Flirting with Federal Family Law

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Courtney G. Joslin, *Federalism and Family Status*, 90 **Indiana L. J**. 787 (2015).

Should the definition of "marriage" be federal? What about the definitions of "parent" and "child"? Courtney Joslin's carefully written article, *Federalism and Family Status*, traces the history of how the law has treated family status determinations and sets forth a framework, grounded in the federalism literature, on when family status should be determined on a state-by-state basis or as a federal matter.

Joslin's article was written before two major events that have changed the family law landscape—the Supreme Court's 2015 decision in *Obergefell v. Hodges* and the presidential election of 2016. In *Obergefell*, the Supreme Court struck down state bans on same-sex marriage, thus essentially federalizing the definition of marriage in one important respect. In the election, Donald J. Trump prevailed, and with him came fears that he will to appoint conservative justices who might overturn *Obergefell*. At this particular historical moment, Joslin's article is worth rereading with an eye to applying her theory to this drastically changed landscape.

Joslin's article begins by debunking the theory that all family status determinations are made at the state level. She acknowledges the extant scholarship on "federal family law" by scholars such as Jill Hasday, Kristin Collins, and Reva Siegel that has already dismantled the notion that all family regulation is state-based, but then identifies one "core" of family law that most scholars still assume cannot be federal—family status determinations. These determinations—who is married, who is a parent—are still widely understood to be governed by state law. Joslin deftly shows how the federal government has nevertheless affected the law of family status determination in several ways. First, Congress has often crafted its own definition of "child" for determining eligibility for federal programs such as Social Security regardless of how a "child" would be defined by state family law. Likewise, federal courts have also adopted independent federal definitions of family status when they interpret federal law. In both instances, the justification has usually been that uniformity is necessary to achieve fairness in the implementation of the federal program or benefit.

So far, the instances Joslin identifies seem completely understandable—in order to administer a federal scheme, the government must have eligibility requirements, and these requirements should not vary depending on the state of one's residence or domicile. She observes, however, that Congress has also been remarkably active in its attempts to coerce states into adopting family status rules that conform to federal ideals, even where no benefits scheme is involved. For example, Congress has conditioned state receipt of welfare funds on a state's willingness to assign legal parentage to genetic fathers of nonmarital children, often through the creation and adoption of voluntary acknowledgment of paternity (VAP) programs. On this account, many of the definitions of parentage that appear to be voluntarily adopted by states have actually been shaped by federal intervention.

Once Joslin identifies the ways in which Congress and federal courts have shaped family status rules, she develops a normative framework for when this type of lawmaking is appropriate. This is the part of the paper that is the most interesting now, with the trajectory of family law up for grabs. Joslin looks to the massive literature of federalism to derive principles of when state or federal control over an area is desirable. State control, she observes, produces decentralized experimentation and can foster innovation. States, too, she observes, as closer to the people, so state action promotes "community buy-in." When government is closer to the people, it can act as a check on national power, prevent tyranny, and promote liberty.

At the same time, Joslin notes, uniformity is sometimes important to ensure fairness and equality. Special interests can

capture local governments, and the federal government may have to intervene to correct for market failure.

Applying these competing principles to family law, Joslin advocates for a system in which experimentation is encouraged in the early stages of change and the federal government intervenes once there has been "sufficient airing of the issue and a general consensus or trend has emerged." This balance, she argues, will respect the "dynamic" nature of family law and the need for "law to adapt to fit" new realities. It is desirable, she argues, in areas such as the law of gestational surrogacy and the legal status of posthumously born children that the states experiment with different approaches. Because we cannot know with certainty what the "right" direction is in uncharted territory, a state-by-state approach is both safer and more likely to guide us to the right result.

In contrast, there are some areas in which there is enough of an emerging national consensus that the need for uniformity overrides the need for experimentation. Joslin suggests that family law may be a place in which this need for uniformity is particularly acute. Because family members are dependent on one another, both financially for emotionally, "there is something deeply unsettling about a world in which one is considered a child or a parent for some purposes and in some places but not others." Same-sex marriage provides a perfect example of Joslin here; with the majority of states in the U.S. recognizing same-sex marriage, the need for uniformity is fast outstripping the need of states to experiment.

Joslin's nuanced approach calls for federal restraint when attempting to shape state definitions. In situations invoking constitutional rights, she argues, "there may be times when early federal intervention is not only helpful, but indeed, may be necessary." In most circumstances, however, Joslin suggests that "aggressive" federal intervention is likely to be a mistake, resulting in lost opportunities for experimentation and a lack of community buy-in.

So, what to make of Joslin's arguments today? Now that *Obergefell* has been decided, we have—for the time being—a requirement imposed by federal constitutional law that any definition of marriage must include same-sex couples. We still, however, have wide variation across states on questions of parentage, especially those involving alternative reproductive technologies (ART). In this landscape, Joslin's article offers to reasons for hope. First, the article confirms the rightness of *Obergefell*. Although the majority opinion has serious flaws, under Joslin's rubric, the big-picture take-away is that society has moved enough in the direction of recognition of same-sex marriage that federal recognition is both timely and appropriate. Could a different Supreme Court overrule this opinion? Certainly yes. But the inexorable trend has been for younger generations to embrace marriage equality and, even if the Court were to undo its work, marriage equality has won the hearts and mind of millennial voters. As for the myriad state-level parentage recognition schemes, Joslin's article counsels us not to worry so much. Experimentation can be good. California's recent statutory adoption of up to three legal parents, for example, seems a welcome experimentation but one that is not ripe for adoption on a national scale. Finally, the benefits of federalism come to the fore when a nation changes its federal leadership so drastically, so quickly. Uniformity can be good, but only when we have a collective consensus on what the "right" answer is. After a national election in which the electors and the popular vote split and the nation is almost evenly divided, it may be time to celebrate the local.

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