see generally* Kimberly Atkins, *Legal Quagmire for Same-Sex Couples After U.S. Supreme Court's DOMA Ruling*, Aug. 29, 2013, R.I. LAW. WKLY., available at 2013 WLNR 22047985.

292. The refusal to recognize an out-of-state marriage may, however, violate principles of Due Process or Equal Protection. *See, e.g.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (striking down a Virginia law that criminalized evasive interracial marriages entered into in other jurisdictions).

293. *See generally* ANDREW KOPPELMAN, *SAME SEX, DIFFERENT STATES: WHEN SAME-SEX MARRIAGES CROSS STATE LINES* (2006).

294. *Statewide Marriage Prohibitions*, HUMAN RIGHTS CAMPAIGN, http://hrc-assets.s3-website-us-east-1.amazonaws.com/files/assets/resources/marriage-prohibitions_6-10-2014.pdf.

295. *See* Estin, *supra* note 35, at 278, 331–34 (discussing vertical and horizontal recognition of family law matters).

296. *Id.* at 334 (noting that we live in “an era when individuals and families move easily across state borders and around the world”).

297. *Cf. id.* at 278 (noting that, at some point interstate disuniformity may become so great that there is a need for “mechanisms to address coordination problems arising from variations among state and local laws”).

298. *See supra* notes 139–42 and accompanying text.

299. *See supra* note 274 and accompanying text.

government nudged the other states in this direction, but it did so without entirely stifling state experimentation.

Using an independent federal family status definition for purposes of one particular federal benefit may be appropriate where having differing eligibility standards depending on the child's home state may contradict the purpose of the program.³⁰⁰ For example, when the purpose of the program is to compensate a child for the death or injury to a parent on the high seas—outside the boundaries of any state—looking to state law may not be the best approach.³⁰¹ With this type of approach, the federal government can nudge the states towards greater liberty and equality without entirely stifling state experimentation.

The challenge presented by this type of approach, however, is that it adds a new level of disuniformity. It is unquestionably complicated and complex to recognize people as family members for some purposes but not for others, or by one level of government but not another. This was sometimes true for nonmarital children. Thus, in its decision in *Labine v. Vincent*,³⁰² the Supreme Court noted that the child in question was considered a child for federal Social Security benefits, even though she was not entitled to intestate succession rights as a child under Louisiana probate law.³⁰³ That said, there may be instances in which some degree of family status dissonance is a better alternative to no recognition or protection at all.

At some point, however, this type of limited federal intervention may need to give way to greater involvement. This may be the case if there has been sufficient experimentation or where the federal government has concluded that, due to the issue at hand, greater uniformity is necessary. Under such circumstances, the federal government could adopt a standard or definition that would apply for all federal purposes, or it could even require the states to adopt and enforce that definition as well. Adopting a family status definition that applies for all purposes could (but would not necessarily) enhance individual liberties, and it certainly would further the goal of ensuring uniformity of status.

Some scholars suggest that surrogacy is an area of family law in which more federal participation may be appropriate. Surrogacy arrangements commonly involve multiple jurisdictions and, given the state-level variation in surrogacy regulation, it is not unusual for multiple jurisdictions to have wildly different rules.³⁰⁴ In addition, because surrogacy involves conception, pregnancy, and family formation, there are important liberty interests at stake.³⁰⁵ For these and other reasons, some

300. See *supra* notes 146–55 and accompanying text.

301. See *Middleton v. Luckenbach S.S. Co.*, 70 F.2d 326, 329 (2d Cir. 1934) (“To allow the law of the state of the decedent’s domicile to prevail would permit and deny for the same accident a right of recovery [under the Death on the High Seas Act] to relatives who were similarly related to persons killed because of residence in different jurisdictions.”).

302. 401 U.S. 532, 539–40 (1971) (rejecting a constitutional challenge to Louisiana’s intestate succession provisions that treated legitimate and illegitimate children differently).

303. See *supra* note 126.

304. For a discussion of the conflict of interest issues that may arise in surrogacy arrangements, see generally Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399 (1990).

305. See SaraAnn C. Bennett, Comment, “There’s No Wrong Way to Make a Family”: *Surrogacy Law and Pennsylvania’s Need for Legislative Intervention*, 118 PENN. ST. L. REV.

commentators argue that “[f]ederal regulation of surrogacy arrangements [would be] ideal.”³⁰⁶

To be clear, in describing these types of federal involvement in ascending order of intrusiveness, I do not mean to suggest that early, aggressive federal involvement in family status determinations is never appropriate. Because we are talking about issues or interests of constitutional import, there may be times when early federal intervention is not only helpful, but indeed, may be necessary. That said, when early federal involvement in an issue is being considered, policymakers should take into account potential costs of such conduct—costs related to the lost experimentation, as well as potential loss of community buy-in. If the intervention is too soon, policymakers may adopt a rule that is not the best they could have come up with had they thought about and experimented with the issue a bit more.

