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Late Fathers' Later Children: Reconceiving the Limits of Survivor's Benefits in Response to Death-Defying Reproductive Technology

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Late Fathers' Later Children: Reconceiving the Limits of Survivor's Benefits in Response to Death-Defying Reproductive Technology

ABSTRACT

When Congress instructed the Social Security Administration to begin paying a social insurance benefit to "widows and orphans" in the 1930s, it simplified the process of determining an applicant's relationship to an insured decedent in two significant ways: First, Congress ordered the agency to honor the intestate laws of each state when determining whether an applicant was actually the child of a decedent, and second, it ordered the agency to treat any child who could qualify as an intestate heir as if that child actually depended on the parent financially at the time of the parent's death. Three-quarters of a century later, advances in reproductive technology make it possible for a child to be born decades after the death of one or both of her genetic parents. As the law begins to explore the rights and responsibilities of the parents who choose postmortem reproduction and the children whose lives come into being through those procedures, the heuristics that facilitated efficiency in the 1930s may yield unintended consequences. This Note explores some of those consequences and suggests minor alterations to the rules governing survivor's-benefits eligibility intended to preserve the program's social insurance function as reproductive technology transforms life after death from a hope or a fear into a choice.

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Consider two children born on the same day in the same hospital, the daughters of men who died two years earlier in the same accident. Both children were conceived by the same in vitro process in the same clinic. Both fathers worked and both employers withheld the applicable Social Security taxes. One daughter is eligible to receive Social Security survivor's benefits as the dependent child of her father. The other is not. The difference has nothing to do with the children and everything to do with a legislative strategy conceived in the 1930s, before the reproductive technology that brought those lives into being was anything more than a twinkle in a scientist's eye.

Social Security survivor's benefits are payments made to orphans of covered workers. They seek to provide financial support that otherwise would have been provided by the deceased parent.[1] The current regulations promulgated by the Social Security Administration offer several ways for an applicant to demonstrate eligibility for survivor's benefits—that is, to demonstrate that a person is in fact a child of an insured worker.[2] Drafted to address needs and assumptions of the mid-twentieth century, these tests initially identified children who relied on support from a decedent at the time of his death.[3] The wife and presumed biological children of a deceased

1. SOC. SEC. ADMIN., SURVIVORS BENEFITS 4 (2012), *available at* http://www.ssa.gov/pubs/10084.pdf ("The loss of the family wage earner can be devastating, both emotionally and financially. Social Security helps by providing income for the families of workers who die.").

2. *See* 20 C.F.R. § 404.355 (2012).

3. The Senate report noted:

man were uncontroversial survivors.[4] Additionally, children born to a decedent's widow within a generous gestational timeframe following the death, though rare, were highly sympathetic candidates for survivor status and federal benefits.[5] Thus, the children who were actually or presumptively the decedent's biological children, within the limits of unassisted human reproduction at the time, were, and are, at the heart of this legislation.[6]

The statutes enacting and revising the program, however, do not define precisely who those children are.[7] Congress might have declined to define this term more precisely for a number of reasons. Families are complicated, as is family law.[8] A more inclusive federal standard might have included children whose biological parentage was either unacknowledged or actively disputed, but a less inclusive

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> As a child is normally dependent upon his father or adopting father, paragraph (3) provides that he shall be deemed so dependent unless . . . at the time of death, such individual was not living with the child or contributing to his support and (A) the child is neither the legitimate nor adopted child of such individual, or (B) the child had been adopted by some other individual, or (C) the child, at the time of such individual's death, was living with and supported by the child's stepfather. As a child is not usually financially dependent upon his mother, adopting mother, or stepparent, paragraph (4) provides that, for the purposes of paragraph (1), a child shall not be deemed dependent upon any such individual unless . . . at the time of death, no parent other than such mother, adopting mother, or stepparent was contributing to the support of the child and the child was not living with the father or his adopting father.

SOCIAL SECURITY ACT AMENDMENTS OF 1939, S. REP. NO. 76-734, at 44 (1939).

4. Upon signing amendments to the Social Security Act, the President stated:

> These amendments to the Act represent another tremendous step forward in providing greater security for the people of this country. This is especially true in the case of the federal old age insurance system which has now been converted into a system of old age and survivors' insurance providing life-time family security instead of only individual old age security to the workers in insured occupations. In addition to the worker himself, millions of widows and orphans will now be afforded some degree of protection in the event of his death whether before or after his retirement.

Franklin D. Roosevelt, *Presidential Statement on Signing Some Amendments to the Social Security Act—August 11, 1939*, http://www.ssa.gov/history/fdrstmts.html#1939b (last visited Feb. 3, 2013).

5. Intestate laws offer one avenue for demonstrating eligibility for survivor's benefits. *See infra* Part II.A. Traditional intestate laws provided identical recognition to all children conceived through sexual intercourse, whether they were born before or after their father died. *See* RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 184 (2004).

6. *See* Astrue v. Capato *ex rel.* B.N.C. (*Capato II*), 132 S. Ct. 2021, 2026 (2012); Schafer v. Astrue, 641 F.3d 49, 58 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012); *see also Special Collections: More Security II (1939)*, SOC. SECURITY HIST., http://www.ssa.gov/history/pubaffairs.html (last visited Jan. 14, 2013).

7. *See infra* Part II.A.

8. *See, e.g.*, *Kansas Pursues Child Support from Sperm Donor*, KAN. CITY STAR (Dec. 30, 2012), http://www.kansascity.com/2012/12/29/3986152/state-pursuing-child-support-from.html (describing a current case involving a lesbian couple and complicated state-law provisions regarding the rights and responsibilities of sperm donors in Kansas); *see generally* William Baude, *Beyond DOMA: Choice of State Law in Federal Statutes*, 64 STAN. L. REV. 1371 (2012) (addressing challenges in the uniform application of federal laws given differing state definitions of marriage).

federal standard might have excluded nonbiological children who, nonetheless, the decedent and community recognized and supported as family. The federal statutes establishing and amending the survivors' benefits program avoid these conflicts by generally deferring to state law.[9] They direct the federal administrators to use the property-rights determinations of individual states' inheritance laws as a proxy for the insurance-benefit decisions.[10]

In the context of a federal program designed to provide security to the families of deceased workers, deference to family law on a state-by-state basis was reasonable.[11] So long as the federal program relied on the state intestacy laws only to establish family relationships, variation between states might have been a reasonable accommodation to the traditional role of states in governing family and property law.[12] Over time, however, advances in genetic and reproductive technology changed the fundamental assumptions that made it reasonable to tie federal social insurance benefits to state property law and family law.[13] The impact of those advances is particularly apparent when applying the law to children whose lives are deliberately brought into being after the death of a parent covered under social security—children whose existence depends on technological advances that occurred long after the 1930s.[14]

Two features dramatically distinguish postmortem-conceived children from historically typical applicants for survivor's benefits: certainty about biological parentage and certainty about new financial support that will flow from the deceased parent. The genetic relationship between these children and their deceased parents is certain. Given that certainty, a postmortem-conceived child's status

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9. *See* Social Security Act, 42 U.S.C. § 416(h) (2006) (binding determinations of family status for the purposes of Social Security benefits to the state laws in effect in the state in which a decedent was domiciled). *But see id.* § 416(h)(3) (establishing alternative means for deciding that an applicant was the child of a decedent).

10. *See id.* § 416(h).

11. *See* Lalli v. Lalli, 439 U.S. 259, 268 (1978) ("The primary state goal underlying [the law at issue] is to provide for the just and orderly disposition of property at death. We long have recognized that this is an area with which the States have an interest of considerable magnitude." (footnote omitted)); *Schafer*, 641 F.3d at 62.

12. *See supra* note 11.

13. *See generally* James E. Bailey, *An Analytical Framework for Resolving the Issues Raised by the Interaction Between Reproductive Technology and the Law of Inheritance*, 47 DEPAUL L. REV. 743, 745 (1998) (arguing that the development of cryopreservation, in vitro fertilization, and other reproductive technologies demand a reassessment of the laws of inheritance, lest they "pass into obsolescence").

14. *See* Emily McAllister, *Defining the Parent-Child Relationship in an Age of Reproductive Technology: Implications for Inheritance*, 29 REAL PROP. PROB. & TR. J. 55, 58–64 (1994) (describing some of the reproductive procedures available in the 1990s). For additional information regarding the current potential of reproductive technology, see also Robert Sparrow, *Orphaned at Conception: The Uncanny Offspring of Embryos*, 26 BIOETHICS 173 (2012).

as determined by state intestacy law is unhelpful in the context of deciding survivor benefits.[15] It is equally certain that a parent who dies before a child is conceived will not provide additional financial support during the life of the child—while careful estate planning may allow a decedent to support a postmortem-conceived child financially, the extent of that support is determined before the child is conceived.[16] The "loss" of expected parental support—a central feature of survivor's benefits as social insurance[17]—is of a fundamentally different nature when the parent's death precedes a deliberate and technologically facilitated choice to procreate.[18] Instead of guarding against the risk that death would turn a worker's child into an orphan, standards that include postmortem-conceived children as survivors arguably create a new subsidy for postmortem reproduction.[19] There may be good reasons to adopt just such a policy,[20] but there is no reason to accept it as an unintended consequence of scientific progress and legislative inertia.

Legislative inertia is a reality for statutory schemes that rely on the written word with little administrative delegation or flexibility. Absent legislative action, the words of a statute retain their force even as technological progress changes their meaning, especially here,

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15. *See infra* Part III.A; *see also, e.g.*, Social Security Online, *PR 01115.046 South Dakota: C. PR 93-001 Use of Genetic Testing to Establish Parent-Child Relationship Posthumously in South Dakota*, SOC. SEC. PROGRAM OPERATIONS MANUAL SYS., https://secure.ssa.gov/apps10/poms.nsf/lnx/1501115046 (last visited Jan. 13, 2013) (citing posthumous genetic testing that identified a 99.9 percent probability of paternity while analyzing a benefits claim).

16. This creates challenges to analyzing the survivor's benefits as a response to an insurable risk. *See, e.g.*, J. DOUGLAS BROWN, AN AMERICAN PHILOSOPHY OF SOCIAL SECURITY: EVOLUTION AND ISSUES 111 (1972) (defining insurable risk as "something concrete and definite which is lost under conditions beyond the control of the insured").

