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## Family Support and Supporting Families

Courtney G. Joslin

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# Family Support and Supporting Families

Courtney G. Joslin\*

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## I. INTRODUCTION

Professor Laura Rosenbury’s recent article *Federal Visions of Private Family Support* offers important new insights into the role of the federal government in the family.<sup>1</sup> In recent years, a number of scholars have challenged the now common or “typical” claim<sup>2</sup> that family law is reserved to the states.<sup>3</sup> I call this claim “family law

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\* Professor of Law, UC Davis School of Law. I thank Erez Aloni, Nancy Polikoff, and and Laura Rosenbury for helpful conversations and feedback.

1. Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835 (2014).

2. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 874 (2004) (“Such assertions of family law’s exclusive localism are typical.”) [hereinafter Hasday, *Canon*]; see also, e.g., Kristin A. Collins, *Federalism, Marriage, and Professor Gerken’s Mad Genius*, 95 B.U. L. REV. 615, 617 (2015) (“If there is a North Star in sovereignty-based theories of federalism, it is family law’s firm entrenchment at the state level . . . .”) [hereinafter Collins, *Professor Gerken’s Mad Genius*].

3. See, e.g., Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 CARDOZO L. REV. 1761, 1860 (2005) (arguing that the contention that family law is reserved to the states “is neither historically predetermined, nor an essential feature of our federalism”) [hereinafter Collins, *Federalism’s Fallacy*]; Hasday, *Canon*, *supra* note 2, at 870–84 (demonstrating that many federal statutes and judicial decisions address family law issues); Jill Elaine Hasday, *Federalism and the Family*

localism.”<sup>4</sup> More recently, during the litigation challenging Section 3 of the Defense of Marriage Act (“DOMA”),<sup>5</sup> a slightly narrower theory was advanced.<sup>6</sup> The narrower claim accepts some federal involvement in the family but posits that there remains a subset of family law matters—specifically, family status determinations—that are reserved to the states.<sup>7</sup>

Because the myth of family law localism is so powerful, few scholars have examined federal interventions in the family.<sup>8</sup> As Kristin Collins explains, “in comparison with fields in which significant energy has been spent trying to determine how federal and state regulatory integration works (or does not work), and how it shapes substantive laws, family law and federalism have benefited from far less detailed descriptive and prescriptive work.”<sup>9</sup> Given the increasing involvement of the federal government in the regulation of the family, it is important to turn to these critical but long overlooked questions.<sup>10</sup>

Rosenbury’s first important contribution is to add to this small body of existing literature by demonstrating that even this narrower

*Reconstructed*, 45 UCLA L. REV. 1297, 1373–1386 (1998) (documenting the existence of “modern federal family law”) [hereinafter Hasday, *Family Reconstructed*]; Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL’Y 175, 220 (2000) (arguing that sweeping claims “that family law is necessarily and inherently a matter of state rather than federal law [are] false”); Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 953 (2002) (noting that the Nineteenth Amendment was a federal intervention “in matters of domestic relations that many believed were reserved to state control”).

4. Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. DAVIS L. REV. 623, 625 (2014). For more detailed accounts of the history and historical uses of this narrative, see generally, for example, Collins, *Federalism’s Fallacy*, *supra* note 3; Hasday, *Canon*, *supra* note 2; Hasday, *Family Reconstructed*, *supra* note 3; Law, *supra* note 3; Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 415 (2002) (“First, although statements that family law ‘belongs’ to the states are often made, federal statutory regimes govern many facets of family life.”) [hereinafter Resnik, *Reconstructing Equality*].

5. 1 U.S.C. § 7 (2012) (defining marriage for all federal purposes to mean “only a legal union between one man and one woman as husband and wife”). Section 3 of DOMA was held unconstitutional in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

6. For a more detailed discussion of the different federalism arguments raised in the *Windsor* litigation and the extent to which they animate the Court’s decision in that case, see generally Courtney G. Joslin, *Windsor, Federalism, and Family Equality*, 113 COLUM. L. REV. SIDEBAR 156 (2013).

7. Brief for Federalism Scholars as Amici Curiae Supporting Respondent, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 U.S. S. Ct. Briefs LEXIS 1402, at \*3–4 [hereinafter *Federalism Scholars’ Brief*].

8. For some important exceptions to this statement, see *supra* notes 2–4.

9. Collins, *Professor Gerken’s Mad Genius*, *supra* note 2, at 626–27.

10. Elsewhere, I argue that consideration of a range of values should guide the determination of which level of government regulates or defines the family. Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 827 (2015) [hereinafter Joslin, *Family Status*].

family law localism claim is inaccurate.<sup>11</sup> As Rosenbury explains, the federal government does not “consistently defer to states’ authority to define family.”<sup>12</sup> And while there is a small body of literature documenting that there *is* federal involvement in the family, even fewer scholars attempt to explain *why* the federal government intervenes.<sup>13</sup> Rosenbury seeks to fill this gap by offering a theory to explain why and when the federal government uses its own family status definitions. This is the second, critical contribution of her piece.<sup>14</sup> Using a series of recent Supreme Court cases,<sup>15</sup> Rosenbury argues that the overriding reason that the federal government recognizes families is “to privatize the dependencies of family members.”<sup>16</sup> Or, to state it another way, the reason that the government “affirmatively recognizes certain intimate relationships, to the exclusion of others [is] in order to incentivize individuals to privately address the dependencies that often arise when adults care for children and for one another.”<sup>17</sup>

Rosenbury is correct to draw our attention to the fact that one consequence of family recognition can be the imposition of financial and caretaking obligations on family members. At a time when one of the most visible family law questions is whether same-sex couples will be permitted to marry, this aspect of family recognition is often overlooked, or at least undertheorized.<sup>18</sup> This oversight is a mistake.

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11. For other evidence refuting the narrower claim, see, for example, Hasday, *Family Reconstructed*, *supra* note 3, at 1376–84 (noting that federal law makes family status determinations in a variety of contexts); Joslin, *Family Status*, *supra* note 10, at 798–99; Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619, 621 (2001) [hereinafter Resnik, *Categorical Federalism*].

12. Rosenbury, *supra* note 1, at 1836.

13. See *supra* notes 8–9 and accompanying text. Some of the few prior attempts to grapple with these questions include Joslin, *Family Status*, *supra* note 10, and Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267 (2009).

14. Rosenbury, *supra* note 1, at 1860 (exploring “when [the federal government] will impose its own definitions [of family]”); see also *id.* at 1837 (“analyz[ing] why federal courts and agencies may continue to defer to states’ definitions of family in some situations but not others”).

15. The two cases Rosenbury focuses on are *Astrue v. Capato*, 132 U.S. 2021 (2012) (considering whether children born through posthumous use of gametes were entitled to children’s Social Security benefits) and *United States v. Windsor*, 133 S. Ct. 2675 (2013) (striking down Section 3 of the Defense of Marriage Act).

16. Rosenbury, *supra* note 1, at 1860.

17. *Id.* at 1866; see also *id.* at 1860 (“Instead, as set forth below, government recognition of family ultimately appears rooted in the desire to privatize the dependencies of family members, encouraging families to ‘take care of their own’ with minimal financial assistance from the state.”).

18. See, e.g., MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT AND AMERICA’S POLITICAL IDEALS* 7 (2010) (noting the “lack of attention to dependency and the important role that the state can play in supporting families dealing with dependency issues”) [hereinafter EICHNER, *THE SUPPORTIVE STATE*].

Thinking more deeply about how the government privatizes the dependencies of family members, particularly when it does so for the purpose of alleviating its own obligations, is an important question for those who care about families. Critically, Rosenbury's piece seeks to keep this consequence of family recognition at the forefront of family law reform conversations.

Because I share Rosenbury's interest and concern about the regulation of families, this Essay highlights the importance of the contributions she offers and then pushes her analysis even further. As Rosenbury herself acknowledges, the imposition of family-care obligations is not the only consequence of family recognition.<sup>19</sup> In many circumstances, the government—at both the state and the federal level—also distributes family-based benefits or subsidies to help people fulfill these caregiving responsibilities. And while both sides of this equation—the legal obligations of and the subsidies for caretaking—clearly are interrelated, additional insights can be garnered by separating rather than collapsing these two effects of family recognition.

In particular, this Essay argues that by looking at both the imposition of family-care obligations *and* the distribution of family-based subsidies one can better assess the effectiveness (or lack thereof) of family law and policy on particular families. This is true for a number of reasons. For example, governments define “family” differently depending on the context. Some family forms are recognized for purposes of the imposition of family caregiving obligations, but not for purposes of family benefits,<sup>20</sup> and vice versa.<sup>21</sup> Accordingly, it is important to look at both sides of the equation to determine whether families are being provided the resources they need to fulfill their family caretaking obligations. Of note, many family-based subsidies continue to be limited to marital spouses,<sup>22</sup> despite the fact that a large and growing percentage of families in the U.S. today are nonmarital.<sup>23</sup> Accordingly, thinking more carefully about which family configurations should be entitled to government recognition and support is a critical question.

