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Families and Federalism

Sylvia Law*

This subject is vast, and for most people, family is the most meaningful element of their lives: more important than work, wealth, or status.¹ Families are also a rich source of fascinating legal conflict. In the prime time TV line-up, families and family law provide weekly fodder for *Judging Amy* and *Family Law*, not to mention *Rosie, Oprah*, and countless other programs. Federalism—the balance of power between state and federal governments—is not even a blip on the radar screen of pop culture or ordinary human values.² In the law, however, federalism is big news. In the past few years, the Supreme Court has revolutionized the balance of state and federal power, and sharply limited the power of Congress.³

Cases at the intersection of federalism and family law are often in

* Professor, New York University Law School. This Article is based on a presentation by Professor Law in the Public Interest Law Speaker Series at Washington University School of Law on March 22, 2000. Susan Frelich Appleton, Associate Dean and Lemma Barkeloo and Phoebe Couzins Professor of Law, Washington University School of Law, has been my family law mentor for many years as co-author, with Professor Kelly Weisberg, of *MODERN FAMILY LAW: CASES AND MATERIALS*. It is a magnificent casebook and Dean Appleton is always willing to provide teachers prompt and wise guidance on hard questions. She encouraged me to do this project and helped throughout.

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1. PHILLIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES: MONEY, WORK, SEX 164-74* (1984); Richard Powers, *American Dreaming*, N.Y. TIMESMAG., May 7, 2000, at 67 (discussing a random sample of 1,003 adults asked “Which do you think shows more of who you really are: your role at home or your role at work?” Seventy-five percent of respondents said role at home, 17% said role at work, and 8% did not work.).

2. Federalism issues surfaced powerfully in public debate during the dispute following the Presidential election of 2000. However, the issues, while vitally important, were narrowly focused.

3. Appendix 1 briefly describes the Supreme Court’s recent constitutional decisions about federalism. Appendix 2 briefly describes the Court’s constitutional decisions concerning families.

the public eye. Who should decide the fate of Elian Gonzales, for example: Florida family courts, U.S. immigration authorities, federal courts, or Congress?⁴ Should grandparents have a right to visit grandchildren over the objection of parents, and who should make that decision: state courts and legislatures or the U.S. Supreme Court?⁵ Does violence against women violate federally protected civil rights and sufficiently impact interstate commerce such that Congress may provide a remedy to supplement ordinary state criminal law?⁶ Should states or Congress decide the fate of frozen embryos when the man and woman who created the embryo disagree?⁷

This Article does not attempt to provide a comprehensive survey of either family law or federalism. Nor does it address the substantive constitutional principles that sometimes govern family law⁸ or the fascinating questions of congressional power and state immunity that presently occupy the Supreme Court.⁹ This Article acknowledges that

4. When Elian Gonzalez was found clinging to an inner tube on Nov. 25, 1999, after his mother and ten others drowned in their flight from Cuba, the U.S. Immigration and Naturalization Service originally announced that state courts should resolve his status in the United States as a matter of state custody law. Attorney General Janet Reno later explained:

As the case evolved, it became clear that Elian's father, who was still in Cuba, was asserting a parental relationship with Elian and had adequately expressed his wish, under the immigration laws, for Elian's petition for admission to this country to be withdrawn. In these circumstances, I.N.S. was obliged to determine whether the father was the appropriate person to speak for Elian on immigration issues. That question . . . remains one of federal, not state, law.

Excerpts From Reno's Letter on Cuban Boy, N.Y. TIMES, Jan. 13, 2000, at A14. The federal courts upheld the INS claim that a six-year-old child can ordinarily only apply for asylum through a parent and that this general rule applies to Cuban parents. *Gonzalez v. Reno*, 212 F.3d 1338 (11th Cir. 2000).

5. In *Troxel v. Granville*, 120 S. Ct. 2054 (2000), the Supreme Court grappled with these questions. The six opinions are delphic and largely leave resolution to state courts and legislatures. See Sylvia A. Law, *Rulings on Abortion and Grandparents' Visitation*, 22 NAT'L L. J. (Aug. 7, 2000), at A26. See *infra* Appendix 2.

6. In *United States v. Morrison*, 120 S. Ct. 1740 (2000) the Court held, 5-4, that Congress lacks power to provide federal civil remedies for gender based violence. See *infra* Appendix 1.

7. With 150,000 frozen embryos in the United States, it is not surprising that couples' plans change and conflicts arise. Carey Goldberg, *Massachusetts Case is Latest to Ask Court to Decide Fate of Frozen Embryos*, N.Y. TIMES, Nov. 5, 1999, at A20.

8. *But see* Appendix 2.

9. *But see* Appendix 1.

in the academic world, constitutional law is King and family law is Cinderella's stepsister.¹⁰ Analysis of constitutional issues is robust, while, at the same time, family law is under-theorized. Therefore, this Article focuses on family law and policy, not constitutional principles, and explores the ways in which federal authority over family law has been exercised. This Article asks: When, as a matter of common sense, experience, and public policy, should family law issues be resolved as a matter of federal, rather than state law? Many political actors confront this question today. Advocates ask Congress to decide whether a federal response to a family law question is desirable, and the Supreme Court, in interpreting the act of Congress, must choose between deference to state discretion and affirmation of federal authority.

Many federal laws affect families, from farm subsidies and minimum wage laws to the treatment of our military forces. The most consequential and pervasive forms of federal regulation of family relations are the rules defining eligibility for cash assistance, including tax exemptions, welfare, Social Security, Medicaid, Medicare, support services for the disabled, Food Stamps and other subsidies. These federal rules proscribe when family relations give rise to an obligation to support or a claim for benefit. The impact of each of these programs on family relations is complex and invites extensive analysis. This Article focuses more narrowly on core issues that define family law as that which "determines what constitutes a family and who is or may become a spouse, parent, child, or other family member; . . . the legal creation and dissolution of these family relationships; . . . [and] the legal rights and responsibilities that family members have because of their familial status."¹¹

10. Deborah Jones Merritt, *Interpreting Legal Citations: A Symposium Sponsored by the West Group: Scholarly Influence in a Diverse Legal Academy: Race, Sex, and Citation Counts*, 29 J. LEGAL STUD. 345, 352-63 (2000) (noting that constitutional law teaching and scholarship is dominated by men).

11. Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1311 (1998). This definition is not standard or controlling. It only suggests a core focus. As a practical matter, policies affecting the economy and income redistribution are probably more important to families. Nonetheless, this article focuses on this narrower definition of family law.

I. ASSUMPTIONS ABOUT FEDERALISM AND FAMILY LAW

Judges, scholars and practitioners commonly assume that family law decisions are quintessentially matters of state law. For example, a common theme of the Supreme Court's federalism decisions is the assertion that "family law (including marriage, divorce, and child custody)" is a matter of exclusive state concern and beyond federal regulation.¹² Indeed, in *Lopez*, the 1995 watershed case limiting congressional power under the Commerce Clause, this assertion was the only proposition on which the entire Court agreed.¹³ Similarly, in *United States v. Morrison*, the Court struck down a provision of the federal Violence Against Women Act, relying in part on the need to distinguish "between what is truly national and what is truly local," whatever the impact on interstate commerce.¹⁴ The majority ominously suggested that if Congress can regulate criminal behavior that has a serious impact on interstate commerce, the same logic could "be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and child rearing on the national economy is undoubtedly significant."¹⁵

The Supreme Court's frequent proclamation that family law is a matter of state, and not federal concern, originated in *Barber v. Barber* in 1859.¹⁶ Mrs. Barber obtained a divorce and alimony order

12. *United States v. Lopez*, 514 U.S. 549, 564 (1995) (holding that the Gun-Free School Zones Act of 1990 exceeded Congress' authority under the Commerce Clause).

13. The majority opinion warns that "under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." *Id.* at 564. However, majority notes that Justice Breyer "posits that there might be some limitations on Congress' commerce power, such as family law or certain aspects of education." *Id.* at 564-65. But, the majority asserts, Justice Breyer's "analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education." *Id.* at 565. Justice Thomas, concurring, also made the point: "[T]he power to regulate 'commerce' can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage. . . ." *Id.* at 585. Justice Breyer, writing for four dissenting Justices, asserted that to uphold the Gun-Free School Zone Act is not "to hold that the Commerce Clause permits the Federal Government. . . to regulate 'marriage, divorce, and child custody' . . ." *Id.* at 624.

14. 120 S. Ct. 1740, 1754 (2000) (citing *Lopez*, 514 U.S. 549).

15. *Id.* at 1753.

16. 62 U.S. (21 How.) 582 (1859).

in New York.¹⁷ Her husband then moved to Wisconsin to avoid enforcement.¹⁸ He filed for divorce in Wisconsin, alleging that his wife had abandoned him, and he concealed the New York decree.¹⁹ Mrs. Barber filed suit in the Wisconsin federal court, invoked diversity jurisdiction, and asked the court to enforce her New York decree.²⁰ Federal courts are generally available to adjudicate civil claims between parties from different states,²¹ but Mr. Barber protested that the federal court could not exercise diversity jurisdiction for two reasons. First, because she was a married woman, his wife's identity had merged into his and disappeared.²² Second, at English common law, divorce was an ecclesiastical action, not a civil action, and therefore not cognizable in federal court.²³ The Supreme Court allowed Mrs. Barber to invoke diversity jurisdiction to enforce the New York award. Nonetheless, in dictum, the Court observed that it "disclaim[ed] altogether any jurisdiction in the courts of the United States" over the actual granting of divorce or alimony decrees.²⁴ This dicta gave birth to the hoary "domestic relations exception" to federal diversity jurisdiction.

In 1992, the Court reaffirmed much of the domestic relations exception to diversity jurisdiction. In *Ankenbrandt v. Richards*, a mother and citizen of Missouri filed a tort action in federal court against her former husband, a citizen of Louisiana, for the physical and mental abuse of their daughters.²⁵ The father argued, and the lower courts held, that the federal courts lacked jurisdiction because the claim fell within the domestic relations exception to diversity jurisdiction.²⁶ The Supreme Court reversed and held that while "the domestic relations exception, as articulated by this court since *Barber*, divests the federal courts of power to issue divorce, alimony,

17. *Id.* at 585.

18. *Id.* at 588.

19. *Id.*

20. *Id.* at 584-85.

21. 28 U.S.C. § 1332(a) (1994). See generally ERWIN CHERMERINSKY, FEDERAL JURISDICTION 286-92 (3d ed. 1999).

22. 62 U.S. at 588-89.

23. *Id.* at 588-92.

24. *Id.* at 584.

25. 504 U.S. 689 (1992).

26. *Id.* at 693-94.

and child custody decrees,” this tort action did not fall within the exception.²⁷ The Court explored the basis for the exception and found that “a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress’ apparent acceptance of this construction of the diversity jurisdiction provisions. . . .” since 1859.²⁸

Tradition is not its own justification.²⁹ Some scholars have argued that the assumption that family law is quintessentially a matter of state concern—exemplified by the domestic relations exception to federal court diversity jurisdiction—should be repudiated because the assumption is grounded in archaic sexist notions about women and marriage and perpetuates a devaluation of women, children, and families.³⁰ By contrast, others assert that states are better suited than the federal government to develop sound principles of family law.³¹

27. *Id.* at 703.

28. *Id.* at 700. The Court also briefly invoked “policy considerations” in support of the domestic relations exception to federal diversity jurisdiction. “Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance.” *Id.* at 703-04. The court noted “the special proficiency developed by state tribunals over the past century and a half.” *Id.* at 704. However, of course, if federal courts did exercise jurisdiction over domestic relations cases in diversity situations, they would develop expertise in this area.

29. As Justice Holmes observed:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897). For a rich discussion of the complexity of Holmes’ view of the role of history in the development of the law, see two special symposium issues on the one hundredth anniversary of the publication of the *Path of the Law*: 77 B.U. L. REV. 515 (1997); 63 BROOKLYN L. REV. 19 (1997).

30. Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1098-1101 (1994); Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1740-50 (1991).

31. Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1791-92 (1995) (“States . . . are far better situated than the national government to develop and sustain a normative political discourse on family life. Moreover, regulatory diversity among the fifty states preserves some measure of individual and family choice in matters touching upon the formative conditions of human identity.”); Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL’Y & L. 541, 558 (1998). Estin observed that:

Family regulation touches directly on very sensitive matters that are deeply felt to be private. . . . Allocating a high level of discretion to local judges, subject to oversight by

Both of these views are exaggerated. While the traditional assumption of exclusive state control of family law was based on sexism, today the justifications for primary state control of family law are more complex. It is not that states are inherently more competent to devise sound family law policy. Some countries with a state-federal government structure define family law as a federal, rather than a state subject, including Canada,³² Germany,³³ Switzerland,³⁴ and Australia.³⁵

state legislatures and appellate courts, permits maximum flexibility in designing norms that are responsive to the thousands of disputes that are presented every day in local communities across the nation.

Id.

32. Martha A. Field, *The Differing Federalisms of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107 (1992). Field explained:

If anyone ever entertained the notion that there was a “normal” way for federalism to be structured, a comparison of the distribution of legislative power in the United States and Canada would dispel that notion Marriage and divorce and criminal law, for example, are governed by the central government in Canada but the state governments in the United States, while labor law, nationalized in the United States, is an area jealously guarded by Canada’s provincial governments.

Id. at 108.

33. In Germany, as in the United States, authority is exercised by a federal government (the federation or “Bund”) and by ten states or “Länder,” each of which has its own constitution and most of which pre-date the federal government. PHILIP M. BLAIR, FEDERALISM AND JUDICIAL REVIEW IN WEST GERMANY 3 (1981). “Where Americans still accept considerable diversity as a necessary consequence of federalism, the Germans increasingly demand equality and uniformity in such fields as education and the social services.” *Id.* at 2. Like the United States, the federal government exercises specifically delegated power, while the Länder possess reserved or residual authority. *Id.* at 4. Unlike the United States, the federal government has little administrative apparatus of its own, but relies on states for the execution of federal authority. *Id.* at 5. Family law is a matter of federal legislation, modified by federal constitutional norms and administered by state authorities. Sibylla Flügge, *Special Issue: Women’s Rights in Germany Since Unification: On the History of Fathers’ Rights and Mothers’ Duty of Care*, 3 CARDOZO WOMEN’S L.J. 377 (1996).

34. Barbara Graham-Siegenthaler, *Family Law in Switzerland*, in FAMILY LAW IN EUROPE 511 (Carolyn Hamilton & Kate Standley eds., 1995).

35. In Australia, the federal constitution gives the Commonwealth the power to regulate marriage and divorce. Austl. Const. § 51. “The Parliament shall . . . have power to make law . . . with respect to . . . Marriage . . . Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants.” *Id.* Until 1959, the federal Parliament failed to act, recognizing that marriage and divorce are controversial; states adopted divergent rules. In 1959, Parliament enacted a uniform federal divorce law and, shortly thereafter, a uniform federal marriage law. PERCY ERNEST JOSKE, AUSTRALIAN FEDERAL GOVERNMENT 227-28 (1967). For a summary of Australian High Court decisions on family law see P.H. LANE, THE AUSTRALIAN FEDERAL SYSTEM 191-215 (1979).

On the other hand, given our particular U.S. history, states had much more experience in dealing with difficult issues of family law. The proliferation of the states' experience, in turn, is a consequence of basic assumptions of our federal system. The federal government is one of limited powers while states possess general authority to provide for the local public welfare. The basic law of contract, tort, and criminal law, not merely women and families, remain primarily matters of state control. Family law is complex and effects, in a very personal and individual way, the most profound human relations. Further, family law disputes are abundant; family law cases constitute the largest category of filings at the state civil trial court level.³⁶ Local judges, social workers, hospitals, and law enforcement officers deal every day and night with families in crisis. States, therefore, function as "laboratories in democracy,"³⁷ developing new approaches to complex issues that provide models to adopt or to avoid for other states and federal authorities.³⁸

Because of our particular history, Congress and federal judges lack knowledge and experience in family law issues. There is no

36. In 1991, family law cases were the largest single category of civil filings and trials at the trial court level at 33%, as compared with tort filings at 10%, contract filings at 14%, and real property filings at 10%. CONFERENCE OF STATE COURT ADMINISTRATORS, THE STATE JUSTICE INSTITUTE AND THE NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1991, at 15 (1993). Between 1984 and 1994, the number of new family law filing increased by 62%. In 1996, family law filings constituted 66% of the civil court docket; tort, the second most common filing constituted only 17% of the docket. CONFERENCE OF STATE ADMINISTRATORS, THE STATE JUSTICE INSTITUTE AND THE NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT, 1996, at 25, 37 (1997). Nonetheless, family law cases constitute a very small portion of the docket of appellate courts. See Margaret P.P. Mason, Note, *Courting Reversal: The Supervisory Role of State Supreme Courts*, 87 YALE L.J. 1191, 1210 (1978). This pattern makes it difficult to know the law in practice, even at the state level. Further, virtually no law school requires study of family law, either explicitly or implicitly.

37. Justice Brandeis offered the classic statement, dissenting, in *New State Ice Co. v. Liebmann*:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. 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.