Kerry Abrams and Brandon Garrett argue this may have been the case with regard to the use of DNA evidence in some paternity proceedings.³⁰⁷ Almost as soon as DNA evidence became available, the federal government hamstrung the states’ ability to decide what to do with this information in some contexts.³⁰⁸ Specifically, Congress passed a “series of acts that increasingly conditioned states’ receipt of welfare funds to the identification of genetic fathers.”³⁰⁹ Abrams and Garrett suggest that this federal involvement may have been too early, and may have stifled what otherwise may have been productive state experimentation about when, whether, and how states should use DNA evidence in their parentage rules.³¹⁰

Looking outside the context of family law, some commentators argue that the Genetic Information Nondiscrimination Act (GINA)³¹¹ is another example where the federal government intervened too soon. GINA bars discrimination in employment and insurance on the basis of genetic information and limits the collection and use of such information.³¹² Some commentators argue that GINA was premature.³¹³ Prior to GINA’s enactment, there had been few examples of such discrimination and little time for courts to consider how to address any such discrimination when it occurred. Other commentators worry that the law is not well drafted and may create

407, 410 n.12 (2013) (“Federal regulation of surrogacy arrangements . . . would create clarity on the issue and uniformity between jurisdictions.”); Emily Gelmann, “*I’m Just the Oven, It’s Totally Their Bun*”: *The Power and Necessity of the Federal Government To Regulate Commercial Gestational Surrogacy Arrangements and Protect the Legal Rights of Intended Parents*, 32 WOMEN’S RTS. L. REP. 159, 161 (2011) (arguing “that the federal government should comprehensively address all aspects of commercial gestational surrogacy”).

306. Bennett, *supra* note 305.

307. Abrams & Garrett, *supra* note 189, at 42 (arguing that federal requirements “have forced states to adopt policies they might not otherwise have chosen”).

308. *See id.*

309. *Id.* at 37.

310. *Id.* at 15 (“In fact, a common argument against GINA was that it was premature, since genetic discrimination was infrequent.”).

311. Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233, 122 Stat. 881 (codified as amended in scattered sections of 29, 42 U.S.C. (2012)).

312. Jessica L. Roberts, *Preempting Discrimination: Lessons from the Genetic Information Nondiscrimination Act*, 63 VAND. L. REV. 439, 441 (2010).

313. *Id.* (“GINA’s opponents cited the lack of existing genetic-information discrimination as evidence that the law was premature or unnecessary.”).

unanticipated problems going forward.³¹⁴ If, however, we had had more experience with laws of this sort, the drafters may have been able to foresee these challenges and address them accordingly.

In the end, there is no simple answer or equation for determining when federal involvement in family status determinations is appropriate. Indeed, our history serves as an important reminder that one should be wary of simple or bright line rules regarding which level of government is the appropriate or best one to act with regard to family status.³¹⁵ There have been times when the states have led the way to what we now view as the correct answer. At other times, it has been the federal government that has had to act to push resistant states towards this end.

But we are not left without any moorings or direction. Instead, the values of federalism and the lessons from our history provide important insights that guide consideration of this question. Rather than relying on rigid, bright-line rules, policymakers must instead consider how various approaches affect a range of values or interests including experimentation, liberty, and uniformity. When considering whether federal involvement in family status determinations is appropriate, it is particularly important for decisionmakers to consider the value of uniformity. That said, it is also important to recognize that this value may be outweighed by other considerations. And when uniformity or stability of family status—whether it be one’s status as a child or a spouse—results in no protection at all, the scales may tip in the other direction.

While this mixed history could be looked upon as cause for alarm or concern, it could also be viewed from the flip side.

A key advantage of having multiple levels of government is the availability of alternative actors to solve important problems. If the federal government fails to act, state and local government action is still possible. If states fail to deal with an issue, federal or local action is possible. In other words, the greatest beauty of federalism is its redundancy: multiple levels of government over the same territory and population, each with the ability to act.³¹⁶

CONCLUSION

The conventional narrative is that all or some part of family law is inherently local. This narrative has proven to be remarkably resilient. Despite critiques from a variety of perspectives, the myth of family law localism lives on, albeit in a slightly more narrow fashion. This Article subjects the most recent iteration of family law localism—

314. See, e.g., Pauline T. Kim, *Regulating the Use of Genetic Information: Perspectives from the U.S. Experience*, 31 COMP. LAB. L. & POL’Y J. 693, 693–94 (2010) (“This examination suggests that relying solely on an anti-discrimination framework is likely to be inadequate; the key to preventing misuse of genetic information by employers will be creating robust privacy protections.”).

315. Other scholars have made similar arguments regarding other areas of law. See, e.g., Huntington, *supra* note 30, at 834 (“Although some commentators contend that non-citizens are at greater risk when the states take a more active role in the regulation of immigration, this hypothesis has not always proven true as an empirical matter.” (footnote omitted)).

316. Chemerinsky, *supra* note 36, at 538.

family status localism—to careful scrutiny. Family status localism, like the broader invocations of the myth, is misguided. A closer examination of our past reveals many examples of shared state and federal authority over family status determinations.

Once we recognize that the federal government does not categorically lack power over family status determinations, we must then contend with the normative questions that have long been ignored—whether and when the federal government *should* exercise this power. Given the broad range of protections, benefits, and responsibilities that are accorded to people by virtue of their family status, engagement with this question is critical and long overdue.

Drawing upon the rich literature exploring the values of federalism, a literature that until now has largely omitted consideration of family law, this Article offers a framework for answering this normative question. This framework seeks to maximize the benefits garnered from local control, but at the same time guard against the dangers of dogmatic family status localism.