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Social Security Survivor Benefits: Why Congress Must Create a Uniform Standard of Eligibility for Posthumously Conceived Children

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SOCIAL SECURITY SURVIVOR BENEFITS: WHY CONGRESS MUST CREATE A UNIFORM STANDARD OF ELIGIBILITY FOR POSTHUMOUSLY CONCEIVED CHILDREN

Abstract: Legal issues surrounding posthumously conceived children often arise in the context of the Social Security Act, which looks to state law to determine who qualifies for benefits through a deceased parent. Because states have failed to respond promptly to the possibility of posthumous conception, reliance on state law does not adequately protect the rights of this special class of children. This Note argues that Congress must create a uniform standard of Social Security eligibility for posthumously conceived children, and proposes that such children should receive benefits only if (1) before death, the deceased father agreed in writing to be responsible for and support a child conceived with his frozen sperm, and (2) the child is conceived within four years of the father’s death.

Introduction

Imagine a young couple, just married and eager to start a family.1 Before they can attempt to conceive any children, however, the husband is diagnosed with cancer, forcing them to put their plans on hold.2 Remaining optimistic, the couple freezes the husband’s sperm to preserve their ability to have children after he recovers.3 But, despite chemotherapy and radiation treatments, doctors finally inform the couple that the husband will soon die.4 Devastated, the couple tries to cope with the news that their dream of raising a family together will never come true.5 Ultimately, they decide that although the husband will be gone, the wife will use his frozen sperm to have a baby.6 The thought that his wife will still be able to bear his children greatly comforts the husband in his final days.7 After he dies, his wife becomes

1 See Beeler v. Astrue, 651 F.3d 954, 956 (8th Cir. 2011) (presenting similar facts).
2 See id.
3 See id.
4 See id. at 957.
5 See id.
6 See id.
7 See Beeler, 651 F.3d at 957.
pregnant and gives birth to a child.8 Should this child—fatherless only because cancer tragically interrupted the couple’s plans—have fewer rights than a child whose father lived to conceive the baby naturally?9

The law has always addressed the rights of posthumous children conceived before and born after their fathers’ deaths.10 But recent advancements in reproductive technology have created a new type of posthumous child like the one described above: a child conceived after the death of one or both of the child’s genetic parents.11 Unfortunately, the law does not protect posthumously conceived children as uniformly as traditional posthumous children.12 Legal issues surrounding posthumously conceived children often arise in the context of the Social Security Act (“the Act”), which looks to state law to determine who qualifies for benefits through a deceased parent.13 Because states have failed to respond promptly to the possibility of posthumous conception, reliance on state law does not adequately provide uniform protection for this special class of children.14 Therefore, this Note argues that Congress must create a uniform standard of Social Security eligibility for posthumously conceived children that addresses their unique situation.15

Part I of this Note details developments in reproductive technology that have allowed for the possibility of posthumous conception, and explains the Act and its relationship with the Social Security Admini-

8 See id.
14 See infra notes 37–44 and accompanying text; see also Banks, supra note 9, at 330 (noting that inconsistencies in state laws for posthumously conceived children have led to different treatment of similarly situated children based on the father’s state of domicile at death).
15 See infra notes 209–354 and accompanying text.
stration (SSA). Part II discusses the first case to interpret the Act for a posthumously conceived child seeking Social Security survivor benefits, and then explains the SSA’s response to that ruling. Part III analyzes the circuit split created by the three circuit court cases that addressed the issue in 2011. Part III then details the 2012 case, Astrue v. Capato (Capato II), in which the U.S. Supreme Court resolved the circuit split by holding that the SSA’s interpretation of the Act as requiring posthumously conceived children to qualify as heirs under state intestacy law in order to receive child survivor benefits was reasonable and entitled to deference. Finally, Part IV argues that posthumously conceived children should not have to rely on state intestacy statutes to qualify for benefits and discusses the reasons that Congress must update the Act at the federal level. Part IV then contends that an appropriate addition to the Act would explicitly allow posthumously conceived children to receive benefits if (1) they are conceived within four years of their fathers’ deaths, and (2) before death, their fathers provided written consent to have and to support the children conceived with their frozen sperm.