285 U.S. 262, 311 (1932). See also BRANDEIS ON DEMOCRACY 147 (Phillippa Strum ed., 1995); FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT 49-51 (1930).

38. See *infra* Parts II.A and B of this Article.

evidence that federal decision makers have an inherent capacity to make better family law policy than state actors. When a uniform national approach makes sense, the approach may be achieved either through state adoption of uniform laws or through federal legislation.³⁹ General federalization of this complex network of relations would be a radical change. Thus, this Article assumes that, in the United States, states are primarily responsible for family law. The assumption may be rooted in a sexist devaluation of women and families; but it is our history in the United States.

However, states do not have exclusive authority over the

39. Enforcement of child custody judgments provides a classic example. Prior to the late 1960s, a state could assert jurisdiction over child custody matters if it had a "substantial interest" in the case. See Leonard Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 808 (1964). The vague standard often led to concurrent assertions of jurisdiction. Judicial willingness to reopen custody decisions at the behest of a state resident meant that custody decisions were freely modifiable in other states. Justice Jackson, dissenting in *May v. Anderson*, 345 U.S. 528, 542 (1953), described the system as "a rule of seize-and-run."

In 1968 the Uniform Child Custody Jurisdiction Act [hereinafter UCCJA] was drafted to reduce jurisdictional competition and confusion, as well as to deter parents from forum shopping to relitigate custody. The UCCJA applies both to initial custody decisions as well as modifications. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 920-22 (1998) [hereinafter WEISBERG & APPLETON].

By 1980, forty-three states had adopted the UCCJA, MARGARET STRICKLAND, HOW TO DEAL WITH A PARENTAL KIDNAPPING 92 (1983), and now all fifty have done so. Robert G. Spector, *Uniform Child-Custody Jurisdiction and Enforcement Act (With Prefatory Note and Comments by Robert G. Spector)*, 32 FAM. L.Q. 301, 305-06 (1997). But, some states modified the uniform standards, and in other states, courts interpreted the provisions inconsistently. *Id.* Congress enacted the Parental Kidnaping Prevention Act [hereinafter PKPA], 28 U.S.C. § 1738A (1994), to provide greater uniformity in determinations of jurisdiction over child custody disputes than had been achieved under the UCCJA. The UCCJA and the PKPA are generally similar, though in modification claims, the federal law gives greater weight to the "exclusive continuing jurisdiction" in the initial decree-granting state. WEISBERG & APPLETON, *supra* at 923-24.

Because the federal law is also subject to interpretation in individual cases, it is not clear that it achieved its objective of uniformity. Anne B. Goldstein declares both the UCCJA and the PKPA "spectacularly unsuccessful," but concedes that the failure may be in implementation, rather than drafting. Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act*, 25 U.C. DAVIS 845, 880 (1992). Commentators and courts disagree about whether the PKPA preempts the UCCJA. Compare Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711, 765 (1982) (arguing no preemption because PKPA does not confer jurisdiction, but rather specifies duties of recognition and nonmodification for decrees consistent with its jurisdictional requirements), with Henry H. Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297, 299 (1981) (arguing that the federal statute supercedes state provisions when conflict arises).

regulation of family law. The federal government has long sought to promote particular family values. For example, a central concern of the abolitionist movement, the Civil War, and the Civil Rights Amendments was to secure access to legitimate family relations for former slaves.⁴⁰ In the nineteenth century the federal government made repudiation of polygamy a condition of statehood⁴¹ and a federal crime.⁴² And throughout the twentieth century, the Supreme Court interpreted the Constitution to limit state authority to regulate families.⁴³

In summary, the big picture is: states have primary responsibility for the regulation of families, yet the federal government has considerable authority to intervene and often has done so. Many observers have addressed the large question of when federal intervention is justified in relation to particular subjects in the literature of law⁴⁴ and political science.⁴⁵ There is general agreement

40. Hasday, *supra* note 11, at 1319-58. Peggy Cooper Davis, *Symposium: Changing Images of the State: Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1361-73 (1994).

41. Hasday, *supra* note 11, at 1319-58.

42. 12 Stat. 501, ch. 126 (1862).

43. See *infra* Appendix 2.

44. Some legal scholars focus specifically on the role of the federal courts. For example Richard H. Posner argues that the federal courts, and presumably the federal government, have special responsibility in situations in which states can adopt policies that impose costs on other states (interstate externalities), or when "federal rights . . . are likely to be asserted by people who are politically disfavored . . . because they lack effective political power in the state." RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 165 (interstate costs), 180 (powerless minorities) (1985). Erwin Chemerinsky and Larry Kramer offer a different approach, identifying "six major functions" of the federal courts: enforcement of the U.S. Constitution, "protecting the interests of the federal government as a sovereign," umpiring "interstate disputes," "assuring uniform interpretation and application of federal law," "developing federal common law," and overseeing federal administrative adjudication. Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 67, 77-87 (1990).

Other legal scholars address allocation of power between state and federal authority in relation to particular issues, such as the environment. For example, Richard Stewart argues that four characteristics of state authority, as opposed to federal authority, may promote individual liberty: (1) Local authorities may make more accurate assessments of costs and benefits; (2) they may be more likely to protect individual liberty by making it more difficult for any one group to seize national power; (3) they may foster community through opportunities for political participation; and (4) they may promote diversity through decentralization. Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1210-11 (1977). Stewart also supports federal regulation of the environment:

that the federal government has a special role in mediating interstate disputes, assuring national uniformity where important, redistributing wealth, and protecting essential rights of vulnerable minorities, whoever they may be and whatever rights are considered essential.⁴⁶ These principles, while important, are obviously quite vague.

Family law is not inherently state or federal. The key question is: When is federal intervention in family law wise? The substantive judgment of what helps and hurts families is highly contested and political. This discussion begins with the examination of a few cases in which most informed observers agree that federal intervention has been good for families and then turns to consider some cases where federal intervention was not helpful to families. The categorization of federal interventions that help or hurt is necessarily complex. For example, child support standards and enforcement guidelines are on balance a sound federal intervention, though they could be improved in significant ways.⁴⁷ By contrast, while federal support for student loans for higher education or pensions for federal employees is just and sensible, federal policy sometimes senselessly ignores state family law.⁴⁸ From this background of particular cases we are able to derive general answers to the question of when the federal

Given the mobility of industry and commerce, any individual state or community may rationally decline unilaterally to adopt high environmental standards that entail substantial costs for industry and obstacles to economic development for fear that the resulting environmental gains will be more than offset by movement of capital to other areas with lower standards.

Id. at 1212.

45. Much of the political science literature examines specific programs and policies and assesses diverse allocations of authority and responsibility between state and federal governments. *See generally* the journal PUBLIUS, providing detailed analysis of cross-cultural comparisons, education, environmental policy, governance, health care financing and delivery, taxation, transportation, voting, welfare and other subjects. This literature, while fascinating, offers sparse insight on family law and little in the way of large, general principles. Other political scientists seek to articulate general principles for allocating authority between state and federal governments. *See, e.g.*, PAUL E. PETERSON ET AL., WHEN FEDERALISM WORKS 10-20 (1986) (arguing that local governments have great capacity for developmental policy, including the maintenance of community infrastructure, while central governments have greater capacity for redistribution policies).

46. *Supra* notes 37-38.

47. *See infra* Parts II.A and II.B.

48. *See infra* Part III.A.

government should intervene in state family law.⁴⁹

The allocation of responsibility and authority between state and federal governments is complicated. Traditional left or right, liberal or conservative, and states rights or federal control predispositions do not provide easy guidance. Given the narrow definition of family law, the principles of public policy remain, at best, only suggestive.

II. FEDERAL INTERVENTIONS THAT SEEM TO HELP FAMILIES

There are many cases in which most informed people believe that federal intervention in family law has been beneficial.

A. *Child Support Standards*

Federal action to define and enforce child support standards is a primary but complex example of a case where federal intervention has been helpful. There is broad public support for the notion that parents should support their children.⁵⁰ The definition and

49. A skeptical reader could plausibly claim that my methodology is “wholly subjective,” i.e., that I like federal power when it reaches results that I like and reject it when it doesn’t. I do not have a slam-dunk answer to that doubt. Still, drawing generalizations from concrete cases has an honorable pedigree. The essence of the common law is to address concrete cases, see what works, and develop generalities slowly. See OLIVER W. HOLMES, JR., *THE COMMON LAW* 35-38 (1881); KARL N. LEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 70-71 (1962). Medicine also seeks to draw general principles for concrete experience. See, e.g., Sarah Marie Lambert & Howard Markel, *Making History: Thomas Francis, Jr., MD, and the 1954 Salk Poliomyelitis Vaccine Field Trial*, 154 *ARCH. PEDIATR. ADOLESC. MED.* 512, 512-13 (2000).

My methodology is different from the common law in that I have picked my cases, rather than waiting for litigants with standing to walk through the door. Also, I seek to draw larger generalizations than are typically offered in deciding a common law case. Finally, I do not canvass the entire universe of federal intervention in family law. For example, I do not explore the Adoption Assistance and Child Welfare Act of 1980, PUB. L. NO. 96-272, 94 Stat. 500 (codified as amended in 42 U.S.C. §§ 620 et. seq. (1988)) or the Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5) (1988). These federal laws are complex and controversial. See, e.g., ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999) (arguing for more efficient means to place abused and neglected children in adoptive homes); Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 *HARV. L. REV.* 1716 (2000) (book review) (arguing for more effective support for biological families).

50. “What is particularly striking about the many child support provisions that Congress has adopted over time is how popular they have been with both political parties.” David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child-Support Enforcement*, 81 *VA. L. REV.* 2575, 2586 (1995) [hereinafter Chambers, 1995].

enforcement of child support is vitally important to millions of children. In spring 1996, 22.8 million children under twenty-one years of age lived with one parent while their other parent lived elsewhere. These children comprised about 28% of all children under twenty-one years of age living in families.⁵¹ About 11.6 million, or 85%, of the 13.7 million custodial parents were women.⁵² Thirty percent of these custodial parents had family incomes below the poverty threshold, compared with 16% of all parents with children under age twenty-one.⁵³

For most of our history, states defined the standards for determining parents' financial obligations to children and generally left the determinations to trial court judges.⁵⁴ State judges systematically underestimated the costs of raising children; overestimated the ability of custodial parents, usually mothers, to maximize income while providing child care; and bent over backwards to accommodate the family and career needs of non-

Ironically, Chambers, one of the most prolific proponents of more effective child support enforcement in the United States, suggested in 1982 that we should abandon the expectation that parents should support their children. David L. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614 (1982). Chambers observed that many children are entitled to support from a parent who no longer lives with them, or never did. *Id.* While there is widespread lip service to the notion that parents should support their children, the practice is different. *Id.* Chambers cited several related developments to both predict and support abandonment of the notion that biological parents should provide financial support for their children. *Id.* at 1624-25. If abortion is a safe and morally neutral option for women, then the mere fact that a man "causes" a child in some biological way should not be any more relevant than the fact that donating sperm at a sperm bank may "cause" a child. *Id.* at 1618-20. Families are increasingly transient and the law should recognize that people increasingly define a family as those people with whom one lives at any particular moment in time. *Id.* at 1621-26. Over time, non-custodial parents become detached from children, and fathers come to regard child support as taxation without representation. *Id.* at 1622. More women are working and able to support a family. *Id.* at 1625. Compulsory support involves government in people's lives in intrusive ways for many many years. "Government should not be in the business of enforcing nostalgia for a world that no longer exists." *Id.* at 1634. Few agree with the Chambers proposal. Indeed, Chambers subsequent work suggests that the 1982 proposal was intended as provocative. Chambers, 1995, *supra*, at 2582-87.

51. Lydia Scroon-Rogers, *Child Support for Custodial Mothers and Fathers: 1995*, 60 CURRENT POPULATION REPORTS 195 (1999) (based on 1995 census data) [hereinafter, 1995 census data].

52. *Id.*

53. *Id.*

54. WEISBERG & APPLETON, *supra* note 39, at 734-35. FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART, 49-52 (1991) [hereinafter FURSTENBERG & CHERLIN].

custodial parents.⁵⁵ State trial court discretion, combined with the absence of any clear theory or objective for child support awards, resulted in child support orders that were pathetically low by any standard.⁵⁶

Through the 1970s, sociologists and other scholars assailed the chronic problem of grossly low child support awards, and many proposed alternatives to assure more adequate and predictable levels of support.⁵⁷ A few states grappled with the problem and came up with formulae that limited trial court discretion and set guidelines for what parents owe their children.⁵⁸ However, most states were paralyzed. Family law issues were never high on state legislatures' agendas,⁵⁹ and trial court judges wanted to retain their discretion.⁶⁰

55. ANDREA H. BELLER & JOHN W. GRAHAM, *SMALL CHANGE: THE ECONOMICS OF CHILD SUPPORT* 165 (1993) [hereinafter BELLER & GRAHAM]; FURSTENBERG & CHERLIN, *supra* note 54, at 49-56.

56. BELLER & GRAHAM, *supra* note 55, at 37. FURSTENBERG & CHERLIN, *supra* note 54, at 60-61.

57. BELLER & GRAHAM, *supra* note 55, at 5. FURSTENBERG & CHERLIN, *supra* note 54, at 50-52. Irwin Garfinkel developed a standard, first adopted in Wisconsin and then in other states, requiring non-custodial parents to pay a fixed percentage of income that varied with the number of children supported. Irwin Garfinkel, *The Role of Child Support Insurance in Anti-poverty Policy*, 479 ANNALS, AAPS 119 (1985); Irwin Garfinkel, *A New Approach to Child Support*, 75 PUBLIC INTEREST 111 (1984). Judge Elwood F. Melson of the Delaware Family Court developed a more complicated version of the income shares formula that reflects several public policy concerns. Particularly, the formula recognizes the public policy that parents' own economic status should not be allowed to grow until the parents jointly, in proportion to their incomes, meet the basic poverty level needs of their children and incorporates a Standard of Living Adjustment (SOLA) into child support awards. Laura W. Morgan, *Child Support And the Anomalous Cases of the High-Income and Low-Income Parent: The Need to Reconsider What Constitutes "Support" in the American and Canadian Child Support Guideline Models*, 13 CAN. J. FAM. L. 161, 180 (1996). Isabel V. Sawhill has argued that child support awards would be more equitable if they were calculated in a manner that attempts to equalize the standard of living of the custodial and the non-custodial parent after divorce while the child is a minor. Isabel V. Sawhill, *Developing Normative Standards for Child Support Payments*, in *THE PARENTAL CHILD SUPPORT OBLIGATION* (Judith Cassetty ed., 1983). *See also* Marcia Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CALIF. L. REV. 41, 59 (1998) [hereinafter Garrison, 1998].

58. BELLER & GRAHAM, *supra* note 55, at 165. DAVID CHAMBERS, *MAKING FATHERS PAY: THE ENFORCEMENT OF CHILD SUPPORT* (1979) [hereinafter, CHAMBERS].

59. Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI. KENT L. REV. 345 (1993) (noting that state legislatures have not addressed issues of child custody standards).

60. Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209 (1991). *See, e.g.,* Schmidt v. Schmidt, 444 N.W.2d 267, 277 (S.D. 1989) (declining to apply statutory guidelines, the dissenting judge observed

In the 1980s, Congress required that states adopt child support guidelines that would control unless a judge provided reasons for departures.⁶¹ Congress gave states three years to adopt such guidelines and allowed states discretion in choosing standards to meet defined federal norms.⁶² States adopted various approaches, building on the experience of pioneering states and early scholarly evaluations.⁶³ Empirical studies show that the guidelines had positive, though modest, effects in achieving the congressional objectives of increased award levels, consistency, and case processing efficiency.⁶⁴

The guidelines adopted pursuant to the federal mandate are far from perfect. In most states, once orders are set, they are seldom modified and so as time passes, support represents a smaller proportion of fathers' earnings and childrens' needs.⁶⁵ Of the nearly ten million mothers raising children with absent fathers who are alive, only slightly more than half have an order for support.⁶⁶ Poor children who receive federally supported aid receive only the first fifty dollars in child support, while the rest goes to repay the state for aid provided.⁶⁷ This regime undermines the mother's incentives to aid in the enforcement of child support and the father's incentives to pay.

that, "we, in the judiciary, retain our independence; we also vault a known, Equity, forged through the centuries in jurisprudence, over an unknown substitute of legislative dogmatism . . .").

61. For a good history of this legislation, see Chambers, *supra* note 50.

62. In 1984 Congress mandated that, by 1987, states use child support guidelines as rebuttable presumptions in cases in which the state seeks to recover payments made to support a poor child from an absent parent. In 1988, the guideline requirement was extended to all cases. Family Support Act of 1988 (FSA), 42 U.S.C. § 667(a)-(b) (1994).

63. The most popular form of guideline, adopted in thirty-two states, computes the total parental income and allocates support obligations based on a formula. Another sixteen states require the non-custodial parent to pay a specified percentage of income, adjusted by the number of children. A few states follow a more complex formula, initially developed in Delaware, which prorates child support needs based on parental income. BELLER & GRAHAM, *supra* note 55, at 199-201.

64. Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 345 (1991). *But see* Garrison, 1998, *supra* note 57, at 62-63 (offering a pessimistic assessment of the impact of guidelines on increasing child support levels).

65. Robert G. Williams, *Implementation of the Child Support Provisions of the Family Support Act: Child Support Guidelines, Updating of Awards, and Routine Income Withholding*, in CHILD SUPPORT AND CHILD WELL BEING 93, 95 (Irwin Garfinkel et al. eds., 1994).

66. Chambers, 1995, *supra* note 50, at 2598.

67. 42 U.S.C. § 657(b) (1994); 45 C.F.R. § 302.51 (2000).

Further, the fifty dollar disregard was never changed. Beller and Graham argue that the child support disregard should be increased to one-half of the poverty level.⁶⁸

B. Child Support Enforcement

Federal intervention requiring states to create more effective remedies to enforce child support obligations is another example of policy that seems helpful. Under traditional state rules, the custodial parent had sole responsibility for enforcing child support orders. Non-custodial parents frequently failed to pay child support and custodial parents often lacked the legal and financial resources needed to collect support.⁶⁹ Even when custodial parents pursued legal claims, state judges were often unsympathetic to their claims for delinquent child support. Moreover, the judges often lacked effective means to assure that children received the support to which they were entitled. Many scholars documented these problems and proposed new approaches.⁷⁰ Several states created mechanisms for child support enforcement that were demonstrably more effective than those of their sister states.⁷¹ But most states did little to assure that

68. BELLER & GRAHAM, *supra* note 55, at 254.

69. Nan D. Hunter offers this description of the situation in the 1970s:

When the typical father is ordered to pay child support, he is usually told to send the mother a check every pay period. Keeping track of the payments or lack of them is up to her. Most courts have a system for keeping the record on computer but judges frequently do not order that this be done, especially for middle- and upper-middle-class fathers, for whom it is considered embarrassing. Even when the bookkeeping is maintained on a computer, if the father does not pay, often nothing happens. It is up to the mother to institute enforcement proceedings. Many months will pass before the amount owed to her equals or exceeds the retainer she will have to pay a lawyer to bring suit. By the time it becomes worth it to sue, her financial plans and budgeting may be in turmoil. If the amount due builds up and the case does get to court, judges in some states are permitted to decrease the amount of arrearage retroactively if they believe it is too large for the father to afford (the children, after all, have managed to survive).

Nan D. Hunter, *Women and Child Support, in FAMILIES, POLITICS, AND PUBLIC POLICY* (Irene Diamond ed., 1983); FURSTENBERG & CHERLIN, *supra* note 54, at 59.

70. FURSTENBERG & CHERLIN, *supra* note 54, at 50-52; IRWIN GARFINKEL, ASSURING CHILD SUPPORT 29-31, 74-76 (1992); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare as We Know It*, 81 VA. L. REV. 2523, 2534-35, 2573 (1995).

71. See, e.g., CHAMBERS, *supra* note 58, at 84 (describing Michigan's organized program to enforce child support obligations through jailing); Pamela Forrestal Roper, *Hitting Deadbeat*

children received the child support to which they were entitled. However, in 1988 Congress required that states adopt laws to: allow child support to be withheld from income, provide for expedited enforcement procedures, allow diversion of state income tax refunds, and permit liens against real and personal property for overdue support.⁷² In addition, in 1994 Congress made it a federal crime to willfully fail to pay state ordered child support if the amount exceeds \$5000, or has remained unpaid for over one year, and the child and parent live in different states.⁷³ These new federally mandated remedies provided real help to thousands of children. For example, wage withholding, which was extremely rare prior to the adoption of the 1988 federal act, produced more than 55% of all child support payments in 1994, over five billion dollars.⁷⁴ In fiscal year 1997, a

Parents Where it Hurts: "Punitive" Mechanisms in Child Support Enforcement, 14 ALASKA REV. 41, 42 (1997) (discussing Alaska's success with the recent expansion of criminal sanctions for those who aid and abet nonpayment of child support obligations and the suspension, revocation, or denial of driver's and occupational licenses of delinquent obligors); U.S. DEP'T OF HEALTH AND HUMAN SERVICES, OFFICE OF CHILD SUPPORT ENFORCEMENT, LICENSE RESTRICTION AND REVOCATION: A PARTIAL PROGRESS REPORT (1996) (calling Maine's occupational and driver's license revocation program one of the "best practices" for obtaining payment from delinquent obligors); Charles David Creech, *Survey of Developments in North Carolina Law, 1986: VII. Domestic Law: Legislating Responsibility: North Carolina's New Child Support Enforcement Acts*, 65 N.C.L. REV. 1354, 1357 (1987) (noting that the dramatic results of North Carolina's program can be attributed, at least in part, to an increased number of cases in which paternity has been established); Margaret Campbell Haynes & Peter S. Feliceangeli, *Child Support in the Year 2000*, 3 DEL. L. REV. 65, 66 (2000) (describing the "arsenal" of enforcement tools Delaware has adopted to ensure child support enforcement, especially the unprecedented administrative power the Delaware's Division of Child Support Enforcement, which includes access to virtually every government data base for the purpose of locating absent parents, establishing paternity of children, and enforcing child support against obligated parents).

72. The Family Support Act of 1988, 42 U.S.C. §§ 651-69 (1994). For a good description of subsequent amendments see Paula Roberts, *The Family Law Implications of the 1996 Welfare Legislation*, CLEARINGHOUSE REV. 988 (Jan.-Feb. 1997).

73. The Child Support Recovery Act, 18 U.S.C. § 228 (1994). Several defendants challenged the criminal penalty as beyond the power of Congress under the Commerce Clause. Federal courts rejected these claims reasoning that payment of a debt constitutes economic activity and the difference in location of obligor and obligee requires satisfaction of the debt by interstate means. See WEISBERG & APPLETON, *supra* note 39, at 783-84. In 2000 the Sixth Circuit held that the Act exceeds the power of Congress. *United States v. Faassee*, 227 F.3d 660 (6th Cir., 2000), *rehearing en banc granted*, 2000 U.S. App. Lexis 31238 (6th Cir. Dec. 1, 2000).

74. Paul Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 539 (1996) [hereinafter Legler].

record \$13.4 billion was collected on behalf of children, an increase of 70% since fiscal year 1992.⁷⁵ In addition, more than one million paternities were established, an increase of over 100% since fiscal year 1992. This increase is largely attributable to paternities established through the voluntary in-hospital paternity programs.⁷⁶

State experience showed that leaving enforcement responsibility to individual custodial parents is not effective and that a well organized program was needed to send non-custodial parents the message that payment of child support is mandatory.⁷⁷ Congress required that states create organized programs for child support enforcement.⁷⁸ At the rhetorical level, Congress is committed to universal enforcement: "The vision for child support enforcement that guided much of the development of the legislation is that the payment of child support should be automatic and inescapable—'like death or taxes.'"⁷⁹ In response to federal prodding, some states created effective coordinated programs to ensure child support payments.⁸⁰

Disappointingly, federal studies and private law suits reveal that other states failed to organize effective child support enforcement systems. For example, after extensive trial, the Ninth Circuit Court of Appeals described Arizona's programs as one of:

systematic failures, including the failure to procure wage assignment when all information as to the former spouse's current employer and address has been provided by the custodial parent, the failure to disburse collected support payments in a timely manner or to sufficiently account for payments collected, the frequent losses of clients' files thus forcing them repeatedly to re-initiate enforcement procedures

75. OFFICE OF CHILD SUPPORT ENFORCEMENT, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TWENTY-SECOND ANNUAL REPORT TO CONGRESS (1999) [hereinafter 1999 REPORT TO CONGRESS ON CHILD SUPPORT].

76. *Id.*

77. CHAMBERS, *supra* note 58, at 90; GARFINKEL, *supra* note 70, at 29-31.

78. "A State plan for child and spousal support must . . . (3) provide for the establishment or designation of a single and separate organizational unit, which meets such staffing and organizational requirements as the Secretary may by regulation prescribe, within the State to administer the plan . . ." 42 U.S.C. § 654 (1994).

79. Legler, *supra* note 74, at 538.

80. *Id.* at 522.

and to complete voluminous forms and burdensome paperwork over and over again, and the inexplicable failure to account for or disburse “pass-through” payments.⁸¹

In other contexts, Congress recognized that broad federal mandates will be followed only if there are effective legal remedies to enforce them⁸² and provisions to pay attorneys who succeed in proving a violation of federal law.⁸³ But more often, Congress does not specifically address the question whether beneficiaries can enforce rules requiring states to implement programs that meet federal standards. When Congress does not explicitly authorize a private federal action allowing beneficiaries to enforce program requirements, the Supreme Court has long been divided on whether courts should be available to assure that federal program requirements are followed. For example, in 1990 the Court in *Wilder v. Virginia Hospital Association* held that hospitals may sue states under 42 U.S.C. § 1983 to enforce a Medicaid provision requiring that states pay hospitals “reasonable and adequate” rates for services provided to beneficiaries.⁸⁴ The *Wilder* Court asked whether “the provision in question was intended to benefit the putative plaintiff.”⁸⁵ If so, the provision creates an enforceable right unless it reflects merely a “congressional preference” for a certain kind of conduct rather than a binding obligation on the state, or unless the interest asserted by the plaintiff is “too vague and amorphous” and thus

81. *Freestone v. Cowan*, 68 F.3d 1141, 1145 (9th Cir. 1995).

82. For example, when Congress required that hospitals provide emergency medical care to all who seek it, Congress specifically created a federal cause of action if services are wrongfully denied, as well as federal administrative remedies. See *Roberts v. Galen of Virginia*, 119 S. Ct. 685 (1999). See also Murray S. Levin, *The Role of Substantive Law in Business Arbitration and the Importance of Volition*, 35 AM. BUS. L.J. 105, 165-66 (1997) (discussing criticism of mandatory arbitration clauses as a condition to employment and acknowledging the Equal Employment Opportunity Commission’s and Congress’ preference for preservation of the individual right to sue); Rand E. Rosenblatt, *The Courts, Health Care Reform, and the Reconstruction of American Social Legislation*, 18 J. OF HEALTH POL., POL’Y & L. 439, 457, 460, 467-68 (1993) (arguing that judicially enforceable rights are vital in federal-state health financing programs).

83. See generally *Survey: 1993-94 Annual Survey of Labor and Employment Law: Employment Discrimination Law*, 36 B.C. L. REV. 373 (1995) (on the importance of attorney’s fees).

84. 496 U.S. 498 (1990).

85. *Id.* at 509.

“beyond the competence of the judiciary to enforce.”⁸⁶ In 1970, Justice John Marshall Harlan explained why beneficiaries should be able to enlist the federal courts to help explicate and enforce the complex requirements that federal statutes impose on states. Congress often voices “its wishes in muted strains” and leaves “it to the courts to discern the theme in the cacophony of political understanding.”⁸⁷ Even when the federal agency is given specific authority to enforce federal requirements on the states, Justice Harlan explained that “We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.”⁸⁸ Courts, he noted, should avoid reading federal statutes in ways that make them “a futile, hollow, and, indeed, a deceptive gesture.”⁸⁹

On the other hand, some Justices have long envisioned a more limited role for the federal courts in enforcing federal requirements in cooperative state-federal programs. In 1991, in *Suter v. Artist M.*, the Justices who dissented in *Wilder* prevailed and ruled that beneficiaries could not enlist the help of the federal courts to enforce provisions of a federal law requiring states to make “reasonable efforts” to reunite biological families prior to placing children for adoption.⁹⁰ Chief Justice Rehnquist, writing for the Court, articulated a radically different view of the role of the federal courts in enforcing the federal conditions upon state-federal programs. He acknowledged that “the Act does place a requirement on the States,” but held “that requirement only goes so far as to ensure that the State have a plan approved by the Secretary which contains the [elements required by the statute].”⁹¹ The *Suter* court also noted that the statute did not define the core term, “reasonable efforts,” with precision. “How the State was to comply with this directive, and with the other provisions

86. *Id.* at 507.

87. *Rosado v. Wyman*, 397 U.S. 397, 412 (1970).

88. *Id.* at 420.

89. *Id.* at 415. *See also* *Maine v. Thiboutot*, 448 U.S. 1 (1980); *Wright v. City of Roanoke Redevelopment & Housing Auth.*, 497 U.S. 418 (1987).

90. 503 U.S. 347 (1992). Between *Wilder* in 1990 and *Suter* in 1992, Justices Brennan and Marshall, who were in the majority in *Wilder*, retired and were replaced by Justices Souter and Thomas, respectively.

91. 503 U.S. at 358.

of the Act, was, within broad limits, left up to the State.”⁹² While *Suter* distinguishes, rather than overrules *Wildier*, the two cases represent fundamentally different views on the appropriate role of the federal courts in enforcing federal requirements in state-federal programs.⁹³

In *Blessing v. Freestone*, the Supreme Court addressed this conflict in determining whether custodial parents and children could challenge the systemic failures in Arizona’s child support enforcement program.⁹⁴ The Court held that a class of beneficiaries who were denied services to which they were entitled under federal law could not challenge the systemic failure of the program.⁹⁵ Because federal law only required “substantial compliance,” only the Secretary of Health and Human Services could determine non-compliance and seek administrative remedies.⁹⁶ Nonetheless, the Court left open the possibility that individual plaintiffs could reformulate their complaints to articulate more precise and narrowly defined claims: “Only when the complaint is broken down into manageable analytic bites can a court ascertain . . . whether a federal statute creates rights.”⁹⁷

Sadly, while some state child support enforcement programs made substantial improvements under the federal mandate, most children entitled to child support still do not receive it.⁹⁸ “After twenty years of effort, more fathers pay more money than ever before, but over half of all children with an absent parent still receive no support.”⁹⁹

92. *Id.* at 360.

93. See also *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 19 (1981) (holding that a federal “patients’ bill of rights” merely expresses a “congressional preference” for a certain kind of conduct rather than a binding obligation on the state).

94. 520 U.S. 329, 342 (1997).

95. *Id.* at 342-47.

96. *Id.* at 341.

97. *Id.* at 342.

98. In cases involving low income families, paying cases in 1997 accounted for only 22% of the Child Support Enforcement caseload. 1999 REPORT TO CONGRESS ON CHILD SUPPORT, *supra* note 75, at 166. Some states do considerably better. For example, Vermont has a 44% collection rate, Minnesota 43%, and Washington State 38%. Paula Roberts, *Beyond Welfare: The Case for Child Support Assurance*, 8 & n.5 (Center for Law and Social Policy, Kellogg Devolution Initiative Paper, 1999).

99. Chambers 1995, *supra* note 50, at 2588.

C. Employment and Family Responsibilities

Between 1959 and 1974, the employment rate for mothers with children under the age of three more than doubled, from 15% to 31%. By 1987, 56% of the mothers of children under the age of six were in the labor force.¹⁰⁰ Beginning in the 1970s, this sea of change in employment patterns of mothers of young children produced public calls for policies that allow workers time to care for family members without losing their jobs. Many states acted to provide workers the right to take an unpaid leave to care for newborns or family members who were ill.¹⁰¹ Federal legislation, the Family Medical Leave Act (FMLA), was first proposed in 1985,¹⁰² twice passed by the Congress and vetoed by President Bush, and finally signed in to law by President Clinton in 1993.¹⁰³

The core purpose of the FMLA is “to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition.”¹⁰⁴ Employees are entitled to a total of twelve workweeks of unpaid leave during any twelve-month period.¹⁰⁵ Leave protected by the FMLA is limited to care for immediate family members: children, parents or spouses.¹⁰⁶ Apart from the care of infants and newly adopted children, leave is only available to care for

100. Marie Richmond-Abbott, *Women Wage Earners*, in *FEMINIST PHILOSOPHIES* 135, 136 (Janet A. Kourany et al. eds., 1992). In 1999, six out of every ten mothers of children under age three were in the labor force (i.e., working or looking for work). U.S. DEPARTMENT OF LABOR, REPORT ON THE AMERICAN WORKFORCE 1999, at <http://www.bls.gov/opub/rtawhome.htm> (last visited Dec. 22, 2000). Seven out of every ten mothers of children age three to five were in the labor force. *Id.* Between 1990 and 1999, the labor force participation rate of mothers with children under age three increased from 53.6% to 60.7%. *Id.*

101. Nancy R. Dasplit, *The Family and Medical Leave Act of 1993: A Great Idea But a “Rube Goldberg” Solution?*, 43 *EMORY L.J.* 1351, 1405 (1994).

102. Patricia Schroeder, *Parental Leave: The Need for a Federal Policy*, in *THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY* 326-332 (Edward F. Zigler & Meryl Frank eds., 1988).

103. PUB. L. NO. 103-3, 107 Stat. 7 (codified as amended at 29 U.S.C. §§ 2601-54 (1994)).

104. 29 U.S.C. § 2601(b)(2) (1994).

105. § 2612(a)(1).