17. *See* SOC. SEC. BD., PROPOSED CHANGES IN THE SOCIAL SECURITY ACT (1938), *available at* http://www.ssa.gov/history/reports/38ssbadvise.html ("Under a social insurance system the primary purpose should be to pay benefits in accordance with the presumptive needs of the beneficiaries, rather than to make payments to the estate of a deceased employee regardless of whether or not he leaves dependents.").

18. *See, e.g.*, *Capato II*, 132 S. Ct. 2021, 2021 (2012) ("Karen and Robert Capato married in 1999. Robert died of cancer less than three years later. With the help of in vitro fertilization, Karen gave birth to twins 18 months after her husband's death."); *cf.* BROWN, *supra* note 16, at 112 ("A person who has, through lifelong mental or physical disability, been unfitted for gainful employment cannot be insured against the loss of earnings which he has never had.").

19. *See infra* Part III.E.

20. It is easy to imagine various constituencies aligning to intentionally extend some degree of postmortem reproductive benefits as compensation for military service. *See, e.g.*, Jennifer Tash Anger, et al., *Cryopreservation of Sperm: Indications, Methods and Results*, 170 J. UROLOGY 1079, 1079 (2003) (citing early speculation that posthumous conception might provide an heir for "a man dying on the battlefield" (internal quotation marks omitted)); Barry Dunn, Note, *Created After Death: Kentucky Law and Posthumously Conceived Children*, 48 U. LOUISVILLE L. REV. 167, 167 (2009) (citing evidence that military personnel store reproductive materials at a higher rate than other citizens and that periods of military activity correlate with increased use of those services).

where the Supreme Court held in *Astrue v. Capato ex rel. B.N.C.* (*Capato II*) that the law as written gives the Social Security Administration little or no leeway to adapt its regulations to react to previously inconceivable[21] modes of reproduction.[22] Instead, relatively clear statutory instructions require the agency to adhere to state-by-state classifications primarily curated to facilitate orderly distributions of unplanned estates when establishing the benefits eligibility. Those statutory instructions do not authorize a different standard for children who come into being through state-of-the-art family planning and medical intervention.[23] Some states are modifying their intestacy laws to establish new presumptions about how to distribute a person's finite private property to future generations that might include postmortem-conceived children.[24] As this occurs, state-to-state variances invite perverse results like the hypothetical situation at the beginning of this Note.[25] Moreover, when applied to a child conceived after a parent's death, the competing interests that shape intestacy law may or may not bear any rational relationship to the risk-distributing function of a federal social insurance program.[26]

This Note examines the eligibility of postmortem-conceived children[27] for Social Security survivor's benefits and considers the

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21. No pun intended.

22. *See Capato II*, 132 S. Ct. at 2034 ("[T]he law Congress enacted calls for resolution of Karen Capato's application for child's insurance benefits by reference to state intestacy law. We cannot replace that reference by creating a uniform federal rule the statute's text scarcely supports.").

23. *See infra* Part II.A.

24. *See infra* Part II.D.

25. *See generally* William H. Danne, Jr., Annotation, *Legal Status of Posthumously Conceived Child of Decedent*, 17 A.L.R. 6TH 593 (2012) (illustrating different results under the laws of various states); Social Security Online, *PR 01115.000 State Law Legitimation/Inheritance Rights Provisions*, SOC. SEC. PROGRAM OPERATIONS MANUAL SYS., https://secure.ssa.gov/apps10/poms.nsf/lnx/1501115000 (last visited Jan. 13, 2013) (presenting examples of contested parental relationships from all fifty states, American Samoa, Puerto Rico, and the District of Columbia analyzed under the relevant inheritance laws).

26. The Social Security Administration stated:

> Many State laws impose time limits within which someone must act to establish paternity for purposes of intestate succession. . . . [T]o provide for an orderly and expeditious settlement of estates. Since this is not the purpose of Social Security benefits for children [the agency will not use those time limits to disqualify applicants].

Application of State Law in Determining Child Relationship, 63 Fed. Reg. 57,590, 57,591 (Oct. 28, 1998) (to be codified at C.F.R. pt. 404).

27. The phrase "postmortem-conceived children" highlights the relevant, undisputed characteristics of these children. For the purposes of this Note, the phrase indicates a biological connection to the insured decedent. It also references the relative timing of the parent's death and the technology-assisted initiation of the pregnancy that leads to the applicant's birth. While the distinction between true postmortem conception (from sperm or eggs banked prior to death or

problems posed when technological innovation upends statutory assumptions. Issues that emerged decades after Congress tethered survivor's-benefits eligibility to state-by-state inheritance laws illustrate how technology that transcends assumed natural limits also complicates legal structures tailored to those perceived limits. Part I introduces the social problem addressed by Social Security survivor's benefits. Part II addresses the current state of the law regarding Social Security survivor's benefits and the original goals that shaped the development of this legal framework. Part III compares and contrasts the core features and policy concerns of intestacy law and survivor's benefits as they relate to postmortem-conceived children. Part IV proposes that Congress reestablish the insurance function of survivor's benefits through legislation that limits eligibility to children conceived before an insured worker's death.

I. DEATH AND PAYROLL TAXES

One death is a tragedy, but a million deaths are a statistic.[28] When analyzing social insurance and public policy, it is important to recognize the fundamental difference between the mundane predictability of some number of deaths occurring across a population and the localized shock of each individual death.[29] The rationale for Social Security, and its survivor's-benefits program in particular, as a form of social insurance, is grounded in the social utility of sharing risk[30] without unduly diminishing individual incentives both to work and to prepare for those aspects of the future that an individual can control.[31]

A. Death Is (Un)predictable

On an average day in the United States, more than six thousand people die and more than ten thousand people are born.[32] The rough totals are predictable,[33] but no individual death or birth is a

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from sperm collected immediately after death) and postmortem implantation of embryos created and frozen prior to death may be relevant to some analyses, this Note does not address those issues.

28. This is a sentiment commonly, though perhaps apocryphally, attributed to Joseph Stalin. *See, e.g.*, Leonard Lyons, *Loose-Leaf Notebook*, WASH. POST, Jan. 30, 1947, at 9.

29. *See infra* Part I.A.

30. *See infra* Part I.B.

31. *See infra* Part III.D–E.

32. *See U.S. POPClock Projection*, U.S. CENSUS BUREAU, www.census.gov/population/www/popclockus.html (last visited Feb. 5, 2013) (indicating "One birth every 8 seconds" and "One death every 12 seconds").

33. *See id.*

certainty until it occurs. Medical science can offer estimates in the aggregate—odds of conception under certain circumstances,[34] life expectancy following certain prognoses,[35] likelihood of a particular pregnancy resulting in a successful birth[36]—but these, too, are group-truths and averages, rather than facts about an individual's future. The uncertainty surrounding individual futures matters because there are no repeat players in life[37]: every human being is born once and dies once.[38] While it is possible to compare the odds of that death coming by shark bite,[39] lightning strike,[40] or natural causes,[41] only one death takes each person. So, while a society can play the odds, individuals tend to be more risk averse.

Despite the powerful impact that each death has on the people close to the decedent, only a small subset of those losses trigger a government response.[42] The death of a parent is in that subset. The death of a parent is a profound emotional event for most people, but for minor children who depend on that parent for food, shelter, and other necessities, it can also be an economic catastrophe.[43] While policymakers can plan for a predictable number of these deaths, the

34. *See, e.g.*, M. Femi Ayadi et al., *Contraceptive Use Among Medicaid-Covered Teens and Risk of Teen Conception: A Longitudinal Study*, 21 J. WOMEN'S HEALTH 146, 150–52 (2012).

35. *See, e.g.*, Fumiyo Nakagawa et al., *Projected Life Expectancy of People with HIV According to Time of Diagnosis*, 26 AIDS 335 (2012).

36. *See, e.g.*, Lena George et al., *Environmental Tobacco Smoke and Risk of Spontaneous Abortion*, 17 EPIDEMIOLOGY 500 (2006).

37. Repeat players tend to be risk-neutral with regard to any particular encounter with uncertainty because they can expect their multiple draws to roughly mirror the broader probabilities. *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974). "One-shot" players, by contrast, tend to be more risk averse because their well being depends entirely on a single event which may deviate substantially from the "typical" outcome. *See generally id.*

38. *See generally* KEN TANAKA, EVERYBODY DIES: A CHILDREN'S BOOK FOR GROWNUPS (2011) (explaining death in a way that even adults can understand).

39. *See, e.g.*, *Risk of Death from Shark Attack*, BANDOLIER.COM, http://www.medicine.ox.ac.uk/bandolier/booth/risk/shark.html (last visited Feb. 4, 2013) ("The risk of dying from a shark attack anywhere in the world in 2004 was 1 in 913,200,766.").

40. *See, e.g.*, Robert Roy Britt, *The Odds of Dying*, LIVESCIENCE (Jan. 6, 2005, 2:00 AM), http://www.livescience.com/3780-odds-dying.html (reporting lifetime odds of a US resident dying from a lightning strike as "1-in-83,930").

41. *See, e.g.*, 58 ELIZABETH ARIAS, NATIONAL VITAL STATISTICS REPORTS: UNITED STATES LIFE TABLES, 2006 4–5 (2010), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_21.pdf.

42. SOC. SEC. ADMIN., *supra* note 1 ("The loss of a family wage earner can be devastating, both emotionally and financially. Social Security helps by providing income for the families of workers who die.").

43. *See id. But see* John Kane et al., *The Effect of the Loss of a Parent on the Future Earnings of a Minor Child*, 36 E. ECON. J. 370, 388 (2010) ("[T]he death of a parent appears to have a relatively small effect on a child's lifetime earnings . . . .").

children who bear the loss cannot, making the death of a parent with dependent children a classic candidate for social insurance.[44]

B. Social-Insurance Origins of Social Security Survivor's Benefits

Congress established Social Security survivor's benefits to mitigate the effects of the individually surprising but systematically predictable catastrophe that is death by spreading the risk of a worker dying and leaving dependent children without financial support across the broader working population.[45] In this sense, Social Security survivor's benefits are insurance.[46] Like all insurance products, these benefits mitigate a certain risk by collecting a relatively small premium from a group subject to that risk and paying out more substantial benefits to the members of that class who actually suffer the anticipated loss.[47] In this case, the risk is that a working (or retired) parent will die and that the decedent's children, deprived of their parent's income (or retirement benefits), will suffer the detrimental effects of childhood poverty—a result that harms both the individuals involved and society at large.[48] By taxing wages and

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44. *See generally* MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 1–4 (1999).

