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The Creeping Federalization of Wealth-Transfer Law

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The Creeping Federalization of Wealth-Transfer Law

Lawrence W. Waggoner*

This Article surveys areas of federalization of wealth-transfer law. Federal authorities have little experience in making law that governs wealth transfers, because that function is traditionally within the province of state law. Although state wealth-transfer law has undergone significant modernization over the last few decades, all three branches of the federal government—legislative, judicial, and executive—have increasingly gone their own way. Lack of experience and, in many cases, lack of knowledge on the part of federal authorities have not dissuaded them from undermining well-considered state law.

The Article covers these topics: federal preemption of several areas of state law, the development of federal common law as a sometime substitute for preempted state law, the federal tax exemption for perpetual trusts, and the right of posthumously conceived children of assisted reproduction to Social Security survivor benefits.

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* Lewis M. Simes Professor Emeritus of Law, University of Michigan. Parts of this Article draw on law-reform products for which I am the Reporter: the Restatement (Third) of Property: Wills and Other Donative Transfers, the Uniform Probate Code, and the Uniform Statutory Rule Against Perpetuities. The views expressed are my own and not made on behalf of the American Law Institute or the Uniform Law Commission. For commenting on earlier drafts, I thank Thomas Gallanis, Douglas Kahn, Yale Kamisar, John Langbein, Melanie Leslie, and Stewart Sterk.

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I. INTRODUCTION

Federal law¹ increasingly departs from state law when governing wealth transfers.² The Uniform Law Commission (“ULC”) has taken notice of the phenomenon by issuing a position paper on the development.³ The ULC urges Congress and federal agencies to take

1. By federal law, I mean acts of Congress, decisions of federal courts, especially the Supreme Court, and regulations issued by federal agencies.

2. Throughout the text, I use the term “wealth-transfer law” to mean the law that governs donative transfers by wills, intestacy, and will substitutes. A will substitute, also called a nonprobate transfer, is an arrangement respecting property or contract rights that is established during the donor’s lifetime, under which “(1) the right to possession or enjoyment of the property or to a contractual payment shifts outside of probate to the donee at the donor’s death; and (2) substantial lifetime rights of dominion, control, possession, or enjoyment are retained by the donor.” RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 7.1 (2003) [hereinafter PROPERTY RESTATEMENT].

Will substitutes include revocable trusts, life insurance, pension and employee benefit accounts, joint tenancy and other forms of undivided ownership with right of survivorship, multiple-party accounts, payable-on-death arrangements, annuities with a death benefit, Totten trusts, and similar arrangements. *See id.*

3. *See* UNIF. LAW COMM’N, *Principles of Federalism* 1 (2013) [hereinafter UNIF. LAW COMM’N, *Principles of Federalism*], available at http://www.uniformlaws.org/shared/docs/federalism%20and%20state%20law/2013aug_Federalism%20Principles.pdf, archived at <http://perma.cc/B7PY-NG7U>. The ULC has not yet decided how to transmit the statement to federal authorities. E-mail from John Sebert, ULC Exec. Dir., to Lawrence Waggoner, Prof. of Law, Univ. of Mich. (Oct. 22, 2013) (on file with author). At the November 14, 2013, meeting of the ULC Federalism and State Law Committee, the ULC decided that the next step is to work with other organizations with similar interests. *See* UNIF. LAW COMM’N, *Minutes of the November 14, 2013 Meeting* 2–3, 6 (2013), http://www.uniformlaws.org/Shared/Docs/Federalism%20and%20State%20Law/Federalism%20and%20State%20Law_Minutes_Nov13.pdf, archived at <http://perma.cc/7QEN-Q3AB>.

the following actions (among others) when considering laws and regulations that potentially conflict with state law⁴:

- “Carefully evaluate the way in which state law addresses the issue under consideration.”
- “Determine the extent to which states face differing needs, circumstances, and requirements in responding to the issue under consideration.”
- “Exercise restraint when legislating in areas in which the states have historically played a primary role . . . by taking action which preempts state law only when necessary to achieve objectives that cannot be reasonably achieved through alternative policies.”
- “When preempting state law other than to prevent direct and irreconcilable conflict with federal law, specify as expressly as possible the extent to which state law is superseded or preserved.”

Among the ULC’s list of factors that favor states retaining autonomy is that “[s]tate law historically has primarily occupied the field.”⁵ Historically, state law has occupied the field of wealth-transfer law. Yet, as we shall see, federal law sometimes disrespects state law that has been promulgated only after having undergone the thoughtful deliberative processes of the ULC and then having been enacted by a state legislature, typically after extensive review and support by the relevant section of the state bar.

Although my purpose is to collect in one place various areas in which federal law, not state law, governs wealth transfers, I make no claim that the list is comprehensive.⁶ Because this is a survey article, each topic merits deeper investigation than I present here.

Parts II through V discuss federal law that preempts state law concerning the validity of beneficiary designations under federally authorized or regulated nonprobate transfers, i.e., state law concerning divorce revocation, elective share, mental incapacity,

4. UNIF. LAW COMM’N, *Principles of Federalism*, *supra* note 3, at 2.

5. *Id.* at 4; *see also* ROBERT A. STEIN, FORMING A MORE PERFECT UNION: A HISTORY OF THE UNIFORM LAW COMMISSION 233–36 (2013).

6. For example, except for *infra* note 26, I have left the slayer rule out of my discussion, as that topic is covered in Professor Langbein’s contribution to this Symposium. *See* John H. Langbein, *Destructive Federal Preemption of State Wealth Transfer Law in Beneficiary Designation Cases: Hillman Doubles Down on Egelhoff*, 67 VAND. L. REV. 1665, 1688–94 (2014). I have also left out state rules regarding antilapse and simultaneous death, as those topics are covered in T.P. Gallanis, *ERISA and the Law of Succession*, 65 OHIO ST. L.J. 185, 189–90 (2004).

undue influence, and defective execution. These Parts also discuss the application of federal common law as a possible substitute for preempted state law.

Parts VI, VII, and VIII explore discrete topics. Part VI takes up federally authorized military wills, whose execution overrides state will-execution law. Part VII points to Congress' enactment of a tax statute that unwittingly promoted perpetual trusts, which led states to repeal or modify their perpetuity laws to allow such trusts. Part VIII addresses the rights of posthumously conceived children of assisted reproduction to Social Security survivor benefits. In this one case, Congress has embraced, not preempted, state law. Years ago, Congress incorporated the deceased wage earner's state intestacy rules as its standard for awarding benefits. Because posthumous conception is such a new phenomenon, however, many states have not yet addressed intestacy rights for such children, and the states that have done so have adopted diverse rules. The result is that the children of some but not all wage earners will benefit.

II. FEDERAL PREEMPTION OF STATE DIVORCE-REVOCATION LAWS⁷

Revocation of a will on the basis of changed circumstances has an esteemed pedigree in the law. At common law, the premarital will of a woman was revoked upon marriage, and the premarital will of a man was revoked upon marriage and birth of issue.⁸ In the twentieth century, that common-law principle was replaced by revocation-on-divorce statutes. The 1969 Uniform Probate Code ("1969 UPC") provided that any provision in a will in favor of a former spouse was presumptively revoked upon divorce.⁹

When the 1969 UPC was revised in 1990, the nonprobate revolution was in full flower. Much if not most wealth today passes on death outside of probate through will-substitute arrangements, such as revocable trusts, joint ownership by right of survivorship, and life insurance and pension arrangements. The 1990 UPC revisions took the logical step of extending the revocation-on-divorce provision of the 1969 UPC to nonprobate transfers.¹⁰ The UPC now provides that divorce or annulment of a marriage presumptively revokes "any revocable disposition or appointment of property made by a divorced

7. My treatment of the divorce-revocation topic is quite brief. Professor Langbein covers the topic in greater depth in another paper in this Symposium issue. *See* Langbein, *supra* note 6, at 1668–71.

8. *See* THOMAS JARMAN & J.C. PERKINS, A TREATISE ON WILLS 151–52 (2d Am. ed. 1849).

9. UNIF. PROBATE CODE § 2-508 (amended 2010).

10. *Id.* § 2-804.

individual to his [or her] former spouse.”¹¹ About thirty percent of the states—mainly states that have adopted the UPC reforms—have now extended their divorce-revocation law to nonprobate transfers.¹² The Restatement of Property, promulgated by the American Law Institute (“ALI”), extends, as a common-law rule, the divorce-revocation rule to nonprobate transfers.¹³

Federal law authorizes or regulates a variety of nonprobate transfers. Anticipating the possibility that federal law might be found to preempt the divorce-revocation rule, the UPC provides that the former spouse who receives benefits must pay them to the person who would have been entitled to them were the revocation rule not preempted.¹⁴ The UPC’s post-distribution rule is essentially a codified form of the age-old constructive-trust remedy used in equity to prevent unjust enrichment.¹⁵

As a result of a pair of decisions of the Supreme Court, *Egelhoff v. Egelhoff*¹⁶ and *Hillman v. Maretta*,¹⁷ both the divorce-revocation

11. *Id.* § 2-804(b). The UPC divorce-revocation provision is a default rule, meaning that it yields to a contrary intention. The divorce-revocation rule applies “[e]xcept as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the marital estate made between the divorced individuals before or after the marriage” *Id.*; accord PROPERTY RESTATEMENT, *supra* note 2, at § 4.1 cmts. o–p.