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19. Rosenbury, *supra* note 1, at 1866 (noting that the government “bestows benefits on families”).

20. See *infra* notes 43–62 and accompanying text.

21. See *infra* notes 79–95 and accompanying text. Because governments do not use a consistent definition of family, it is hard to provide a simple definition of what a “recognized” or “nonrecognized” family is. That said, with regard to the adult-adult relationship, the marital family is the most consistently recognized type of family form. By contrast, adult nonmarital, cohabiting relationships are less frequently recognized by the government.

22. See *infra* notes 80–93 and accompanying text.

23. See *infra* notes 109–110 and accompanying text.

In addition, different families have access to different levels of resources. Thus, for some families, the existing provision of benefits may be sufficient to enable them to fulfill their family-care obligations. But for other families, that may not be the case. It is only by looking at the interactions between these two effects of family recognition that one can assess whether and to what extent family law and policy is working for different families.

Finally, looking at both sides of the equation can also provide a deeper understanding of *why* governments recognize families. It is certainly correct that one of the reasons governments recognize families is to impose financial and caregiving obligations on family members. But one can also find examples where the federal government recognizes certain family relationships primarily for the purpose of extending family-based subsidies. These examples suggest that other factors, including goals of fairness and equality, sometimes motivate family recognition. Moreover, the fact that marital families often are treated differently than nonmarital families suggests that the goal of channeling families into marriage sometimes motivates family recognition policy.<sup>24</sup>

## II. PRIVATIZING DEPENDENCY THROUGH FAMILY LAW

Professor Rosenbury's piece offers two critical interventions. First, Rosenbury demonstrates that neither family law generally, nor even the more specific issue of family status determinations, are matters within the exclusive domain of the states.<sup>25</sup> Second, Rosenbury offers a theory to explain when the federal government intervenes in family law matters.<sup>26</sup> The importance of these interventions cannot be overstated.

One of the most visible family law questions of our time is whether same-sex couples must be permitted to marry. In these debates, advocates on both sides of the question invoke the narrative of family law localism. During the litigation challenging the

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24. To be clear, I am not agreeing with this goal, I am only noting its existence.

I thank Erez Aloni for flagging this issue. For a more detailed discussion of the varied motivations behind a range of so-called "conservative" family law policies, see generally Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415 (2005).

25. Rosenbury, *supra* note 1, at 1836 ("Yet developments both before and after *Capato* and *Windsor* reveal that federal courts and agencies do not consistently defer to states' authority to define family."); *id.* at 1849 (noting that the Supreme Court acknowledged in *Windsor* that the federal government at times uses its own definitions of family status).

26. Rosenbury, *supra* note 1, at 1860–70 (examining "why the federal government might continue to defer to states' definitions of family and why it might not").

constitutionality of Section 3 of DOMA, advocates for same-sex couples argued that the federal marriage ban was an unconstitutional federal intervention into the exclusively state-government-controlled domain of family status determinations.<sup>27</sup> For example, an amicus brief filed on behalf of Edie Windsor argues that “the power to define the basic status relationships of parent, child, and spouse . . . are reserved to the States.”<sup>28</sup> In the subsequent litigation challenging state marriage bans, state defendants often rely on a similar argument to defend the constitutionality of their marriage bans. For example, in its brief to the Sixth Circuit, the Governor of Kentucky argues that Kentucky’s marriage bans are permissible because the issue of marriage “is a local issue left to be determined by the states—not the federal government.”<sup>29</sup>

As Judith Resnik explains, the claim that some or all of family law is exclusively state or local is “not only fictive, [it is also] harmful.”<sup>30</sup> As Resnik,<sup>31</sup> Naomi Cahn,<sup>32</sup> Emily Sack,<sup>33</sup> and others argue, the narrative devalues family law and the women’s issues that are often connected to it. Naomi Cahn explains that the reluctance of federal courts to adjudicate family law cases may be rooted “in an attitude that dismisses the comparative importance of family law, both in the sense that it is more appropriate for states to control family law and also that family law, perceived as a traditionally feminine domain, does not merit federal judicial resources.”<sup>34</sup> Elsewhere I argue that the myth of family law localism also harms the doctrine of family law.<sup>35</sup> Specifically, I contend that the myth facilitates application of a “more deferential form of review in family

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27. For a more detailed account of the federalism arguments put forward in the DOMA litigation, see Joslin, Windsor, *Federalism, and Family Equality*, *supra* note 6, at 159–63.

28. *Federalism Scholars’ Brief*, *supra* note 7, at \*3–4.

29. Brief of Intervening Defendant/Appellant, Steve Beshear at \*12, *Love v. Beshear*, 2014 WL 3696961 (6th Cir. July 17, 2014) (No. 14-5818).

30. Judith Resnik, *Categorical Federalism*, *supra* note 11, at 621; *see also* Reva B. Siegel, “*The Rule of Love*: *Wife Beating as Prerogative and Privacy*,” 105 *YALE L.J.* 2117, 2204 (1996).

31. Resnik, *Categorical Federalism*, *supra* note 11, at 621; *see also* Judith Resnik, “*Naturally*” *Without Gender: Women, Jurisdiction, and Federal Courts*, 66 *N.Y.U. L. REV.* 1682, 1760 (1991).

32. Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 *IOWA L. REV.* 1073, 1114–15 (1994).

33. Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 *WASH. U. L. REV.* 1441, 1445 (2006).

34. Cahn, *supra* note 32, at 1094–95 (1994); *see also* Sack, *supra* note 33, at 1445 (“This alternative explanation . . . reveals the . . . now-discredited beginnings [of the domestic relations exception to federal diversity jurisdiction] and exposes one of the primary causes and consequences of the exception—the belief that family law is a ‘women’s issue’ that is not deserving of the attention of the federal courts.”).

35. Courtney G. Joslin, *The Perils of Family Law Localism*, 48 *U.C. DAVIS L. REV.* 623, 634–53 (2014).

law cases.”<sup>36</sup> For these and other reasons, it is important to critique and challenge this resilient myth. Rosenbury’s piece serves a critical function by offering further evidence of federal involvement in family law, including family status determinations.

Because the myth of family law localism is so enduring, there has been little sustained analysis of federal interventions in family law.<sup>37</sup> Attempts to theorize about *why* the federal government does or should intervene in this realm are even more rare.<sup>38</sup>

Rosenbury seeks to fill this gap by offering a theory to explain “when the federal government will defer to states’ definitions of family and when it will impose its own definitions.”<sup>39</sup> She also explores why the federal government chooses one path over the other.<sup>40</sup> Rosenbury argues that the federal government takes into account a number of values when considering intervention in the family—values including federalism and states’ rights, equality, and dignity.<sup>41</sup> Ultimately, however, Rosenbury explains that the most important factor—the one that trumps all others—is an interest in “privatiz[ing] the dependencies of family members.”<sup>42</sup>

Rosenbury’s theory focuses on an aspect of family law that is often overlooked. One consequence of being a legally recognized family member can be the imposition of financial and caretaking responsibilities.<sup>43</sup> And, at least in some situations, this imposition of responsibility on family members can shift responsibility *away from* the state. Indeed, marriage long has been perceived by some (rightly or wrongly) as a way “to contain liability for women’s financial needs within the private family.”<sup>44</sup> Attaching responsibility to the husband

36. *Id.* at 626–27.

37. *See supra* notes 2–4 for examples of articles that do explore federal intervention in the family.

38. *See supra* note 13 and accompanying text.

39. Rosenbury, *supra* note 1, at 1860.

40. *Id.* (“The contested terrain provides an opportunity, however, to examine why the federal government might continue to defer to states’ definitions of family and why it might not.”).

41. *Id.* at 1864–65.

42. *Id.* at 1860; *see also id.* at 1865 (“[W]hen read in conjunction with *Windsor*, *Capato* suggests that legal recognition of family hinges on a third interest, above and beyond both federalism and individual rights. As set forth below, both *Windsor* and *Capato* are consistent with the long-standing goal of privatizing the dependencies of family members.”).

43. People who are recognized as legal parents are responsible for the care and financial support of their children. *See, e.g.*, Anne L. Alstott, *What Does A Fair Society Owe Children—And Their Parents?*, 72 *FORDHAM L. REV.* 1941, 1955 (2004) (“Most obviously, society requires parents to care for their children. The law makes parents responsible for feeding, clothing, and sheltering their children.”).