45. *Capato II*, 132 S. Ct. 2021, 2032 (2012).

46. *See Insurance—4.a.*, OXFORD ENG. DICTIONARY ONLINE, http://www.oed.com/view/Entry/97268 (last visited Dec. 20, 2012); *see also* BROWN, *supra* note 16, at 111.

47. During World War II, a Social Security Board member stated:

> In accordance with the social security law, each of these wage earners contribute to a common fund—1 cent out of every wage dollar. Their employers contribute a similar amount. Out of this fund the Social Security Board and the U.S. Treasury make monthly payments to those insured workers who have become too old to work and to the families of those who have died.

Address by Ellen S. Woodward, Member, Soc. Sec. Bd., Social Security—In War and Peace (Jan. 27, 1943), *available at* http://www.ssa.gov/history/woodwardspeech.html. But Graetz and Mashaw noted:

> The conceptual error lies in believing that the recipients of social insurance in retirement have "paid for their own benefits." That simply is not how Social Security pensions in the United States work. . . . Today's retirees are supported not by "savings" in the Social Security Trust Fund, but by the current payments of America's workers.

GRAETZ & MASHAW, *supra* note 44, at 41.

48. Commenting on the reason for the 1939 Social Security Act Amendments, the Director of the Bureau of Old-Age and Survivors Insurance commented:

> The basic purpose of all forms of social insurance is to replace a sufficient part of that wage income when it is lost as a result of any of these hazards—unemployment, accident, old age, or death of the wage earner—to insure not only that the individual may look forward to protection, but that society as well may be protected against the hazards which it faces.

Memorandum from John J. Corson, Dir., Bureau of Old-Age & Survivors Ins., to Soc. Sec. Bd. Reg'l Dirs., Reg'l Reps. & Field Office Pers. on Reasons for the 1939 Amendments to the Social Security Act (Jan. 10, 1940), *available at* http://www.ssa.gov/history/reports/1939no3.html.

guaranteeing support for families of workers who die, this program distributes the ex post costs of supporting a dead worker's family among the ex ante population of workers who must plan their careers and family lives without knowing whether they will live to earn their next paycheck.[49]

The survivor's-benefits program (like other Social Security programs) resembles private insurance in some ways, but certain features distinguish it as social insurance.[50] The mandatory and universal nature of the Social Security program is typical of social insurance, as is its policy-oriented balancing of personal responsibility, shared risk, and progressive financing that provides payouts in response not only to contributions but also to relative need.[51] Private life-insurance policies allow an individual worker to provide family members (or anyone else) with a source of income in the event of the worker's death, but Social Security requires all covered workers to contribute to a publically administered system that provides a "fair" benefit that balances equity and adequacy.[52] While the private insured worker negotiates the level of coverage and dictates the beneficiaries, Social Security reflects collective policy decisions that early in the program's history emphasized securing the financial stability of families after the loss of a wage earner.[53]

This focus on providing for families of deceased workers represented an early shift in the goals of Social Security.[54] When established in 1935, Social Security provided some protection against the risks associated with poverty among the elderly.[55] The program targeted depression-era insecurity among US citizens approaching an undefined period of old age and potential infirmity with finite personal savings and the good will of family, friends, and community.[56] The

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49. *See* GRAETZ & MASHAW, supra note 44, at 41–42.

50. Jerry L. Mashaw, *Social Insurance and the American Social Contract*, *in* IN SEARCH OF RETIREMENT SECURITY: THE CHANGING MIX OF SOCIAL INSURANCE, EMPLOYEE BENEFITS, AND INDIVIDUAL RESPONSIBILITY 95, 98 (Teresa Ghilarducci et al. eds., 2005).

51. *See id.* at 97–98.

52. *See id.*

53. *See* W. ANDREW ACHENBAUM, SOCIAL SECURITY: VISIONS AND REVISIONS 32–33 (1986). Brown also noted:

> The new focus [following the Advisory Council of 1937–38] became *adequacy* and the protection of the family unit. The principle of differential graduations in the primary benefits related to earnings levels was confirmed, not only to sustain incentive, but also to reflect the fact that adequacy of protection, itself, is related to the customary costs and standards of living of the family.

BROWN, *supra* note 16, at 136.

54. NAT'L RES. PLANNING BD., SECURITY, WORK, AND RELIEF POLICIES 47–48 (1942), *available at* http://www.ssa.gov/history/reports/NRPB/NRPBChapter3b.pdf.

55. *See* ACHENBAUM, *supra* note 53, at 21–22.

56. *See id.* at 16–17.

program provided payments to the oldest US citizens to prevent the elderly from dying in poverty once they outlasted the resources they had accumulated during their working years.[57]

In 1938, the Advisory Council on Social Security recommended adding a survivor's-insurance program to Social Security "intended primarily for the protection of the dependent orphans of deceased wage earners."[58] President Franklin D. Roosevelt celebrated the 1939 amendments that enacted this recommendation as "another tremendous step forward in providing greater security for the people of this country," emphasizing that the conversion of the "federal old age insurance system" into an "old age and survivors' insurance" system would protect "millions of widows and orphans . . . in the event of [a worker's] death . . . ."[59] Thus, Social Security survivor's benefits reflect collective policy decisions that, early in the program's history, established an emphasis on securing the financial stability of families after the loss of a wage earner.[60]

II. THE CURRENT STATE OF THE LAW

Congress has revisited Social Security repeatedly since 1939.[61] Although there have been several significant amendments and Social Security programs remain perennial topics of political debate,[62] the fundamental features of the survivor's-benefits program remain recognizable.[63] Indeed, the stability of the code governing survivor's

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57. The accompanying House Report noted:

> This situation necessitates two complementary courses of action: We must relieve the existing distress and should devise measures to reduce destitution and dependency in the future. Thus far in the depression, we have merely attempted to relieve existing distress, but the time has come for a more comprehensive and constructive attack on insecurity. The foundations of such a program are laid in the present bill.

H.R. REP. NO. 74-615, at 3 (1935).

58. *Reports & Studies: 1938 Advisory Council*, SOC. SECURITY ONLINE, http://www.ssa.gov/history/reports/38advise.html (last visited Jan. 22, 2013).

59. *See* Roosevelt, *supra* note 4.

60. *See* ACHENBAUM, *supra* note 53, at 32–33. Brown also observed:

> The new focus [following the Advisory Council of 1937-38] became *adequacy* and the protection of the family unit. The principle of differential graduations in the primary benefits related to earnings levels was confirmed, not only to sustain incentive, but also to reflect the fact that adequacy of protection, itself, is related to the customary costs and standards of living of the family.

BROWN, *supra* note 16, at 136.

61. *See generally* GEOFFREY KOLLMANN & CARMEN SOLOMON-FEARS, CONG. RESEARCH SERV., MAJOR DECISIONS IN THE HOUSE AND SENATE ON SOCIAL SECURITY: 1935–2000 (2001), *available at* http://www.socialsecurity.gov/history/reports/crsleghist3.html.

62. *See generally id.*

63. Schafer v. Astrue, 641 F.3d 49, 58 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012). *Compare* Social Security Act Amendments of 1939, Pub. L. No. 76-379, § 202(c), 53 Stat.

benefits in the face of change both in reproductive technology and in the associated fields of state law is the central issue in this Note.

A. The Code

The portion of the US Code that governs children's survivor's benefits is 42 U.S.C. § 402(d).[64] It establishes eligibility for "every *child* . . . of an individual who dies a fully or currently insured individual," subject to certain restrictions.[65] First, as an administrative matter, the child must apply for benefits.[66] Second, a child without a qualifying disability must be unmarried and not older than eighteen (or nineteen if still enrolled in school).[67] Third, the child applying as a survivor also must have been dependent upon the decedent at the time of his death.[68] The law deems that a child is

> dependent upon his father . . . or his mother . . . at the time [of the parent's death], unless, at such time, [the parent] was not living with or contributing to the support of [the] child and [either the] child is neither the legitimate nor adopted child of [the decedent] or [the] child had been adopted by some other individual.[69]

Each surviving child who meets these requirements is eligible to gain access to 75 percent of the deceased parent's primary Social Security benefits,[70] subject to limitations on the total benefits provided based on an individual worker's primary benefits.[71]

The definition of "child" cited in § 402(d) begins—in a tautology that suggests that the legislators were more interested in building on the term "child" than in precisely defining it—by explaining that "[t]he term 'child' means (1) the child . . . of an individual . . . ."[72] The legislative definition then expands beyond circular reference to embrace adopted children, well-established stepchildren, and certain otherwise-unsupported grandchildren.[73] So, instead of defining

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1360, 1364–65 (1939), *with* 42 U.S.C. § 402(d) (2006) (evincing similarities that still exist in the program).

64. 42 U.S.C. § 402(d) (authorizing various benefits to the dependent children of insured workers).

65. *Id.* § 402(d)(1) (emphasis added); *see infra* notes 72–74 and accompanying text addressing the ambiguous meaning ascribed to the term "child."

66. *Id.* § 402(d)(1)(A).

67. *Id.* § 402(d)(1)(B). Age limits vary depending on other circumstances. *See id.* § 402(d).

68. *Id.* § 402(d)(1)(C).

69. *Id.* §§ 402(d)(3)–(d)(3)(B). Section 402(d)(3) recognizes that a child can be dependent upon his "[parent] or adopting [parent]," suggesting that biology is not the only consideration when assessing survivor status. *See id.* § 402(d)(3).

70. *Id.* § 402(d)(2).

71. *See id.* § 403.

72. *See id.* § 416(e).