106. *Id.* Gay and lesbian partners are thus not entitled to leave to care for one another or children that they co-parent. See Ruth Colker, *The Anti-Subordination Principle: Applications*, 3 *WISC. WOMEN’S L.J.* 59, 74-75 (1987).

family members who are seriously ill.¹⁰⁷ In 2000, two circuit courts of appeals, applying the Supreme Court's new concepts limiting federal power, held that the FMLA is unconstitutional as applied to state employers.¹⁰⁸

The FMLA has been criticized from two directions. Business opponents of the FMLA argued that it would have a significant negative impact on industry. However, an empirical study commissioned by Congress (based on seven million work sites) reveals that the FMLA has had little impact in terms of cost or disruption to employers.¹⁰⁹ On the other hand, many feminists criticized the FMLA as not doing enough to enable workers to meet their family obligations. The FMLA provides no protection to part-time workers, even though the economy increasingly relies on part-time workers and parents of young children, particularly women, are disproportionately likely to work part-time.¹¹⁰ Most seriously, the FMLA only protects the worker's ability to take unpaid leave and therefore forces workers to choose between caring for family and earning a salary.¹¹¹

In 1999, advocates for family leave benefits developed a new

107. FMLA defines "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). The Department of Labor promulgated regulations that define a "serious health condition" as one in which an employee is (1) incapacitated for more than three days, (2) seen once by a doctor, and (3) prescribed a course of medication. 29 C.F.R. § 825.114 (2000). See Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028 (D. Tenn. 1995) (showing that plaintiff, who was terminated for excessive absenteeism, succeeded in demonstrating that her daughter had a "serious health condition" that excused an absence from work, but failed in demonstrating that her own previous illness was sufficiently severe to justify absence).

108. *Sims v. Univ. of Cincinnati*, 219 F.3d 559 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61 (2nd Cir. 2000). See Appendix 1.

109. U.S. COMM. ON LEAVE, A WORKABLE BALANCE: REPORT TO CONGRESS ON FAMILY AND MEDICAL LEAVE POLICIES 144-46 (May 1996).

110. JOAN WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 112 (2000) [hereinafter WILLIAMS]; Ann Brookman, *Flexibility at What Price? The Costs of Part-Time Work for Women Workers*, 52 WASH. & LEE L. REV. 799, 804 (1995).

111. Christine Littleton, for example, is highly critical of the FMLA for not assuring paid leave. Christine A. Littleton, *Does it Still Make Sense to Talk about "Women"?*, 1 UCLA WOMEN'S L.J. 15, 36-37 (1991). But, as Williams points out, the political struggle to obtain unpaid leave was long and difficult and the realistic choice was protection for unpaid leave or nothing at all. WILLIAMS, *supra* note 110, at 228-29.

approach to the problem. Since the depression, the U.S. unemployment compensation system has been administered by the states, within federal guidelines and with federal financial support.¹¹² Because the economy is robust and unemployment is at historic low levels, many state unemployment compensation funds are flush.¹¹³ As a result, the Department of Labor issued regulations allowing and encouraging states to allow new parents to apply for unemployment compensation to enable them to take leave to care for new children.¹¹⁴

The new program allowing states to use unemployment compensation funds to make paid leave available to new parents is also controversial. The Chamber of Commerce filed suit in federal court arguing that the new regulations are not authorized by the federal statute.¹¹⁵ The Chamber of Commerce argued that the regulations put at risk a fund “that was set up for unemployed workers. At some point a recession is going to hit and there’s not going to be enough money for unemployed workers and people

112. SAMUEL ESTREICHER & MICHAEL C. HARPER, *CASES AND MATERIALS ON THE LAW GOVERNING THE EMPLOYMENT RELATIONSHIP* 928-35 (1990).

113. All but a few state unemployment funds have swelled from years of high employment. The combined holdings of all state funds doubled from 1992 to 1999. According to the U.S. Department of Labor, the District of Columbia’s fund grew by 1,200%, Maryland’s by 458% and Virginia’s by 104%. Dale Russakoff, *Clinton’s Push for Paid Parental Leave Falls Flat in States*, WASH. POST., Aug. 1, 2000, at A2.

114. Birth and Adoption Unemployment Compensation, 64 Fed. Reg. 67,972 (1999) (to be codified at 20 C.F.R. pt. 604) (proposed Dec. 3, 1999) (“We can do this in a way that preserves the soundness of the unemployment insurance system and continues to promote economic growth,” quoting President Clinton). The regulations also articulate that it is each State’s responsibility to assess the effect such changes would have on the solvency of its unemployment fund and the importance that states make “prudent” decisions prior to enacting Birth and Adoption Unemployment Compensation. 64 Fed. Reg. 67,978 (1999). *See also*, Alice Ann Love, *Labor Department Sued Over Paid Leave*, N.Y. DAILY NEWS, June 26, 2000; Birth and Adoption Unemployment Compensation, 65 Fed. Reg. 37,210 (2000) (to be codified at 20 C.F.R. pt. 604). The regulations grant state agencies the opportunity to voluntarily choose to provide partial wage replacement to parents who take approved leave or otherwise leave employment after the birth or placement for adoption of a child. Citing the Department of Labor’s discretion to interpret the Federal Unemployment Compensation laws as legal authority to take such measures, the regulations give state agencies great latitude in the ability to determine eligibility criteria and benefit amounts and durations, should they choose to participate in this “experiment.” The only proscription is that participating states may not restrict eligibility in ways “inconsistent with Federal law.” *Id.*

115. This suit was filed in the District Court for the District of Columbia on June 26, 2000. The complaint and a press release are available from the National Chamber of Commerce Litigation Center, at <http://www.uschambers.org/nclcl>.

taking family leave.”¹¹⁶ On the other hand, many major newspapers editorialized in support of proposals to make unemployment compensation available to parents with new babies.¹¹⁷ The dispute also takes the form of conflicting estimates about the likely cost of such a program. The conservative Economic Policy Foundation estimates such programs would cost between \$6.2 billion and \$28.4 billion.¹¹⁸ Advocates and legislators who support the idea estimate that costs are likely to be much more modest.¹¹⁹

From a federalism point of view, this program appears sound. The federal action addresses a serious and well documented problem that states proved unable to solve. The federal rules facilitate state action

116. Love, *supra* note 114.

117. See, e.g., *Baby Benefits*, BOSTON GLOBE, June 26, 2000, at A10 (urging state legislature to adopt a bill providing new parents twelve weeks of paid leave, up to unemployment's maximum of \$431 per week); Janet Stoodley, *The Two Faces of the Family Medical Leave Act: It Has Been a Boon for Some, a Bust for Others*, CHICAGO TRIB., June 25, 2000, at 1 (supporting unemployment compensation funding for infant care leaves in an opinion story); Editorial, *A Boost for Families*, LOS ANGELES TIMES, July 3, 2000, at B6 (supporting unemployment compensation funding for infant care leaves).

118. The Economic Policy Foundation's (EPF) projection is based on the assumption that every state will expand its UI program to provide parental leave benefits. In 1999, ten states were considering such a move, but many states are unlikely to do so. The EPF assumes that all states will offer either twenty-six or twelve weeks of parental leave. The EPF assumes that every eligible parent will take the full amount of time available. In reality many parents will take no leave and others will not be able to afford to take the full amount available. See NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, OVERESTIMATING THE COSTS OF PARENTAL LEAVE: FUNDAMENTAL FLAWS IN THE EMPLOYMENT POLICY FOUNDATION'S COST ASSESSMENT OF BIRTH AND ADOPTION UNEMPLOYMENT COMPENSATION PROGRAMS I (2000), Letter from Unemployment Policy Foundation, to Unemployment Insurance Service Re: Notice of Proposed Rulemaking on Birth and Adoption Unemployment Compensation, January 26, 2000, available at <http://www.epf.org/documents/20000126.pdf>.

119. A careful study, based on data about the use of unpaid family leave and survey data of people who say that they would take leave, if it were paid, estimates that in Massachusetts in 1998 paid parental leave on the same terms as unemployment compensation would have covered 28,887 people at an annual cost of \$32,735,000 or \$10.81 per year per covered employee. RANDY ALBELDA & TIFFANY MANUEL, FILLING THE WORK AND FAMILY GAP 12 (U. Mass., Labor Resource Center, 2000). Another careful study by New Jersey Assemblywoman Arlene Friscia estimates that in 1998 between 41,900 and 44,500 workers would have taken twelve weeks of subsidized leave to care for newborns and adopted children, as compared to 265,700 workers who received regular unemployment compensation. Gregory L. Williams, Estimate of Utilization and Cost of Family Leave Benefits Under Assembly Bill, No. 2037, 1-2 (N.J. 2000) (Gregory L. Williams is Senior Legislative Analyst to Assemblywoman Arlene Friscia). The annual cost of the birth and adoption program would have been between \$95.1 million and \$101.1 million, compared to \$1,124 billion for regular unemployment compensation. *Id.*

by allowing states to use the unemployment compensation funds, however, states are not required to act. Individual states must make judgments based on state economic conditions, the status of the compensation fund, and other factors. This program comes at a time when we observe that, in supporting workers who have conflicting obligations to families even with the FMLA and the new unemployment compensation proposals, the United States does far worse than any other industrialized nation and worse than many less developed nations.¹²⁰ Perhaps the pattern of success should cause us to challenge our basic assumption that family law is primarily a matter of state, rather than federal, responsibility.

III. FEDERAL INTERVENTIONS IN FAMILY LAW THAT HURT FAMILIES

This section examines two categories of federal interventions in state family law that appear to have done more harm than good. First, there are cases where federal law defines the financial consequences of marriage and divorce and the financial obligations of parents to children in ways that irrationally conflict with state rules. Second, there are federal interventions, and proposed interventions, that involve “hot button issues” that push the federal government to act without the necessary understanding of the larger context of relationships created under state family law.

Federal law often allocates rights and responsibilities on the basis of legal status as a family member and relies on states to define marriage. For example, married people are entitled to claim federally financed Social Security and Medicare through their spouses.¹²¹

120. Until the FMLA, the United States was one of two industrialized countries (the other is South Africa) without national family leave. Many countries provide paid leave. For example, Greece and the Netherlands provide sixteen weeks at full pay; Italy provides twenty weeks at 80% pay. The European Community policy calls for a minimum of fourteen weeks with compensation at least equal to sick pay. See Joseph P. Allen, *European Infant Care Leaves: Foreign Perspectives on the Integration of Work and Family Roles* 270-71 in THE PARENTAL LEAVE CRISIS: TOWARD A NATIONAL POLICY (Edward F. Zigler & Meryl Frank eds., 1988); Sabra Craig, Note, *The Family and Medical Leave Act of 1993: A Survey of the Act's History, Purposes, Provisions, and Social Ramifications*, 44 DRAKE L. REV. 51, 79 (1995).

121. See Matthew R. Dubois, Note, *Legal Planning for Gay, Lesbian, and Non-Traditional Elders*, 63 ALB. L. REV. 263 (1999) [hereinafter Dubois]; *Id.* at 290 (Social Security retirement and disability benefits); *Id.* at 299 (Medicare).

Similarly, federal tax law treats married people differently than those who are single.¹²² Sometimes this federal tax policy benefits married people by allowing a high income and low income spouse to pool income and qualify for lower tax rates than the high income person would have alone; when both partners are high income earners the federal tax policy requires them to pay higher taxes.¹²³ Again, for the most part, federal law does not define who is married, but rather relies in large part on states to do that job.¹²⁴ Furthermore, though federal power over immigration is extremely broad, federal immigration law, with rare exceptions, relies on states to determine who is married.¹²⁵

Thus, while family legal status is often important to the determination of federal rights and responsibilities, the federal government usually does not attempt to define who is entitled to marry, the responsibilities of married people, or the terms and conditions of divorce. Rather, federal law relies on state determinations of marital status. This section considers situations in which federal law defines the legal consequences of family relation without reference to state law.

122. IRS Income Tax on Individuals, 26 C.F.R. § 1.1-1 (1999).

123. Dubois, *supra* note 121, at 293-96.

124. Boyter v. Comm'r of Internal Revenue Service, 668 F.2d 1382, 1385 (4th Cir. 1981). The court recognizes that for federal tax purposes, state law determines whether people are married, except when the marriage is sham undertaken to avoid tax liability. The sham transaction doctrine may apply to the year-end foreign divorce of taxpayers who promptly remarry if:

the underlying purpose of the transaction, viewed as a whole, is for the taxpayers to remain effectively married while avoiding the marriage penalty in the tax laws. It is the prompt remarriage that defeats the apparent divorce when assessing the taxpayers' liability, just as the prompt reincorporation of a business enterprise in continuous operation defeats the apparent liquidation of the predecessor corporation.

Id. at 1387.

125. See Adams v. Howeton, 673 F.2d 1036 (9th Cir. 1982). The court held that § 201 of the Immigration and Nationality Act of 1952, as amended 8 U.S.C. § 1551(b) (1994), requires a two step process that first asks whether a marriage is valid under state law, and second, whether it qualifies under federal law. *Id.* at 1038. In the immigration context, a marriage valid under state law might nonetheless fail to confer preferred federal immigration status. *Id.* at 1039-40. "So long as Congress acts within constitutional constraints, it may determine the conditions under which immigration visas are issued. Therefore, the intent of Congress governs the conferral of spouse status under § 201(b), and a valid marriage is determinative only if Congress so intends." 673 F.2d at 1039.

A. *Thoughtless and Seemingly Irrational Federal Action on Family Finances*

1. Pensions as Marital Property

Conflicts between state and federal treatment of pension distributions upon divorce provide a prime example of federal intervention that is damaging to families. For many families, pension benefits, along with the home and the automobile, are the most significant assets acquired during the term of the marriage.¹²⁶ The policy and technical problems involved in the division of marital property, particularly pensions, are complex and the stakes are high. Clear and stable rules are essential to encourage negotiation and settlement in these stressful situations. States take divergent approaches to the division of marital property and pensions. Nothing in the legal and policy literature of family law suggests that any state has figured out a clearly preferable way to divide pensions, nor does this seem to be an issue, like child support enforcement, that suffers from neglect and lack of attention at the state level.

In many situations, federal policy must address issues that impact the division of property at the time of divorce. For example, when Congress creates pension programs for military personnel or for railroad employees, obvious questions arise concerning the relation between federal pension law and state marital property law. Often the congressional approach to such a conflict was to shield the federal pensions or retirement benefits from distribution as marital property under state law.¹²⁷ Similarly, when Congress regulates private

126. Marsha Garrison, *Equitable Distribution in New York: Results & Reform*, 57 BROOKLYN L. REV. 621, 665 (1991). Because a smaller percentage of divorcing couples receive a pension than own a home, the family home is likely to be a couple's most valuable asset. However, for couples who receive pension and retirement benefits, these earnings have the potential to become great, especially in a longer marriage, and may be the most valuable asset a couple owns. LENORE WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 55, 114 (1985).

127. See *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 584-85, 590 (1979) (holding that a California rule stating that husband's pension, earned during the term of the marriage, is community property subject to division is preempted by a federal rule prohibiting the alienation of federal railroad retirement pensions); *McCarty v. McCarty*, 453 U.S. 210, 230 (1981) (California rule that nondisability military retirement benefits are community property divisible

pensions, as it has done extensively through the Employment Retirement Income Security Act,¹²⁸ it sometimes ousts state law governing the distribution of marital property.¹²⁹

These federal interventions—removing federally regulated pensions from distribution as marital property under state law—were completely unjustifiable.¹³⁰ This conclusion is supported by the fact that Congress subsequently revised federal policy in relation to railroad pensions¹³¹ and later retroactively revised the federal policy in relation to military pensions and benefits.¹³² Why did Congress adopt rules intervening in state family law in such significant and senseless ways? Two explanations seem plausible. First, the protection of pensions against distribution at divorce might have been motivated by sexism. Pensioners are more likely to be men and the spouses seeking distribution more likely to be women. Congress could have acted on the traditional belief that money belongs to the person who earns it,¹³³ even though states have now uniformly

at divorce is preempted by federal law, despite absence of clear statutory language).

128. 29 U.S.C. § 1101 (1994).

129. *Boggs v. Boggs*, 520 U.S. 833, 844 (1997). The Court held, 5-4, that several provisions of ERISA regarding the distribution and non-alienation of pension benefits directly conflicted with, and therefore preempted, the application of Louisiana's community property law to undistributed ERISA pension benefits. Justice Breyer, dissenting, observed: "Obviously, Congress did not intend to pre-empt all state laws that govern property ownership. After all, someone must own an interest in ERISA plan benefits . . . The question, 'who owns the property?' needs an answer. Ordinarily, where federal law does not provide a specific answer, state law will have to do so." *Id.* at 861. See also, Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1181-1201 (1998).

Since 1995, the Supreme Court has reversed course and sharply restricted the sweep of the federal ERISA preemption of state law. *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Inc. Co.*, 514 U.S. 645 (1995); *N.Y. Comm'r of Health v. NYSA-ILA Medical & Clinical Services Fund*, 520 U.S. 806 (1997); *Pegram v. Herdrich*, 530 U.S. 211 (2000). *In re Egelhoff*, 989 P.2d 80 (Wash. 1999), used these recent cases to reject a former wife's claim that ERISA preempted a state law rule awarding her deceased ex-husband's pension to his children. The state court distinguished *Boggs*.