44. Kristin A. Collins, “*Petitions Without Number*”: *Widows’ Petitions and the Early Nineteenth-Century Origins of Public Marriage-Based Entitlements*, 31 *LAW & HIST. REV.* 1, 3 (2013) [hereinafter Collins, *Petitions Without Number*]; *see also* Ariela Dubler, *In the Shadow of*



was perceived as a way to reduce state or government responsibility for the wife.<sup>45</sup>

These ideological commitments about the role of marriage are reflected in law. Historically, the law required husbands to be financially responsible for their wives both during life and after death.<sup>46</sup> As Kristin Collins explains, “under the doctrine of necessities, a husband could be held liable for essentials, such as food and clothing, purchased by his wife on credit. Dower, the widow’s right to one third of her husband’s real property, had long provided limited financial resources for widows of propertied husbands.”<sup>47</sup> The imposition of caretaking and financial responsibility for family members is not simply a thing of the past.<sup>48</sup> While coverture largely has been dismantled,<sup>49</sup> today, legal spouses have legal obligations vis-

*Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1715 (2003) (noting that marriage was viewed as the “solution to female poverty”).

45. Jeffrey Evans Stake et al., *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 541–42 (1998) (“As Martha Fineman has analyzed, legislators have long imagined that marriage serves the critical social and political function of attaching dependent women to provider men, thereby creating ‘the mechanism through which we can avoid assuming collective (or state-assumed) responsibility for dependent members of our society.’”); see also Dubler, *supra* note 44, at 1715 (“[P]oliticians still look to marriage, broadly defined, as a solution to female dependency, pointing to the family as the proper providing institution for women’s material needs, and, thus, designating husbands as the proper providers for female citizens.”).

46. For a detailed look at the historical doctrine of necessities and the modern spousal obligations of support and services, see generally Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003).

47. Collins, *Petitions Without Number*, *supra* note 44, at 39. Kristin Collins also points out that:

Although there is reason to doubt its efficacy in securing women’s financial security, this complex web of laws both reflected and reinforced a deep ideological commitment to the private marital family as the normatively appropriate source of support for women and other family dependents. That commitment was reflected in and reinforced by the scarcity of government assistance availability to women generally, including married women.

Kristin A. Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy, and the Legal Construction of the Family*, 62 VAND. L. REV. 1085, 1109 (2009) [hereinafter Collins, *Administering Marriage*].

48. To be clear, however, some argue that laws directly imposing legal obligations on recognized family members have been decreasing rather than increasing over time. See, e.g., Hasday, *Canon*, *supra* note 2, at 847 (reporting that, as of that time, only approximately 33 states still recognized some form of the doctrine of necessities). And, as scholars of family law know, the doctrine of necessities cannot be enforced by the spouses during an intact marriage. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953); see also Perry, *supra* note 46, at 13 (“One particularly interesting aspect of the duty of support is that while the courts have indicated that the couple cannot waive the duty, neither can either spouse enforce it against the other during the pendency of their marriage.”).

49. As scholars have shown, however, vestiges of coverture remain. See, e.g., Elizabeth Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 762 (2007) (“While the law no longer requires women to change their names, it still shapes people’s decisions about marital names in both formal and informal ways.”); Jill Elaine

à-vis each other, including the responsibility to care for one another,<sup>50</sup> to share their property,<sup>51</sup> and, in some cases, to be responsible for the other's debt.<sup>52</sup>

Rules imposing family caretaking obligations are not limited to the marital family. With regard to children, all legal parents—marital and nonmarital—are legally obligated to support their children.<sup>53</sup> Failure to fulfill this obligation may result in civil or even criminal penalties.<sup>54</sup> In addition, even though nonmarital partners generally are not directly obligated to support each other,<sup>55</sup> in a variety of contexts, the government presumes such support.<sup>56</sup> For instance, in the past, many states automatically reduced or terminated welfare benefits if a female beneficiary was living with a man.<sup>57</sup> The idea was that the government could reduce its obligations because the

Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000) (arguing that a majority of states still retained some form of the common-law doctrine that marital rape was a legal impossibility).

50. See, e.g., Perry, *supra* note 46, at 14 (“The law is clear that spouses owe each other a duty of services.”).

51. In the absence of a valid pre- or post-marital agreement, all states divide some portion of accumulated property equitably or equally upon divorce. See, e.g., Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1233–34 (2005) (describing property division upon divorce). Spouses also have property rights upon the death of the other spouse. In all states, spouses have a right of intestate succession. *Id.* at 1261. In addition, in all but one state, spouses cannot be disinherited. *Id.*

52. See, e.g., Marie T. Reilly, *In Good Times and In Debt: The Evolution of Marital Agency and the Meaning of Marriage*, 87 NEB. L. REV. 373, 397–412 (2008) (discussing spouses' legal responsibility for each other under contemporary law). According to Reilly, “[t]wo-thirds of the states retain the common-law doctrine of necessaries, including five of the nine community property jurisdictions” and other states have “adopted ‘family expense’ statutes that impose liability on both husband and wife for designated family expenses incurred by either of them.” *Id.* at 399 (footnotes omitted).

53. Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385, 390 (2008) (“Indeed, the law makes clear that both the legal rights and responsibilities for caregiving are vested in parents.”); see also Gomez v. Perez, 409 U.S. 535 (1973) (holding that state law denying nonmarital children the right to paternal child support violated Equal Protection).

54. D. KELLY WEISBERG & SUSAN F. APPLETON, MODERN FAMILY LAW 631–44 (5th ed. 2013).

55. See, e.g., Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1384 (2001) (“Remedies available to cohabitants are largely limited to untangling shared property interests and reimbursing extraordinary contributions made by one partner to the other's business or property interests. Under these rules, most cohabitants have no rights or obligations that arise by virtue of their shared life.”).

56. See *infra* notes 96–110 and accompanying text. That said, as discussed *infra*, the law does not always presume support from nonmarital partners.

57. ELIZABETH PLECK, NOT JUST ROOMMATES: COHABITATION AFTER THE SEXUAL REVOLUTION 47–70 (2012); see also Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647, 1665–73 (2005).

beneficiary likely was receiving support from the man even though he had no legal obligation to do so.<sup>58</sup>

Some of the laws and regulations imposing legal obligations of support and caretaking responsibilities on family members were enacted for the explicit purpose of reducing the public's responsibility for the provision of that care. This is true both inside and outside of marriage. Child support policies are a good example. A series of federal child support statutes enacted in the 1970s, 1980s, and 1990s "were very much about the privatization of public responsibility, transferring responsibility for the support of children from taxpayer to parent."<sup>59</sup> Or, as Laura Morgan puts it: "It is restating the obvious to say that federal and state [child support policies are] increasingly focused on making fathers, mothers, and even extended family members, such as grandparents, pay for the support of those in need in an effort to decrease the welfare burden on the federal government."<sup>60</sup>

In the context of adult caretaking, one can also find policies that shift responsibility from the state to recognized family members. For example, if a widow or a divorcee is receiving spousal Social Security benefits through his or her former spouse, those benefits are terminated if the widow or divorcee remarries.<sup>61</sup> This rule is based on the presumption that the new spouse, rather than the state, should shoulder the responsibility. Policies shifting responsibility away from the state and onto family members are not limited to the marital family. As noted above, in some instances, an adult may be ineligible for need-based government assistance if that person is living with a nonmarital partner.<sup>62</sup>

Placing caretaking responsibilities on family members is not necessarily bad from a policy perspective.<sup>63</sup> That said, it is critical that these family members have the support they need. And, to date, there

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58. See, e.g., PLECK, *supra* note 57, at 57 ("Alabama had identified as a suitable father a man who was not a cohabitor, was not the children's biological father, was not legally obligated to support the children, was not supporting the children, and was never caught visiting the woman and her children in her home.").

59. Cossman, *supra* note 24, at 442 (listing various federal statutes, including the Child Support Act of 1974, the Family Support Act of 1988, and the Child Support Recovery Act of 1992).

60. Laura Morgan, *Family Law at 2000: Private and Public Support of the Family: From Welfare State to Poor Law*, 33 FAM. L.Q. 705, 705 (1999).

61. Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43, 48 (2014).

62. See *supra* notes 55–58 and accompanying text; see also ROBERT A. MOFFITT, ROBERT T. REVILLE, ANNE E. WINKLER & JANE MCCLURE BURSTAIN, COHABITATION AND MARRIAGE RULES IN STATE TANF PROGRAMS (2008, revised 2009), available at <http://www.aspe.hhs.gov/hsp/09/CohabitationMarriageRules/index.shtml>, archived at <http://perma.cc/W7Z4-S3VA>.

63. See *infra* Part II.A.

has been too little attention devoted to thinking about family dependency and government support for family caretaking.<sup>64</sup> Hopefully, Rosenbury's piece will stimulate a robust and thoughtful conversation about these questions.