73. *See id.*

"child," it establishes a legislative category that builds on the common understanding of the term child.[74]

Isolated from the broader context of the statute, that broad category might easily expand to encompass the limits of reproductive technology; however, the legislation provides more specific guidance regarding the meaning of "child" in subsequent sections of the Act.[75] For example, when "determining whether an applicant is the child . . . of [an] . . . insured individual for purposes of [42 U.S.C.]," § 416(h)(2) establishes that

> [T]he 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 [the insured individual] was domiciled at the time of death, or, if such individual . . . was not so domiciled in any State, by the courts of the District of Columbia.[76]

Additional language in § 416(h) provides that an applicant who does not qualify as a decedent's child under the state intestacy law provisions of § 416(h)(2) may nevertheless qualify as that person's child[77] if, *before the parent died*, either the parent acknowledged the child in writing,[78] a court decree established the parental relationship,[79] or a court ordered the parent to support the child financially on the basis of a parental relationship.[80] In addition to these express acknowledgements and judicial determinations, "evidence satisfactory to the Commissioner of Social Security" may also establish that the insured individual was the applicant's parent and lived with or supported the applicant when the insured individual died.[81]

While other classes of survivor's benefits require evidence of actual dependency, § 402(d)(3) deems children to be dependent on their parents.[82] The presumption that a child is dependent upon her parents or adopted parents eliminates the need for children to demonstrate dependency and for the agency to evaluate dependency.[83]

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74. *See id.*

75. *See id.* § 416 (establishing "additional definitions" "for the purposes of this subchapter"); *see also infra* notes 76–87 and accompanying text.

76. 42 U.S.C. § 416(h)(2)(A).

77. *Id.* § 416(h)(3).

78. *Id.* § 416(h)(3)(C)(i)(I).

79. *Id.* § 416(h)(3)(C)(i)(II).

80. *Id.* § 416(h)(3)(C)(i)(III).

81. *Id.* § 416(h)(3)(C)(ii).

82. *Id.* § 402(d)(3). Although the deceased parents of postmortem-conceived descendants were, by definition, not "living with or contributing to the support" of their as-yet unconceived children at their death, the additional restrictions from § 402(d)(3)(A)–(B) keep postmortem-conceived descendants within the scope of the deemed support. *See id.*

83. *See id.*

The presumption covers children conceived before and born after a father's death.[84] It extends equal status to children whose parents failed to provide support during their lives.[85] The Code places certain limits on this presumption, recognizing the legal and practical impact of adoptions.[86] It also definitively establishes the legal fiction that any postmortem-conceived child whom state intestate law recognizes as the insured decedent's child drew financial support from a parent who died long before the child's conception.[87]

Taken together, these requirements clarify the status of postmortem-conceived children. There can be no evidence that an applicant and a decedent lived together when the decedent died before the applicant was conceived.[88] The statutory mechanisms for direct acknowledgement of the relationship by the decedent or through court proceedings are likewise unavailable to children whose parents die before their conception.[89] The remaining standard—the borrowing of state intestacy law—is therefore the only statutory mechanism that can determine that a postmortem-conceived child is a "child" of an insured worker under Social Security.[90] If a child meets that state standard, that child is deemed to have been dependent on the deceased parent at the time that parent died.[91]

B. Administrative and Judicial Interpretations of Postmortem-Conceived Children's Eligibility

The Social Security Administration adopted precisely the reading of the code described above, determining that if a child conceived after the death of an insured decedent is ineligible to inherit property from that decedent under state intestacy law, the child is likewise ineligible to receive survivor's benefits.[92] The Social Security Administration, following § 416(h)(2), uses the intestacy laws of an

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84. *See id.*

85. *See id.*

86. *See id.* § 402(d)(3)(B).

87. *See id.* § 402(d)(3).

88. *See id.* § 416(h)(3)(C)(ii).

89. *See id.* § 416(h)(3)(C)(i)(III) (requiring the "acknowledgement, court decree, or court order" to be made before the decedent's death).

90. *See id.* § 416(h)(2)(A).

91. *See id.* § 402(d)(3).

92. Social Security Online, *GN 00306.001 Determining Status as Child*, SOC. SEC. PROGRAM OPERATIONS MANUAL SYS., https://secure.ssa.gov/apps10/poms.nsf/lnx/0200306001 (last visited Jan. 13, 2013) ("A child conceived by artificial means after the [insured's] death cannot be entitled under the Federal law provisions of the Act (section 216(h)(3)). Such a child can only be entitled if he or she has inheritance rights under applicable State intestacy law.").

insured decedent's last state of residence.[93] A child who can inherit under that state's intestacy laws qualifies as a child of the decedent for the purposes of granting survivor's benefits.[94] A child who cannot inherit under the most accommodating version of state intestacy law in force between the death of the parent and the child's application for benefits does not qualify for survivor's benefits.[95] Not surprisingly, this definition drew challenges from parents of postmortem-conceived children in states where the intestacy laws do not recognize postmortem-conceived children after the Social Security Administration denied their applications for survivor's benefits.[96]

In 2004, the US Court of Appeals for the Ninth Circuit disagreed with the agency's interpretation of the Code, holding that, regardless of the method or timing of conception, all biological children whose parentage was not in question were eligible for survivor's benefits.[97] The Social Security Administration followed this ruling only within the Ninth Circuit, creating a unique standard for that region.[98] Several years later, the Fourth and Eighth Circuits affirmed the Social Security Administration's general interpretation limiting benefits to those postmortem-conceived children who met state intestate-law standards, although they disagreed about the reasoning.[99] The Fourth Circuit held this was the unambiguous requirement of the Social Security Act.[100] The Eighth Circuit, however, found the statute to be ambiguous before extending *Chevron*

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93. In applying state law it is determined:

> Section 216(h)(2)(A) of the Social Security Act (the Act) states in part that in determining whether an applicant is the child of a deceased insured individual, the Commissioner of Social Security (the Commissioner) shall apply such law as would be applied in determining the devolution of intestate personal property by the courts of the State in which the insured individual was domiciled at the time of his or her death.

Application of State Law In Determining Child Relationship, 63 Fed. Reg. 57,590, 57,591 (Oct. 28, 1998) (to be codified at 20 C.F.R. pt. 404).

94. *See id.*

95. When applying state law, it is noted:

> Therefore, when the insured is deceased, we will determine the status of such a child by applying the State inheritance law that is in effect when we adjudicate the child's claim for benefits. If the child does not have inheritance rights under that version of State law, we will apply the State law that was in effect when the insured died, or any version of State law in effect from the time the child first could be entitled to benefits based on his or her application until the time we make our final decision on the claim, whichever version is more beneficial to the child.

Id.

96. *See infra* notes 97–107 and accompanying text.

97. Gillett-Netting v. Barnhart, 371 F.3d 593, 598 (9th Cir. 2004).

98. *See* SSAR 05-1(9), 70 Fed. Reg. 55,656, 55,656 (Sept. 22, 2005).

99. Beeler v. Astrue, 651 F.3d 954, 963–64 (8th Cir. 2011), *cert. denied*, 132 S. Ct. 2679 (2012); Schafer v. Astrue, 641 F.3d 49, 62–63 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).

100. *Schafer*, 641 F.3d at 62–63.

deference[101] to what it found to be a reasonable administrative interpretation.[102] That same year, the Third Circuit read § 416(h) to apply only to nonbiological children.[103] The Third Circuit's decision aligned closely with the Ninth Circuit's decision, reinforcing the circuit split over the proper application of the venerable statute in an era marked by DNA testing and steadily advancing reproductive technology.[104] The Supreme Court finally addressed that split by granting certiorari to the Third Circuit case.[105] The Court held both that the Social Security Administration's reading of the statute was entitled to *Chevron* deference[106] and that the text did not support the interpretations advanced by the Third Circuit and the Ninth Circuit decisions.[107]

C. Capato II

The Court in *Capato II* decisively rejected the argument that genetic kinship trumped the statutory framework governing benefits eligibility, resolving the circuit split and effectively foreclosing administrative reinterpretation of the statute.[108] *Capato II* directly addressed the question of whether it was necessary to look to § 416(h) when a postmortem-conceived child—undeniably the biological child of an insured decedent—seeks to establish eligibility for survivor's benefits as "the child . . . of an individual" under § 416(e) alone.[109] Karen Capato, applying for survivor's benefits on behalf of her twin sons born through in vitro fertilization after the death of her insured

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101. *Chevron* deference prevents courts from second-guessing administrative-agency interpretations of ambiguous portions of those statutes entrusted to particular agencies by Congress. *See* Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984); *see, e.g.*, *Beeler*, 651 F.3d at 959–60.

102. *Id.* at 963–64.

103. Capato *ex rel.* B.N.C. v. Comm'r of Soc. Sec. (*Capato I*), 631 F.3d 626, 630 (3d Cir. 2011), *rev'd sub nom.* Astrue v. Capato *ex rel.* B.N.C. (*Capato II*), 132 S. Ct. 2021 (2012).

104. *Compare Capato I*, 631 F.3d at 630 (3d Cir.), *and* Gillett-Netting v. Barnhart, 371 F.3d 593, 598 (9th Cir. 2004), *with Beeler*, 651 F.3d at 963–64 (8th Cir.), *and Schafer*, 641 F.3d at 62–63 (4th Cir.). *See also Capato II*, 132 S. Ct. at 2030 (discussing some of the relevant changes in reproductive technology and law between the 1939 amendments and the present).

105. *Capato II*, 132 S. Ct. at 2027; *see infra* Part II.C.

106. *Capato II*, 132 S. Ct. at 2033.

107. The Court in *Capato II* noted:

> Tragic circumstances—Robert Capato's death before he and his wife could raise a family—gave rise to this case. But the law Congress enacted calls for resolution of Karen Capato's application for child's insurance benefits by reference to state intestacy law. We cannot replace that reference by creating a uniform federal rule the statute's text scarcely supports.

Id. at 2034.

108. *See id.* at 2030, 2034.