12. Divorce-revocation statutes extend to nonprobate transfers in Alaska, Arizona, California, Hawaii, Massachusetts, Michigan, Minnesota, Montana, New Mexico, New York, North Dakota, South Dakota, Utah, Virginia, and Washington. ALASKA STAT. § 13.12.804 (2013); ARIZ. REV. STAT. ANN. § 14-2804 (2014); CAL. PROB. CODE § 5600 (West 2014); HAW. REV. STAT. § 560:2-804 (2013); MASS. GEN. LAWS Ch. 190B, § 2-804 (2014); MICH. COMP. LAWS § 700.2806 (2014); MINN. STAT. § 524.2-804 (2014); MONT. CODE ANN. § 72-2-814 (2013); N.M. STAT. ANN. § 45-2-804 (2014); N.Y. EST. POWERS & TRUSTS LAW § 5-1.4 (McKinney 2014); N.D. CENT. CODE § 30.1-10-04 (2013); S.D. CODIFIED LAWS § 29A-2-804 (2014); UTAH CODE ANN. § 75-2-804 (LexisNexis 2013); VA. CODE ANN. § 20.111.1 (2014); WASH. REV. CODE § 11.07.010 (2014). Professors Sterk and Leslie point out that in the states whose divorce-revocation statutes are limited to wills, “a provision in the divorce decree that voids the designation [in favor of the former spouse] may be given effect.” Stewart E. Sterk & Melanie B. Leslie, *Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession*, 89 N.Y.U. L. REV. 165, 196 (2014); *see, e.g.*, *Sweebe v. Sweebe*, 712 N.W.2d 708, 713 (Mich. 2006) (“[P]laintiff signed a provision in her judgment of divorce in which she extinguished any interest she had or may have had in any insurance contract or policy of the decedent.”); *Reed v. Reed*, 693 N.W.2d 825, 834 (Mich. Ct. App. 2005) (“[I]t is now well established that prenuptial agreements governing the division of property in the event of a divorce are recognized in Michigan.”).

13. PROPERTY RESTATEMENT, *supra* note 2, at § 4.1 cmt. p.

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

15. *See* Sarabeth A. Rayho, Note, *Divorcees Turn About in Their Graves as Ex-Spouses Cash In: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Employee Benefit Plans*, 106 MICH. L. REV. 373, 377 (2007). A constructive trust arises when “a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant’s rights.” RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55(1) (2011).

16. 532 U.S. 141 (2001).

17. 133 S. Ct. 1943 (2013).

rule and the post-distribution rule are preempted with respect to any federally authorized or regulated nonprobate transfer.¹⁸ In *Hillman*, Justice Sotomayor, speaking for the Court, held that the federal statute in question, the Federal Employees' Group Life Insurance Act of 1954 ("FEGLIA")¹⁹—and, in effect, any federal statute that provides that pension, insurance, or any other proceeds are to be paid to the named beneficiary—means that the proceeds “belong to the named beneficiary *and no other*.”²⁰ The Virginia statute's post-distribution rule—which is similar to the UPC's post-distribution rule—is preempted: It “interferes with Congress' scheme,²¹ because it directs that the proceeds actually belong to someone other than the named beneficiary by creating a cause of action for their recovery by a third party.”²² Had these state laws not been preempted, federally

18. The Washington divorce-revocation rule that was preempted in *Egelhoff* is similar to the UPC's divorce-revocation rule. Compare WASH. REV. CODE § 11.07.010(2)(a) (2014), with UNIF. PROBATE CODE § 2-804(b)(1)(A) (amended 2010). The Virginia post-distribution rule that was preempted in *Hillman* is similar to the UPC's post-distribution rule. Compare VA. CODE ANN. § 20-111.1(D) (2014), with UNIF. PROBATE CODE § 2-804(i)(2) (amended 2010).

19. 5 U.S.C. §§ 8701–8716 (2012).

20. *Hillman*, 133 S. Ct. at 1952 (quoting *Ridgway v. Ridgway*, 454 U.S. 46, 55 (1981)). State insurance codes have similar provisions. For example, the insurance codes of Michigan and Minnesota provide that the proceeds of a life insurance policy are payable to the named beneficiary. See MICH. COMP. LAWS § 500.2207 (2014) (life insurance proceeds “shall be payable to the person or persons for whose benefit the insurance was procured”); MINN. STAT. § 61A.12 (2014) (“[T]he beneficiary shall be entitled to the proceeds . . .”). Both states also have divorce-revocation statutes similar to the Virginia statute in *Hillman*. See MICH. COMP. LAWS § 700.2807 (2014); MINN. STAT. § 52A.2-804 (2014). No state court in either state has ever as much as hinted that its insurance code trumps the divorce-revocation statute on the dubious ground that the proceeds belong to the named beneficiary and no other.

21. The Court's emphasis on “Congress' scheme” is part of the Court's move from deciding preemption questions on the basis of the literal text of a federal statute (called “textualism”) to examining whether the state law stands as an obstacle to accomplishing the objectives of the federal statute (called “obstacle preemption”). See Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 6 n.38 (2013) (“[T]he Court's recent decision in *Hillman* rested squarely on obstacle preemption . . .”). Obstacle preemption was first adopted by a unanimous Court in 1995. See *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995) (“We simply must go beyond the unhelpful text . . . and look instead to the objectives of the ERISA statute as a guide to the scope of the state law that Congress understood would survive.”). Obstacle preemption is questioned by some current justices, notably Justice Thomas, who prefers to decide preemption questions on the basis of textualism. See Meltzer, *supra*, at 35–43.

In the earlier *Egelhoff* case, the Court relied on ERISA's broad preemption clause, which provides that state laws are superseded “insofar as they may now or hereafter relate to any [ERISA-covered] employee benefit plan.” ERISA § 514(a), 29 U.S.C. § 1144(a) (2012). For discussion of the Court's analysis in *Egelhoff*, see Langbein, *supra* note 6, at 1671–78.

22. *Hillman*, 133 S. Ct. at 1952 (internal quotation marks omitted). The Court did not base preemption on administrative convenience because the rule “takes effect only after benefits have been paid, and so would not necessarily impact the Government's distribution of insurance proceeds.” *Id.* at 1950. The Court based preemption on the dubious “belong to no other” interpretation of the federal statute. See *supra* text accompanying note 20.

authorized or regulated nonprobate transfers would only be affected in those states whose divorce-revocation law reaches nonprobate transfers that are not federally authorized or regulated.²³

Is there any chance that the gap in federal law will be filled by a federal common-law divorce-revocation or post-distribution rule? In an often-quoted pre-*Egelhoff* case, the Fourth Circuit provided this guidance: Federal courts “should apply common-law doctrines best suited to furthering the goals of ERISA [and presumably the goals of FEGLIA and of any other federal statute at issue].”²⁴ The Supreme Court has decided that the goal of FEGLIA, and by extension ERISA, is that the insurance proceeds must go to the designated beneficiary “and no other.” The strength of the Court’s opinion in *Hillman* makes it unrealistic to think that the Court would allow federal common law to change that result. Although Justice Breyer, dissenting in *Egelhoff*, could find no rationale for preempting the Washington divorce-revocation statute,²⁵ he was silent regarding the Virginia divorce-post-distribution statute in *Hillman*. Neither he nor any other Justice dissented in *Hillman*.²⁶

23. For a list of those states, see *supra* note 12.

24. *Singer v. Black & Decker Corp.*, 964 F.2d 1449, 1453 (4th Cir. 1992).

25. *Egelhoff v. Egelhoff*, 532 U.S. 141, 154 (2001) (Breyer, J., dissenting) (“No one could claim that ERISA pre-empts the entire field of state law governing inheritance[]” (emphasis omitted)).

26. The preemption of the divorce-revocation law invites comparison with the slayer rule. Both rules are in the “probably would have revoked” category, but the post-*Egelhoff* slayer decisions of the lower federal courts prevent the validly designated beneficiary—the slayer—from taking or keeping the property. See, e.g., *In re Estate of Burklund*, No. 11-5024, 2013 WL 327622, at *6 (E.D. Pa. Jan. 29, 2013); *Honeywell Sav. & Ownership Plan v. Jicha*, No. 08-4265 (DRD), 2010 WL 276237, at *7 (D.N.J. Jan. 15, 2010); *Atwater v. Nortel Networks, Inc.*, 388 F. Supp. 2d 610, 614–15 (M.D.N.C. 2005). See also the pre-*Egelhoff* slayer decision in *Addison v. Metro. Life Ins. Co.*, 5 F. Supp. 2d 392, 393–95 (W.D. Va. 1998). These cases apply the applicable state’s slayer statute or federal common law based on the state slayer statute.

The slayer cases are different from the divorce cases in that the murdered victim did not have an opportunity to revoke the beneficiary designation, whereas the divorced spouse did. This is why the divorce-revocation rule is in the form of a rebuttable presumption but the slayer rule is not rebuttable. The slayer rule is also based on the principle that a slayer cannot be allowed to profit from his or her own wrong, whereas divorce is not a wrong. Finally, the slayer rule is universally applied to nonprobate transfers. In jurisdictions in which the slayer statute applies only to probate transfers, courts supplement the statute with the common-law slayer rule to cover nonprobate transfers. See PROPERTY RESTATEMENT, *supra* note 2, at § 8.4 cmt. i (“If a statute covers some but not all of the situations in which a killer stands to benefit from the wrong as provided in this section, the slayer rule as enunciated in this section applies to the situations not covered by the statute.”); see also RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 cmt. b (2011) (“If a case is not covered by a particular statute, it must not be supposed that the enrichment of the slayer is therefore to be allowed.”); Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803, 847 (1993) (“[I]n jurisdictions where the slayer statute refer[s] only to inheritance by will or intestacy, courts nonetheless appl[y] a common law slayer rule [to nonprobate transfers].”).

By adopting the dubious “belong to no other” interpretation of federal law,²⁷ the Supreme Court has destroyed the UPC’s intent-effecting divorce-revocation rule for federally authorized or regulated nonprobate payments.²⁸ Sadly, the Court seemed unaware of the decades-long movement toward unifying the law of probate and nonprobate transfers, of which the divorce-revocation and post-distribution rules are parts.²⁹ If the Justices were aware of that movement, they were decidedly unmoved by it.