### III. SUBSIDIZING CARE THROUGH FAMILY LAW

As Rosenbury herself acknowledges, however, government recognition of families does not work solely in one direction.<sup>65</sup> Governments also recognize families for the purpose of distributing benefits, many of which are intended to help family members meet their family caretaking obligations.<sup>66</sup>

Examining *both* the family-based caretaking obligations and family-based public subsidies can provide an even deeper understanding of the effectiveness of family law and policy. As Clare Huntington explains, in thinking about family law reform, it is critical to "recogniz[e] that families and the state are mutually dependent."<sup>67</sup> Families need benefits, protections, and subsidies from the state, and the state needs families to fulfill critical caretaking functions.<sup>68</sup> Accordingly, effective family law reform must examine both sets of needs. If one only considers the ways in which the law privatizes family dependency, one might not see the ways in which the government recognizes some family relationships for the purpose of imposing obligations, but not for purposes of extending family-based subsidies, and vice versa. In addition, failure to look at both sides of the equation would make it harder to assess whether families are

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64. EICHNER, *THE SUPPORTIVE STATE*, *supra* note 18, at 6 (noting the lack of a "well-thought-out theory of dependency").

65. Rosenbury, *supra* note 1, at 1866–67 ("The government therefore recognizes and bestows benefits on families . . .").

66. Murray, *supra* note 53, at 405–06 ("Both the state and private employers offer significant support for caregiving and caregivers through insurance benefits and other employment prerequisites, Social Security benefits, and more recently, the Family and Medical Leave Act of 1993.").

67. Clare Huntington, *Flourishing Families*, 50 *FAM. CT. REV.* 273, 275 (2012) [hereinafter Huntington, *Flourishing Families*].

68. Clare Huntington elaborates on this mutual dependence:

Families of all income levels rely on the state in myriad ways and benefit from direct subsidies, tax deductions, the provision of public education, and laws establishing rights and obligations. But just as families need the state, the state also needs families. The state cannot (and should not) directly undertake the essential work of raising children. Instead, the state relies on families to care for dependents. But if the state is going to rely on families, then it needs to reject the misleading rhetoric of family autonomy and instead embrace a policy of active engagement and support.

*Id.*; see also EICHNER, *THE SUPPORTIVE STATE*, *supra* note 18, at 1 (2010).

receiving enough government support to fulfill their caretaking obligations.<sup>69</sup>

Looking at both sides of the equation also offers additional insights as to *why* governments recognize families. As Rosenbury demonstrates, one of the reasons governments recognize families is for the purpose of privatizing dependency. But, as she also shows, there are other motivations as well. And the fact that the government sometimes recognizes family relationships only for purposes of access to benefits but not for purposes of imposing obligations suggests that sometimes other motivations—including the goals of fairness and equality—predominate.

### *A. Reflections on Family-Based Obligations*

Before going further, it is important to offer some context for thinking about privatizing family dependency. The notion of privatizing dependency is often given a negative valence. And, certainly, to the extent that phrase is used to mean a regime requiring people to care for family members in complete isolation, without any outside assistance, it is indeed troubling.<sup>70</sup> But, as noted above, federal and state governments do not recognize families solely for the purpose of assigning obligations. At least in some contexts, and at least for some families, the states and the federal government also extend benefits or subsidies to family members to assist them with the provision of family caretaking responsibilities.<sup>71</sup>

As Maxine Eichner<sup>72</sup> explains in much more detail, having a default rule that care will be provided by family members is not necessarily a bad thing. Everyone, Martha Fineman reminds us, “has been, is, or will be dependent on others for essential care since we have all been infants and many of us will require assistance due to either age, disability, or illness.”<sup>73</sup> Family members are often best

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69. Collins, *Administering Marriage*, *supra* note 47, at 1088–90. Indeed, “[t]oday, the number of women in the United States who receive some sort of social provision based on their marital status (i.e. as wives or widows) is several times that of the number of women who receive purely need-based assistance.” *Id.* at 1089–90.

70. While such a system is troubling in general, it also raises race, class, and gender concerns because, as a whole, some groups feel the effects of such a system more acutely.

71. For a very thoughtful and compelling defense of the position that the government has a responsibility to help family members fulfill their caregiving obligations, see generally EICHNER, *THE SUPPORTIVE STATE*, *supra* note 18.

72. *Id.* at 58–59; Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State’s Regulation of Intimate Relationships Between Adults*, 30 HARV. J.L. & GENDER 25, 36–37 (2007) [hereinafter Eichner, *Marriage and the Elephant*].

73. Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL’Y REV. 89, 90 (1998).

positioned to provide this essential care<sup>74</sup> and many people would prefer to be cared for by a family member. Moreover, when family members care for each other, it often strengthens and stabilizes those relationships.<sup>75</sup> People who are in stable, healthy, supportive relationships tend to have better health and welfare outcomes.<sup>76</sup>

Thus, from a family law perspective, the goal should not necessarily be to eliminate a presumption of family-based care and financial support, or even to eliminate the legal imposition of these responsibilities on family members.<sup>77</sup> Helping people care for one another can be a positive end. But such a system can only function well if family members have the support they need to fulfill these caregiving obligations. Accordingly, a critical question to examine is whether the government is striking the correct balance between the imposition of obligations and the provision of support.

### *B. Adding in Family-Based Subsidies*

As noted above, governments recognize family relationships for the purpose of imposing responsibilities *and* for the purpose of distributing benefits.<sup>78</sup> The latter consequence of legal family

74. Eichner, *Marriage and the Elephant*, *supra* note 72, at 36–37 (“This level of capability and self-sufficiency helps ensure that human dependency needs are not only met, but met in a manner superior to that which the state could provide, in the sense that caretaking is delivered by family members who know and respond to the needs of the dependent.”); EICHNER, *THE SUPPORTIVE STATE*, *supra* note 18, at 58–59 (“In many cases, family members will be in the best position to care for other family members, both because they know the needs of their family members best and because they are most motivated to act in their interests because of their emotional bond.”).

75. *Cf.* Anne C. Dailey, *Developing Citizens*, 91 IOWA L. REV. 431, 433 (2006) (discussing the importance of caregiving to child development).

76. *See, e.g.*, Leslie Joan Harris, *Questioning Child Support Enforcement Policy for Poor Families*, 45 FAM. L.Q. 157, 170 (2011) (“[T]he *Fragile Families* research confirms that children whose custodial parents are in stable relationships do much better in terms of cognitive functioning, behavior and overall health than those whose parents’ relationships are unstable.”); *see also, e.g.*, Cynthia Osborne & Sara McLanahan, *Partnership Instability and Child Well-Being*, 69 J. MARRIAGE & FAMILY 1065, 1065 (2007) (exploring why “children exposed to multiple changes in family structure have poorer outcomes, on average, than children who grow up in stable families”).

77. Maxine Eichner also argues that “the imposition of legal obligations to family members can work to reduce power, race, class, and gender imbalances that can arise in relationships.” Eichner, *Marriage and the Elephant*, *supra* note 72, at 49 (“The interdependent nature of intimate relationships between adults, particular when they are long-term, can create large economic inequalities and imbalances of power in the absence of regulation. These issues are best addressed through laws that, at a minimum, establish a fair default position between the parties to the relationship.”).

78. Collins, *Administering Marriage*, *supra* note 47, at 1088–90 (noting that there is a significant body of literature “demonstrating how marriage is employed—for better or worse, successfully or unsuccessfully—as an antidote for women’s poverty and as a substitute for social

recognition is of more recent vintage. Kristin Collins explains that while marriage historically did not entitle family members to government benefits or subsidies, that “began to change in the early nineteenth century with the development of federal military widows’ pensions.”<sup>79</sup> The provision of these widows’ benefits transformed the role that marriage played. Marriage was no longer just about imposing obligations. Marriage became “a source of broad-scale systematic public entitlements[.]”<sup>80</sup>

Today the extent of family-based government subsidies is wide. A large number of programs extend benefits based on the parent-child relationship.<sup>81</sup> These benefits include: the earned income tax credit, which primarily helps low-income families with children;<sup>82</sup> children’s Social Security benefits, which assist families with children in the event of the death, retirement, or disability of a parent;<sup>83</sup> and dependent care accounts, which allow parents to use pre-tax earned income to pay for a portion of child care costs.<sup>84</sup> As a result of policy developments as well as constitutional mandates, benefits based on the parent-child relationship are generally extended to both marital and nonmarital children.<sup>85</sup>

provision” but with the qualification that “myriad forms of social provision use marriage as a basis for eligibility rather than as a basis for de facto exclusion”).

79. Collins, *Petitions Without Number*, *supra* note 44, at 60; *see also id.* (“Under the pension statutes, military widows could claim support, not just from their husbands’ estates or from other private parties, but from the public coffers. The development of this novel form of legal entitlement—the public marriage-based entitlement—signaled important transformations in the legal and social meanings of marriage.”).

80. Collins, *Administering Marriage*, *supra* note 47, at 1163; *see also* Collins, *Petitions Without Number*, *supra* note 44, at 3 (noting that by the 1830s, military widow’s pensions “were a form of financial assistance, created by public law statutes, intended to alleviate pinching poverty for a significant class of women”); Dubler, *supra* note 44, at 1705–06.