109. *Id.* at 2029.

husband, Robert Capato, had convinced the Third Circuit that § 416(h) did not apply to children like her sons.[110] The Third Circuit accepted Capato's argument that, since there was no doubt about the biological origins of the twins, there was also no need to consult a section of the statute designed to facilitate the "determination of family status."[111] The Supreme Court disagreed.[112] Following this decision, state-specific intestate-law analysis became determinative of postmortem-conceived children's eligibility for survivor's benefits.[113]

D. Intestacy Law and Postmortem-Conceived Children

Intestacy law provides a set of state-specific default rules for distributing the property of state residents who die without a will.[114] State intestacy laws focus intensely—even rigidly—on family status as defined by blood, marriage, and adoption.[115] The distribution schemes typically make no distinction based on economic reliance on the decedent or on the economic needs of the recipients.[116] Instead, they "mechanistically" distribute a decedent's estate based on shares assigned by legal and biological degrees of separation.[117]

Most states have not yet amended their intestacy laws to address the possibility of heirs born years after the death of a biological parent.[118] Those that have addressed the potential for postmortem-conceived children have understandably focused on the needs of the state and the interests of property owners within the state.[119] Predictably, different states addressed the issue by different means.[120] Several states adopted variations on the Uniform

110. *Id.*

111. *Id.* (internal quotation marks omitted); *Capato I*, 631 F.3d 626, 631 (3d Cir. 2011), *rev'd sub nom.* Astrue v. Capato *ex rel.* B.N.C. (*Capato II*), 132 S. Ct. 2021 (2012).

112. *Capato II*, 132 S. Ct. at 2029.

113. *See id.* at 2034.

114. *E.g.*, Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 206 (2001).

115. *Id.* at 206–08.

116. *See id.* at 208–09.

117. *Id.*

118. *See infra* notes 128–137; *see also* Alycia Marie Kennedy, Note, *Posthumous Conception and the Social Security Act*, 54 B.C. L. REV. (forthcoming 2013) (manuscript at 4), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2132532## ("Only eleven states have statutes dealing explicitly with posthumously conceived children.").

119. *See, e.g.*, Gloria J. Banks, *Traditional Concepts and Nontraditional Conceptions: Social Security Survivor's Benefits for Posthumously Conceived Children*, 32 LOY. L.A. L. REV. 251, 296 (1999) (citing the orderly administration of estates and discouraging unfounded claims as common state interests that lead to excluding postmortem-conceived children as heirs).

120. *See* Kennedy, *supra* note 118; *see also* David Shayne & Christine Quigley, *Defining 'Descendants': Science Outpaces Traditional Heirship*, 38 EST. PLAN. J. 14, 16 (2011) ("State statutes do not offer any consistency.").

Parentage Act (UPA), a piece of model legislation that addresses relationships between parents and children and includes provisions for recognizing postmortem-conceived children as heirs under certain circumstances.[121] Others have drafted their own qualifications for recognizing postmortem-conceived children as heirs.[122] Still others have relied on courts to address the issues that arise when ambiguities in laws drafted in earlier eras create disputes involving inheritance and postmortem-conceived children.[123]

The UPA addresses a plethora of family law issues arising when the legal relationship between adults and their "children" is uncertain.[124] This uncertainty complicates adoptions, child-support arrangements, sperm-and-egg-donation agreements, gestational agreements, and inheritance rights.[125] In addressing these traditionally state-governed areas of family law, property law, and contract law, the UPA relies heavily on intent and express consent to establish a person's parental relationship to a child.[126] A person who plans to reproduce after death—even a person who was unwilling to reproduce while alive—can effectively establish a legal parent-child relationship with a postmortem-conceived child in a jurisdiction that has adopted the UPA.[127]

Massachusetts provides an example of a common-law approach to addressing the status of postmortem-conceived children.[128] The Supreme Judicial Court of Massachusetts was the first high court to issue a decision regarding inheritance rights of "children conceived from the gametes of a deceased individual."[129] Massachusetts law

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121. The Act states:

> Article 7 deals with parentage when there is assisted conception and incorporates the earlier Uniform Status of Children of Assisted Conception Act into the 2002 Uniform Parentage Act almost without change. If a man and a woman consent to any sort of assisted conception, and the woman gives birth to the resultant child, they are the legal parents. A donor of either sperm or eggs used in an assisted conception may not be a legal parent under any circumstances.

Parentage Act Summary, UNIFORM L. COMM'N, http://www.uniformlaws.org/ActSummary.aspx?title=Parentage%20Act (last visited Jan. 13, 2013).

122. *See, e.g.*, *infra* notes 135, 137 and accompanying text.

123. *See, e.g.*, *infra* notes 129–132, 134 and accompanying text.

124. *See* UNIF. PARENTAGE ACT, Prefatory Note 1–2 (2002), *available at* http://www.uniformlaws.org/shared/docs/parentage/upa_final_2002.pdf.

125. *See id.*

126. *Compare id.* § 702 (establishing that "a donor is not a parent of a child"), *with id.* §§ 703–704 (establishing that a man who "provides sperm for, or consents to, assisted reproduction by a woman" is the resulting child's father), *and id.* § 707 (establishing that a deceased individual who consented to becoming a parent through postmortem conception may be a legal parent to a postmortem-conceived child).

127. *See id.* §§ 703–704, 707.

128. *See* Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 264 (Mass. 2002).

129. *Id.* at 261 (footnote omitted).

provided inheritance rights to a decedent's "issue." The high court relied heavily on state interests in promoting the welfare of children conceived before or after a parent's death, the efficient administration of estates, and the reproductive rights of both biological parents to determine whether "issue" included postmortem-conceived children.[130] The Massachusetts court declared that, at a minimum, a claim for inheritance rights on behalf of postmortem-conceived children must include evidence of the appropriate genetic relationship, the decedent's consent to postmortem reproduction, and the decedent's consent to support any postmortem-conceived children.[131] Thus, the Massachusetts court established a decedent's intentions as a critical factor for analyzing a postmortem-conceived child's claim against an estate.

Time limits also factor prominently in intestacy law.[132] These limits advance a common state preference for quick and decisive distribution of estates that allow market forces to put resources to their most productive uses. The Massachusetts court noted, but did not decide, the question of how soon a postmortem-conceived child must be born following the death of a parent in order to receive inheritance benefits,[133] but legislatures in other states and scholars have repeatedly identified timeliness as a significant feature of a postmortem-conceived child's inheritance claim.[134] Similar to Massachusetts, California requires evidence of a decedent's intent to procreate posthumously and sets a two-year time limit within which a child must be in utero in order to be treated as an heir under intestacy law.[135] Louisiana provides for a maximum of three years between death and birth in order for a posthumously conceived child to make a claim against an estate, and it requires evidence that the decedent intended the posthumous creation of a legal heir.[136] Scholars, like legislatures, advocate solutions that balance state interests, decedents' interests, and heirs' interests, typically requiring clear evidence of the decedent-parent's intent and setting a time limit long enough to allow for grieving and conceiving but not so long that the

130. *See id.* at 263–65; *see generally* Browne C. Lewis, *Dead Men Reproducing: Responding to the Existence of Afterdeath Children*, 16 GEO. MASON L. REV. 403, 416–20 (2009) (analyzing the reasoning of the Massachusetts court).

131. *Woodward*, 760 N.E.2d at 272.

132. *See* Schafer v. Astrue, 641 F.3d 49, 59 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012); *infra* notes 133–137 and accompanying text.

133. *See Woodward*, 760 N.E.2d at 267–68.

134. *See infra* notes 136–137 and accompanying text.

135. *See* CAL. PROB. CODE § 249.5 (Deering 2013).

136. *See* LA. REV. STAT. ANN. § 9:391.1 (2012).

administrators and other heirs are unduly inconvenienced waiting for heirs who may never be born.[137]

In sum, while variability is a hallmark of policies entrusted to the laboratories of democracy (the states), the states' approaches to incorporating postmortem conception into estate distribution tend to emphasize the same basic features. Consistent with estate law, as well as property law generally, the decedent's clearly expressed wishes regarding both the creation of postmortem-conceived children and the distribution of assets carry significant weight. Also, time limits generally favor resolving disputes over months or a small number of years rather than freezing assets for an extended period of time. As states alter their intestacy laws to respond to the possibility of postmortem-conceived children, both advancing technology and responsive changes to state intestacy laws make it prudent to consider postmortem-conceived children's eligibility for survivor's benefits. Do the policy motivations behind survivor's benefits favor eligibility for postmortem-conceived children?

III. FIT AND FRICTION: THE COMPETING RATIONALES UNDERLYING INTESTACY LAW AND SOCIAL INSURANCE

It may have been both necessary and beneficial in the 1930s for federal legislation to defer uncertain determinations about eligibility to the states' various legal paradigms.[138] Now, however, although the relationships at the core of intestacy law and survivor's insurance are similar,[139] the purposes of the two fields of law are not always commensurate. The similar goals and circumstances of Social Security survivor's benefits and state intestacy laws help to explain why the latter was and is a good guide for the former in most circumstances.[140] But the systems' typically harmonious purposes dictate conflicting outcomes when they evaluate postmortem-conceived children's claims.[141]

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137. *See, e.g.*, Lewis, *supra* note 130, at 443.

138. Describing Social Security's beginnings, Achenbaum noted:

> One of the most important facts to remember about the early years of social security is that it got off to a slow start. Without a large staff or even the money that had been appropriated to hire administrators, the Social Security Board's three members and their assistants had to establish procedures for a maze of new programs.

ACHENBAUM, *supra* note 53, at 27.

139. *See infra* Part III.A.

140. *See infra* Part III.A.

141. *See infra* Part III.B–E.

A. Family Focused

Survivor's benefits are most beneficial to a decedent's family when they replace the lost income quickly—before lost wages lead to missed payments.[142] State intestacy laws—also triggered by unexpected deaths—had (and continue to have) a related interest in identifying heirs and achieving a timely resolution to estate-related disputes so that life and commerce continue. This common purpose made existing bodies of state intestacy law valuable resources for a new federal program such as Social Security that aimed to deliver targeted benefits to assist families after the untimely death of a wage earner.[143] Although the federal program distributed publically funded benefits and the states' systems were providing the orderly disbursement of privately accumulated wealth,[144] both Social Security and state intestacy laws attempted to direct the resources under their care toward the dependent family members of a decedent.

For example, under typical[145] state intestacy laws, the ranking of presumptive heirs began with a legal spouse and children before extending to parents, siblings, and other more distant relatives.[146] The emphasis on keeping property within the household of the decedent had obvious benefits for a Social Security program focused on "family security" for "widows and orphans."[147] Intestacy law similarly allowed quick and final determinations of rights and relationships.[148] The state had an interest in clearing title quickly so that market forces could put property to its most economically beneficial use.[149] The federal government was also interested in quickly providing widows and orphans with benefits payments to partially replace the

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142. *See, e.g.*, NANCY J. ALTMAN, THE BATTLE FOR SOCIAL SECURITY: FROM FDR'S VISION TO BUSH'S GAMBLE 1–3 (2005) (describing the Social Security Administration's response to the terrorist attacks on September 11, 2001, that resulted in thousands of victims' family members receiving their first survivor's benefits checks by October 3, 2001).