130. In the pension cases, the Supreme Court shares responsibility for creation of the conflict between state and federal pension law. *Hisquierdo*, 439 U.S. 572, *McCarty*, 453 U.S. 210, and *Boggs*, 520 U.S. 833, were all divided decisions in which the dissenting Justices would have interpreted the federal statutes more consistently with general state family law.

131. 45 U.S.C. § 231a(c)(4) (1994).

132. Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (1994).

133. For example, in *Hisquierdo* the Court observed:

Congress has fixed an amount thought appropriate to support an employee's old age. . . Any automatic diminution of that amount frustrates the congressional objective. [T]he

adopted a vision of marriage that treats assets acquired during the marriage as belonging to the marital community.¹³⁴ A second possible explanation is that Congress simply did not confront the problem of federal pension rules and state marital property division. This is not surprising. Because family law is a matter of state law in most instances, Congress has had little reason or opportunity to develop expertise in it.

2. Federally Subsidized Student Loans and Parental Child Support Obligations

The pension cases are not unique examples of federal disregard of state family law. Federal rules for subsidized loans for college students take little account of state family law obligations. Federal rules assume that the income of custodial parents and stepparents is available to support college education. To qualify for federal loans, college students must submit their parents' tax return. Loan authorities take parent's income into account in determining students' eligibility for federally subsidized loans.¹³⁵ Further, in many schools, the federal financial aid application is the "gateway to applications for various types of aid."¹³⁶ Federal rules do not expect non-custodial parents to contribute to college education, and no information is required about them, whatever their ability to pay.¹³⁷

community property interest that respondent seeks . . . promises to diminish that portion of the benefit Congress has said should go to the retired worker alone, and threatens to penalize one whom Congress has sought to protect.

439 U.S. at 585, 590.

134. While states differ substantially in the details of the rules for dividing marital property, all states now follow some form of equitable distribution under which title is not wholly determinative. *See* WEISBERG & APPLETON, *supra* note 39, at 650-55.

135. Applicants for Federal Student Aid must submit financial information on their parents, unless the student was born before Jan. 1, 1976, is working for a graduate degree, is married, has dependent children, or is a veteran. *See* APPLICATION FOR FEDERAL STUDENT AID, 4, 7, available at <http://www.fafsa.gov>; 20 U.S.C. § 1087kk (1994).

136. A senior Massachusetts family law judge and experienced practitioner observed that "the pervasive method for obtaining financial aid is to initially apply for federal loans by filling out a federal financial aid form." Other sources of aid then rely upon this information. Edward M. Ginsburg & Anita Wyzanski Robboy, *Support and Education after Age Eighteen*, 10 MASS. FAM. L.J. 101, 104 (1993) [hereinafter Ginsburg & Robboy].

137. Colleges, particularly private schools, expect that non-custodial parents will contribute to the cost of their children's education. Linda Matthews, *Divorced Father's Case Raises*

By contrast, under the family law of most states, parents, whether custodial or not, are not legally obligated to support their children beyond the age of eighteen.¹³⁸ The minority of states that require parents to pay reasonable educational expenses until age twenty-one apply this obligation equally to custodial and non-custodial parents.¹³⁹ Most states do not make stepparents legally responsible for the financial support of their stepchildren;¹⁴⁰ the few states that impose support obligations on stepparents define those obligations more narrowly than obligations to biological children.¹⁴¹ An experienced Massachusetts family judge lamented that under the federal assumption of stepparent income, “the understandable and lawful refusal of a stepparent to disclose his or her financial circumstances may foreclose a child from any financial aid.”¹⁴²

Congress could resolve this conflict in several ways. Federally subsidized loan programs could be modified to take into account only that financial support to which a student is legally entitled or which he or she actually receives.¹⁴³ This approach would respect state choice with respect to defining parental obligations to help with the educational expenses of children over eighteen. There is an obvious disadvantage to this strategy. If federal law were changed to tell parents and children that in most states parental support for college education is purely voluntary, undoubtedly some parents, who now struggle to provide financial support, would decline to do so, knowing that children could borrow increased amounts of low interest, federally-subsidized loans. College education is expensive. In 1998 the average married-couple family in the United States

Difficult Issues of Who Pays Tuition, N.Y. TIMES, Nov. 18, 1995, at B11.

138. WEISBERG & APPLETON, *supra* note 39, at 744.

139. *Id.*

140. *Id.* at 748.

141. Charles F. Willson, *But Daddy, Why Can't I go to College? The Frightening De-Kline of Support for Children's Post-Secondary Education*, 37 B.C. L. REV. 1099, 1104-12 (1996) [hereinafter Willson].

142. Ginsburg & Robboy, *supra* note 136, at 104.

143. A similar issue arose in relation to public assistance when state welfare authorities denied aid to children whose mothers had a boyfriend, even though the boyfriend did not in fact provide financial support and was not legally required to do so. In *King v. Smith*, 392 U.S. 309, 327 (1968), the Supreme Court held that the Social Security Act did not permit states to attribute income to a child unless the child was legally entitled to receive it, or it was actually provided.

earned \$54,276.¹⁴⁴ The average cost for one year at a private four-year college, including tuition and living expenses, was \$17,420. Changing federal policy to correspond to state law would require a vast increase in federal, as opposed to parental, contribution to the costs of higher education.

Alternatively, Congress could require states to modify the parental support rules by amending the federal child support guidelines. If Congress assumes that the custodial parent's income is available to support college education, the federal child support guidelines should be amended to require such support.¹⁴⁵

The disparity between federal assumptions about parental support for college education and state requirements is more than an issue of messy inconsistency. Both state and federal rules are gender biased in different ways. State rules are gender biased in that they do not generally expect parents to pay for college education even if they are able to do so. Custodial parents—overwhelmingly women—struggle to help their children take advantage of higher education.¹⁴⁶ But, in most states, the law does not insist that non-custodial parents help. The federal rules are even worse. Even in states that require non-custodial parents to help their kids with college expenses, the federal government does not require so. Further, even though few states require stepparents to support their stepchildren, federal law expects support from stepparents married to widowed or custodial parents. State law does not require stepparents to support their stepchildren because states want to leave adults free to marry, without taking on obligations to children.¹⁴⁷ But under federal law, for custodial

144. U.S. CENSUS BUREAU, INCOME 1998, TABLE A, COMPARISON OF SUMMARY MEASURES OF INCOME BY SELECTED CHARACTERISTICS, available at <http://www.census.gov/flp/pub/hhes/income/income98/in98sum>.

145. The simplest rule would simply require states to extend existing support obligations to children between the ages of eighteen and twenty-one enrolled in high school, college or vocational education programs.

146. After high school, many middle-class or wealthy non-custodial fathers cease financial support, maintain it at minimal levels, or attach burdensome strings. See Judith S. Wallerstein & Shauna B. Corbin, *Father-Child Relations After Divorce: Child Support and Educational Opportunity*, 20 FAM. L.Q. 109 (1986); See also JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN & CHILDREN A DECADE AFTER DIVORCE* 157-60 (1989).

147. Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 CORNELL L. REV. 38, 45 (1984).

parents—almost all women—the price of remarriage is that the new husband is required to pay for the kids' college education.¹⁴⁸ By contrast, the non-custodial parent has no obligation under federal law or under the laws of most states. The stepparent who weds the non-custodial parent has no obligation to pay.

Apart from the inconsistency of state and federal expectations, and the gender bias that assumes that custodial parents and their new spouses will provide financial support, neither state nor federal law assure young people that they can look to their parents for financial support for college, even if the parents are able to pay. This is not necessarily a federalism problem, but it is troubling.

Until the 1970s, many states required parents to support children until age twenty-one. When young men were drafted to fight the war in Vietnam at age eighteen, many people argued that people old enough to fight and die were old enough to vote. In 1971 the Twenty-sixth Amendment to the Constitution lowered the voting age from twenty-one to eighteen.¹⁴⁹ Whatever the logic of "old enough to fight and die means old enough to vote," it is far from obvious that eighteen year olds are old enough to pay for their own college education. Nonetheless, most states responded to the Twenty-sixth Amendment by ending parents' obligations to support their children at age eighteen.

A few states continued a gender differentiated rule that required parents to support male children until age twenty-one and female children until age eighteen.¹⁵⁰ In 1975 the Supreme Court explained, and rejected, the gender differentiated rule:

No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas. . . . If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, it is for the

148. Margorie Engel, *Pockets of Poverty: The Second Wives Club—Examining the Financial [In]Security of Women in Remarriages*, 5 WM. & MARY J. WOMEN & L. 309, 366 (1999).

149. U.S. CONST. amend. XXVI, § 1.

150. By 1975 only two states, Utah and Arkansas, fixed the age of majority for women younger than that for men. *Stanton v. Stanton*, 421 U.S. 7, 15 (1975).

girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed.¹⁵¹

When the Court struck down the gender based rule, Utah corrected the disparity by lowering the age of required support from twenty-one to eighteen for all young people.¹⁵² Ironically, these two measures, designed to empower young people by giving them the vote and opening higher education for girls, had the practical effect of denying all young people the ability to look to their parents for financial support for higher education.

In the twenty-first century in the United States, able young people need education beyond high school. They should be able to expect their parents to support them if the parents are financially able to do so. As a society we have not delivered on the Supreme Court's recognition in *Stanton* that the "market place and the world of ideas"¹⁵³ should be open to both men and women, and that higher education is essential to such participation and contribution.

Congress should amend the child support guidelines to require states to extend child support obligations for both custodial and non-custodial parents to age twenty-one for young people in accredited educational programs. Under state law, married people are not now legally required to provide more than minimal financial support to their children.¹⁵⁴ On the controversial issue of stepparent liability for

151. *Id.* at 14-15.

152. *Stanton v. Stanton*, 429 U.S. 501, 501 n.2 (1977) (reviewing decision of Utah Supreme court after remand).

153. 421 U.S. at 14-15.

154. Current child support obligations apply only to families in which the parents are unmarried and do not live together. The assumption is that when a family lives together they typically share a standard of living; state involvement in enforcing support obligations in the context of an on-going family relation is seen as unduly intrusive on family privacy. *McGuire v. McGuire* provides the classic statement of the concept in the context of spousal support obligations. 59 N.W.2d 336 (Neb. 1953) (showing that even though Mr. McGuire was quite wealthy, he was extremely stingy with his hard-working farm wife). Feminists have sharply criticized the rule that marital support obligations are enforceable only after separation or divorce. *See, e.g.*, Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 151, 155-56 (David Kairys ed., 1990). Even if the notion that support obligations should not be

the financial support of stepchildren, Congress should either amend the child support guidelines to require that stepparents support their stepchildren, or modify the federal college loan qualifications to eliminate the assumption that young people can look to their stepparents for financial support.¹⁵⁵ As with the child support guidelines, there would continue to be disputes about the application of guidelines in particular cases, and it is sensible to allow state courts, who have all the experience in defining and enforcing support obligations, to continue to do that job.

The current regime, in which federal law assumes that students can look to their custodial parent, most often mothers, for financial support for a college education and state law that says they cannot, is not defensible. In our federal system, states cannot change the federal policy. States could revise their own rules to bring support obligations into line with the expectations of federal financial support for higher education. But, consistent with the more general problems of the definition and enforcement of child support, states have shown little inclination to do so.¹⁵⁶ Additionally, both the state and federal

enforceable when a family shares a home is defensible, it is far from clear that the justifications apply to financial support for children's higher education. In many cases, the child is no longer in the home. The educational accreditation process provides a means of defining institutionally valuable education, and the financial aid application process, including the federal loan programs, provide a mechanism for quantifying need and obligation. There would, of course, be disputes. However, these disputes would be similar to those now adjudicated by state family court judges in jurisdictions where separated parents are legally obligated to provide financial support for higher education for young people eighteen to twenty-one years old.

In *Curtis v. Kline*, 666 A.2d 265 (Pa. 1995), the Pennsylvania Supreme Court held that a state law requiring divorced and separated parents to provide educational financial support for children age eighteen to twenty-one, but not imposing such obligations on married couples, violated the Equal Protection Clause of the Fourteenth Amendment because there was no rational basis to distinguish between young people whose parents were married and those whose parents were divorced, unmarried or separated. *But see* *LeClair v. LeClair*, 624 A.2d 1350 (N.H. 1993) (holding that the legislature could create educational support obligations for separated parents of children eighteen to twenty-one because it could rationally conclude that these children are less likely to receive financial support from both parents).

155. The question of stepparent obligation is obviously extremely controversial, as exemplified by the fact that few states require stepparents to support their stepchildren. *See* Mahoney, *supra* note 147. Perhaps this suggests a national consensus that stepparents should not be expected to support stepchildren and that federal rules should be changed to eliminate the requirement that stepparent income be taken into account in determining student eligibility for federally supported loans.

156. Willson, *supra* note 141, at 1103-06. Washington and Iowa, for example, have passed legislation authorizing courts to order parental support for high school or college students.

rules are gender biased and fail to provide support to children whose parents are capable of supporting them. Congress could and should address this issue.¹⁵⁷

B. Federal Intervention on “Hot Button” Issues

Another category of cases in which federal intervention in family law hurts families involves “hot button” issues; Congress seeks to “do something” without serious consideration of the impact of congressional action. The phenomena of symbolic congressional action on issues with popular political appeal is not confined to family law. The Gun-Free School Zones Act,¹⁵⁸ which precipitated the *Lopez* decision that radically cut back on federal legislative power,¹⁵⁹ is a good example. It is an exceptionally silly law. While no one could deny the problem of guns in schools or the importance of providing children a safe educational environment, the Gun-Free School Zones Act was not a serious response to the problems.¹⁶⁰ Criminal law, like family law, is basically a state responsibility. Most states have a raft of laws that prohibit guns in schools.¹⁶¹ So what does the federal Gun-Free School Zones Act add to this picture? It created a new federal cause of action.¹⁶² However, the Gun-Free

157. Even though the federal college loan program systematically disfavors women by requiring custodial parents, but not non-custodial parents, to support children in college, the possibility of a constitutional challenge is remote. Discriminatory effects, however dramatic, do not prove a violation of constitutional gender, or racial, equality norms. *Personnel Adm’r. of Massachusetts v. Feeney*, 442 U.S. 256 (1979). Also, the Supreme Court has held that when the federal government spends money, it can penalize speech or choice that would otherwise be constitutionally protected. *Rust v. Sullivan*, 500 U.S. 173 (1991); *Harris v. McRae*, 448 U.S. 297 (1980).

158. 18 U.S.C. § 922(q) (1994).

159. See *infra* discussion in Appendix 1.

160. David B. Kopel, *Children and Guns, in GUNS: WHO SHOULD HAVE THEM?* 329-30 (David B. Kopel ed., 1995); Laura Beresh-Taylor, *Preventing Violence in Ohio’s Schools*, 33 AKRON L. REV. 311, 327 (2000) [hereinafter Beresh-Taylor].

161. All fifty states mandate the immediate expulsion of students who possess weapons on school property. Beresh-Taylor, *supra* note 160, at 323. See Thomas M. Mengler, *The Sad Refrain of Tough on Crime: Some Thoughts on Saving the Federal Judiciary from the Federalization of State Crime*, 43 KAN. L. REV. 503, 504 (1995).

162. 18 U.S.C. § 922(q). See also John M. Scott, *Constitutional Law—Supreme Court Invalidates Federal Gun-Free School Zones Act*, 18 U. ARK. LITTLE ROCK L.J. 513, 514 (1995); Deanell Reece Tacha, *Preserving Federalism in the Criminal Law: Can the Lines Be Drawn?*, 2 FED. SENT. R. 129, 130 (1999).

School Zones Act did not appropriate funds, provide expertise in enforcing existing laws, reduce class room size, or, most importantly, control access to guns. Mostly the Gun-Free School Zones Act provided federal politicians an opportunity to stand up and say they supported gun-free schools. Immediately following the *Lopez* decision, the President reaffirmed his commitment to federal legislation on gun-free schools, observing, quite accurately, that Congress can reach the same result by attaching substantive provisions to federal funding for education,¹⁶³ or by making the interstate commerce connection more explicit.¹⁶⁴

Family law presents federal actors many opportunities to “do something” about an issue of popular concern in the media. The remainder of this section considers two cases in which federal intervention in state family law seems unwarranted and unwise: The Child Abuse Prevention and Treatment Act of 1984 (CAPTA) and the federal anti-gay Defense of Marriage Act. Each example raises consequential issues about which reasonable people disagree and in which state courts and legislatures are deeply involved. Federal actors are motivated by a desire to “do something,” but in both of these cases, it seems that federal intervention is either meaningless grandstanding or hurts, rather than helps, families.