III. FEDERAL PREEMPTION OF STATE ELECTIVE-SHARE LAWS

Anglo-American law has traditionally protected the decedent’s surviving spouse from disinheritance. In early law, protection took the form of dower and curtesy. Protection now takes the form of a statutory elective share. The elective share is ineffective if it only

27. The Supreme Court in *Hillman* said that the case was “govern[ed]” by two prior decisions: *Ridgway v. Ridgway*, 454 U.S. 46 (1981) (five-to-three decision), and *Wissner v. Wissner*, 338 U.S. 655 (1950) (five-to-three decision). *Hillman*, 133 S. Ct. at 1950–51 (2013). The dissenting opinions in both cases were well reasoned. Justices Minton, Frankfurter, and Jackson dissented in *Wissner*, saying that “the right which Congress gave the serviceman to designate his beneficiary does not require disrespect of settled family law and the incidents of family relationship.” *Wissner*, 338 U.S. at 663 (Minton, J., dissenting). Justice Stevens, dissenting in *Ridgway*, said that “[c]laims based on family obligation . . . may be precisely the type of claim for which the federal benefit was intended.” *Ridgway*, 454 U.S. at 67 (Stevens, J., dissenting). Justice Powell, joined by Justice Rehnquist, dissented on similar grounds. *Id.* at 60–62 (Powell, J., dissenting). The dissenters in both cases argued that the only purpose of Congress in stating that the insured had the right to name the beneficiary was to protect the interest of the beneficiary from the claims of creditors. *See id.* at 62, 64–67; *Wissner*, 338 U.S. at 662–64. The *Hillman* Court could easily have adopted the analysis of the dissenters in *Ridgway* and *Wissner* and held that *Hillman* was not governed by those cases.

28. Yet, as Professor Langbein notes, the Supreme Court has held that the constructive-trust remedy is permitted under ERISA’s enforcement provision authorizing “appropriate equitable relief.” *See* Langbein, *supra* note 6, at 1679 & n.67; ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B) (2012). In *Sereboff v. Mid Atlantic Medical Services, Inc.*, 547 U.S. 356 (2006), an ERISA-regulated health insurance plan paid medical expenses on behalf of the Sereboffs, who were insured plan participants. The plan contained a subrogation clause entitling the insurer to reimbursement for such payments in the event of a subsequent tort recovery. *Id.* at 359–61. The Court sustained the insurer’s right to “a constructive trust or equitable lien,” which the Court called a “familiar rul[e] of equity.” *Id.* at 364 (citation omitted).

29. Sadly, too, the Solicitor General filed an amicus brief supporting preemption in *Hillman*. *See* Brief for the United States as Amicus Curiae Supporting Respondent at 9, *Hillman v. Maretta*, 133 S. Ct. 1943 (2013) (No. 11-1221). He also seemed unaware of the movement toward unifying the law of probate and nonprobate transfers and questioned the policy of the divorce-revocation statute. The Solicitor General argued that a “divorced federal employee might want his ex-spouse to receive insurance proceeds for a number of reasons—out of a sense of obligation, remorse, or continuing affection, or to help care for children of the marriage that remain in the ex-spouse’s custody.” *Id.* at 28. The preempted divorce-revocation rule rests on the rebuttable presumption that the divorced spouse would not want the ex-spouse to benefit, but the rule espoused by the Solicitor General and adopted by the Court in effect creates the opposite presumption.

applies to the decedent's net probate estate, just as the federal estate tax would be ineffective if it only taxed the value of the decedent's net probate estate.³⁰ Expanding upon statutes in New York and Pennsylvania,³¹ the 1969 UPC developed the concept of the augmented estate. Under the 1969 UPC, the surviving spouse's elective share is applied to the decedent's net probate estate augmented by the death-time value of specified will-substitute transfers, including "any transfer during the marriage whereby property is held at the time of decedent's death by decedent and another with right of survivorship."³² The 1990 revisions to the UPC's elective share expand the augmented estate to include the value of "the decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship."³³ About thirty-seven percent of the non-community property states—mainly those that have adopted the UPC reforms—extend their elective-share laws to nonprobate transfers.³⁴ The ALI's Restatement of Property promulgates UPC-type anti-evasion rules as common-law rules.³⁵

A. ERISA, FEGLIA, and Other Federal Statutes Authorizing or Regulating Nonprobate Transfers

By extension, *Egelhoff* and *Hillman* probably mean that state elective-share anti-evasion laws as well as divorce-revocation laws are preempted by ERISA and other federal statutes authorizing or regulating nonprobate transfers.³⁶ ERISA itself, as amended by the Retirement Equity Act of 1984 ("REAct"),³⁷ protects the rights of a

30. See Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 56 (1994).

31. N.Y. EST. POWERS & TRUSTS LAW § 5-1.1 (McKinney 2014); 20 PA. CONS. STAT. § 2203 (2014).

32. See UNIF. PROBATE CODE § 2-201(1)(iii) (amended 2010).

33. *Id.* § 2-205(1)(C).

34. Elective-share laws extend to nonprobate transfers in Alaska, Delaware, Florida, Hawaii, Kansas, Maine, Minnesota, Montana, Nebraska, New York, North Dakota, Pennsylvania, South Dakota, Utah, and West Virginia. ALASKA STAT. § 13.12.205 (2013); DEL. CODE ANN. tit. 12, § 902 (2014); FLA. STAT. § 732.2035 (2014); HAW. REV. STAT. § 560:2-205 (2013); KAN. STAT. ANN. § 59-6a205 (2014); ME. REV. STAT. tit. 18-A, § 2-201 (2013); MINN. STAT. § 524.2-205 (2014); MONT. CODE ANN. § 72-2-222 (2013); NEB. REV. STAT. § 30-2314 (2013); N.Y. EST. POWERS & TRUSTS LAW § 5-1.1A (McKinney 2014); N.D. CENT. CODE § 30.1-05-02 (2013); 20 PA. CONS. STAT. § 2203 (2014); S.D. CODIFIED LAWS § 29A-2-205 (2014); UTAH CODE ANN. § 75-2-205 (LexisNexis 2013); W. VA. CODE § 42-3-2 (2014).

35. PROPERTY RESTATEMENT, *supra* note 2, at § 9.1 cmt. i.

36. See Gallanis, *supra* note 6, at 190–92.

37. Pub. L. No. 98-397, 98 Stat. 1426 (1984).

surviving spouse in an employee spouse's ERISA-covered pension plan.³⁸ But REAct does not apply to FEGLIA, the federal life insurance act at issue in *Hillman*, nor does it apply to other federally authorized or regulated life insurance acts, including those involved in *Wissner v. Wissner*³⁹ (National Service Life Insurance Act of 1940) and *Ridgway v. Ridgway*⁴⁰ (Servicemen's Group Life Insurance Act of 1965), cases that the Supreme Court needlessly found controlling in *Hillman*.⁴¹ So, except for ERISA-covered plans, a decedent's surviving spouse has no protection with respect to federal statutes authorizing or regulating nonprobate transfers.

B. U.S. Government Securities in Survivorship Form

Federal law provides another means of dodging state anti-evasion rules. Unlike nonprobate arrangements available only to specific subsets of the general public, such as federal government employees or employees whose pension plans are covered by ERISA, this one is available to the public at large: Purchase U.S. government securities in survivorship form. The Constitution grants to Congress the power "to borrow Money on the credit of the United States."⁴² Congress has delegated that power to the Secretary of the Treasury.⁴³ The Secretary has issued regulations that provide that the survivor of any U.S. government security registered in survivorship form is the sole and absolute owner.⁴⁴ The purpose of granting sole and absolute ownership is to "give investors the assurance that the forms of registration they select will establish conclusively the right to their . . . securities. . . . It will have the effect of overriding inconsistent State laws."⁴⁵ The Supreme Court in *Free v. Bland*⁴⁶ agreed, holding that any contrary state law is preempted.⁴⁷ The

38. With respect to marriages ending at death, REAct creates spousal interests in the form of survivorship rights. If the employee spouse survives to retirement age, the pension must be paid as a "qualified joint and survivor annuity" ("QJSA"). If the employee spouse dies before retirement age and his or her pension is vested, the surviving spouse is entitled to a "qualified preretirement survivor annuity" ("QPSA"). These two types of REAct annuities are discussed in JOHN H. LANGBEIN ET AL., PENSION AND EMPLOYEE BENEFIT LAW 285–86 (5th ed. 2010).

39. 338 U.S. 655, 658 (1950).

40. 454 U.S. 46, 56 (1981).

41. See *supra* note 27.

42. U.S. CONST. art I, § 8.

43. 31 U.S.C. §§ 321, 3102–3106 (2012).

44. 31 C.F.R. §§ 315.20, 315.70, 357.21 (2011).

45. *Id.* § 357 app. A (2012).

46. 369 U.S. 663 (1962).

47. *Id.* at 666.

contrary state law in *Free* was the Texas community property law, but a New York court⁴⁸ has held that the same rule overrides the elective share of the surviving spouse as well.⁴⁹ Had these state laws not been preempted, federally authorized or regulated nonprobate transfers would only be subject to the surviving spouse's elective share in states whose elective-share law reaches nonprobate transfers.⁵⁰

Preemption does not necessarily reduce the amount that the surviving spouse takes. The value of any U.S. government security in survivorship form can still be included in the UPC's augmented estate. Preemption simply means that the survivor takes the security. Other takers of amounts included in the augmented estate must contribute more to make up the deficiency.⁵¹ A problem arises, however, if those amounts are insufficient to make up the deficiency or if there are no other takers. In such cases, federal preemption does reduce or even eliminate the surviving spouse's share.

The means of evading the elective share is therefore apparent: Spouses who want to disinherit their surviving spouses need only convert as much of their liquid wealth as possible to U.S. government securities in survivorship form with third-party donees, so that as little as possible remains for their surviving spouses. The UPC has a post-distribution rule similar to the Virginia rule at issue in *Hillman*.⁵² In the light of *Hillman*, the UPC post-distribution rule would also be preempted. Because the Treasury Department has decided that the survivor of any U.S. government security registered in survivorship form is the sole and absolute owner notwithstanding "any inconsistent State laws,"⁵³ it is hard to believe that the Court would allow federal common law to change that result.