143. *See* Marjorie Dick Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 261–62 (1977).

144. *See infra* Part III.B.

145. That these prioritizations are for the most part "typical" does not suggest that they are "natural"; ranking and resolving claims to the property of the dead is fundamentally a policy challenge subject to a variety of solutions. *See, e.g.*, Foster, *supra* note 114, at 252–71 (exploring several alternatives to the typical family paradigm in inheritance law, beginning with the elimination of inheritance). Similarly, the alignment between a body of law and a separate policy goal in one era does not ensure similar compatibility in all eras. For example, the inheritance laws that inform Jane Austen novels would probably not be of much use to a Victorian era program attempting to provide survivor's benefits to widows and orphans.

146. *See* BRASHIER, *supra* note 5, at 10–11.

147. *See* BROWN, *supra* note 16, at 140–45.

148. *See infra* notes 132–137 and accompanying text.

149. Lewis, *supra* note 130, at 443; *see infra* notes 132–137 and accompanying text.

wages that they lost through the sudden death of a worker.[150] Although disagreements about estates may drag out over months or years, a person's status as an heir is generally established by the relationship to the decedent at the time of death. This shared emphasis on the welfare of decedents' families makes intestacy law a potentially compatible source for survivor's-benefits–eligibility standards.

B. Private Property and Public Funds

While intestacy law and survivor's-benefits determinations both funnel resources to decedents' families, the different sources of those resources—personal property in intestacy law and federal funds in survivor's benefits—justify different analyses.[151] Intestacy law reflects society's judgment that one person's death should not result in property being removed from circulation or tied up in extended legal disputes because of the decedent's inadequate estate planning.[152] Survivor's benefits reflect society's judgment that one person's death should not result in destitute orphans.[153] Although both intestacy law and survivor's benefits reflect public-policy choices, intestacy law redirects private resources back into economic use in a way that happens to benefit surviving family members,[154] while survivor's benefits commit public funds to achieve their primary goal of supporting survivors.[155]

The branches of law that distribute or restrict private property are understandably influenced by owners' intentions, but the distribution of public funds (through social insurance) prioritizes

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150. *See* ALTMAN, *supra* note 142, at 2 ("Social Security recognized that it was vital to get benefits to the families quickly.").

151. Discussing survivor's benefits as a pool of resources distinct from a decedent's estate, Professor Brashier asserts:

> But if the children inherited nothing from his estate, then why should it matter whether they were his heirs? . . . The primary reason for seeking an heirship determination . . . was to make the children eligible for Social Security benefits as the heirs of their father, a deceased worker. In short, the children were not seeking to take from their father's estate but from the government.

BRASHIER, *supra* note 5, at 185–86.

152. *See id.* at 188; *cf.* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS div. 1, pt. 1, intro. note (1983) (rationalizing the Rule Against Perpetuities as a mechanism for ensuring that living owners of property are able to put that property to good use without interference from "the dead hand" of a deceased owner or the uncertainty inherent in superseding interests that might vest in as-yet unborn owners).

153. *See* Roosevelt, *supra* note 4 ("In addition to the worker himself, millions of widows and orphans will now be afforded some degree of protection in the event of his death . . . .").

154. *See* BRASHIER, *supra* note 5, at 185–86.

155. *See* Roosevelt, *supra* note 4 ("In addition to the worker himself, millions of widows and orphans will now be afforded some degree of protection in the event of his death . . . .").

collective, democratic intentions over private interests.[156] Intestacy law, therefore, exercises public judgment in response to absent or ineffective private estate planning without providing public funding; the heirs of a decedent with a will but no wealth receive nothing, while the heirs of a decedent with wealth but no will receive whatever portions of the estate the state's intestacy laws direct toward them. In the social-insurance realm of survivor's benefits, however, public policy first determines how much assistance (if any) is warranted and only then provides public funds to meet that need.[157] Just as estate law is not implicated when a person dies without property, survivor's benefits are not implicated when someone dies without leaving behind actual surviving dependents.[158]

C. Decedents' Intentions

A deep sense that the law should allow private-property owners to bequeath their private property to whomever they wish informs estate law, but it has no analogue when applied to the public funds implicated by survivor's benefits.[159] So, while policies incorporating postmortem-conceived children into state inheritance laws ought to balance decedents' intentions against other concerns, there is no corresponding justification for introducing decedents' intentions into a survivor's-benefits analysis.[160]

Since the fundamental goal of intestacy law is to put property back in circulation in an orderly fashion, any successful assignment of property to a new owner is socially beneficial.[161] But intestacy law is also part of a broader estate-distribution system that generally prefers to carry out the intentions of the decedent.[162] Thus, state courts and legislatures continue to consider the intentions of decedents when modifying state estate-planning laws to address complications

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156. *See* GRAETZ & MASHAW, *supra* note 44, at 42–45 (addressing the question, "how much social insurance is enough?" as a challenge to society to balance certain costs and benefits).

157. *See* ACHENBAUM, *supra* note 53, at 32–33 (describing tests for benefits eligibility and rates that were independent from an implicit government guarantee to make up for any difference between program expenditures and current payroll taxes); *see also* PETER J. FERRARA, SOCIAL SECURITY: THE INHERENT CONTRADICTION 113–17 (1980) (exploring with umbrage several ways by which public-policy determinations distinguish survivor's benefits from private insurance benefits).

158. *See* BROWN, *supra* note 16, at 136 (explaining the comparative paucity of coverage provided to single workers whose deaths would not generate survivor's benefits as illustrative of the general Social Security program's value of "adequacy" of coverage as opposed to an exclusive commitment to "equity").

159. *See supra* Part III.B.

160. *See* GRAETZ & MASHAW, *supra* note 44, at 41; *see also* FERRARA, *supra* note 157.

161. *See* Lalli v. Lalli, 439 U.S. 259, 268 (1978).

162. *See, e.g.*, Foster, *supra* note 114, at 209–10.

introduced by evolving family structures and reproductive technology.[163] This distinguishes estate law from social-insurance programs in which the decedent does not "own" survivor's benefits and has no property right in them that might be transferred based on the decedent's intent.[164]

Even to the extent that the family relationships that govern eligibility reflect the decedent's intentions—at least with respect to marriage and adoptions that require individual assent—Social Security makes it difficult for dying individuals to "game" the system.[165] Consistent with its original purposes, Social Security legislation limits dying workers' ability to manufacture dependent relationships—and corresponding entitlements—through adoption or marriage.[166] A marriage of less than nine months does not establish eligibility for spousal survivor's benefits.[167] A similar nine-month restriction applies to stepchildren,[168] and a support test for adoptions[169] (along with time restrictions) limits dependent relationships to those who actually depended on an insured decedent. These limits suggest legislative intent to channel benefits toward those with established need and reasonable expectations of support (but for death) while preventing sophisticated actors from manufacturing relationships in order to direct benefits from "their" Social Security to people not otherwise entitled to survivor's benefits.[170]

Decedents' bare intentions to provide support through Social Security have never been relevant for social-insurance purposes.[171] Actual prior support of a survivor by a decedent has always been the

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163. *See supra* notes 119–130 and accompanying text.

164. *See* GRAETZ & MASHAW, *supra* note 44, at 41.

165. *See infra* notes 167–169 and accompanying text.

166. *See infra* notes 167–169 and accompanying text.

167. *See* 42 U.S.C. §§ 416(c)(1)(E), 416(g)(1)(E) (2006).

168. *See id.* § 416(e)(2).

169. The statute notes:

> For purposes of [the clause providing benefits to adopted children], a person shall be deemed, as of the date of death of an individual, to be the legally adopted child of such individual if such person was either living with or receiving at least one-half of his support from such individual at the time of such individual's death and was legally adopted by such individual's surviving spouse after such individual's death but only if (A) proceedings for the adoption of the child had been instituted by such individual before his death, or (B) such child was adopted by such individual's surviving spouse before the end of two years after . . . the day on which such individual died . . . .

§ 416(e).

170. *See* Schafer v. Astrue, 641 F.3d 49, 58–59 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012).

171. *See generally* BROWN, *supra* note 16, at 111–13 (describing the general features of social insurance as including a primary emphasis on socially recognized need, rather than private insurance's focus on quid pro quo equity).

standard for evaluating dependency, because dependency is fundamentally about need—in this case, needs that will no longer be met following a death.[172] Social insurance is not an estate-planning tool by which individuals can impact the lives that remain after their death; it is instead a social program through which society replaces some of the financial support that a survivor would have received if the wage earner were living.[173] While a decedent may exercise personal intentions through optional life insurance and estate-planning tools, Social Security is mandatory.[174] It is neither voluntary nor customizable,[175] and its reliance on the financial commitments made by an insured worker during that worker's lifetime does not create an obligation to honor or even consider the wishes of a decedent when administering the program.[176]

Notably, Social Security ignores decedents' express wishes when dealing with other potential survivors.[177] It neither provides benefits to nor withholds them from applicants based on whether an insured worker's will names an applicant.[178] Social Security's function as social insurance rather than life insurance leads it to distribute benefits strictly on the basis of an established expectation of ongoing support.[179] A plan that explicitly contemplates a future in which a parent has died cannot serve as evidence that the parent intended to provide ongoing support as a wage earner.

Therefore, when considered in the context of postmortem-conceived children, the decedent's wishes for how those children should be included in the distribution of an estate are inapposite.[180] While it may be important to consider the decedent's reproductive and property rights when determining the fate of the preserved genetic material that makes postmortem reproduction possible,[181] the decedent's wishes do not deserve any weight when determining a social-insurance program's response to those decisions.

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172. *See Schafer*, 641 F.3d at 58–59.

173. *Id.* at 58.

174. SOC. SEC. ADMIN., SOCIAL SECURITY PROGRAMS IN THE UNITED STATES 21 (1968).

175. *See* Mashaw, *supra* note 50, 98–99.

176. *See* GRAETZ & MASHAW, *supra* note 44, at 41.