1. The Child Abuse Prevention and Treatment Act of 1984

Parents ordinarily decide what medical treatment is appropriate for their children. Parents have wide discretion to decide whether colds their children contract should be treated with antibiotics, homeopathic remedies, vitamin C, faith, or chicken soup. However, if the child’s condition is life threatening and doctors believe that treatment has a reasonable prospect of success, parents cannot reject

163. Todd S. Purdum, *Clinton Seeks Way to Retain Gun Ban in School Zones*, N.Y. TIMES, Apr. 30, 1995, at A1.

164. Congress rewrote the law struck down in *Lopez* to require that the firearm near the school yard has “moved in or the possession of the firearm otherwise affects interstate or foreign commerce.” 141 CONG. REC. S6459-02 (daily ed. May 10, 1995). See also Kathleen F. Brickey, *Symposium: The New Federalism After United States v. Lopez: Panel III: Crime Control and the Commerce Clause*, 46 CASE W. RES. L. REV. 801, 828-30 (1996); Robert Wax, *Comment: United States v. Lopez: The Continued Ambiguity of Commerce Clause Jurisprudence*, 69 TEMPLE L. REV. 275, 299 (1996).

treatment. In every state, doctors can go to court to get an order declaring the parents neglectful for refusing to consent to medical treatment.¹⁶⁵ For infants with serious disabilities, these choices are often gut-wrenchingly difficult and must be informed by particular facts, the fast moving state of technology at the treating hospital, and sharply divergent parental values. For example, some parents of an anencephalic infant—a baby with no brain—seek aggressive treatment even though it is certain to be futile,¹⁶⁶ while other parents want the infant declared dead so that another child might benefit from healthy donated organs.¹⁶⁷ For the most part it seems that doctors and parents act responsibly, and state courts intervene only when parents unreasonably refuse treatment.¹⁶⁸

In 1982, a baby in Indiana with Down's syndrome, Baby Doe, suffered from an obstruction of the esophagus which precluded normal feeding, but was surgically correctable. On the advice of their obstetrician, the parents refused to consent to surgery. The hospital sought a court order to override the decision of the doctor and parents, and the court denied it.¹⁶⁹ The baby died when he was six days old. The Indiana Baby Doe case was highly unusual and shockingly wrong.¹⁷⁰ The case triggered calls for federal action to

165. *Newmark v. Williams*, 588 A.2d 1108, 1117-18 (Del. 1991), provides a good review of the cases. When the parents refused treatment, the court rejected the doctor's request to order invasive and painful chemotherapy for a seven-year-old child for whom treatment offered only a 40% chance of success. *Id.*

166. See *In re Baby K.*, 16 F.3d 590 (4th Cir. 1994) (denying a hospital request to issue a "Do not Resuscitate Order" over the objection of the mother).

167. See *In re T.A.C.P.*, 609 So. 2d 588 (Fla. 1992) (denying parents' request to have infant declared dead because no Florida law addressed the situation).

168. See Raymond F. Duff & A.G. Campbell, *Moral and Ethical Dilemmas in the Special Care Nursery*, 289 N. ENG. J. MED. 890 (1973) (detailed description of thoughtful decision making process at Yale New-Haven Hospital); Phoebe A. Haddon, *Baby Doe Cases: Compromise and Moral Dilemma*, 34 EMORY L.J. 545, 568 (1985) (discussing a tradition of preference for decentralized decision making in matters concerning the family and the appropriateness of state intervention only where parental decision making is contrary to the interests of the child); H. Lila Hubert, Comment, *In the Child's Best Interests: The Role of the Guardian Ad Litem in Termination of Parental Rights Proceedings*, 49 U. MIA. REV. 531, 535 (1994) (discussing case law limiting state interference with parental choice).

169. *In re Infant Doe*, No. 608 204-004A (Monroe County Cir., Apr. 1982) (declaratory judgment, writ of mandamus dismissed *sub nom.* State *ex rel.* Infant Doe v. Bloomington Hosp), *cert. denied*, 464 U.S. 951 (1983).

170. Dr. Norman Frost, discussing the Indiana Baby Doe case, says: "[t]here is a broad consensus in the United States that many of the decisions of under treatment in the past were

protect vulnerable babies.¹⁷¹ The Reagan Administration issued regulations requiring hospitals to post notices informing staff and patients that infants with disabilities, however severe, were entitled to a full range of treatment, whatever the judgments of parents and treating doctors, and that complaints could be filed with a Handicapped Infant Hotline.¹⁷² This initial federal effort had the immediate effect of transforming the small Office of Civil Rights of the federal office of Health and Human Services from an organization that dealt with a broad range of discrimination issues in health care to one with the single-minded focus of responding to Baby Doe Hot Line calls. The people who previously joined the office to fight broad patterns of discrimination in health care found themselves on the other end of a Hot Line to represent a nurse, aide, or visiting stranger who sought to overrule the judgments of responsible parents and competent doctors who decided that aggressive treatment was not warranted.¹⁷³ The Supreme Court eventually held that these Executive initiatives were not authorized by statute.¹⁷⁴

Yet, Congress still wanted to “do something” about the problem. It passed the CAPTA.¹⁷⁵ The federal standards are simultaneously

morally wrong.” Norman Frost, *Decisions Regarding Treatment of Seriously Ill Newborns*, 281 JAMA 2041, 2042 (1999). Dr. Frost also observes that “It is difficult to find a single case of withholding life-sustaining treatment from an infant based on a diagnosis of Downs syndrome or spina bifida since 1985.” *Id.* at 2041.

171. C. Everett Koop, *Life and Death and the Handicapped Newborn*, 5 ISSUESL. & MED. 101, 110 (1989).

172. 48 Fed. Reg. 9630 (1983).

173. See PETER G. FILENE, IN THE ARMS OF OTHERS: A CULTURAL HISTORY OF THE RIGHT-TO-DIE IN AMERICA 119-24 (Ivan R. Dee ed., 1998).

174. *United States v. Univ. Hosp., State Univ. of New York at Stony Brook*, 575 F. Supp. 607 (E.D.N.Y. 1983), *aff'd*, 729 F.2d 144 (2d Cir. 1984). This case began when a baby at a Long Island hospital was born with spina bifida. *Id.* at 610. After consultation with many doctors, family and religious advisors, the parents, a Catholic couple who wanted a child, decided against surgical treatment. *Id.* Someone on the staff called A. Lawrence Washburn, a right-to-life attorney in Vermont, who filed suit in New York, seeking to be appointed guardian for the child. The New York courts rejected his petition. *Id.* HHS demanded the baby’s medical records and the hospital refused. *Id.* The Second Circuit held that the regulations were not authorized by the federal law prohibiting discrimination on the basis of disability. 729 F.2d 144. In *Bowen v. American Hosp. Ass’n.*, 476 U.S. 610 (1986), the Supreme Court confirmed that the regulations were not authorized by the statute.

175. PUB. L. NO. 98-457, 98 Stat. 1749 (codified as amended at 42 U.S.C. §§ 5101-5106 (1994)). The federal law requires states that receive federal assistance for child abuse and neglect programs take steps to protect handicapped infants. Treatment may be withheld only when:

rigid, imprecise and porous; it is not clear that they differ from the principles applied by the state courts that grapple with these awful conflicts.¹⁷⁶ More significantly, CAPTA turns enforcement of these standards over to the state agencies and courts that have always done just that.¹⁷⁷ Congress “did something” but it did not change either the state developed substantive standards or processes in any significant way.¹⁷⁸ Some doctors now assert that the federal law and the threat of prosecution leads them to provide care that they believe is futile and that the parents do not want, while others recognize that they are not legally compelled to do this and that there is no realistic threat of prosecution.¹⁷⁹

Despite the CAPTA having little or no formal impact, practices in neo-natal intensive care units have changed dramatically in the past two decades. Extremely small infants are treated much more aggressively,¹⁸⁰ and parents who believe that treatment is futile and cruel have less say in determining what treatments their infants

in the treating physician’s or a physician’s reasonable medical judgment . . . : A) the infant is chronically and irreversibly comatose; B) the provision of such treatment would—(i) merely prolong dying; (ii) not be effective in ameliorating or correcting all of the infant’s life-threatening conditions; or (iii) otherwise be futile in terms of survival of the infant; or C) the provision of treatment would be virtually futile in terms of the survival of the infant and the treatment itself under such circumstances would be inhumane.

42 U.S.C. § 5105g(10) (1994).

176. Whether one of the exceptions applies is determined solely on the basis of “reasonable medical judgment,” which implemented regulations define as “medical judgment that would be made by a reasonably prudent physician, knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.” 45 C.F.R. § 1340.15(3)(ii) (2000).

177. 42 U.S.C. § 5106a(b)(10)(C) (1994).

178. Mary A. Crossley observed: “In marked contrast to the flurry of regulatory and judicial activity spawned by HHS’s attempts to regulate selective nontreatment under section 504, the Child Abuse Amendments of 1984 have faced no judicial challenges and have generated little litigation.” Mary A. Crossley, *Of Diagnoses and Discrimination: Discriminatory Nontreatment of Infants with HIV Infection*, 93 COLUM. L. REV. 1581, 1615 (1993).

179. Gina Kolata, *Parents of Tiny Infants Find Care Choices Are Not Theirs*, N.Y. TIMES, Sept. 30, 1991, at A1.

180. JEFF LYON, PLAYING GOD IN THE NURSERY 116 (1995) (describing the recent trend toward more treatment while acknowledging the danger of doctors trying to salvage newborns whose prognosis is poor).

receive.¹⁸¹ Many factors encourage increased treatment for infants with serious problems. Continuing development of knowledge and technology makes it possible to treat infants who would not have survived a decade ago and motivates doctors to treat infants more aggressively.¹⁸² Perhaps social recognition of the worth of people with serious disabilities is growing.¹⁸³ In addition, insurance covers the cost of care, including experimental treatments.¹⁸⁴

What has the federal CAPTA accomplished? As a formal matter, it seems that CAPTA did nothing, which is preferable to the Reagan Administration's earlier efforts to mobilize federal lawyers to insist on full treatment for all infants, however futile. Meaningless federal action is better than actions with serious negative consequences. Still, meaningless federal intervention into state law and practice is not a good idea. Further, it is not clear to what extent the lingering effects of the federal law encourage doctors to provide aggressive treatment against their own better judgments and the decisions of parents.

2. The Defense of Marriage Act

Many gay and lesbian people in committed relationships seek to be married.¹⁸⁵ In 1993, the Hawaii Supreme Court held that state law limiting marriage to couples that included a man and a woman

181. Kolata, *supra* note 179, (quoting Dr. Norman Frost, a pediatrician and ethicist from the University of Wisconsin: "We have reversed ourselves 180 degrees," from allowing parents to participate in decisions to a situation in which doctors decide). See also Anna Quindlen, *The Littlest Patients*, N.Y. TIMES, Jan. 29, 1992, at A1.

182. Kolata, *supra* note 179 (quoting Dr. Norman Daniels of Tufts University: "People get driven by their desire to solve a problem."). See also ROBERT F. WEIR, SELECTIVE NONTREATMENT OF HANDICAPPED NEWBORNS: MORAL DILEMMAS IN NEONATAL MEDICINE 34-35 (1984).

183. MELVIN I. UROFSKY, LETTING GO: DEATH, DYING, AND THE LAW 116-17 (1993).

184. Elisabeth Rosenthal, *As More Tiny Infants Live, Choices and Burden Grow*, N.Y. TIMES, Sept. 29, 1991, at 1-1. Neo-natal intensive care for very low birth weight babies costs an average of \$2,000 a day. *Id.* Premature infants stay in intensive care for about the same amount of time they would have remained in their mother's wombs, or four months for the most premature. *Id.* Many of these small infants suffer serious brain damage and stay in the intensive care unit for months or even years. *Id.* The neo-natal intensive care units are over crowded and must some times turn away new patients, for whom treatment is less likely to be futile. *Id.*

185. See William B. Rubinstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997) (summarizing disputes among gay and lesbian advocates about whether access to marriage is an important issue for gay and lesbian people).

violated the state constitutional prohibition against discrimination on the basis of gender, just as earlier state rules prohibiting marriages between Blacks and whites violated the federal constitutional prohibition against race discrimination.¹⁸⁶ In response to this decision and the general effort by committed gay and lesbian couples to marry, Congress adopted the Defense of Marriage Act (DOMA) in 1996.¹⁸⁷

DOMA has two parts. First, DOMA affirms state authority to decide whether to recognize the validity of a marriage that was valid in another state.¹⁸⁸ This provision simply confirms traditional legal rules. The Full Faith and Credit Clause of the Constitution¹⁸⁹ always has been interpreted to allow states to decide whether to recognize the validity of marriages that were legal where contracted.¹⁹⁰ The 1971 Restatement (Second) of Conflict of Laws says: “A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of

186. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). In 1997 the Hawaii legislature proposed a constitutional amendment providing: “The legislature shall have the power to reserve marriage to opposite-sex couples.” H.R. 117, 19th Leg., Reg. Sess. § 1 (Haw. 1997). The amendment was ratified by the electorate in November 1998. The Hawaii Supreme Court held that the amendment made plaintiffs’ claims moot. *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999). Hawaii also adopted a Reciprocal Beneficiaries Act recognizing same-sex civil unions. W. Brian Burnette, *Hawaii’s Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same Sex Marriage*, 37 BRANDEIS L.J. 81 (1998).

187. Defense of Marriage Act, 28 U.S.C. § 1738(c) (Supp. IV 1998).

188. The Act contains the following provision:

No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right to claim arising from such relationship.

Id.

189. “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1.

190. Linda J. Silberman, *Can the Island of Hawaii Bind the World? A Comment on Same-Sex Marriage and Federalism Values in Symposium: The Interstate Effects of Legalizing Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 191, 193 (1996).

the marriage.”¹⁹¹ The issue arises in many contexts. For example, if second cousins get married in Italy, where their marriage is legitimate, should the marriage be valid in Connecticut, which prohibits marriages between second cousins? Connecticut said no.¹⁹² Several states, such as California, adopted rules stating that any marriage valid in the place contracted is valid in their state.¹⁹³ Other states take a more restrictive approach and refuse to recognize marriages that violate a strong public policy of the state.¹⁹⁴

States have always been free to decide whether a marriage valid in the state in which it was contracted violates a “strong public policy” of another state. So what does this provision of DOMA accomplish? If same-sex marriages were legal in Hawaii and a couple married there, New York or Alabama has always been free to decide whether that marriage violated a “strong public policy” of that state. Substantively, the federal DOMA law does nothing. It simply affirmed the status quo. Nonetheless, symbolically, it sends a strong message. Congress singles out gay marriages, distinguishes them from teen marriages or cousin marriages, and affirmed that states have authority to condemn them as illegitimate.¹⁹⁵ While the

191. Restatement (Second) of Conflict of Laws § 283(1) (1971). My colleague, Professor Larry Kramer, argues that the public policy exception, allowing states to refuse to recognize the validity of marriages, legal where celebrated, on the grounds that they violate a strong public policy of the state, is unconstitutional. Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997). As Kramer recognizes, his view is eccentric: “The principle claim of this Article—that the public policy doctrine violates the Full Faith and Credit Clause—may elicit patronizing chuckles from some conflicts scholars.” *Id.* at 2007.

192. For example in *Catalano v. Catalano*, 170 A.2d 726 (Conn. 1961), the Connecticut Supreme Court refused to recognize the marriage of a half-uncle and niece, even though the marriage was legal in Italy, where it was celebrated, the couple had obtained the permission of the Catholic Church, had lived as man and wife in Connecticut for 40 years and had produced four children.

193. CAL. FAM. CODE § 308 (West 1994) provides that “A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.” See also Sandra Cavazos, *Harmful to None: Why California Should Recognize Out-of-State Same Sex Marriages Under its Current Marital Choice of Law Rule*, 9 UCLA WOMEN’S L.J. 133, 150 (1998); Thomas M. Keane, *Aloha, Marriage? Constitutional and Choice of Law Arguments for Recognition of Same-Sex Marriages*, 47 STAN. L. REV. 499, 525-26 (1995). Seventeen states in addition to California have statutory rules requiring recognition of marriages valid where contracted. *Id.* at 516.

194. *Supra* note 190-92.

195. Silberman, *supra* note 190, at 197-99.

provision effectuates no concrete practical change in the law, it does send a powerful message that Congress regards same-sex marriage as uniquely illegitimate. The central purpose of the Full Faith and Credit Clause of the constitution is to encourage states to respect the rules and judgements of sister states. Section 1 of DOMA represents the first time in U.S. history that Congress spoke out in support of state disregard of another state's laws.¹⁹⁶

The second part of DOMA is even more serious. It provides that for purposes of federal benefits, including taxes, Social Security, and other federal benefits, the terms "marriage" and "spouse" include only the union of a man and a woman.¹⁹⁷ Thus, even if an individual state decides to legalize gay marriage, these couples, legally married in their state, will not be entitled to benefits available to married people under federal law. In 1999, the Vermont Supreme Court held that under the state constitution, the state must allow gay couples access to the material benefits comparable to those provided to heterosexual couples; the court declined to grant gay couples the right to marry.¹⁹⁸ The Vermont legislature approved a bill to enable gay couples to form "civil unions" that would entitle them to the rights and benefits available under state law to married couples.¹⁹⁹ Beginning on July 1, 2000 gay couples in Vermont affirmed their commitment to a civil union.²⁰⁰ Still, many of the most important material benefits of marriage—federal taxes and pensions—are a matter of federal law. DOMA prevents Vermont from granting gay couples these federal benefits.