48. *In re Estate of Scheiner*, 535 N.Y.S.2d 920, 921 (Sur. Ct. 1988).

49. *Id.*

50. For a list of those states, see *supra* note 34.

51. See UNIF. PROBATE CODE § 2-209 (amended 2010). The same point applies to life insurance or pension benefits under other federally authorized or federally regulated nonprobate transfers, such as ERISA or FEGLIA, but those nonprobate transfers are only available to subsets of the general population.

52. *Id.* § 2-210(b).

53. 31 C.F.R. § 357 app. A (2012). These regulations are issued by the Bureau of the Public Debt, a division of the Treasury Department. On February 23, 1996, and October 2, 1996, I wrote on behalf of the Joint Editorial Board for the Uniform Probate Code (later named the Joint Editorial Board for Uniform Trust and Estate Acts) to the head of the Bureau, asking for reconsideration of the preemption of state elective-share law on the grounds that those regulations were written when state elective-share law only applied to wills and did not apply to nonprobate transfers, and so elective-share law could not have been the federal government's original concern. No one from the federal agency responded to either letter. For details, see LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 620 (3d ed. 2002).

The conclusion is inescapable: Despite the best efforts of the ULC and the ALI to prevent evasion of the surviving spouse's elective share, federal law has made evasion possible by those determined to disinherit their spouses.⁵⁴

IV. FEDERAL PREEMPTION OF STATE LAWS REGARDING INITIAL VALIDITY OF BENEFICIARY DESIGNATIONS

Although the Supreme Court in *Hillman* said that the FEGLIA life insurance proceeds "belong to the named beneficiary and no other,"⁵⁵ and although Treasury regulations provide that the survivor of any U.S. government security registered in survivorship form is the "sole and absolute owner,"⁵⁶ those propositions surely cannot stand if the beneficiary designation would have been initially invalid due to incapacity, undue influence, or defective execution.⁵⁷

No case has reached the Supreme Court on issues of initial validity, but the Supreme Court has held that ERISA gaps concerning contract and tort law must be filled, not by the law of an individual state, but by federal common law.⁵⁸ Although divorce-revocation and elective-share law is preempted by federal statute and not replaced by federal common law, a different pattern has emerged from the decisions of the lower federal courts in both pre- and post-*Egelhoff* cases on questions of initial validity of the beneficiary designation: Federal common law replaces preempted state law on these questions. The problem with mandating the use of federal common law is that there is no preexisting body of federal common law that deals with

54. On May 20, 2009, President Obama issued a memorandum to the heads of executive departments and agencies, stating that "the general policy of my Administration [is] that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption." Preemption: Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 24,693 (May 20, 2009). To a similar effect, see Exec. Order No. 13,132, 3 C.F.R. 206 (2000), and Exec. Order No. 12,612, 3 C.F.R. 252 (1987). These presidential orders have not led the Treasury Department to reconsider its regulations regarding U.S. government securities held in survivorship form.

55. See *supra* text accompanying note 20.

56. See *supra* text accompanying note 44.

57. Cf. *Egelhoff v. Egelhoff*, 532 U.S. 141, 154 (2001) (Breyer, J., dissenting); see also Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REFORM 109, 111 (1985) ("Congress enacted ERISA while still oblivious to numerous problems related to benefit plans that the states had already recognized and addressed.").

58. See *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987); see also *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 111-12 (1989) (holding that an employer's fiduciary duties under ERISA are controlled by federal common law).

these questions. As a result, the federal courts are forced to fashion federal common law from scratch on these questions.⁵⁹

In an early ERISA breach-of-contract case, *Singer v. Black & Decker Corporation*,⁶⁰ the Fourth Circuit stated this guiding principle: “In fashioning federal common law, courts do not look to the law of a particular state, but rather should apply common-law doctrines best suited to furthering the goals of ERISA. Consequently, federal common law should be consistent across the circuits.”⁶¹

As we shall see, the Fourth Circuit’s guiding principle has not been consistently followed in wealth-transfer cases, and hence federal common law in those cases is inconsistent across the circuits. Although the lower federal courts agree that state law is preempted and replaced by federal common law, they are not always rigorous in stating the sources on which they base federal common law.

A. Lack of Mental Capacity

In a pre-*Egelhoff* case, *Metropolitan Life Insurance Co. v. Hall*,⁶² the federal district court for Maryland applied the following federal common-law standard of mental capacity:

To be capable of effecting a valid change of beneficiary a person should have clearness of mind and memory sufficient to know the nature of the property for which he is about to name a beneficiary, the nature of the act which he is about to perform, the names and identities of those who are the natural objects of his bounty; his relationship towards them, and the consequences of his act, uninfluenced by any material delusions.⁶³

B. Undue Influence

In *Tinsley v. General Motors Corporation*,⁶⁴ a pre-*Egelhoff* case, a change-of-beneficiary form in an ERISA-covered life insurance policy was challenged on the ground that it was procured by undue influence.⁶⁵ The General Motors employee died domiciled in Michigan.⁶⁶ The Sixth Circuit held that the Michigan case law of

59. See *Thomason v. Aetna Life Ins. Co.*, 9 F.3d 645, 647 (7th Cir. 1993) (concluding that where ERISA is silent, courts must develop federal common law and, in so doing, may use state common law as a basis, to the extent that state law is not inconsistent with congressional policy concerns).

60. 964 F.2d 1449 (4th Cir. 1993).

61. *Id.* at 1453.

62. 9 F. Supp. 2d 560 (D. Md. 1998).

63. *Id.* at 564 (quoting *Taylor v. United States*, 113 F. Supp. 143 (W.D. Ark. 1953)).

64. 227 F.3d 700 (6th Cir. 2000).

65. *Id.* at 702.

66. *Id.*

undue influence was preempted and that the case was controlled by federal common law.⁶⁷

C. Substantial Compliance for Defective Execution

Employees often fill out beneficiary designation forms or change-of-beneficiary forms without the benefit of counsel.⁶⁸ The forms can also be confusing and can lead to defective execution of the correct form or to correct execution of the wrong form.⁶⁹

Although the Fourth Circuit in *Singer* said that, in fashioning federal common law, the “courts do not look to the law of a particular state,” the same circuit, in a later case, *Phoenix Mutual Life Insurance Co. v. Adams*,⁷⁰ said that “federal courts may draw on state common law in shaping the applicable body of federal common law.”⁷¹ The court in *Phoenix* endorsed the following statement of federal common law of substantial compliance:

[A]n insured substantially complies with the change of beneficiary provisions of an ERISA life insurance policy when the insured: (1) evidences his or her intent to make the change and (2) attempts to effectuate the change by undertaking positive action which is for all practical purposes similar to the action required by the change of beneficiary provisions of the policy.⁷²

Although *Phoenix* was a pre-*Egelhoff* case,⁷³ the Fifth and Seventh Circuits have applied the *Phoenix* test in post-*Egelhoff* cases.⁷⁴ Applying the *Phoenix* test, the Seventh Circuit found that an

67. *Id.* at 704.

68. *See* Sterk & Leslie, *supra* note 12, at 211.

69. *Id.* at 188, 190.

70. 30 F.3d 554 (4th Cir. 1994).

71. *Id.* at 564.

72. *Id.*

73. In other pre-*Egelhoff* cases, the Fourth and Eighth Circuits followed the *Phoenix* test. *See* Hill v. AT&T Corp., 125 F.3d 646, 648 (8th Cir. 1997); Estate of Altobelli v. Int'l Bus. Machs. Corp., 77 F.3d 78, 81–82 (4th Cir. 1996). The Ninth and Tenth Circuits, however, have held that states' substantial-compliance doctrines were not preempted. *See* BankAmerica Pension Plan v. McMath, 206 F.3d 821, 830 (9th Cir. 2000); Peckham v. Gem State Mut., 964 F.2d 1043, 1052–54 (10th Cir. 1992).

74. Guardian Life Ins. Co. v. Finch, 395 F.3d 238, 240–41 (5th Cir. 2004); Metro. Life Ins. Co. v. Johnson, 297 F.3d 558, 567 (7th Cir. 2002); accord Prudential Ins. Co. v. Schmid, 337 F. Supp. 2d 325, 329–30 (D. Mass. 2004). Although the employee in the *Schmid* case telephoned his employer's customer service representatives saying that he wanted to change the beneficiary on an insurance policy from his daughter to his second wife, he did not substantially comply with the change-of-beneficiary requirements. *Id.* at 327. Because of a transmission error by the customer service representative, he did not complete a change-of-beneficiary form before he died. *Id.* The Sixth Circuit is alone in refusing to recognize a federal common-law doctrine of substantial compliance. *See* Kmatz v. Metro. Life Ins. Co., 232 Fed. App'x 451, 456 (6th Cir. 2007); Unicare Life & Health Ins. Co. v. Craig, 157 Fed. App'x 787, 791 (6th Cir. 2005).

unsigned change-of-beneficiary form was valid on the ground that the failure to sign was a “careless error.”⁷⁵

V. THE ROLES OF FEDERAL PREEMPTION AND FEDERAL COMMON LAW

The Supreme Court has not had the opportunity to confirm the use of federal common law on questions of initial validity, but it is difficult to imagine that the Court would reject the application of such law in cases of mental incapacity or undue influence. Invalidity due to mental incapacity or undue influence is universal law. It is hoped that the Court would also confirm the use of federal common law of substantial compliance in cases of defective execution. Nearly all states follow such a doctrine for defective execution of life insurance beneficiary designations.⁷⁶ Because the Court has not spoken on issues of initial validity, it is even possible that the Court would hold that state laws on these questions are not preempted in the first place, on the ground that state laws on mental capacity and undue influence—and perhaps substantial compliance as well—do not conflict with Congress’ scheme in enacting ERISA, FEGLIA, and similar federal statutes.⁷⁷

Assuming that the Supreme Court would approve of replacing preempted state law with federal common law on questions of initial validity, what are appropriate sources of federal common law?