I. Posthumous Conception and the Social Security Act

Section A of this Part addresses assisted reproduction and discusses how states have responded to the possibility of posthumous conception. Section B explains the relevant provisions of the Act and why they become problematic when applied to posthumously conceived children. Section C explains the SSA’s role in interpreting the Act and discusses the level of deference courts must afford to the SSA’s interpretation.
A. Posthumously Conceived Children

Assisted reproduction and cryopreservation are appealing options for couples facing cancer. Because chemotherapy can leave a man sterile, he may choose to freeze his sperm before undergoing treatment to preserve the couple’s ability to have children. If he later dies, his wife might use the sperm to conceive a child after his death. Questions concerning whether posthumously conceived children can inherit from their deceased fathers arise from this fact pattern when the child applies for Social Security survivor benefits.

Modern medicine has developed various methods of assisted reproduction to make posthumous conception possible. One popular method is artificial insemination, in which the sperm is inserted into the woman to fertilize her egg as in natural conception. Another commonly used procedure is in vitro fertilization. There, fertilization of an extracted egg occurs outside the body, and the resulting zygote is subsequently implanted into the woman’s uterus.

In anticipation of assisted reproduction, men can preserve sperm through cryopreservation, by which the sperm is frozen to suspend development until it is needed. Sperm can be stored for many years through this process, allowing for conception long after the donor’s death. Cryopreservation of eggs is also possible. Thus, through assisted reproduction, a woman with donated sperm and a donated egg could conceive a child after both of its genetic parents are deceased.

25 See Capato II, 132 S. Ct. at 2025 (using assisted reproduction and cryopreservation to preserve a cancer-stricken husband’s sperm); Beeler, 651 F.3d at 956 (same); Schafer v. Astrue, 641 F.3d 49, 51 (4th Cir. 2011) (same); Gillett-Netting v. Barnhardt, 371 F.3d 593, 594 (9th Cir. 2004) (same).
26 Nolan, supra note 11, at 1072.
27 Id.
28 See Capato II, 132 S. Ct. at 2025; Beeler, 651 F.3d at 957; Schafer, 641 F.3d at 51; Gillett-Netting, 371 F.3d at 595.
29 Nolan, supra note 11, at 1069–70.
30 Id. at 1069.
31 Id.
32 Id. at 1070. Additionally, reproduction can occur through a gamete intrafallopian transfer, in which the sperm and egg are injected into the woman’s fallopian tubes where fertilization occurs. Id. at 1070–71. In a similar procedure called zygote intrafallopian transfer, fertilization occurs outside the body, as with in vitro fertilization, and the zygote is subsequently injected into the fallopian tubes. Id. at 1071.
33 Id. at 1071.
34 Id.
35 Nolan, supra note 11, at 1071.
36 See id.
Because these technological advancements are so recent, the status of posthumously conceived children with respect to their deceased parents has received little attention from state legislatures or judiciaries. Only thirteen states have statutes dealing explicitly with posthumously conceived children. Nine of these states have adopted a version of the Uniform Parentage Act (“UPA”), a model act that addresses the establishment of parent-child relationships. The UPA acknowledges a parent-child relationship if the father provided written consent to be the parent of a child conceived by a woman with his sperm after his death. The four other states address posthumously conceived children in their intestacy statutes, specifically allowing such children to inherit from their deceased parent if they meet certain criteria. In the remaining states, no laws expressly discuss posthumously conceived children. Because these states’ intestacy statutes were drafted before posthumous conception was possible, most statutes are ambiguous as applied to posthumously conceived children. Only a very small num-

37 See infra notes 38–43 and accompanying text.
38 See infra notes 39–42 and accompanying text.
40 Unif. Parentage Act § 707 (2002). Section 707 of the UPA states:

If an individual who consented in a record to be a parent by assisted reproduction dies before placement of eggs, sperm, or embryos, the deceased individual is not a parent of the resulting child unless the deceased spouse consented in a record that if assisted reproduction were to occur after death, the deceased individual would be a parent of the child.