81. It is important and interesting to note that how this relationship is defined varies from program to program. For a more detailed analysis of this, *see* Joslin, *Family Status*, *supra* note 10.

82. Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and a Proposal For Repair*, 88 N.Y.U. L. REV. 515, 530 (2013). As Greene and others have argued, however, while laudable in theory, the EITC tax credit is far from perfect in practice. *Id.*

83. Courtney G. Joslin, *Protecting Children(?): Marriage, Biology, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1209–10 (2010).

84. *See, e.g.*, Ashlea Ebeling, *The ABCs of Child Care Breaks*, FORBES.COM, (March 18, 2009), <http://www.forbes.com/2009/03/18/nanny-tax-credit-personal-finance-taxes-child-care.html>, archived at <http://perma.cc/2TUY-NY2S>.

85. To be clear, however, the marital status of the parents may affect the amount of the benefit and/or the means of proving eligibility. *See, e.g.*, Vada Waters Lindsey, *Encouraging Savings Under the Earned Income Tax Credit: A Nudge in the Right Direction*, 44 U. MICH. J.L. REFORM 83, 102 (2010) (“An unmarried couple with dual income and children will be entitled to a greater EITC than a similarly situated married couple.”).

In terms of benefits for adult-adult caretaking, however, marriage continues to be a prerequisite for many family-based subsidies.<sup>86</sup> Legal spouses, for example, may have access to spousal health insurance to help them provide medical treatment for a sick partner.<sup>87</sup> Many workers<sup>88</sup> have a right under the federal Family Medical Leave Act (“FMLA”) to take leave from work to care for spouses with serious medical needs.<sup>89</sup> Legal spouses are often able to use pre-tax earned income to pay for a spouse’s uncovered medical expenses.<sup>90</sup> These are just a few of the many examples one could point to.<sup>91</sup> Often these benefits are not extended to nonmarital partners.<sup>92</sup>

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86. Huntington, *Postmarital Family Law*, *supra* note 73, at 13 (“In the case of certain rights and privileges, legislatures and courts believe marriage is a necessary condition for receipt of benefits.”).

87. See, e.g., Holning Lau & Charles Q. Strohm, *The Effects of Legally Recognizing Same-Sex Unions on Health and Well-Being*, 29 LAW & INEQ. 107, 116 (2011) (noting that “the federal government offers health care benefits to spouses of federal employees”).

88. A significant number of workers, however, are not entitled to FMLA leave, either because they have not yet worked for the employer for one year, because they are part-time employees, or because they work for a small employer not covered by the statute. Naomi Gerstel & Amy Armenia, *Giving and Taking Family Leaves: Right or Privilege?*, 21 YALE J.L. & FEMINISM 161, 166 (2009) (“Approximately 90% of employers, employing about 40% of the workforce, are outside the scope of these provisions. Furthermore, almost one-fifth of workers at covered employers do not meet eligibility requirements, leaving approximately 53% of the workforce ineligible for FMLA leave.” (footnotes omitted)).

89. See 29 U.S.C. § 2612(a)(1)(C) (2012) (providing that an “eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . in order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition”); see also Robin L. West, *The Incoherence of Marital Benefits*, 161 U. PA. L. REV. ONLINE 179, 190 n.13 (2013) (noting that “the Family and Medical Leave Act (FMLA) requires qualifying employers to provide leave to employees in order to care for a legal spouse, but not for an unmarried partner.”).

90. Lucille M. Ponte & Jennifer L. Gillan, *From Our Family to Yours: Rethinking the “Beneficial Family” and Marriage-Centric Corporate Benefit Programs*, 14 COLUM. J. GENDER & L. 1, 71 (2005) (“[U]nless the employee’s domestic partner is a dependent, a mandate not placed on spouses, [the IRS prohibits] pre-tax employee contributions to flexible spending accounts to be spent on the premiums of the domestic partner program or on the partner’s out-of-pocket medical expenses [like] vision care, prescriptions, or counseling services.” (footnote omitted)).

91. On the federal side alone, the General Accounting Office previously identified over a thousand federal provisions that turn on marital status. Letter from Dayna K. Shah, Assoc. Gen. Counsel, GAO, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>, archived at <http://perma.cc/FZK9-6E5C>. Many, though not all, of these provisions extend benefits and protections to married spouses. *Id.*

92. See, e.g., Bowman, *supra* note 86, at 453–54 (noting that “[a] cohabitant is not eligible for [spousal Social Security] benefits under the act unless he or she would be considered a spouse under the state law where the decedent was domiciled”).

That said, a limited number of programs extend benefits based on other family relationships, including a dependent-caretaker relationship. For example, a portion of the funds spent on providing care to a person who is “dependent” (regardless of one’s legal familial relationship) may be entitled to special tax treatment. Gail Levin Richmond, *Taxes and the Elderly: An Introduction*, 19 NOVA L. REV. 587, 597 (1995). For purposes of the dependent care tax credit, a “dependent” is defined to mean an individual “who is physically or mentally incapable of caring



Rosenbury is certainly correct to point out that these family-based subsidies are linked in important ways to the family-based responsibilities. Part of the reason that the “government . . . recognizes and bestows benefits on families [is] so that they will serve a private welfare function, minimizing reliance on state and federal coffers.”<sup>93</sup> Thus, Rosenbury argues, the federal government provides Social Security benefits for children when a parent becomes disabled or dies in part to encourage that parent to support the child during periods of nondisability.<sup>94</sup>

Although these consequences of family recognition are interrelated, it is nonetheless helpful and important to examine government intervention in the family with a finer-grained comb. Looking at both the imposition of family-based obligations *and* the distribution of family-based subsidies provides additional insights into the effectiveness of both state and federal policies on the family. It can also offer a deeper understanding of why the government recognizes certain family forms in certain contexts.

#### IV. ACCOUNTING FOR THE FAMILY-BASED OBLIGATIONS AND THE FAMILY-BASED SUBSIDIES

##### *A. Effectiveness of Family Law and Policy*

Parsing the imposition of family-based obligations from the distribution of family-based subsidies provides a fuller and more nuanced understanding of the effectiveness of family law and policy for a number of reasons.

First, if one thinks about family recognition solely as a means of privatizing dependency, this framing might create the perception that individuals in nonrecognized families are generally not expected to care for themselves.<sup>95</sup> To the contrary, however, healthy adults of working age are generally expected to care for themselves, or to find care for themselves, regardless of whether they are in a marital or some other recognized family form. This has become increasingly true in light of drastic cuts to need-based government assistance in recent

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for himself or herself and who has the same principal place of abode as the taxpayer for more than one-half of such taxable year.” I.R.C. § 21(b)(1).

93. Rosenbury, *supra* note 1, at 1866–67.

94. *See, e.g., id.* at 1867 (“In other words, benefits are available only after a wage earner takes on the obligations of dependency through legal family status and then is unable to meet those obligations because of death.”).

95. As explained in note 21, *supra*, it is hard to provide a simple definition of a “nonrecognized” family as different family configurations are recognized for different purposes. That said, with regard to family-based subsidies to support adult-adult relationships, marital relationships are the most commonly recognized family form.

years.<sup>96</sup> “From 1994 to 2007, the number of recipients receiving welfare . . . declined [by] more than seventy percent.”<sup>97</sup> Unfortunately, the decrease in the number of welfare recipients is not the result of declining poverty rates. Instead, it is at least in part due to the transformation of need-based government assistance “into a temporary assistance program.”<sup>98</sup> Indeed, the 1996 Personal Responsibility and Work Opportunity Reconciliation Act “established a five-year lifetime limit on welfare assistance and significantly toughened the work requirements.”<sup>99</sup> As a result, the total amount of need-based benefits provided to the poorest of Americans has declined in recent years.<sup>100</sup> To be specific, between 1983 and 2004, the benefits for the poorest actually “declined in real terms by about one-third.”<sup>101</sup>

Thus, individuals in nonrecognized (often meaning nonmarital) families are largely expected to be self-sufficient;<sup>102</sup> but, critically, they are often expected to do so without access to many of the family-based benefits. Consider an unmarried, cohabiting couple. Despite the fact that the man is not legally obligated to support the woman, the parties are nonetheless expected to be largely autonomous.<sup>103</sup> And that expectation attaches even though they are ineligible for a range of important family-based subsidies that help family members care for one another. For example, neither partner is entitled to take FMLA leave to care for the other in the event of a serious medical condition.<sup>104</sup> It may be the case that neither partner will be eligible to obtain partner health insurance through public or private employment.<sup>105</sup> And neither partner is eligible for spousal Social Security benefits in the event of the death or disability of the other.<sup>106</sup>

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96. See, e.g., Cossman, *supra* note 24, at 417 (“[S]ociety has called upon family law to address the economic needs of women and children at precisely the moment when it is dismantling the welfare state and public financial assistance has become increasingly scarce.”).