As noted earlier, the Fourth Circuit’s guiding principle in the *Singer* case is that “federal common law should be consistent across the circuits.”⁷⁸ In practice, however, the lower federal courts’ efforts to develop federal common law have been inconsistent. The substantial-compliance test in *Phoenix* was fashioned by the district court,⁷⁹ which based the formulation on two sources: a federal district court decision from the Eastern District of Missouri⁸⁰ and a treatise on insurance.⁸¹ The federal district court in Missouri fashioned the formulation from Missouri case law.⁸² The Maryland federal district court in *Hall*

75. *Davis v. Combes*, 294 F.3d 931, 942 (7th Cir. 2002).

76. See 6 COUCH ON INSURANCE 3D § 83.15 (1995); Meredith H. Bogart, Note, *State Doctrines of Substantial Compliance: A Call for ERISA Preemption and Uniform Federal Common Law Doctrine*, 25 CARDOZO L. REV. 447, 469–73 (2003).

77. See *supra* note 21; cf. *Egelhoff v. Egelhoff*, 532 U.S. 141, 153–61 (2001) (Breyer, J., dissenting).

78. 964 F.2d 1449, 1453 (4th Cir. 1993).

79. *Phoenix Mut. Life Ins. Co. v. Adams*, 828 F. Supp. 379, 388 (D.S.C. 1993).

80. *Metro. Life Ins. Co. v. Barnes*, 770 F. Supp. 1393 (E.D. Mo. 1991).

81. 19 COUCH ON INSURANCE 2D § 82.76, at 871 (1984).

82. *Metro. Life*, 770 F. Supp. at 1397.

derived the mental incapacity standard from *Taylor v. United States*,⁸³ a decision of the federal district court for the Western District of Arkansas. The Arkansas federal district court based that standard on a decision of the Supreme Court of Arkansas and two legal encyclopedias: *Corpus Juris Secundum* and *American Jurisprudence*. The Sixth Circuit in *Tinsley* stated that “we look to state-law principles for guidance.”⁸⁴ The court then extracted federal common law of undue influence for the Sixth Circuit from cases from Michigan, Ohio, Kentucky, and Tennessee, and from *American Jurisprudence*.⁸⁵ The federal courts have therefore based federal common law variously on state case law from Arkansas, Kentucky, Michigan, Missouri, Ohio, and Tennessee, on an insurance treatise, and on two legal encyclopedias.

The only consistency in the development of federal common law is that the lower federal courts have overlooked the most accessible, unifying, and reliable sources for determining federal common law: the ALI's Restatements and the ULC's uniform laws.⁸⁶ Yet, in other contexts, the Court has relied on Restatements for guidance. For example, in *Firestone Tire & Rubber Company v. Bruch*,⁸⁷ the Court noted that ERISA “abounds with the language and terminology of trust law.”⁸⁸ Although ERISA itself did not direct the source of trust law, the Court referred generously to the Restatement of Trusts in developing federal common law of rights and obligations under ERISA-regulated plans.⁸⁹ In *United States v. Alcan Aluminum Corp.*,⁹⁰ the Third Circuit referred to the Restatement of Torts in developing federal common law of joint and several liability.⁹¹

83. 113 F. Supp. 143, 148 (W.D. Ark. 1953), *aff'd*, 211 F.2d 794 (8th Cir. 1954).

84. *Tinsley v. General Motors Corp.*, 227 F.3d 700, 704 (6th Cir. 2000).

85. *Id.* at 704–05.

86. On mental incapacity, see PROPERTY RESTATEMENT, *supra* note 2, at § 8.1. On undue influence and fraud, see *id.* § 8.3. Although the Uniform Probate Code does not address substantial compliance for insurance-beneficiary designations, the Restatement provides that the harmless-error rule for execution of wills, see *id.* § 3.3, applies to the creation, revocation, or amendment of will substitutes, including the designation or change of beneficiary. See *id.* § 7.2 cmt. d.

Scholars have long argued that federal common law should be derived from the Restatements or uniform laws to achieve uniformity. See Gallanis, *supra* note 6, at 189–90, 195–96; David S. Lebolt, *Making the Best of Egelhoff: Federal Common Law for ERISA-Preempted Beneficiary Designations*, 28 J. PENSION PLAN. & COMPLIANCE, no. 3, Fall 2002, at 29, 51–54.

87. 489 U.S. 101 (1989).

88. *Id.* at 110.

89. *Id.* at 111–12. The Court also referred to the standard treatises on trust law by Austin Wakeman Scott and George G. Bogert. *Id.* at 111.

90. 964 F.2d 252 (3d Cir. 1992).

91. *Id.* at 268–69.

Restatements may be a more appropriate source for federal common law for a reason apart from their uses in *Firestone Tire & Rubber* and *Alcan Aluminum*. The purpose of Restatements is to unify state common-law principles, whereas uniform laws achieve uniformity only by state legislative enactment.⁹²

Although federal common law, preferably derived from Restatements, is an acceptable alternative to nonpreemption in cases of initial validity, federal common law is problematic in some cases if, as the Fourth Circuit stated in *Singer*, federal common law “should be consistent across the circuits.” The problem arises when state wealth-transfer law is itself not uniform, especially when the lack of uniformity relates to the fundamental question of whether the state law extends to nonprobate transfers.

As noted earlier, divorce-revocation laws extend to nonprobate transfers in about thirty percent of the states, and elective-share laws extend to nonprobate transfers in about thirty-seven percent of the non-community property states.⁹³ Although the ALI now bases Restatement provisions on a minority view if that view is considered the better view,⁹⁴ it is probably unrealistic to expect federal courts to adopt minority positions as federal common law for all states even when supported by a Restatement. In such cases, holding that state law is not preempted has the advantage of uniformity—not across state lines, but within each state—regarding nonprobate transfers that are and those that are not authorized or regulated by federal law. Unfortunately, the Supreme Court in *Eglehoff* and *Hillman* opted for preemption—period. The unhappy result is that former spouses can benefit, but surviving spouses can be disinherited.

92. Although uniform laws are not enacted in all states, there is state-law precedent for looking to a uniform law for guidance even in states that have not enacted the law. *See, e.g.*, *Ruotolo v. Tietjen*, 890 A.2d 166, 177 (Conn. App. Ct. 2006), *aff'd per curiam*, 916 A.2d 1 (Conn. 2007); *Allen v. Dalk*, 826 So. 2d 245, 250 (Fla. 2002); *In re Will of Ranney*, 589 A.2d 1339, 1343 (N.J. 1991).

93. *See supra* notes 12 and 34.

94. The Institute’s mission is “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.” *See* AMERICAN LAW INST., CERTIFICATE OF INCORPORATION (1923), available at <http://www.ali.org/doc/charter.pdf>, archived at <http://perma.cc/9QYV-8QQA>. The Restatement provides that the divorce-revocation and elective-share laws extend to nonprobate transfers and presents them as common-law rules. *See* PROPERTY RESTATEMENT, *supra* note 2, at §§ 4.1 cmt. p. (divorce revocation), 9.1 cmt. i (elective share).

VI. FEDERAL PREEMPTION OF STATE WILL-EXECUTION FORMALITIES
FOR MILITARY WILLS

Not all federal preemption of state wealth-transfer law is harmful. A case in point is a federal statute that expressly preempts state will-execution formalities for military wills.

Historically, soldiers in active military service and mariners or sailors at sea were excused from the more rigorous testamentary formalities,⁹⁵ and comparable measures still exist in some probate codes.⁹⁶ The UPC contains no such dispensation.

Most states, including the UPC, have a choice-of-law provision recognizing the validity of a will executed in compliance with the law at the time of execution of the place where the will is executed.⁹⁷ Because military personnel are based throughout the country and in many foreign countries,⁹⁸ state choice-of-law provisions might not be sufficient to validate all wills executed by military personnel. So, in 2000, Congress enacted a federal will-execution statute for members of the armed forces and their dependents. The statute was buried in the broader National Defense Authorization Act for Fiscal Year 2001 (“NDAA”).⁹⁹ In the NDAA, military wills are called “military testamentary instruments.”

The NDAA constitutes a mini federal probate code limited to will execution. The federal statute provides that a military testamentary instrument must (1) be executed by a “person eligible for

95. See Statute of Frauds, 1677, 29 Car. 2, c. 3, §§ 19–21, 23 (Eng.); Wills Act, 1837, 7 Will. 4 & 1 Vict., c. 26, § 11 (U.K.).

96. See Nowell D. Bamberger, *Are Military Testamentary Instruments Unconstitutional—Why Compliance with State Testamentary Formality Requirements Remains Essential*, 196 MIL. L. REV. 91, 124–25 (2008).

97. Section 2-506 of the UPC provides that a
written will is valid if . . . its execution complies with the law at the time of execution of the place where the will is executed, or, of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode or is a national.

UNIF. PROBATE CODE § 2-2506 (amended 2010).

98. See *List of United States Military Bases*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_United_States_military_bases, archived at <http://perma.cc/KM6P-Y67Z> (last visited Aug. 28, 2014).

99. Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 551(a), 114 Stat. 1654, 1654A-123 (2000) (codified at 10 U.S.C. § 1044d (2012)) (describing military wills in a section entitled “Military testamentary instruments: requirement for recognition by States”). For Department of Defense regulations regarding military testamentary instruments, see Dep’t of Def. Directive 1350.4, Legal Assistance Matters (Apr. 28, 2001), 32 C.F.R. § 153.4, available at <http://regulations.vlex.com/vid/testamentary-instruments-attorney-advance-22952048>, archived at <http://perma.cc/DX5Z-TEZ5>.

military legal assistance,”¹⁰⁰ (2) be executed in accordance with prescribed formalities, and (3) make a disposition of the property of the testator.¹⁰¹ To be valid as a military testamentary instrument, the will must also be executed by the testator in the presence of a military legal assistance counsel¹⁰² acting as presiding attorney and at least two disinterested witnesses, each of whom attests to witnessing the testator’s execution of the instrument by signing it.¹⁰³ The statute also authorizes the use of a self-proving affidavit.¹⁰⁴ Although the federal statute does not say so expressly, a properly executed military will should continue to be treated as a validly executed military will even after the military member is discharged or retires. To assure that state probate courts accept military wills as validly executed, the NDAA provides:

A military testamentary instrument (1) is exempt from any requirement of form, formality, or recording before probate that is provided for testamentary instruments under the laws of a State; and (2) has the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate.¹⁰⁵

Military personnel are executing these federal wills. The Department of Defense (“DoD”) directs all commanding officers to “urge military personnel to seek legal counsel regarding an estate plan well before mobilization, deployment, or similar activities.”¹⁰⁶ Enclosure E1 of the DoD Directive provides the preamble for military testamentary instruments that the statute requires:

This is a MILITARY TESTAMENTARY INSTRUMENT prepared pursuant to section 1044d of title 10, United States Code, and executed by a person authorized to receive legal assistance from the Military Services. Federal law exempts this document from any requirement of form, formality, or recording that is provided for testamentary

100. A “person eligible for military legal assistance” is a member of the armed forces who is on active duty, a member or former member entitled to retired or retainer pay or equivalent pay, an officer of the commissioned corps of the Public Health Service who is on active duty or entitled to retired or equivalent pay, or a dependent of such a person. 10 U.S.C. § 1044(a)(1) (2012).

101. Under the UPC, a will need not dispose of property, but can act solely to revoke a prior will, nominate a guardian, appoint an executor, or disinherit an heir. *See* UNIF. PROBATE CODE § 1-201(57) (amended 2010).

102. The term “military legal assistance counsel” is defined as (a) a judge advocate as defined in 10 U.S.C. § 801(13), i.e., an officer of the Judge Advocate General’s Corps of the Army or the Navy, an officer of the Air Force or the Marine Corps who is designated as a judge advocate, or a commissioned officer of the Coast Guard designated for special duty (law); or (b) a civilian attorney serving as a legal assistance officer under 10 U.S.C. § 1044, i.e., a civilian attorney who is a member of the bar of a federal court or of the highest court of a state. *Id.* § 1044d(g).

103. *Id.* § 1044d(c).

104. *Id.* § 1044d(d).

105. *Id.* § 1044d(a).

106. Dep’t of Def. Directive 1350.4, *supra* note 99, § 4.1.3.

instruments under the laws of a State, the District of Columbia, or a commonwealth territory, or possession of the United States. Federal law specifies that this document shall receive the same legal effect as a testamentary instrument prepared and executed in accordance with the laws of the State in which it is presented for probate.¹⁰⁷

The federal execution formalities satisfy the requirements of most but not all states.¹⁰⁸ Perhaps because compliance with the federal formalities for executing a military will satisfies the will-execution formalities of most states, there has been no litigation over the validity of a particular military will¹⁰⁹ nor over the constitutionality of the federal statute preempting state will-execution law.¹¹⁰

107. *Id.* at E1.

108. Compliance with the federal formalities satisfies the formalities of the UPC, *see* UNIF. PROBATE CODE § 2-502 (amended 2010), but does not satisfy the formalities of all states. Under Louisiana law, the testator must sign the will in the presence of two witnesses and a notary and must sign at the end and on each page, LA. CIV. CODE ANN. art. 1577 (2013), but the federal statute has no such requirements. Under some state statutes, the witnesses must sign in the presence of each other, *see, e.g.*, TENN. CODE ANN. § 32-1-104 (2014), but the federal statute has no such requirement. Under some state statutes, the testator must declare to the witnesses that the document is his or her will, *see, e.g.*, ARK. CODE ANN. § 28-25-103 (2013); N.Y. EST. POWERS & TRUSTS LAW § 3-2.1 (McKinney 2014), but the federal statute has no such explicit requirement. Under some state statutes, the testator must sign the will “at the end,” *see, e.g.*, ARK. CODE ANN. § 28-25-103, but the federal statute has no such requirement. Also, as noted *supra* note 101, a will under the Uniform Probate Code and other state statutes need not dispose of property, but can act solely to revoke a prior will, nominate a guardian, appoint an executor, or disinherit an heir, *see, e.g.*, UNIF. PROBATE CODE § 1-201(57) (amended 2010), but the federal statute requires the will to dispose of property in order to qualify as a military testamentary instrument.

109. The only decision found is *Auclair v. Auclair*, C.A. No. PC 2012-3714, 2013 R.I. Super LEXIS 174 (Sept. 18, 2013), but that case decided that Rhode Island was the decedent’s state of domicile at death. Whether the decedent’s military testamentary instrument was validly executed was not an issue in the case.

110. The constitutionality of the federal statute has not been tested. One commentator, Nowell Bamberger, has argued that the statute is unconstitutional. *See* Bamberger, *supra* note 96, at 108–10. Under the Tenth Amendment, “[P]owers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States.” To be constitutional, federal preemption of state will-execution formalities for military wills must come under one of the enumerated powers granted to Congress. Despite the contrary argument of that one commentator, the federal military-will statute is almost certainly constitutional under the war powers granted to Congress by Article I, Section 8. This follows from the Court’s decision in *United States v. Oregon*, 366 U.S. 643 (1961), which upheld the constitutionality of a federal statute requiring the personal property of veterans who die in a veterans’ hospital without a will or heirs to pass to the United States rather than escheat to the state. In that case, the Court said:

The fact that [the federal law] pertains to the devolution of property does not render it invalid. Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power.

Id. at 649; *see also* Gerry W. Beyer, *Introduction to Military Wills*, PROFESSORBAYER.COM, http://www.professorbeyer.com/Archive/new_site/Articles/Military_Wills.html (last visited Aug. 28, 2014), *archived at* <http://perma.cc/NY35-VMYA>.

The NDAA only deals with will execution. The statute does not provide that the beneficiaries of military wills are entitled to take their bequests and devises. The only federal preemption question is whether the execution of the wills complies with statutory formalities. State-law wealth-transfer doctrines—such as revocation by act or subsequent will, divorce revocation, elective share of the decedent's surviving spouse, antilapse, lack of mental capacity,¹¹¹ undue influence, the slayer rule, and probate procedures—should be just as applicable to military wills as they are to nonmilitary wills.

Universal acceptance of military wills is a worthy goal,¹¹² but federal preemption of state-law execution requirements is not foolproof. A few states have put the matter at rest by providing that a will executed in accordance with the federal statute is deemed to be validly executed under state law. A Vermont statute, for example, provides:

Notwithstanding any other provision of law, a military will containing a provision stating that the will is prepared pursuant to 10 U.S.C. § 1044d shall be deemed to be legally executed and shall be of the same force and effect as if executed in the mode prescribed by the laws of this state.¹¹³

VII. PROMOTING PERPETUAL TRUSTS¹¹⁴

For centuries, Anglo-American law has curtailed excessive dead-hand control through the common-law Rule Against Perpetuities (the “common-law Rule”). Judicial concern about excessive dead-hand control appeared as early as the seventeenth century when Lord Nottingham, in the *Duke of Norfolk's Case*,¹¹⁵ upheld the trust at issue but suggested that there was a limit “when any inconvenience appears.” The courts thereafter developed the common-law Rule case-by-case over a long period of time. As developed by the courts, and as crystallized in the late nineteenth century by Harvard Law School Professor John Chipman Gray, the common-law Rule came to be stated as follows: “No [contingent future] interest [in real or personal

111. State statutes require the testator to be “of sound mind” and of a certain age (typically eighteen) in order to execute a valid will, *see, e.g.*, UNIF. PROBATE CODE § 2-501 (amended 2010), but the federal statute has no such requirements. A few state statutes waive the age requirement for wills of members of the armed forces. *See, e.g.*, TEX. ESTATES CODE ANN. § 251.001 (2014).

112. Full disclosure: I served as a member of the armed forces from 1966 to 1968.

113. VT. STAT. ANN. tit. 14, § 7 (2013). Florida has enacted a similar statute. *See* FLA. STAT. § 732.502 (2014).

114. For greater detail, see Lawrence W. Waggoner, *Congress Promotes Perpetual Trusts: Why?* (Univ. of Mich. Pub. Law & Legal Theory Research Paper Series, Paper No. 349, 2014), available at <http://ssrn.com/abstract=2326524>, archived at <http://perma.cc/N45X-6E2Q>.

115. (1682) 22 Eng. Rep. 931 (Ch.).

property] is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.”¹¹⁶

As a mechanism for curtailing excessive dead-hand control, the common-law Rule was poorly designed. One flaw was that it invalidated a contingent future interest on the basis of what might happen in the future, not on the basis of what actually happened in the future. In the late twentieth century, reform efforts to correct this flaw started taking hold. In 1986, the ULC promulgated the Uniform Statutory Rule Against Perpetuities (“USRAP”), which provided that a contingent future interest that would be valid under the common-law Rule remains valid at the outset, but a contingent future interest that would be invalid under the common-law Rule is only invalid if it does not actually vest or fail to vest within ninety years.¹¹⁷ USRAP was incorporated into the UPC¹¹⁸ and came to be enacted in over half of the states.

USRAP was on its way to even wider enactment when Congress intervened, with the effect of stalling and then reversing its progress. Congress’ intervention has also prevented the additional perpetuity reforms promulgated by the ALI from taking hold: In place of a lives-in-being-plus-twenty-one-years limit, the Restatement (Third) of Property adopts a two-younger-generations limit and requires a trust to terminate and its principal distributed outright if the trust exceeds that limit.¹¹⁹

Congress’ intervention occurred in 1986 when it enacted the current incarnation of the federal generation-skipping transfer tax (“GST tax”).¹²⁰ The GST tax imposes a flat tax at the highest federal estate tax rate (forty percent as of 2013) on generation-skipping transfers.¹²¹ The purpose of the GST tax is to make sure that property is taxed every time it shifts from generation to generation or skips a generation.