This second DOMA provision is unprecedented. There is no general federal law of marriage. In a vast range of contexts, the

196. Susan Frelich Appleton called this point to my attention.

197. DOMA provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of 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.

198. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

199. H.B. 847, 2000 Gen. Assem. Reg. Sess. (Vt. 2000).

200. Associated Press, *Civil Unions Law Goes into Effect*, July 1, 2000, available at <http://www.nytimes.com/aponline/a/ap-Civil-Unions-The-First>.

federal government relies on states to define who is, and who is not, married.²⁰¹ Section 2 of DOMA creates practical problems for states. For example, under Vermont's Civil Union law, a couple seeking to separate is subject to the same law applicable to married people who divorce.²⁰² When married people divorce, the impact of federal tax laws is a major factor in determining the financial terms of settlement.²⁰³ State family courts and family law practitioners are familiar with these rules and routinely use them in reaching settlements. There is no way of knowing the federal tax rules applicable to civil union couples who separate; the issue is certain to be a matter of controversy and litigation.

The problem with DOMA's federal intervention is not a slippery slope. It seems highly unlikely that Congress is about to impose federal rules defining the legitimacy of marriage between minors or cousins. Rather, the problem is that Congress has singled out gay and lesbian people and expressed its animosity toward them by applying unique and disfavorable principles of state and federal law to them. In *Romer v. Evans*, the Supreme Court struck down a Colorado constitutional amendment that prohibited states and localities from providing civil rights protection to gay and lesbian people.²⁰⁴ While the meaning of *Romer* is far from clear, it is possible that DOMA violates the constitutional guarantee of equal protection by singling

201. Jennifer Gerarda Brown, *Extraterritorial Recognition of Same-Sex Marriage: When Theory Confronts Praxis*, 16 QUINNIPIAC L. REV. 1, 7, 8 & n.23 (1996) ("Under the law and custom that preceded DOMA, the federal government generally defined marriage with reference to state law. DOMA deviates entirely from this practice and in a very real sense compromises the power of the various states to regulate marriage."). Evan Wolfson & Michael F. Melcher, *Constitutional and Legal Defects in the "Defense of Marriage" Act*, 16 QUINNIPIAC L. REV. 221, 233-34 (1996), observes that:

most federal statutes do not define domestic relations terms (especially terms such as 'spouse', 'husband,' or 'wife'), and courts have generally found that Congress intended such terms to be defined by reference to state law (even with disparities from state to state). This policy—followed by Congress for more than two hundred years—is not simply a result of deference, but rather is part of our system of federalism.

202. See *supra* note 199, at Section 3.

203. Under federal law, alimony or spousal support is fully taxable to the person who receives it, I.R.C. § 71 (West Supp. 1996), and fully deductible to the person who pays, I.R.C. § 215 (West 1994). By contrast, child support payments are nontaxable and nondeductible. I.R.C. § 71(c).

204. 517 U.S. 620 (1996).

out gay people for unfavorable treatment.²⁰⁵ Whether or not DOMA is constitutional, it seems gratuitous and terribly unwise.

IV. WHAT GENERAL PRINCIPLES CAN WE DERIVE FROM THIS EXPERIENCE?

When, as a general matter, should the federal government intervene to set national family law policy? The preceding discussion suggests several principles.

The common assumption that family law is necessarily and inherently a matter of state rather than federal law is false. Federal intervention in state family law is pervasive. In some situations, such as the distribution of federally funded pensions and student loans, federal intervention is inevitable, and the only choice is whether to defer to state law or to establish new federal rules. In other situations, such as child support enforcement, federal intervention is not inevitable, but is nonetheless very common. At the same time, states retain primary responsibility for articulation of rules governing family relations and administering the law in complex and common family conflicts. These patterns suggest that federal actors should be cautious in intervening in state family law. Because federal actors typically lack rich knowledge and experience with family law issues, they should act only with circumspection and after careful study. However, these patterns do not imply that federal authorities should never act.

Federal policies in relation to the definition and enforcement of

205. See Cass R. Sunstein, *The Supreme Court 1995 Term Forward: Leaving Things Undecided*, 110 HARV. L. REV. 4, 97 & n.492 (1994) (suggesting that DOMA violates equal protection and the “impermissible selectivity” principle of *Romer*); Mark Tanney, *The Defense of Marriage Act: A “Bare Desire to Harm” an Unpopular Minority Cannot Constitute a Legitimate Governmental Interest*, 19 T. JEFFERSON L. REV. 99, 143-46 (1997) (suggesting that DOMA violates the constitutional principles of due process and equal protection); Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1 (1997) (suggesting the same); Kafahni Nkrumah, *The Defense of Marriage Act: Congress Re-Writes the Constitution to Pacify its Fears*, 23 THUR. MAR. L. REV. 513 (1998) (same); Bradley J. Betlach, *The Unconstitutionality of the Minnesota Defense of Marriage Act: Ignoring Judgments, Restricting Travel and Purposeful Discrimination*, 24 WM. MITCHELL L. REV. 407, 447-55 (1998). But see Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 418 (1998).

child support obligations provide a prime example of justifiable federal action and underscores the factors that make federal action sensible. First, there was, and still is, a broad national commitment to the general policy proposition that parents should support their children, even if they are not living with them.²⁰⁶ Second, there was widespread and well documented evidence that most states were performing poorly in defining appropriate levels of child support and enforcing ordered support.²⁰⁷ This was not a situation in which Congress was reacting to an individual horror story that may or may not reflect a larger problem. Third, a wide, informed consensus developed that alternative means of defining and enforcing child support payment would meet deeply shared social goals more effectively.²⁰⁸ Many of these alternatives were pioneered and tested by individual states.²⁰⁹ Finally, federal action in this area respected state experience and diversity by allowing states to fashion their own child support definitions and enforcement programs within a range of alternatives reasonably calculated to achieve the deeply shared federal goals. Some of the federal child support enforcement reforms could only be adopted at the federal level; for example, the interception of federal tax refunds.²¹⁰ Nonetheless, the federal action on child support definitions and enforcement goes far beyond the above example and suggests that federal intervention may be justified in situations where states could act without federal prodding.

The Birth and Adoption Unemployment Compensation regulations are similar in that they respond to a problem that is widely acknowledged and that states have proven unable to address.²¹¹ Like child support enforcement, we know that the problems confronting working parents with infants are not idiosyncratic or rare. However, this federal intervention differs from child support definition and enforcement policies in that there is substantial opposition to the claim that society should do more to enable working parents to care for newborns. While no one is against

206. *See supra* note 50 and accompanying text.

207. *See supra* notes 54-68, 75, 76 and accompanying text.

208. *See supra* Part II.

209. *See supra* note 71.

210. *Supra* note 72.

211. *See supra* notes 104-14 and accompanying text.

mothers and babies, significant business interests oppose the use of unemployment compensation funds for these purposes.²¹²

The cases of federal pensions and student loans suggest another set of principles. Federal benefits and responsibilities often turn on legally recognized family status. For the most part, federal actors appreciate that there is no general federal family law and rely upon state law to determine who is married and who owes financial obligations to whom.²¹³ When federal law relies upon state determinations to determine federal family rights and responsibilities, policy remains responsive to changing social circumstances addressed by changes in state law. Sometimes, as in the cases of federal pensions and student loans,²¹⁴ Congress creates family law rules that conflict with common state standards. The point is not that Congress lacks power to supercede state family law rules or even that such federal preemption is always unwise. The principle urged here is more modest. Federal actors should be conscious of the fact that, as a general matter, state law defines family relations and federal authority is the exception rather than the rule. In departing from state rules, federal actors should at least ask whether there is a good federal reason to reject the policies adopted by the states. Further, federal actors should assure that the new federal rules are grounded in general family law context. For example, if Congress wants to require that stepparents provide financial support for the college education of their stepchildren, it should impose an obligation on stepparents and not simply a penalty on the stepchildren.

CAPTA presented issues dramatically different from child support and enforcement. First, CAPTA does not reflect any national consensus.²¹⁵ To be sure, there was, and is, a broad consensus that the parents, doctors, and courts were wrong in the Indiana Baby Doe case—infants with Down's Syndrome should not be denied ordinary medical care essential to preserve life.²¹⁶ However, there was no evidence that the Indiana Baby Doe case presented a common

212. See *supra* note 109 and accompanying text.

213. See *supra* notes 121-25 and accompanying text.

214. See *supra* text accompanying notes 126-48.

215. See *supra* notes 175-79 and accompanying text.

216. See *supra* note 169 and accompanying text.

problem. The federal debate and CAPTA addressed issues much broader than those raised by the Indiana Baby Doe case. Furthermore, there was no reason to believe that the solution imposed by CAPTA was superior to those developed by states in adjudicating these overwhelmingly difficult issues. The fact that, in the end, federal law turned the issue back to state control underscores that Congress did not find a new or better standard or process. In short, this history suggests Congress resist the impulse to “do something” about current, trendy, or sexy topics. Family law is so popular in the media precisely because it engages passionate emotions on issues about which reasonable people can and do disagree sharply.²¹⁷ Federal actors should resist the temptation to impose a uniform national answer, unless they are convinced that problems are common and that federal law offers a standard or process that might remedy state defects.

DOMA also illustrates the danger of quick federal response to hot button issues. As noted, Section 1 of DOMA, confirming state authority to determine whether a marriage valid where celebrated violates the public policy of the examining state, does nothing as a practical matter.²¹⁸ It does, however, reflect Congressional ignorance of basic principles of state family law, while gratuitously expressing unique federal disapproval of a particular form of marriage. The second section, providing that gay marriages will not be recognized for federal purposes, even if recognized by state law, reflects federal contempt for both homosexual people and for the ability of states to govern the most basic element of family law—the definition of marriage. There is no developed evidence that gay marriage presents a general problem that states have systematically failed to address. Because no state has recognized gay marriage, almost by definition there is no evidence of the impact, positive or negative, that such recognition would have. Given states’ vastly greater knowledge and experience in dealing with issues of marriage and family law, it is insulting to the states, as well as to gay people, for Congress to declare that federal law does not respect traditional state authority over the definition of marriage. In short, Section 2 of DOMA

217. See *supra* notes 4-7.

218. See *supra* notes 194-95 and accompanying text.

addresses a problem that does not yet exist, expresses scorn for both gay people and state competence to act in an area traditionally left to state decision-making, and thoughtlessly creates many problems that Congress neither addressed nor anticipated.

The principles offered here are modest. They are not crisp, precise, or rule-like. Their modesty derives from an empirical methodology.²¹⁹ It is possible to produce cleaner rules by reasoning first from principles, and then deductively. However, starting from messy facts, appreciating that the universe of potentially relevant facts is infinite, that important decisions are made in fact selection, and that inferences are drawn, judgments must be tentative and modest.

From a federalism point of view, a classic assumption of political science and the law is that the federal government has greater capacity than state or local governments to perform redistributive functions.²²⁰ In the United States, where family law is assumed to be a subject primarily of state authority,²²¹ financial and social supports for families are weaker than in other developed nations.²²² These two phenomena may be simple coincidence or the product of larger forces, but they may also be related. In countries where the federal government grapples with the day to day problems confronting families, it is possible that federal authorities develop a keener appreciation of the degree that lack of resources and difficulty in meeting conflicting obligations to wage work undermine family values. This appreciation may, in turn, produce more generous and sensitive programs of family and social support.

219. See *supra* note 49 and accompanying text.

220. See *supra* notes 44-46 and accompanying text.

Each state has an interest in attracting the rich, who will pay taxes and create employment, and deflecting the poor, who will impose net cost. . . . National programs or minimum federal standards can stop such destructive competition. . . . [Further], there are enormous disparities in wealth and income among the states, and only the federal government can effectively collect revenue and redistribute it from rich states to poor.

Kathleen M. Sullivan, *The Balance of Power Between the Federal Government and the States*, in *NEW FEDERALIST PAPERS* 111, 114-15 (Alan Brinkley et al. eds., 1998).

221. See *supra* notes 12-28 (assumption that family law is a state subject in the U.S.), notes 32-35 (assumption that it is a federal subject in other countries).

222. See *supra* note 120. See also LAWRENCE MISHEL, JARET BERNSTEIN, JOHN SCHMITT, *THE STATE OF WORKING AMERICA*, 1998-99, 369-89 (1999).

Finally, these principles have no direct relation to the questions asked in the constitutional cases about the power of Congress under the Commerce Clause, Section 5 of the Fourteenth Amendment, or the Eleventh Amendment.²²³ Wise is not the same as constitutional. Many policies are stupid, but nonetheless probably constitutional. As suggested above, federal rules exempting pensions from state marital property distribution are unwise. However, they are not beyond the power of Congress. Similarly, federal student loan requirements that assume the availability of income to which the student has no legal claim appear unjust. However, these rules, too are probably within the power of Congress. Even very conservative judges would agree generally that the Constitution allows Congress to enact dumb laws, as well as wise laws. Nonetheless, the current Court's push to limit congressional power may be driven, in part, by a sense that Congress is too often willing to act where it lacks knowledge, expertise, or an ability to affect positive change. Whether or not this is true, Congress could do better in deciding whether and when to regulate family law.

223. See *infra* Appendix 1.

Appendix 1—Constitutional Restraints on Federal Power

Since 1995 the Supreme Court, often in sharply divided decisions, has dramatically limited the power of Congress. First, the Court has circumscribed the power of Congress to act under its constitutional authority to regulate interstate commerce. Second, the Court has restricted the power of Congress to act pursuant to Section 5 to enforce the substantive requirements of the Fourteenth Amendment. Finally, the Court has expanded state immunity from federal actions for money damages, even where Congress makes plain that it seeks to create legally enforceable rights against states.

A. Commerce Clause

Since 1995, the Supreme Court has sharply limited the power of Congress to regulate interstate commerce. Article I, Section 8 of the Constitution gives Congress the authority to “regulate Commerce . . . among the several States.” Initially the Supreme Court, in an opinion by Chief Justice Marshall, interpreted this power broadly, allowing Congress to regulate commercial activity having any interstate impact, however indirect. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194, (1824). Until 1887, Congress rarely exercised this broad power. When Congress began to regulate interstate commerce, the Supreme Court applied formalistic distinctions, for example, between commerce and manufacture, or between production and trade, to limit the power of the Congress. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, 3RD ED. 808-11 (2000) [hereinafter, TRIBE, 2000]. In the 1930s, as the New Deal Congress sought to find national solutions to the Great Depression, the Court’s constraint on congressional power produced a national crisis. In 1937, the Supreme Court returned to the older view of broad congressional power under the Commerce Clause. *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (upholding the National Labor Relations Act); *United States v. Darby*, 312 U.S. 100, 118-119 (1941) (upholding the wage and hour provisions of the Fair Labor Standards Act); *Wickard v. Filburn*, 317 U.S. 111, 129 (1942) (upholding the application of wheat price controls as applied to grain grown for home consumption

because the cumulative effect may affect interstate demand).

From 1937 until 1995, the Court never struck down an act of Congress for exceeding its powers under the Commerce Clause. Indeed because economic relations were increasingly national and global, and the lines between commercial and other activities so difficult to draw, some respected scholars urged the Court to renounce completely any role in policing the boundaries of the commerce power. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 171-259 (1980).

In 1995, for the first time in over half a century, the Court found that an act of Congress exceeded its power under the Commerce Clause. In *United States v. Lopez*, 514 U.S. 549 (1995), the Court held, 5-4, that Congress lacked power under the Commerce Clause to adopt the Gun-Free School Zones Act of 1990 that made it a federal crime for any individual “knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(2)(A). The *Lopez* majority asked whether the federally prohibited activity “substantially affects,” rather than tangentially affects, interstate commerce. 514 U.S. at 564-66. The Court also suggests concern about whether the underlying activity is “commercial” or “economic.” *Id.* at 567.

In *United States v. Morrison*, 120 S. Ct. 1740 (2000), the Court, 5-4, affirmed broad limits on the power of Congress under the Commerce Clause in striking down a narrowly crafted federal civil remedy for victims of gender-motivated violence. Even though Congress made careful legislative findings documenting the impact of violence against women on the economy, and the inadequacies of state remedies, the Court refused to defer to the congressional determination because of fear that “Congress might use the Commerce Clause to completely obliterate the Constitution’s distinction between national and local authority. . . .” *Id.* at 1752. The Court further observed that “[g]ender-motivated crimes of violence are not, in any sense of the phrase, economic activity.” *Id.* at 1751. “The Constitution requires a distinction between what is truly national and what is truly local,” and the Court identified criminal law and family law as inherently local. *Id.* at 1754.

In the family law area, while most federal courts have held that the Commerce and Spending Clauses allow Congress to address

problems of child support enforcement, most recently the Sixth Circuit struck down provisions of the Child Support Recovery Act of 1994 that authorized criminal prosecution of parents who willfully fail to pay support for a child in another state. *United States v. Faasse*, 227 F.3d 660 (6th Cir. 2000).