97. Julie A. Nice, *Forty Years of Welfare Policy Experimentation: No Acres, No Mule, No Politics, No Rights*, 4 N.W. J.L. & SOC. POL’Y 1, 2 (2009).

98. Cossman, *supra* note 24, at 466.

99. *Id.* at 469.

100. Patricia Cohen, *Aid to Needy Often Excludes the Poorest in America*, N.Y. TIMES, Feb. 16, 2015, at A1.

101. *Id.*

102. Or at least to need only a little bit of temporary assistance.

103. In fact, as discussed in more detail below, the already quite limited need-based benefits may be reduced or terminated due to the presence of and voluntary support from the man. See *infra* notes 120–123; see also Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1321–22 (2014) (discussing states’ reduction of need-based benefits when unrelated male lives in the home).

104. FMLA leave authorizes covered workers to take leave to care for: oneself, a spouse, a child, or a parent. 29 U.S.C. §§ 2612(a)(1)(C)–(D) (2012).

105. According to a 2010 Mercer study, only forty percent of employers offered benefits to different-sex unmarried partners. Katherine Bindley, *Domestic Partner Health Insurance*

The fact that people in nonmarital families are expected to fend for themselves, but must do so without access to some of the family-based benefits and supports<sup>107</sup> is particularly concerning in light of the growing demographic shift in family formation. “In the United States today, family form is strongly correlated with socioeconomic status.”<sup>108</sup> People of color, people in lower income brackets, and people with less education are significantly less likely to be married.<sup>109</sup>

To be sure, nonrecognition may be financially beneficial for some families. This would be the case if the combined income of both adults put them over the income threshold for a particular need-based benefit.<sup>110</sup> In such a scenario, the person would be eligible for the benefit only if the relationship was not taken into account.<sup>111</sup> In such circumstances, nonrecognition might result in greater state support and, consequently, a reduced degree of privatized dependency. However, one must keep in mind that need-based state support is limited and becoming even more so. Thus, while nonrecognition may result in a temporary increase in state support, the general default rule remains that nonrecognized families are still largely expected to be self-sufficient and autonomous, at least at the end of their five years of welfare benefits.<sup>112</sup>

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*Benefits Grow for Heterosexual Couples, Too*, HUFFINGTON POST (June 1, 2012), [http://www.huffingtonpost.com/2012/06/01/domestic-partner-health-insurance-unmarried-heterosexual-couples\\_n\\_1532584.html](http://www.huffingtonpost.com/2012/06/01/domestic-partner-health-insurance-unmarried-heterosexual-couples_n_1532584.html), archived at <http://perma.cc/YXS4-Q9R4>.

106. Bowman, *supra* note 86, at 453–54 (noting that “[a] cohabitant is not eligible for [spousal Social Security] benefits under the act unless he or she would be considered a spouse under the state law where the decedent was domiciled”). There can also be situations where a person who is fulfilling the financial and care obligations of parenthood is not recognized as a parent for purposes of important parent-child benefits and protections. See Joslin, *Protecting Children(?): Marriage, Biology, and Assisted Reproductive Technology*, *supra* note 84, at 1198–1217 (assessing whether a child’s relationship with an “equitable parent” receives same benefits and protections as relationship with a “legal parent”).

107. To be clear, however, being married is not always economically beneficial to the family. See Aloni, *supra* note 104, at 1280–81. Marriage is often financially disadvantageous for certain demographic groups, including: “poor and low-income individuals who are the beneficiaries of means-tested programs, the elderly and divorced who may lose existing entitlements upon remarriage, and college students who can be awarded more financial aid for higher education based on their (or their parents’) nonmarital status.” *Id.*

108. Huntington, *Postmarital Family Law*, *supra* note 73, at 186.

109. *Id.* at 186–88.

110. Aloni, *supra* note 104, at 1290.

111. Governments are not consistent with regard to which relationships are recognized for purposes of need-based assistance programs. Some programs consider the incomes of marital but not nonmarital partners. By contrast, other programs consider the income of any household member, regardless of marital status. This is true, for example, with regard to eligibility for food stamps. 7 C.F.R. § 273.1(b)(1)(i) (2014) (establishing eligibility based on a household and defining household to include “[a] group of individuals who live together and customarily purchase food and prepare meals together for home consumption”).

112. There are some circumstances where nonrecognition could result in financial benefits that are not time-limited in that way. The Earned Income Tax Credit (EITC) is one such

Second, focusing only on the ways in which the government uses family recognition to privatize dependency may distract scholars and policymakers from asking important questions about the benefit-side of the equation, including whether the family-based subsidies are going to *all* of the families that need them.<sup>113</sup> As noted above, many family-based subsidies are distributed only to marital families. In other works, Rosenbury has persuasively argued that we must think about caregiving in a broader way, a way that extends beyond the marital family.<sup>114</sup> Because there can be downsides to legal recognition,<sup>115</sup> using a broader definition of family isn't always the right answer.<sup>116</sup> But, it surely is an issue that must be considered and carefully assessed.<sup>117</sup>

A third reason why it is important to consider both the imposition of obligations *and* the distribution of subsidies is because they can be, as Erez Aloni explains, "asymmetrical."<sup>118</sup> For example, there are situations where a family relationship is recognized for purposes of imposing or presuming a caretaking relationship, but where that same relationship is not recognized for purpose of access to critical family-based benefits.<sup>119</sup> Where this is true, the balance of obligations and supports may be particularly lopsided. Aloni describes how asymmetry can occur in the welfare context. In some states today, the government "has a policy that recognizes [nonmarital, cohabiting relationships] for purposes of reducing the welfare amount."<sup>120</sup> In California, for example, "the state imposes a duty on an unrelated adult male to make minimum financial contributions to the family . . . [and t]his sum is reduced from the welfare grant."<sup>121</sup> But, importantly, these nonmarital, cohabiting relationships are recognized

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example. The total tax benefits under the EITC are typically larger if the parents are unmarried. See, e.g., Robert S. McIntyre & Michael J. McIntyre, *Fixing the "Marriage Penalty" Problem*, 33 VAL. U. L. REV. 907, 923 (1999).

113. For an in-depth analysis of this question, see NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND) GAY MARRIAGE: VALUING ALL FAMILIES* 137–43 (2008).

114. See, e.g., Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 242 (2007) (arguing that family law should consider relationships beyond the home, including friendships); Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 898 (2007) (arguing that family law should take account of childrearing that occurs "between home and school").

115. See *supra* notes 133–136 and accompanying text.

116. See, e.g., Aloni, *supra* note 104, at 1285–99 (exploring situations where broader family recognition can leave a family financially worse off).

117. Huntington, *Postmarital Family Law*, *supra* note 73, at 57.

118. Aloni, *supra* note 104, at 1283 (exploring, in much more detail, some of these asymmetries).

119. *Id.* at 1283.

120. *Id.* at 1321.

121. *Id.*

“only for the purpose of reducing or terminating a benefit; they are not recognized when it is a matter of gaining most of the partnership rights that would otherwise stem from these same relationships.”<sup>122</sup>

Another recent example of asymmetry was the situation that married, same-sex couples found themselves under Section 3 of DOMA.<sup>123</sup> Under Section 3, many married same-sex spouses had the state-conferred obligations of marriage (and, of course, some state-conferred benefits, too) without access to any of the federal marriage-based benefits.<sup>124</sup> Thus, these spouses often had legal obligations to care for one another, to share at least some of their property, and, in many cases, to be responsible for at least some of their spouses’ debts.<sup>125</sup> But, these spouses did not have the right to spousal Social Security benefits<sup>126</sup> and they were taxed on the value of health benefits for same-sex spouses.<sup>127</sup>

There are other situations where the reverse might be true—that is, where a person might be a recognized family member for purposes of one or a range of benefits but not for purposes of family-based obligations. For example, there are some minors who are considered children for purposes of a range of benefits for the children of military servicemembers, but who are not considered children for purposes of state law, including for purposes of state child support obligations.<sup>128</sup>

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122. *Id.* at 1283.

123. 1 U.S.C. § 7 (2006) (defining marriage for all federal purposes to mean “only a legal union between one man and one woman as husband and wife”) was held unconstitutional in *United States v. Windsor*, 133 S. Ct. 2675 (2013).

124. Though, to be clear, for some couples, Section 3 helped them avoid additional responsibilities or costs. For example, for some couples, their federal tax burden will be less if they file as single individuals rather than as a married couple. *See, e.g.*, Widiss, *supra* note 61, at 48 (2014) (“But not all couples benefit by being considered married for federal purposes. Beyond the lowest tax brackets, married couples who earn relatively equal incomes pay more in taxes than they would if they were single.”).