As part of the GST tax, Congress exempted trusts up to a certain value. The ceiling on the GST exemption started out at \$1 million, but it is now \$5.34 million for individuals (double that for married couples). The GST exemption,¹²² not the GST tax itself, sparked a perpetual-trust movement. When Congress granted the exemption, it failed to impose a durational limit on exempt trusts.

116. JOHN CHIPMAN GRAY, *THE RULE AGAINST PERPETUITIES* § 201 (2d ed. 1906).

117. *See* UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a) (amended 1990).

118. *See* UNIF. PROBATE CODE §§ 2-901 to -906 (amended 2010).

119. PROPERTY RESTATEMENT, *supra* note 2, §§ 27.1–3.

120. I.R.C. §§ 2601–2663 (2012).

121. *See id.* §§ 2641, 2001.

122. *Id.* § 2631.

Congress relied on state perpetuity laws to supply that limit. At the instigation of state banking groups and estate-planning attorneys, states began to pass legislation allowing settlors to create perpetual trusts—trusts that can last for several centuries or even forever.¹²³

Because Congress has not acted to close the tax loophole,¹²⁴ the perpetual-trust movement is in full bloom. With state perpetuity laws out of the way, the wealthy created and continue to create perpetual trusts in significant numbers. An empirical study found that roughly \$100 billion in trust assets had flowed into states allowing perpetual trusts.¹²⁵ The study was based on data through 2003 from the annual reports that institutional trustees file with federal banking authorities. Considerably more wealth has undoubtedly moved into these states in the years following 2003.¹²⁶

123. See Ira Mark Bloom, *How Federal Transfer Taxes Affect the Development of Property Law*, 48 CLEV. ST. L. REV. 661, 673 (2000) (“The very recent perpetuities repeal movement is the best example of how federal transfer tax laws affect the development of property law in the worst of ways.”); see also Ira Mark Bloom, *The GST Tax Tail Is Killing The Rule Against Perpetuities*, 87 TAX NOTES 569, 569 (2000).

124. On February 21, 2014, the House Ways and Means Committee unveiled its long-awaited proposal for comprehensive tax reform, but the proposal does not address the GST exemption for perpetual trusts. See Tax Reform Act of 2014 (Discussion Draft 2014), available at http://waysandmeans.house.gov/uploadedfiles/statutory_text_tax_reform_act_of_2014_discussion_draft_022614.pdf, archived at <http://perma.cc/B6SY-EQ8V>. The prospect for enactment of comprehensive tax reform in the 113th Congress appears bleak in any event. See Lori Montgomery, *McConnell: Tax Reform is Dead*, WASH. POST WONKBLOG (Feb. 25, 2014), <http://www.washingtonpost.com/blogs/wonkblog/wp/2014/02/25/breaking-mcconnell-kills-tax-reform>, archived at <http://perma.cc/7FNX-B4SC> (noting Minority Leader McConnell’s doubt that any tax reform bill will pass in 2014).

125. See Robert H. Sitkoff & Max Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 410–11 (2005). The study found that the states that attracted the most perpetual-trust business were those that do not tax trust income produced by funds originating from out of state. See *id.* States that levy an income tax on trust funds attracted from out of state experienced no observable increase in trust business. See *id.* at 420. The \$100 billion trust figure did not represent the value of GST-exempt perpetual trusts. See *id.* at 411. It appears that the payoff for institutional trustees operating in these perpetual-trust states is that “high net worth clients” create perpetual trusts up to the GST exemption limit and also move the greater bulk of their wealth into non-exempt trusts with the same institutional trustee.

126. I have previously questioned whether the state legislators who vote to authorize perpetual trusts and the wealthy who create them have thought through what they are allowing or putting in place, in view of the fact that these trusts can have as many as 450 living beneficiaries 150 years after creation, more than 7,000 living beneficiaries after 250 years, and more than 114,000 living beneficiaries after 350 years. See Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* 5 (Univ. of Mich. Pub. Law & Legal Theory Research Paper Series, Paper No. 259, 2011), available at <http://ssrn.com/abstract=1975117>, archived at <http://perma.cc/UYF4-6WMP>. After 125 years, the settlor’s genetic relationship to all his then-living beneficiaries will drop below one percent, and as the trust presses on into the more distant future, the settlor’s genetic relationship to the beneficiaries will decline further as the trust benefits ever more remote relatives. See *id.* at 8–9.

Not only is there no federal interest in promoting perpetually GST-exempt trusts, the federal interest cuts the other way. Tax revenues will be lost by Congress' action and subsequent inaction. The longer Congress procrastinates, the amount of wealth safely sheltered in perpetually GST-exempt trusts will continue to grow.¹²⁷

VIII. SOCIAL SECURITY SURVIVOR BENEFITS FOR CHILDREN OF ASSISTED REPRODUCTION

The previous topics dealt with federal preemption of state law regarding transfers of assets belonging to the transferor. This topic is a change of direction. Federal law in this instance has embraced state wealth-transfer law, not preempted it. The topic is the right of children of assisted reproduction ("ART children") to Social Security survivor benefits. Congress has chosen to make the right to these federal benefits depend on state intestacy law. Although this is a case in which uniformity is desirable, state intestacy law is far from uniform and is silent regarding the intestacy rights of ART children in many states.¹²⁸

Congress amended the Social Security Act in 1939 to provide a monthly benefit for children of a deceased insured wage earner. Section 202(d)(1)¹²⁹ provides that every "child" of a deceased wage earner is entitled to a monthly benefit if the child was dependent upon the wage earner at the time of death.

In determining whether an applicant is the child of a deceased wage earner, Section 216(h)(2)(A)¹³⁰ provides that the Commissioner of Social Security "shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which such individual is domiciled . . . at the time of his death." Regulations issued under the auspices of the Commissioner of Social Security define the word "child" as one who would inherit under the intestate succession law of the state of domicile of the deceased wage earner.¹³¹

127. See Zachary R. Mider, *Moguls Rent South Dakota Addresses to Shelter Wealth Forever*, BLOOMBERG NEWS (Dec. 27, 2013, 12:01 AM), <http://www.bloomberg.com/news/2013-12-27/moguls-rent-south-dakota-addresses-to-dodge-taxes-forever.html>, archived at <http://perma.cc/5UK6-K8NP> (reporting on wealthy families who have created dynasty trusts in South Dakota).

128. Another area of nonuniformity is the right of adopted children to inherit from their genetic parents. See UNIF. PROBATE CODE § 2-119 (amended 2010). Adopted children commonly inherit from their adopting parents. See *id.* § 2-118.

129. 42 U.S.C. § 402(d)(1) (2012).

130. *Id.* § 416(h)(2)(A).

131. See 20 C.F.R. § 404.355 (2014).

In 1939, intestacy rights of children were nearly uniform,¹³² but state law has now become inconsistent on the question of intestacy rights of posthumously conceived ART children. In *Astrue v. Capato*,¹³³ the Supreme Court had to decide whether Social Security survivor benefits for posthumously conceived ART children still depend on disparate state intestacy laws. Robert Capato, who was married to Karen Capato, developed cancer. Before undergoing chemotherapy, he deposited semen in a sperm bank, where it was frozen and stored. Robert died a couple of years later. Shortly after his death, Karen began in vitro fertilization with his frozen sperm and, eighteen months after his death, gave birth to twins. Karen claimed Social Security survivor benefits on behalf of the twins.

The Supreme Court granted certiorari to resolve a split in the circuits.¹³⁴ Justice Ginsberg delivered the opinion for a unanimous Court, holding that the Social Security Administration's reading that defines the word "child" as a child who would inherit by intestacy¹³⁵ "is better attuned to the statute's text and its design to benefit primarily those supported by the deceased wage earner in his or her lifetime." The Court added that "even if the SSA's longstanding interpretation is not the only reasonable one, it is at least a permissible construction that garners the Court's respect under [the *Chevron* Doctrine]."¹³⁶

The Court was well aware that posthumous conception of ART children is such a new development that state intestacy laws regarding the intestacy rights of those children have only sporadically caught up to the phenomenon. The Court was also aware that the

132. Back then, nonmarital children inherited from their mothers but not from their fathers unless certain conditions were met. In the wake of *Trimble v. Gordon*, 430 U.S. 762 (1977), and *Lalli v. Lalli*, 439 U.S. 259 (1978), nonmarital children now inherit from their mothers and fathers. See, e.g., UNIF. PROBATE CODE § 2-117.

133. 132 S. Ct. 2021, 2025–26 (2012).

134. Circuit court cases holding that survivor benefits do not depend on state intestacy law are *Capato v. Commissioner of Social Security*, 631 F.3d 626 (3d Cir. 2013), and *Gillett-Netting v. Barnhart*, 371 F.3d 593 (9th Cir. 2004). Circuit court cases holding the opposite are *Beeler v. Astrue*, 651 F.3d 954 (8th Cir. 2011), and *Schafer v. Astrue*, 641 F.3d 49 (4th Cir. 2011).

135. See *supra* text accompanying note 130.

136. *Astrue v. Capato*, 132 S. Ct. at 2026 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). The requirement that an applicant satisfy the definition of "child" is not the only statutory requirement. The Act also requires the child to be dependent upon the wage earner at the time of death. The latter requirement would seem to preclude benefits not only for an ART child who was conceived posthumously but also for a child who was in gestation at the time of the wage earner's death. In the following passage, the Court basically read this requirement out of the Act: "It was nonetheless Congress' prerogative to legislate for the generality of cases. It did so here by employing eligibility to inherit under state intestacy law as a workable substitute for burdensome case-by-case determinations whether the child was, in fact, dependent on her father's earnings." *Id.* at 2032.

UPC now addresses the matter.¹³⁷ Had Robert Capato died domiciled in a state that had enacted the UPC, his posthumously conceived children would have inherited,¹³⁸ and that would have entitled them to Social Security benefits. Unfortunately, he died domiciled in Florida, where, in order to inherit, the twins must have been conceived before his death.¹³⁹ The Court also foreclosed the idea of providing uniformity among the states by developing federal common law on the question: “We cannot [create] a uniform federal rule the statute’s text scarcely supports.”¹⁴⁰

The result is that the posthumously conceived ART children of one wage earner can qualify for survivor benefits, but the posthumously conceived ART children of another wage earner cannot receive those benefits.