B. Section 5 of the Fourteenth Amendment

In addition, the Court has limited the power of Congress to enforce the Fourteenth Amendment. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court held that the Religious Freedom Restoration Act (RFRA) exceeded the power of Congress under Section 5 of the Fourteenth Amendment, which provides that “[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” RFRA was enacted in direct response to the Court’s decision in *Employment Div. v. Smith*, 494 U.S. 872 (1990). 521 U.S. at 512. In that case, the Court, 5-4, overruled the traditional principle that facially neutral rules may not be applied to impose substantial burdens on the free exercise of religion unless supported by compelling state interests. 494 U.S. at 886-87. Congress sought to reinstate the prior understanding of the First Amendment. In *Boerne* the Court held that Section 5 of the Fourteenth Amendment does not empower Congress to “enforce a constitutional right by changing what the right is.” 521 U.S. at 519. Because RFRA broadly changed the meaning of the free exercise clause in direct response to a Supreme Court interpretation, the Court held that “RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. It appears, instead, to attempt a substantive change in constitutional protections.” *Id.* at 532. The Court held that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Id.* at 520.

Boerne’s limit on congressional power under Section 5 of the Fourteenth Amendment might have been read as a response to an unusual situation in which Congress had acted openly and directly to reverse a Supreme Court interpretation of the Constitution, in violation of the core holding of *Marbury v. Madison* that the Supreme Court is the final arbiter of the meaning of the Constitution. 5 U.S. (1

Cranch) 137 (1803). However, subsequent decisions make plain that the Supreme Court believes that the power of Congress under Section 5 of the Fourteenth Amendment is sharply circumscribed. *See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank and United States*, 527 U.S. 627, 639 (1999) (holding the federal Patent Act, which subjected States to patent infringement suits, was not appropriate legislation under Section 5 of the Fourteenth Amendment because it does not meet the new standard of “congruence and proportionality”); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 61, 645 (2000) (holding that Congress lacks power, under Section 5 of the Fourteenth Amendment to prohibit age discrimination in employment). Even though the federal prohibition against age discrimination allowed employers to rely on age when it is “a bona fide occupational classification,” the *Kimel* Court held that “the substantive requirements the ADEA imposes on state and local governments are disproportionate to any unconstitutional conduct that conceivably could be targeted by the Act.” 120 S. Ct. at 645.

United States v. Morrison confirmed and expanded the Court’s view that congressional power under Section 5 of the Fourteenth Amendment is strictly limited. 120 S. Ct. 1740 (2000). The law challenged in *Morrison* created a federal cause of action against individuals who inflict gender-motivated violence. *Id.* at 1747-48. The Court observed that the Fourteenth Amendment prohibits only state action denying people the equal protection of the laws. *Id.* at 1755-56. Congress made extensive findings that gender bias in state court and prosecutorial systems necessitated a new federal cause of action against perpetrators of gender-motivated violence to remedy the states’ bias against women and deter future instances of discrimination in the state courts. *Id.* at 1755. Attorney generals from thirty-eight states supported the act in Congress and thirty-six states joined a brief supporting the law before the Supreme Court. Nonetheless, the Court in *Morrison* held that Section 5 of the Fourteenth Amendment did not authorize Congress to create a new federal remedy against gender-motivated violence. *Id.* at 1759. Even though four Justices dissented from *Morrison*’s holding that the Commerce Clause did not authorize Congress to adopt the Violence Against Women Act, no Justice dissented from the holding denying congressional power under Section 5 of the Fourteenth Amendment

to provide remedies for gender-motivated violence against women. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2001).

C. Sovereign Immunity

In addition, the Court vastly expanded the immunity that states enjoy under the Eleventh Amendment, holding that Congress cannot make states subject to suits for money damages even when states violate federally recognized rights, such as the right to be free from discrimination on the basis of age. When Congress acts pursuant to its power to regulate interstate commerce, it may not enforce federal norms through private damage actions in either state or federal courts, even if Congress is perfectly clear in asserting that it intends to impose such remedies. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress lacked the power to remove States' sovereign immunity); *Kimel v. Florida Board of Regents*, 120 S. Ct. 631, 641 (2000) (holding that the Age Discrimination in Employment Act was not a valid exercise of Fourteenth Amendment powers and therefore could not abrogate the states' sovereign immunity).

In 2000, the Supreme Court was scheduled to hear arguments and decide two cases raising the question whether the Eleventh Amendment bars the application of the Americans with Disabilities Act to the states. On March 2, 2000, the parties settled the disputes. Advocates for people with disabilities feared defeat in the Court, while the defendants feared political embarrassment. One advocate for the disabled in the Florida case said, "It didn't hurt that it was an election year. . . . [T]here were a lot of people who questioned Jeb Bush seeking to overturn George Bush's greatest presidential achievement." Joan Biskupic and Al Kamen, *Two Appeals Involving Disabilities Act Voided: Settlements Preclude High Court Decisions*, WASHINGTON POST, March 2, 2000, at A10.

At the end of 2000 the Supreme Court considered the issue avoided earlier in the year, i.e. whether Congress may make the ADA applicable to states that discriminate against people with disabilities, in violation of federal law. The lower court found that Congress had enacted the ADA pursuant to its power under Section 5 of the

Fourteen Amendment, noting that the Supreme Court, in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985), had held that the disabled are protected against discrimination by the Equal Protection Clause. *Garrett v. University of Alabama at Birmingham*, 193 F.3d 1214, 1219 (11th Cir. 1999). The circuit court reasoned that because the ADA was enacted pursuant to Section 5, rather than the Commerce Clause, and Congress has explicitly provided that it is applicable to the states, Alabama could not invoke sovereign immunity under *Kimel*. The Supreme Court granted review, 120 S. Ct. 1669, and heard oral argument on Oct. 11, 2000. Linda Greenhouse, *Justices Consider Scope of the Disabilities Act*, N.Y. TIMES, Oct. 12, 2000, at A1.

In the family law area, federal circuit courts have read these decisions to declare that the Family Medical Leave Act is unconstitutional, as applied to state employers. *Sims v. University of Cincinnati*, 219 F.3d 559, 566 (6th Cir. 2000); *Hale v. Mann*, 219 F.3d 61, 69 (2nd Cir. 2000). Congress enacted the FMLA, and provided that it applies to state employees, pursuant to its power under both the Commerce Clause and Section 5 of the Fourteenth Amendment, and made plain that it intended to abrogate whatever immunity states might enjoy under the Eleventh Amendment. These two circuit courts held that, when acting pursuant to the Commerce Clause, Congress has no power to abrogate state immunity. Further, even if the FMLA is regarded as enforcing the Fourteenth Amendment by addressing problems of gender discrimination, it is unconstitutional because it lacks “congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.” *Sims*, 219 F.3d at 562 (quoting *Boerne*, 521 U.S. at 520).

These new limitations on federal power are all interrelated, and they combine to substantially limit congressional power to act. The radical changes wrought by these recent decisions cannot be overstated, particularly in the short run; major federal programs have already been struck down or eviscerated. At the same time, many of the goals that Congress seeks to achieve can still be accomplished in other ways. See Kathleen M. Sullivan, *Federal Power, Undimmed*, N.Y. TIMES, June 17, 1999, at A14. (arguing that even if states are immune from money damage claims, aggrieved parties may still seek

injunctive relief or the federal government may sue for money damages). On the immunity issue, I am less satisfied that alternative remedies are adequate. Even if the federal government can act to protect victims of discrimination on the basis of age or disability, the federal government does not have a good track record in enforcing individual claims of discrimination. Congress and public interest advocates appreciate that the individual right to sue is essential. Even when suits for injunctive relief are possible, individuals who are subject to discrimination are typically motivated to find a lawyer because of the possibility of receiving back pay, and lawyers are motivated to take such suits because of the possibility of attorneys fees. Rights without remedies are not rights. *See supra* notes 83-98 and accompanying text.

Even though the Court sharply constrained the power of Congress to act under the Commerce Clause and under Section 5 of the Fourteenth Amendment, many of the goals Congress seeks to achieve may still be pursued through the federal spending power, if such goals are carefully cast as conditions on federal funding. *South Dakota v. Dole*, 483 U.S. 203 (1987), upheld a federal program withholding a percentage of otherwise available federal highway funds from states that failed to adopt a twenty-one year-old minimum drinking age, even though the regulation of alcohol is assigned to the states under the Twenty-first Amendment. The Court suggested that the spending power is subject to four restrictions. First, “the exercise of the spending power must be in pursuit of ‘the general welfare.’” *Id.* at 207. Second, if Congress conditions the states’ receipt of Federal funds, it “must do so unambiguously. . . , enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation.” *Id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). Third, the conditions on federal grants must be related “to the federal interest in particular national projects or programs.” *Id.* Finally, conditions on spending may not violate other substantive constitutional norms. *Id.* at 208. The *Dole* Court also acknowledged that financial inducements offered by Congress may be “so coercive as to pass the point at which ‘pressure turns into compulsion.’” *Id.* at 211.

The eight-hundred pound gorilla in the room is whether the Court will interpret the Constitution to restrict the power of Congress to act

under the spending power. For now, at least, the Court has not done so. Professor Laurence H. Tribe suggests that “the scope of the spending power would seem to extend to virtually any secular activity.” TRIBE, 2000, at 839. *But see* Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1916 (1995) (arguing that the spending clause power should be reinterpreted to prohibit “conditional offers of federal funds in order to regulate the states in ways [Congress] could not directly mandate”); Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL’Y & L. 541, 595 (1998) (arguing that Congress and the Supreme Court need to consider whether the allocation of family and policy-making authority away from states is a sensible choice).

Appendix 2—Federal Constitutional Constrains on State Control of Family Law

The Fourteenth Amendment places many limits on state authority to regulate family law. *See* *Meyers v. Nebraska*, 262 U.S. 390 (1923) (recognizing parents' right to teach children a foreign language); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (recognizing parents' right to send children to private schools); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (recognizing the right of an extended family to live together); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down a state rule that denies marriage licenses to people with unpaid support obligations); *Turner v. Safley*, 482 U.S. 78 (1987) (striking a rule allowing prisoners to marry only with the permission of the superintendent of the prison). *See also* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that compulsory school attendance laws may not be applied to Amish children after the eighth grade).

The Constitution prohibits states from ordering family relations on the basis of race. *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down laws prohibiting Blacks and whites from marrying one another); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (overruling a state decision awarding custody to uninvolved father because mother had married a Black man).

It also sharply limits the ability of states to allocate family rights and responsibility on the basis of gender. *See* *Orr v. Orr*, 440 U.S. 268 (1979) (holding that a state law providing that needy women may receive alimony, but needy men may not violates Equal Protection); *Caban v. Mohammed*, 441 U.S. 380 (1979) (holding it unconstitutional to require the mother, but not the father to consent to adoption). *But see* *Lehr v. Robertson*, 463 U.S. 248 (1983) (denying father a veto in adoption in circumstances in which a mother would be allowed to prevent adoption).

In addition, the Constitution limits the ability of the state to allocate children's rights on the basis of parent's marital status. *See* *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding that to denying a child the right to sue for mother's wrongful death because she was not married violates equal protection); *Gomez v. Perez*, 409 U.S. 535 (1973) (state may not grant marital children a statutory right to

paternal support while denying this right to nonmarital children). *But see* *Lalli v. Lalli*, 439 U.S. 259 (1978) (holding that distinctions are allowed with respect to inheritance).

The Court has also held that the Constitution prohibits state from terminating parental rights without demonstrating parental wrongdoing by “clear and convincing evidence.” *Santosky v. Kramer*, 455 U.S. 745 (1982) (in order to terminate parental rights the state must show parental wrong-doing or neglect by clear and convincing evidence). *But see* *Lassiter v. Dept. of Soc. Servs.*, 452 U.S. 18 (1981) (holding that the Constitution does not require appointment of counsel for indigent parents in termination proceedings).

Most recently, in *Troxel v. Granville*, 120 S. Ct. 2054 (2000), the Supreme Court considered constitutional dimensions of state family law in the context of the rules applicable to child visitation disputes between parents and others. The case is described here in detail, both because it is recent and because it illustrates the complexity of the relation between state family law and constitutional norms. The Court filed six opinions, and except for Justice Scalia, it is difficult to say what the Court, or indeed, any individual Justice, held. For Scalia the case is easy: Because the constitution does not mention parents, it never protects parental rights. *Id.* at 2074.

The mother, Tommie Granville, was willing to allow her two daughters regular visits with the parents of their father, who previously killed himself. 120 S. Ct. at 2057. The grandparents wanted more—two weekends a month and two weeks in the summer. *Id.* at 2058. The mother, and her new husband who adopted the girls, refused. *Id.* The grandparents sued. *Id.* at 2057.

Currently, every state allows some non-parents to petition for visitation, even over the objection of a parent. Grandparents and former stepparents are the most common beneficiaries of these laws. Washington’s statute is unusually broad. “The court may order visitation rights for any person when visitation may serve the best interests of the child whether or not there has been any change of circumstances.” WASH. REV. CODE § 26.10.160(3) (1994). *See also* *Troxel*, 120 S. Ct. at 2057-58.

The trial court granted the grandparents’ petition, suggesting that the mother had the burden of persuading the trial judge that expanded visitation was not in the best interests of the children. *Id.* at 2058. The

Washington Court of Appeals, in a decision addressing the claims of several disputing families, reversed. *Id.* The Washington Supreme Court held that the state law swept too broadly. *Id.* at 2058-59. In addition, the state court held that interference with parental discretion could only be justified to prevent harm or potential harm to the child, and not simply on a showing that visitation was in the child's best interest. *Id.* at 2058-59.

The U.S. Supreme Court has great discretion in deciding the cases it will hear. Nothing compelled the Court to review this case, even if most Justices read the U.S. Constitution somewhat differently than the Washington state court. It is not the High Court's job to fix all the mistakes of lower appellate courts, much less local trial courts. Indeed, four Justices said that the Supreme Court should have denied review, or simply affirmed the Washington decision. 120 S. Ct. at 2065, 2068, 2075. All went on to say more.

Several opinions reflect a laudable recognition of the diversity of American families. Justice Stevens called attention to "the almost infinite variety of family relationships that pervade our ever-changing society." 120 S. Ct. at 2073. Similarly, Justice O'Connor noted that, "The demographic changes of the past century make it difficult to speak of an average American family. . . In 1996, children living with only one parent accounted for 28 percent of all children under age 18 in the United States." *Id.* at 2059.

The plurality opinion, written by Justice O'Connor, and joined by Justices Rehnquist, Ginsberg and Breyer, assumed the role of an intermediate appellate state court and ruled narrowly that, on the specific facts of the case, ordering more extensive visitation violated parents' constitutional liberty in "the care, custody, and control of their children." 120 S. Ct. at 2060. The plurality noted that the Washington statute is "breathtakingly broad," and "contains no requirement that a court accord the parent's decision any presumption of validity or any weight whatsoever." *Id.* at 2061. The plurality also observed that there was no evidence that the mother was unfit, and that she was willing to allow some regular visitation with the grandparents. However, the Washington Supreme Court already reached this conclusion, albeit on broader grounds. It is unclear which factors the Supreme Court plurality regarded as critical, and they declined to review the principled constitutional law rulings of

the Washington Supreme Court.

Justice Kennedy's dissent is particularly critical of the Washington ruling that compelled visitation can only be supported by a finding of parental unfitness. 120 S. Ct. at 2077. He and other Justices sensibly observed that there are situations in which visitation over parental objection might be in the child's best interest, even though the parent is fit and denial of visitation would not "harm" the child. Justices Kennedy and Stevens would remand to the Washington court in the hope that they might provide a construction of the statute that would avoid constitutional issues, even though the Washington court had already held that the "any person" language could not be construed to mean a more limited category of people.

Justice Souter concurred, observing that the fact specific approach of the plurality provided no guidance to lower courts that decide these cases in a variety of contexts every day. He would have affirmed the Washington holding that the state law was unconstitutionally broad. 120 S. Ct. at 2067.

Justice Stevens agreed with Justice Souter that the plurality's "as applied" approach was untenable. However, in considering the statute on its face, he, along with Scalia and Kennedy, would reverse the Washington holding that a law granting "any person" the right to petition for visitation is unconstitutionally sweeping. Because some of those in the broad "any person" category may have legitimate claims, these Justices found that the mother could not "establish that no set of circumstances exists under which the Act would be valid." *Id.* at 2070 n.6. Hence, they held that the statute could not be unconstitutional on its face.

In short, the Court provided little guidance on whether or how the Constitution restricts state choice in setting the rules applicable to visitation disputes between parents and other adults who have close relations with their children. This result is probably wise. As Justice O'Connor observed: "Because much state-court adjudication in this context occurs in a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter." *Id.* at 2064. And, Justice Kennedy warned that "We owe it to the Nation's domestic relations legal structure, however, to proceed with caution." *Id.* at 2079. Given the complexity of these issues, the tradition of state responsibility, and the diversity

of American families, the Court was wise to avoid definitive proclamations.