177. *See supra* Part II.A (describing the eligibility requirements for survivor's benefits).

178. *See supra* Part II.A.

179. *See* BROWN, *supra* note 16, at 112 ("[T]he emphasis upon imputed need involves the extension of the protection afforded from the primary beneficiary, whose earnings or health are lost, to those assumed to be or to have been dependent upon him and his earnings.").

180. *See supra* Part II.D.

181. As a legal matter, cryogenically stored embryos—and to a lesser extent sperm and eggs—exhibit characteristics of property while also receiving special attention as a result of their capacity to develop into fully autonomous human beings. *See* BRASHIER, *supra* note 5, at 181–83; Bailey, *supra* note 13, at 748–80.

A parent's intent to support a child born from that material may be entitled to substantial respect during the distribution of the estate, but it is irrelevant for survivor's benefits. Even a parent who would have been willing to provide support is clearly no longer able to do so. Decisions by states to enforce wills that include planned postmortem-conceived children as heirs or to accommodate certain postmortem-conceived children in default intestate systems do not make it reasonable to assume that a person who died last year will earn money next year to support a person conceived this year. Since decedents' intentions are incorporated through Social Security's reliance on state inheritance provisions, it may be necessary to blunt the impact of these new and irrelevant considerations on the survivor's-benefit program if they turn out to be not only irrelevant, but also harmful.

D. Moral Hazards

The disqualification of manufactured dependents limited the risk of moral hazards in the survivor's-benefits program;[182] people intent on getting more out of the system for their dependents had to either increase their base benefits level by earning (and contributing) more money or increase their number of dependents by actually supporting more people.[183] The one notable exception to this rule in the 1930s was a child conceived shortly before the father's death.[184] When a father died in the several months between conception and birth, his child would be eligible for survivor's benefits—even though the standard tests of support might not apply—because inheritance law broadly recognized these children as heirs to their fathers (as it typically does today).[185]

This active-pregnancy exception in intestacy law creates at most a theoretical moral-hazard problem of an insured worker maxing

182. *See supra* notes 167–169 and accompanying text.

183. *See* SOC. SEC. ADMIN., *supra* note 1, at 6 ("How much your family can get from Social Security depends on your average lifetime earnings. That means the more you have earned, the more their benefits will be."); ALTMAN, *supra* note 142, at 80 ("Those who contributed more in absolute dollars to the system—workers with higher wages—received higher benefits in absolute dollars.").

184. *See supra* Part II.A; *infra* note 185 and accompanying text.

185. *See, e.g.*, GA. CODE ANN. § 53-2-1(b)(1) (2012) (establishing that under Georgia's rules of intestate succession "[c]hildren of the decedent who are born after the decedent's death are considered children in being at the decedent's death, provided they were conceived prior to the decedent's death, were born within ten months of the decedent's death, and survived 120 hours or more after birth"); TENN. CODE ANN. § 31-2-108 (2012) ("Relatives of the decedent conceived before the decedent's death but born thereafter inherit as if they had been born in the lifetime of the decedent."); *see also* BRASHIER, *supra* note 5.

out his survivor's benefits by reproducing aggressively after learning that he is likely to die soon, thereby establishing his unborn children as his legal heirs. Language limiting this exception to those children conceived before the parent's death and born within a generous quasi-gestational timeframe following the death clearly marks this policy as an accommodation to the liminal qualities of pregnancy.[186] Since prognoses of death are still only predictions,[187] even a dying man intent on getting the most out of his Social Security benefits through his survivors—or, more plausibly, a dying man whose decision to make his genetic mark on the world was influenced by the promise of survivor's benefits—would have to consider all the other social and financial consequences of fathering children.

Modern reproductive technology changes the chronological relationship between death and reproduction[188] and the epistemic limits of paternity,[189] and reveals newly relevant moral-hazard concerns when linking intestacy law and federal social insurance. As a practical matter, frozen sperm, eggs, and embryos may remain viable indefinitely.[190] Whether or not estate law should permit postmortem-conceived children to make claims on private estates, decoupling the time of a child's conception from the lifespan of a parent opens significant gaps between that body of law and survivor's benefits. In effect, postmortem reproductive technology permits a surviving parent to decide to create a child,[191] knowing both that the other parent is already dead and unable to provide financial support and that Social Security survivor's benefits may provide a guaranteed

186. Pregnancy and fetal development occur between the legally significant actions that lead to conception and the legally significant birth of an independent human life. The necessary waiting that follows a decedent's choice to potentially create a dependent child does not fundamentally change the obligations that attach when parents put a pregnancy into motion.

187. *See, e.g.*, Paul Glare, Editorial, *Predicting and Communicating Prognosis in Palliative Care*, BRIT. MED. J., Aug. 25, 2011, at 1 (using the case of Abdelbaset Ali al-Megrahi—the Lockerbie bomber who survived for several years after a terminal prognosis led to his early release from prison—to illustrate the uncertain nature of terminal prognoses).

188. *See, e.g.*, Jennifer Levine et al., *Fertility Preservation in Adolescents and Young Adults with Cancer*, 28 J. CLINICAL ONCOLOGY 4831, 4835 (2010) ("Long-term follow-up studies have demonstrated successful pregnancies with sperm stored between 10 and 28 years.").

189. *See, e.g.*, *id.*; Social Security Online, *supra* note 15.

190. Maggie Davis, Comment, *Indefinite Freeze?: The Obligations a Cryopreservation Bank Has to Abandoned Frozen Embryos in the Wake of the Maryland Stem Cell Research Act of 2006*, 15 J. HEALTH CARE L. & POL'Y 379, 398 (2012).

191. *See, e.g.*, Jennifer A. Tash, et al., *Postmortem Sperm Retrieval: The Effect of Instituting Guidelines*, 170 J. UROLOGY 1922, 1923–24 (2003) (suggesting a period of mourning can allow a bereaved woman to "differentiate between her previous married life and her subsequent life without the deceased" before making decisions about reproduction "based on thoughtful considerations of outcomes").

source of public financing for the child's early years.[192] Postmortem reproduction bypasses the primary risks that survivor's benefits address, allowing the surviving parent to choose whether or not to reproduce after a partner's death. The ability to plan for reproduction after death introduces an element of moral hazard that was essentially nonexistent when only death could create orphans.

The ability to plan a postmortem pregnancy likewise undermines the justification for using intestacy law as a safety net to catch unknown, unacknowledged, and unborn children. Given the genetic certainty accompanying postmortem-conceived children, intestate heuristics no longer offer any assistance in determining likely biological kinship between a decedent and an applicant for survivor's benefits. Barring laboratory error, it is an absolute certainty that a genetic parent-child relationship exists. That genetic relationship is also largely irrelevant to the logic of social insurance, as survivor's-benefits determinations depend not on genetic kinship, but on social factors indicating that a child has a reasonable expectation of continued support.[193] Using state laws as a guide, Social Security steps in to replace support that children lose when a biological or legal parent dies.[194] But what expectation of support attaches to lives set in motion with full knowledge that a parent has already died?

E. Social Insurance or Reproductive Subsidy?

Traditionally, a child becomes a survivor when her parent dies, but a postmortem-conceived child acquires that status either at conception or at birth.[195] Thus, while traditional Social Security

192. *See supra* Part II. From a social-insurance perspective, this parenting situation is analogous to that of a single person who chooses to adopt or to employ modern reproductive technology to create a child using an anonymous sperm donor. People who choose to start or expand their families as single parents would, conceivably, create benefits-eligible children if they used gametes from people who died in states with permissive intestacy laws while people who chose to bring children into single parent families in other ways would not receive federal support through survivor's benefits. Aside from the peculiar possibility that state-by-state variances might establish a market for prequalified semen, ova, or even fetuses, the more pressing issue from a social-insurance perspective is that children knowingly brought into single-parent families—by whatever means—have not suffered an insurable loss. Their circumstances—at least with respect to family income—are precisely what they were at conception.

193. *See supra* Parts II.C, III.C.

194. *See Capato II*, 132 S. Ct. 2021, 2032 (2012).

195. *See* Schafer v. Astrue, 641 F.3d 49, 58–59 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 2680 (2012) (identifying the significance of the parent's death preceding the point at which the postmortem-conceived descendent "come[s] into being" for distinguishing these children from other survivors).

survivor's benefits responded to death, these reconceived insurance benefits now can spring from life. In the parlance of insurance, this treats the deliberate, technologically facilitated birth of a child as a covered loss.[196] Putting aside the political and legal implications of treating a healthy birth as an injury to the child and the family,[197] insurance generally does not compensate insured individuals whose carefully orchestrated plans achieve their intended results; it compensates for unexpected accidents.[198] The predictable conclusion of a carefully planned, medically assisted pregnancy is decidedly different from other categories of adverse events that typically trigger insurance payments—automobile accidents, disability, fires, or the death of a wage earner. Survivor's benefits paid to postmortem-conceived children may actually function as another type of planned payment—subsidies.[199]

Payments to postmortem-conceived children may more closely resemble subsidies[200] because, while social insurance spreads risk across society, subsidies promote certain behaviors by making them more profitable or less expensive than they would otherwise be.[201] For example, tax deductions for interest on home mortgages are subsidies because they effectively lower the cost of home ownership relative to renting by allowing homeowners to pay the interest with untaxed money; it is a subsidy that disproportionately benefits those who are able to purchase a home.[202] Since benefits payments to postmortem-conceived children also tie payments to voluntary behavior, they might reasonably be thought of as subsidies.[203] This leads to a peculiar outcome: a program initially designed to alleviate the economic insecurity associated with "widows and orphans"[204] would, as a result of changed circumstances, effectively subsidize

196. A covered loss is an event that triggers an insurance payment. *Covered Loss*, BUSINESSDICTIONARY.COM, http://www.businessdictionary.com/definition/covered-loss.html (last visited Feb. 9, 2013).

197. Even wrongful birth or wrongful life torts are predicated on the contention that, but for a defendant's failure to provide relevant information, a plaintiff would have chosen to prevent a birth. *See* Kelly E. Rhinehart, Student Article, *The Debate Over Wrongful Birth and Wrongful Life*, 26 L. & PSYCHOL. REV. 141, 142 (2002).

198. *See, e.g.*, BROWN, *supra* note 16 (defining insurance to require a loss beyond the control of the insured).