125. Margaret M. Mahoney, *The Equitable Distribution of Marital Debts*, 79 UMKC L. REV. 445, 445 (2010) (“At the time of divorce, however, modern equitable distribution laws authorize the courts to reallocate both assets and debts between the spouses.” (footnote omitted)).

126. *See* 42 U.S.C. § 402(b)-(c) (2006); *see also* Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 937 (2010).

127. *See* Private Letter Ruling (“PLR”) 200524016, 2005 PLR LEXIS 278 at \*23–24 (Mar. 17, 2005); PLR 200339001, 2003 PLR LEXIS 879 at \*\*9–11 (June 13, 2003); PLR 9850011, 1998 PLR LEXIS 1650 at \*10–13 (Sept. 10, 1998); PLR 9717018, 1997 PLR LEXIS 85 at \*11–12 (Jan. 22, 1997); *see also How DOMA Hurts Americans*, GAY & LESBIAN ADVOCATES & DEFENDERS, <http://www.glad.org/doma/how-doma-hurts-americans>, archived at <http://perma.cc/S9XE-PY9G> (last visited Feb. 26, 2015).

128. *See* Joslin, *Family Status*, *supra* note 10, at 806 (“As a result, under this federal definition, some nonmarital children were eligible for benefits even though they were not considered children as a matter of state family law.”).

Thus, family-based obligations and benefits do not always go hand-in-hand. Sometimes relationships are recognized for purposes of entitlement to additional benefits but are not recognized for purposes of some or all of the obligations. In other circumstances, family forms might be subject to many family-based obligations without having access to the full array of family-based benefits.

This asymmetry is not necessarily a bad thing. As I have explored elsewhere, asymmetry may be appropriate in some circumstances. For example, if the relationship only entitles the people to a limited protection, it may not be appropriate to recognize it for purposes of conferring all family-based obligations. In addition, there may be some circumstances where the extension of one or a few benefits is a limited attempt to alleviate a broader disparity against a particular type of family form.<sup>129</sup> For example, in 1965, the federal government decided that, as a matter of fairness, it would recognize some nonmarital parent-child relationships for purposes of children's Social Security benefits even if those relationships were not recognized as a matter of state law, including state child support law.<sup>130</sup> But while asymmetry is not a result that should always be avoided, it is still important to be aware of any such disjunctions and to assess whether they make sense as a matter of law, fairness, and policy.

Fourth, even when a particular family relationship is recognized for purposes of both the family-based obligations and the family-based support, the balance may be off, at least for some families. Families with access to more resources may not require much government support to shoulder their family-care responsibilities, while those with fewer resources may require much more government support. Thus, the mere existence of symmetry between the imposition of obligations and the distribution of benefits does not necessarily mean that the system is working well for all families.

Moreover, even if the families that need family-based subsidies have access to them, the timing may be off. For some families, the support they receive may be enough, but it may come much too late.<sup>131</sup>

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129. Elsewhere, I go into more detail regarding the various factors that may need to be taken into account when weighing whether to use different family status definitions for different purposes. See Joslin, *Family Status*, *supra* note 10, at 815–27.

130. S. REP. NO. 89-404, at 110 (1965), *reprinted in* 1965 U.S.C.C.A.N. 1943, 2050 (“The committee believes that in a national program that is intended to pay benefits to replace the support lost by a child when his father retires, dies, or becomes disabled, whether a child gets benefits should not depend on whether” the state recognizes and protects that parent-child relationship).

131. Huntington, *Flourishing Families*, *supra* note 67, at 273–74 (noting that the law often “fails to strength families early on,” and instead often waits to intervene until crises occur).

Many family-based subsidies kick in only during times of family crisis. Children's Social Security benefits, for example, are available only after the death, disability, or retirement of the wage-earning parent.<sup>132</sup> But, families often need help before these triggering events occur.

### *B. Purpose of Government Recognition*

Taking both the benefit and the obligation sides of the equation into account also provides additional insights with regard to the question Rosenbury originally sought to explore—when and why does the federal (and, I would add, the state) government use its own family status definitions? Is privatizing dependency the overriding factor that always drives that decision? Or are there other factors that, at times, outweigh the goal of privatizing dependency?

When one looks at the range of circumstances that governments recognize families, one finds what Kristin Collins describes as a “messier, textured, interesting reality of the past and present regulation of family law and policy . . . .”<sup>133</sup> Many family-based obligations are imposed as a matter of state law. For example, the doctrine of necessities was recognized under state common law and, in some states, by statute.<sup>134</sup> In many states today, this doctrine is now reflected in gender-neutral family support statutes.<sup>135</sup> Likewise, child support amounts are set under state family law.<sup>136</sup>

But federal law, as Rosenbury suggests, also plays a role in imposing obligations on family members. Federal law requires mothers seeking welfare benefits to participate in the establishment of the child's paternity, so that the federal government can shift some of its responsibility to the child's other parent.<sup>137</sup> Under federal law,

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132. *Benefits for Children*, U.S. SOC. SEC. ADMIN., <http://www.ssa.gov/pubs/EN-05-10085.pdf>, archived at <http://perma.cc/K263-UXXB> (last visited Feb. 18, 2015).

133. Collins, *Professor Gerken's Mad Genius*, *supra* note 2, at 627.

134. Note, *The Unnecessary Doctrine of Necessaries*, 82 MICH. L. REV. 1767, 1767–68 (1984) (“More than three centuries ago, the English courts developed the doctrine of necessities as a means of enforcing a husband's duty to support his wife during an ongoing marriage . . . . [T]he doctrine survived into this century in both common law and statutory forms.” (footnotes omitted)).

135. Hasday, *Canon*, *supra* note 2, at 838 n.34 (listing statutes and case law).

136. Jane C. Venohr, *Child Support Guidelines and Guidelines Reviews: State Differences and Common Issues*, 47 FAM. L.Q. 327 (2013) (“Since 1989, federal regulations require each state to provide presumptive guidelines (formulas) for determining the amount of child support awards and to review their guidelines at least once every four years.”).

137. 42 U.S.C. § 608(a)(2) (corresponds to § 103(a), 110 Stat. 2135); *see also* Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325, 347–48 (2005) (noting that the 1996 federal welfare amendments “strengthened the ‘cooperation requirement’ in which a mother seeking public assistance must aid in identifying the father of the child” and that the “[f]ailure of women to

spousal Social Security benefits are terminated upon remarriage, based on the theory that the new spouse should be financially responsible, not the state.<sup>138</sup>

And both the states and the federal government participate in the provision of family-based benefits programs. For example, some states have established paid-family leave programs.<sup>139</sup> In California, for instance, workers can take up to six weeks of partially paid leave to care for certain recognized family members.<sup>140</sup> Additionally, state employees often have access to spousal health insurance benefits.<sup>141</sup>

However, the states are not alone in distributing family-based subsidies and protections. An important federal benefit program is Social Security. In addition to the protections for individual workers, the program also provides benefits to spouses and children in the event of the death, disability, or retirement of the worker.<sup>142</sup> The federal Employee Retirement Income Security Act ("ERISA") extends special pension protections to married spouses.<sup>143</sup> Other important federal protections include benefits for the family members of federal employees, including military servicemembers.<sup>144</sup> Family-based protections for servicemembers are particularly extensive, ranging

cooperate in identifying putative fathers without a showing of good cause will result in a reduction of benefits or a complete denial of assistance").

138. See *supra* note 62 and accompanying text.

139. Niraj Chokshi, *What Paid Family Leave Looks Like in the Three States that Offer It*, WASH. POST (June 24, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/06/24/what-paid-family-leave-looks-like-in-the-three-states-that-require-it/>, archived at <http://perma.cc/V8JY-URLG>.

140. Jennifer Thompson, *Family and Medical Leave for the 21st Century?: A First Glance at California's Paid Family Leave Legislation*, 12 U. MIAMI BUS. L. REV. 77, 92–93 (2004) (describing California's Paid Family Leave program).

141. See, e.g., *The State Health Plan of North Carolina*, NORTH CAROLINA STATE UNIVERSITY (describing that employees can choose "from the four coverage levels: Employee Only, Employee + Children, Employee + Spouse, Employee + Family (must include spouse and child(ren)"), [http://www.ncsu.edu/human\\_resources/benefits/state\\_health\\_plan.php](http://www.ncsu.edu/human_resources/benefits/state_health_plan.php), archived at <http://perma.cc/G8U7-ZZ2B> (last visited April 8, 2015).

142. Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1485–86 (2013) ("[T]he 1939 amendments [to the Social Security Act] provided for benefits to wives, widows, and children in the event of the wage earner's death or retirement. These derivative benefits continue to exist today and now also protect spouses and children in the event the wage earner becomes disabled." (footnotes omitted)) [hereinafter Joslin, *Federal Benefits*].