As the reporter for the UPC provisions on ART children, I am tempted to argue that the solution is for all states to enact the UPC,¹⁴¹ but I know that will not happen. I do urge more states to do so, not only for purposes of Social Security survivor benefits but because of the merits of the UPC quite apart from those benefits.¹⁴²

The actual solution rests with Congress. In 1939, when Congress added the provisions granting survivor rights for children of a deceased wage earner, the phenomenon of births by means of assisted reproduction was unheard of, much less the idea of posthumous conception. The first “test tube baby” was born in England in 1978; the first in the United States in 1981.¹⁴³ Now that the Supreme Court has spoken so decisively, the results will continue to vary from state to state until Congress holds hearings on the

137. See *id.* at 2032. For the UPC treatment, see UNIF. PROBATE CODE §§ 2-120, -121.

138. See UNIF. PROBATE CODE § 2-120 (allowing posthumously conceived children to inherit from their deceased parent so long as certain time requirements are met).

139. See FLA. STAT. § 732.106 (2014).

140. *Astrue v. Capato*, 132 S. Ct. at 2034.

141. A decision of the Supreme Court of Michigan, *Mattison v. Social Security Commissioner*, 825 N.W.2d 566 (Mich. 2012), held that posthumously conceived ART children born to the decedent’s widow were not entitled to take by intestacy (and hence not entitled to Social Security survivor benefits). That decision prompted the Council of the Probate and Estate Planning Section of the State Bar of Michigan to appoint a committee to study enactment of the UPC provisions dealing with ART children. Full disclosure: I am a member of that committee.

142. See Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC L.J. 30, 30–33 (2009), available at <http://ssrn.com/abstract=1477961>, archived at <http://perma.cc/QD62-MQ3D>.

143. See Walter Sullivan, *First “Test Tube” Baby Born in U.S., Joining Success Around World*, N.Y. TIMES (Dec. 24, 1981) <http://www.nytimes.com/learning/general/onthisday/big/1228.html>, archived at <http://perma.cc/EUM9-46UN>.

question¹⁴⁴ and brings the Social Security Act's survivor benefits provisions up to date.¹⁴⁵

Sometimes state law is neither uniform nor well-enough developed—and not likely to become so in the foreseeable future—to govern rights to federal benefits. Such an instance is the right of posthumously conceived ART children to survivor benefits under the Social Security Act.

IX. CONCLUSION

In this survey of the creeping federalization of wealth-transfer law, I found only one area in which the result has been benign. In all the others, including the one area in which federal law has incorporated state wealth-transfer law, the results have been detrimental to the administration of justice. The responsibility lies with all three branches of the federal government—legislative, judicial, and executive.

First, the favorable result. The far-flung locations of our military personnel—overseas, sometimes in combat zones, and on stateside bases—have necessitated preemption of state will-execution formalities. The federal military-wills statute does not stop at expressly preempting state will-execution formalities, however. Unlike

144. Congressional hearings, if thorough, would take a hard look at how the UPC handles the intestacy rights of ART children.

145. Federal authorities other than Congress are capable of a rapid response to new developments. On October 28, 2014, the U.S. Citizenship and Immigration Services ("USCIS") announced that it had adopted a new policy granting citizenship to ART children born to female U.S. citizens even if the children's mothers are not the children's genetic mothers. See Press Alert, USCIS, *USCIS Expands the Definition of "Mother" and "Parent" to Include Gestational Mothers Using Assisted Reproductive Technology (ART)* (Oct. 28, 2014), <http://www.uscis.gov/news/uscis-expands-definition-mother-and-parent-include-gestational-mothers-using-assisted-reproductive-technology-art>, archived at <http://perma.cc/8P5M-8Q9W>. The new policy is implemented in USCIS's Policy Manual. See USCIS, POLICY MANUAL ch. 2E, <http://www.uscis.gov/policymanual/HTML/PolicyManual-Volume12-PartH-Chapter2.html>, archived at <http://perma.cc/QBG3-KQ99>.

Although federal benefits for same-sex couples is a topic that is outside the scope of this essay, federal authorities have been quick to respond to *United States v. Windsor*, 133 S. Ct. 2675 (2013), in which the Supreme Court held that the federal Defense of Marriage Act, which denied federal benefits for same-sex married couples, is unconstitutional. Federal agencies and courts have acted expeditiously to provide that same-sex married couples are entitled to federal benefits even if they are domiciled in a state that does not recognize same-sex marriages. Lower federal courts have gone further and held that state laws and constitutions defining marriage as between one man and one woman violate the U.S. Constitution. The National Conference of State Legislatures keeps up-to-date data on same-sex marriage laws and court decisions. See *Defining Marriage: State Defense of Marriage Laws and Same-Sex Marriage*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/human-services/same-sex-marriage-overview.aspx> (last updated July 28, 2014), archived at <http://perma.cc/T7V3-DT5A>.

ERISA, FEGLIA, and the Treasury Regulations regarding U.S. government securities in survivorship form, which simply preempt state law without replacing it with any comparable federal substitute,¹⁴⁶ the federal military-will statute responsibly replaces preempted state will-execution formalities with a well-thought-out set of federal will-execution formalities. The statute also requires the execution of military wills to be supervised by a military legal assistance counsel,¹⁴⁷ greatly reducing the chance of defective execution.

Apart from military wills, federal action with respect to state wealth-transfer law has led to detrimental results. In the one instance in which Congress has expressly tied federal benefits to state law, the tie-in now works an injustice because the posthumously conceived ART children of one wage earner can qualify for survivor benefits but the posthumously conceived ART children of the another wage earner are deprived of benefits. When Congress long ago expressly tied Social Security survivor benefits to state intestacy law, the tie-in may have made sense. But, because of advances in medical technology allowing posthumous conception, the tie-in is now out of date. Congress needs to bring the Social Security Act's out-of-date provisions regarding survivor benefits for posthumously conceived ART children up to date so that those federal benefits are uniform throughout the states instead of being dependent on nonuniform state intestacy law in this still-emerging field.

Congress, the Supreme Court, and the Treasury Department are responsible for undermining state wealth-transfer law reforms. State law dealing broadly with questions of wealth transfers has traditionally been backward and in many instances intent defeating. The last few decades, however, have seen efforts largely spearheaded by the ALI and the ULC to modernize that law. One of the efforts has been to unify the law of probate and nonprobate transfers. The Supreme Court's *Egelhoff* and *Hillman* decisions and the Treasury regulations regarding U.S. government securities in survivorship form

146. Although Professor Meltzer notes that "it is unimaginable that [members of Congress and congressional staffs] generally would be aware of the relevant array of state and local laws," Meltzer, *supra* note 21, at 15, state wealth-transfer laws are readily accessible in the Restatements. See *supra* note 86 and accompanying text; see also Irish & Cohen, *supra* note 57, at 111 ("Congress enacted ERISA while still oblivious to numerous problems related to benefit plans that the states had already recognized and addressed.").

147. See *supra* note 102.

have thoughtlessly and needlessly barred the unification effort for federally authorized or regulated nonprobate transfers.¹⁴⁸

Congress has undermined state wealth-transfer law in the perpetuity area by granting a tax exemption for perpetual trusts. Unlike the well-thought-out federal statute relating to military wills, the federal tax statute granted a tax exemption for perpetual trusts by mistake, not by design.¹⁴⁹ That Congress has shown little inclination to correct its earlier mistake is negligent at best and irresponsible at worst.¹⁵⁰ The result of its inattention is that wealth continues to accumulate in perpetually tax-exempt trusts, now counted in the billions of dollars.¹⁵¹

Because of the raw power granted to the federal government by the Constitution, federal law is the elephant in the room, even in a traditional state-law sphere as wealth-transfer law. It is distressing indeed that those who produce that elephant often—not always, but often—seem oblivious to the damage they can do and have done to well-considered state law. Whether the ULC’s position paper urging more care when dealing with state law¹⁵² will carry any weight with federal authorities or will even be noticed by them remains to be seen. It should, but I have doubts.

Shakespeare praised those who “have power to hurt, and will do none.”¹⁵³ Too bad that the concept of avoiding harm has not seeped into the collective federal consciousness when intruding into a field so traditionally the province of state law.

148. In some instances, the Justices’ analysis has been embarrassingly uninformed. As Professor Langbein noted: “[F]ederal courts are sometimes unaware of basic principles of the wealth transfer field, as in *Hillman*, in which both the majority opinion and a concurrence by Justice Alito voice the mistaken assumption that a life insurance beneficiary designation can be altered by will.” Langbein, *supra* note 6, at 1695.

149. See Waggoner, *supra* note 114, at 8–12.

150. Congress has known about the problem since at least 2005 and has had several opportunities to correct its mistake. See *id.* at 2 n.3 (“It appears that the congressional tax-writing authorities were first officially notified of the problem in a 2005 report of the staff of the Joint Committee on Taxation.”); see also *id.* at 9, 26–30. For a proposed solution, see *id.* at 30–33.

151. See *id.* at 3, 10 n.39 (recounting studies that indicate perpetually tax-exempt trusts continue to grow, as they have “been tremendously profitable for banks and other financial service companies, which can generate large fees administering these long term trusts”).

152. See UNIF. LAW COMM’N, *Principles of Federalism*, *supra* note 3, at 1.

153. WILLIAM SHAKESPEARE, SONNET XCIV, in SHAKESPEARE’S SONNETS 100, 100 (Boston, Ticknor & Fields 1865). Shakespeare’s sonnets are readily accessible on the web, e.g., SHAKESPEARE’S SONNETS <http://www.shakespeares-sonnets.com/all.php> (last visited Aug. 31, 2014), archived at <http://perma.cc/3S2L-UDYB>, and in many collected works, e.g., WILLIAM SHAKESPEARE, SHAKESPEARE’S SONNETS (Stephen Booth ed. 2000).