199. *See Schafer*, 641 F.3d at 59.

200. *See id.*

201. *See generally* Dennis J. Ventry, Jr., *The Accidental Deduction: A History and Critique of the Tax Subsidy for Mortgage Interest*, 73 LAW & CONTEMP. PROBS. 233, 278 (2010).

202. *See id.* at 264–65.

203. *See Schafer*, 641 F.3d at 59.

204. *See* Franklin D. Roosevelt, *supra* note 4.

medical interventions through which widows would create more orphans.[205]

Assuming that the people who choose to engage in postmortem procreation act rationally, any subsidy would tend to increase the rate of use.[206] Even if other concerns predominate the decision-making, the effective reduction in cost or the perceived security of guaranteed supplemental income to support the child will persuade some families to undergo the procedures who would not have done so otherwise.[207] Increasing the rate of fertility procedures would channel additional patients and payments to the individuals and institutions that provide those medical services. Some of those payments will come from the patients. Additional support will flow from private and public forms of medical insurance. While it will be possible to limit the cost imposed on others through limits on insurance coverage for expensive technologically assisted reproductive procedures, it will not prevent eighty-year-old Social Security legislation from effectively subsidizing the increased utilization of modern elective medical procedures in contravention of recent policy decisions about the efficient allocation of medical resources.[208]

These policy and budgetary concerns apply differently to social insurance than to intestacy law because they deal with public funds.[209] Property law permits bizarre requests and bequests because of a fundamental commitment to allowing property owners to dispose of their estates according to their wishes.[210] Likewise, family law focuses on chosen associations as well as biological relationships. These areas of law give effect to private decisions, and when Social Security

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205. While it may be jarring to think of children with one living and one deceased parent as orphans, that dissonance is itself a product of the Social Security survivor's benefits program. BROWN, *supra* note 16, at 112 ("The provision for survivors benefits for younger widows and their children in the 1939 revision of the Social Security Act did more to eliminate the word 'orphan' from the American vocabulary than any other development.").

206. For example:

> [E]conomists had already indicted the [mortgage interest deduction] for distorting the cost of owner-occupied housing relative to other investments, contributing to overinvestment in the asset class and misallocation of capital stock, artificially raising housing prices, disproportionately favoring high-income taxpayers, encouraging over-consumption of bigger and more-expensive homes, and having ambiguous effects on tenure choice (that is, the decision to own or rent).

Id. at 234 (footnotes omitted).

207. *See, e.g.*, Ventry, *supra* note 201, at 234.

208. *See generally* Peter R. Orszag & Ezekiel J. Emanuel, *Health Care Reform and Cost Control*, 363 NEW ENG. J. MED. 601, 601–03 (2010) (discussing how the Affordable Care Act will reduce healthcare costs).

209. *See supra* Part III.B.

210. *See, e.g.*, THE ART OF THE STEAL (IFC Films 2009) (presenting an ongoing legal dispute over the Barnes art collection which, according to Albert Barnes's will, was never to be moved from the Philadelphia home in which he assembled it).

borrows rules and definitions from those areas of law, it may defer to those private decisions. While these borrowings may be harmless, they deserve scrutiny, especially when they invite small-scale manipulations that might undermine public confidence in a crucial social safety net.

IV. SOLUTION

While the Court's holding in *Capato* does not entirely preclude an administrative reinterpretation of the old statutory scheme, Congress should amend the Social Security Act to explicitly address the survivor's-benefits eligibility of postmortem-conceived children. The clear instructions of previous Congresses currently require the Social Security Administration to look to state intestacy laws to determine whether an applicant who claims to be the child of a particular insured individual is that individual's "child" for the purposes of Title 42.[211] Congress also requires the Social Security Administration to presume that a child depended on her parent, regardless of how long that parent had been dead when the remaining parent used medical technology to bring the child to life.[212] Together, those congressional mandates require the Social Security Administration to pay so-called insurance benefits even though the absence of the insured parent (and the parent's financial support) was an absolute certainty prior to the deliberate choices that brought these lives into being. Congress's decision to yolk a federal program's determinations of family status to state laws and to preclude any meaningful inquiry into dependency created this perverse system; Congress can and should correct the problem.

A. Legal Mechanism for Excluding Postmortem-Conceived Children from Survivor's Benefits

While it would be possible to exclude postmortem-conceived children from survivor's benefits by modifying the statutory definition of "child" in 42 U.S.C. § 416(e) and the procedures for determining family status in § 416(h), it would be better to leave family determinations to the states and simply revise § 402(d)(3) to reflect the current state of reproductive science. Just as the Code previously recognized the exception to a presumption of support created by adoption,[213] it should now recognize a similar exception for

211. *See supra* note 76 and accompanying text.

212. *See supra* notes 82–87 and accompanying text.

213. *See* 42 U.S.C. § 402(d)(3)(B) (2006).

postmortem reproduction. This could be accomplished with a simple addition to § 402(d)(3):

> A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) unless, at such time, such individual was not living with or contributing to the support of such child and
>
> (A) such child is neither the legitimate nor adopted child of such individual, or
>
> (B) such child has been adopted by some other individual, *or*
>
> *(C) such child was born as a result of a pregnancy initiated after the death of such individual.*[214]

By modifying the survivor's-benefits program's presumptions about dependency rather than the definition of family relationships, this solution honors both the states' traditional role in family law and the federal government's authority to establish the parameters of federal programs.

B. Impact of Excluding Postmortem-Conceived Children from Survivor's Benefits

The above modification would free states to explore various options for balancing a property owner's interest in shaping the distribution of personal property against the state's (and heirs') interests in timeliness and finality, without entangling federal benefits programs. As discussed above, states are already finding various ways to honor the choices that individuals make to utilize reproductive technology and to distribute their property after death.[215] Eliminating an accidental subsidy on postmortem reproduction will eliminate any undue influence such a subsidy might have on the important policy decisions about family and property law being made in each state.

Drawing a clear line at death would free surviving spouses and partners from any perceived need to rush decisions about whether to conceive in the midst of the turmoil surrounding a death.[216] While the

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214. Compare the suggested text with the current version:

> A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) unless, at such time, such individual was not living with or contributing to the support of such child and—
>
> (A) such child is neither the legitimate nor adopted child of such individual, or
>
> (B) such child has been adopted by some other individual.

Id. § 402(d)(3).

215. *See supra* Part II.D.

216. Woodward v. Comm'r of Soc. Sec., 760 N.E.2d 257, 268 (Mass. 2002) (dictum) ("In the case of posthumously conceived children, the application of [a] one-year limitations period . . . requires, in effect, that the survivor make a decision to bear children while in the freshness of grieving.").

states have some interest in the timely and orderly disposition of estates, the federal government has no legitimate interest in a use-it-or-lose-it postmortem procreation subsidy that could push grieving survivors to follow through with ex ante plans made with the deceased, nor does the federal government have a legitimate interest in encouraging, through a faux-insurance subsidy, the hasty creation of one life in response to the loss of another. The federal government should not unnecessarily disturb individuals grieving a loss, celebrating a life, and reflecting on the future by incentivizing hasty decisions in the aftermath of a death.

Limiting survivor's benefits to lives in being at the time of the death would prevent a program intended to stabilize the financial footing of widows and orphans from drifting into subsidizing technologically assisted reproduction. While society may determine that it has an interest in supporting certain forms of reproductive assistance for all or some of its people, an accidental subsidy of the sort currently offered would most benefit those families that are wealthy enough to engage in the often expensive prospect of technologically assisted reproduction. It is difficult to imagine a justification for preferentially subsidizing medically enhanced reproduction. It is considerably easier to envision a few well-publicized instances of such a practice eroding public support for the broader survivor's benefit program.[217] Instead, preserving the character of the program as a safety net for the widows and orphans of President Roosevelt's signing statement would leave legislators free to debate the merits of deliberate government action in other areas relevant to the new technology.

V. CONCLUSION

As early as 1866, a scientist studying the physiology of sperm cells speculated that someday "a man dying on the battlefield may beget a legal heir with his semen frozen and stored at home."[218] Today, the technology that makes it possible for that dying man to beget a biological heir is an accepted part of the US medical landscape.[219] States will continue to adjust intestacy law and property law to accommodate these technological advances, extending measured inheritance rights that balance the traditional interests of the state, the decedent, and the potential heirs to private estates. So long as the Social Security Act remains as written, those changes to

217. *See, e.g.*, Ventry, *supra* note 201, at 234.

218. Anger, et al., *supra* note 20.

219. *See generally* Sparrow, *supra* note 14, at 173–74, 181.

the systems of state laws that distribute private fortunes will continue to dictate the terms by which public funds meant to provide security to widows and orphans are instead distributed to subsidize knowing private choices to create heirs for the dead.

As imaginative speculation coupled with diligent experimentation continues to expand the possibilities for human action, the law must adapt. In the case of survivor's benefits, Congress's reasonable delegation in the 1930s of certain parent-child determinations to state law and its presumption that all children once depended on their parents' incomes is no longer reasonable. That delegation depended on assumptions that no longer hold true because technology has given birth to exceptions. Congress's clear instructions preclude an administrative or judicial adjustment. It is up to Congress to uncouple the insurance function of Social Security from the distinct state functions of intestacy law. Congress can accomplish this uncoupling by gently adjusting the presumption of dependency to account for the technology that allows humans to reproduce not only in anticipation of death but also as a response to it.

In doing so, Congress should extend survivor's benefits only to those children who actually survived the death of a parent—those who suffered the kind of loss contemplated by the drafters of the Social Security Act. The lives of children knowingly conceived after a biological parent's death are not losses for which we need social insurance. They are, instead, the quintessential example of technology that has made it possible for human beings to reduce the impact of chance on reproduction. Congress would be wise to continue to rely on states to police the boundaries of complicated family relationships; however, Congress should not rely entirely on the states' determinations of rights to private property when administering a public system of social insurance. Social insurance and intestacy law draw on different resources to solve different problems. Those differences cause these systems to justifiably give different weights to private intentions and public determinations. Ignoring these distinctions in the face of advancing technology creates potential inefficiencies and injustices. By distinguishing lives created after death from those in being at the time of death when determining

eligibility for survivor's benefits, the solution proposed in this Note would preserve the social-insurance function of survivor's benefits.

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