143. Albert Feuer, *Who Is Entitled to Survivor Benefits from ERISA Plans?*, 40 J. MARSHALL L. REV. 919, 948 (2007) (explaining that "REACT enhanced the protection of spouses of participants during their marriage by strengthening and extending the coverage of the original pension beneficiary designation mandate of ERISA" with "three enhancements: (1) more pension plans were covered, (2) covered pension plans were required to designate spouses as beneficiaries of specified survivor benefits, and (3) any change in such statutory designations requires the written consent of the participant's spouse").

144. See Joslin, *Federal Benefits*, *supra* note 142, at 1501 ("[M]any of these benefits are provided not only to the servicemember, but are also extended to or for the benefit of certain enumerated family members.").



from health insurance benefits, to benefits in the event of the death or disability of the servicemember as the result of his or her service.<sup>145</sup> Thus, it is clear that neither level of government has a monopoly on either the obligation or the benefits side of the equation.<sup>146</sup> Both state and federal governments sometimes recognize family status for the purpose of imposing obligations and, at other times, for the purpose of distributing benefits to help recognized family members fulfill their obligations.<sup>147</sup>

A review of these various state and federal interventions in the family reveal a complex mix of goals and concerns. One can find examples of federal family status definitions where the overriding purpose appears to be a goal of shifting government obligations to family members. For example, for purposes of income-based Social Security benefits, the federal government takes into account the income of common-law spouses, regardless of whether the relevant state recognizes common-law marriages.<sup>148</sup>

There are other examples, however, where the federal government uses its own family status definitions primarily for other reasons. The federal government's approach to same-sex couples prior to the demise of Section 3 of DOMA offers a useful illustration. When Section 3 prevented the federal government from recognizing same-sex married spouses, many federal agencies extended a range of benefits to same-sex partners (including partners who were not legally recognized family members as a matter of state law). For example, the State Department promulgated policies that took same-sex domestic partners into account with respect to a range of benefits including the calculation of housing allocations, access to medical facilities abroad,

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145. *Id.*

146. *See generally* Joslin, *Family Status*, *supra* note 10.

147. Indeed, as Kristin Collins points out:

[O]fficials operating at every level of government . . . have . . . shaped the legal definition and meaning of marriage over time. That process has sometimes been evolutionary, sometimes revolutionary; sometimes cooperative, sometimes contested; sometimes peaceful, sometimes violent. Some of the most significant changes—Reconstruction-era efforts to recognize the marriages of emancipated slaves, woman suffrage, New Deal social welfare programs, and the end of state anti-miscegenation laws—brought federal power to bear on family relationships in very direct ways.

Collins, *Professor Gerken's Mad Genius*, *supra* note 2, at 626–27; *cf.* Resnik, *Reconstructing Equality*, *supra* note 4, at 417 (“Equality is not an artifact of the level of a court or of a government body but of who has power within it and what their commitments are.”).

148. *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013) (“Congress decided that although state law would determine in general who qualifies as an applicant’s spouse, common-law marriages also should be recognized, regardless of any particular State’s view on these relationships.”) (citing 42 U.S.C. § 1382c(d)(2)).

emergency travel funds, and calculations of overseas allowances.<sup>149</sup> These federal policies recognized the family status of domestic partner primarily, if not exclusively, for the purpose of extending important benefits; few, if any, legally enforceable obligations attached to this status.<sup>150</sup> Thus, with respect to these policies, it seems relatively clear that privatizing dependency was not the government's primary motivation. Instead, these policy changes were intended to address discrimination against same-sex couples.<sup>151</sup> Indeed, these policies were promulgated after direction from the President ordering all federal agencies to review their policies to address what he described as "systemic inequality."<sup>152</sup> And there are other examples where the federal government has "intervened in the name of greater protection and fairness."<sup>153</sup> One can find similar policies at the state level. For example, when California first established its domestic partnership registry, registration brought about only rights and protections, no legally conferred obligations. Initially, registered domestic partners were entitled to the right to visit a domestic partner in the hospital and certain state employees were entitled to domestic partner health insurance benefits.<sup>154</sup> Two years later, the state extended about a

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149. Frequently Asked Questions Regarding Same-Sex Domestic Partners, U.S. DEPT OF STATE, <https://careers.state.gov/faqs/faqs-wiki?func=byKeyword;keyword=Same-sex%20domestic%20partner>, archived at <https://perma.cc/Q6EN-6KG9> (last visited Feb. 18, 2015).

150. It is true that to become a "declared domestic partner" for purposes of this provision, the two people would have to sign a statement declaring that they "[s]hare responsibility for a significant measure of each other's common welfare and financial obligations." U.S. DEPT OF STATE, DECLARATION OF A DOMESTIC PARTNER, 3 FOREIGN AFFAIRS MANUAL 1612, available at <http://www.state.gov/documents/organization/84830.pdf>, archived at <http://perma.cc/N6HV-YS5N> (last visited Feb. 6, 2015). That said, the couple need not be considered registered domestic partners under state law, and therefore need not be considered recognized family members for a range of state and maybe for purposes of other federally imposed family-based obligations and responsibilities.

151. For example, the President explained that:

For far too long, many of our Government's hard-working, dedicated LGBT employees have been denied equal access to the basic rights and benefits their colleagues enjoy. This kind of systemic inequality undermines the health, well-being, and security not just of our Federal workforce, but also of their families and communities. That is why, last June, I directed the heads of executive departments and agencies (agencies), in consultation with the Office of Personnel Management (OPM), to conduct a thorough review of the benefits they provide and to identify any that could be extended to LGBT employees and their partners and families.

Memorandum from President Barack Obama on the Extension of Benefits to Same-Sex Domestic Partners of Federal Employees (June 2, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-extension-benefits-same-sex-domestic-partners-federal-emplo>, archived at <http://perma.cc/42SE-WYVJ> (last visited March 15, 2015).

152. *Id.*

153. Joslin, *Family Status*, *supra* note 10, at 819.

154. Assembly Bill 26, Act of Oct. 2, 1999, ch. 588, 1999 Cal. Stat. 4157.

dozen additional rights to registered domestic partners.<sup>155</sup> As explained in the Bill Analysis, the more comprehensive bill sought to “confer a number of new legal rights on” domestic partners.<sup>156</sup>

Moreover, the fact that marriage continues to be a prerequisite for so many caregiving benefits related to adult-adult relationships demonstrates that another factor that sometimes trumps other considerations is an interest in promoting certain family forms. For a variety of reasons, including moral ones, some policymakers believe that the marital family form is ideal. And some policymakers believe that this ideal only includes heterosexual couples. Limiting important family-based subsidies to (certain) marital families is viewed by some as a means of encouraging this model. Some policies—both state and federal—make the goal of promoting the alleged moral desirability of certain family forms explicit. For example, when Congress enacted DOMA in 1996, the “stated purpose of the law was to promote an ‘interest in protecting the traditional moral teachings reflected in heterosexual-only marriage laws.’”<sup>157</sup> Similar efforts can also be seen at the state level.<sup>158</sup>

Thus, Rosenbury is correct in noting that the government sometimes recognizes families primarily for the purpose of shifting responsibility from the state. But in other instances, government recognition of families is driven primarily by other goals.

## V. CONCLUSION

Rosenbury’s important article will, I hope, spur more engagement with the neglected but critically important questions about the role of the federal government in the family. Importantly, her article reminds us not to lose sight of one reason for such intervention—a desire to privatize dependency. This Essay builds upon Rosenbury’s contribution by arguing that we gain additional insights when we look at family recognition with an even finer-grained comb. In particular, by looking not only at the ways the law imposes

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155. Assembly Bill 25, Act of Oct. 14, 2001, ch. 893, 2001 Cal. Stat. 893. The additional rights included the right to sue for the wrongful death of a domestic partner, the right to make medical decisions for an incapacitated domestic partner, and the right to take sick leave to care for a domestic partner. *Id.*

156. Assembly Committee on Judiciary, Bill Analysis, March 13, 2001, Assembly Bill 25, Act of Oct. 14, 2001, ch. 893, 2001 Cal. Stat. 893, [http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab\\_0001-0050/ab\\_25\\_cfa\\_20010309\\_170135\\_asm\\_comm.html](http://www.leginfo.ca.gov/pub/01-02/bill/asm/ab_0001-0050/ab_25_cfa_20010309_170135_asm_comm.html), archived at <http://perma.cc/P2RL-ESWP>.

157. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (quoting H.R. REP. NO. 104-664, at 12–13 (1996)).

158. For a comprehensive review of state DOMAs, see, for example, Andrew Koppelman, *The Difference Mini-DOMAs Make*, 38 LOY. U. CHI. L.J. 265 (2007).

obligations on family members but also at the ways the law extends support to family members helps us better assess the extent to which family law is (or is not) serving families. Using this dual lens also provides a deeper and more nuanced understanding of why governments are in the business of recognizing families.