Id.
42 See David Shayne & Christine Quigley, Defining ‘Descendants’: Science Outpaces Traditional Heirship, 38 Est. Plan. 14, 17 (2011) (noting that only about one-third of states have statutes or case law dealing with posthumously conceived children).
43 See, e.g., Finley v. Astrue, 270 S.W.3d 849, 853–55 (Ark. 2008) (analyzing whether freezing an embryo during the father’s life made the resulting child, implanted into the mother after the father’s death, fit into Arkansas’ intestacy statute covering posthumous
ber of cases have attempted to interpret intestacy laws for posthumously conceived children, and they reach varied results.\textsuperscript{44}

Moreover, posthumously conceived children are in a unique position that was not anticipated by the drafters of the Act.\textsuperscript{45} Thus, when these children began to apply for survivor benefits under the Act, unforeseen tensions arose in its interpretation.\textsuperscript{46}

B. The Social Security Act

In 1935, Congress passed the Act to promote economic stability following the Great Depression by providing continued income to workers after retirement.\textsuperscript{47} Congress amended the Act in 1939 and created survivor benefits for children whose working parents had died.\textsuperscript{48} The underlying goal of these child survivor benefits was to replace the lost financial support of the deceased wage earner.\textsuperscript{49} By keeping families together and giving children the opportunity to grow up securely, Congress intended to increase the chances that these children would become productive adults, rather than wards of the state, despite the untimely death of a parent.\textsuperscript{50} In 1965, Congress amended the Act to

\textsuperscript{44} See, e.g., Finley, 270 S.W.3d at 850 (holding that posthumously conceived children cannot inherit under Arkansas intestacy law); Woodward, 760 N.E.2d at 259 (holding that posthumously conceived children can inherit under Massachusetts intestacy law in limited circumstances); Khabbaz, 930 A.2d at 1182 (holding that posthumously conceived children cannot inherit under New Hampshire intestacy law); In re Estate of Kolacy, 753 A.2d 1257, 1264 (N.J. Super. Ct. Ch. Div. 2000) (holding that certain posthumously conceived children can inherit under New Jersey intestacy law).

\textsuperscript{45} See Capato ex rel. B.N.C. v. Comm’r of Soc. Sec. (\textit{Capato I}), 631 F.3d 626, 627 (3d Cir. 2011) (“It goes without saying that these technologies were not within the imagination, much less the contemplation, of Congress when the relevant sections of the Act came to be . . . .”), rev’d and remanded sub nom. Astrue v. Capato ex rel. B.N.C., 132 S. Ct. 2021 (2012).

\textsuperscript{46} See Gillett-Netting, 371 F.3d at 595–96.


\textsuperscript{50} Banks, \textit{supra} note 9, at 358.
expand the class of children eligible for survivor benefits to include many extramarital children who were previously ineligible.\footnote{Social Security Act Amendments of 1965, ch. 666, Pub. L. No. 89-97, 79 Stat. 286, 409-10 (codified as amended at 42 U.S.C. § 416(h)); see Knaplund, supra note 49, at 632.}

The old-age and survivor benefits provision, 42 U.S.C. § 402, details the Act’s overall scheme.\footnote{42 U.S.C. § 402.} Section 402(d) states that “every child (as defined in 416(e) of this title)” is entitled to Social Security survivor benefits provided that the child meets certain enumerated criteria.\footnote{42 U.S.C. § 402(d) (2006). The child must be unmarried, below specific age limits or under disability beginning before age twenty-two, and dependent on the insured at the time of the insured’s death. Id.} Unfortunately, §§ 416(e) and 416(h) define the term “child” differently, and from the Act’s text it is unclear how Congress intended these sections to interact.\footnote{Capato II, 132 S. Ct. at 2029 (discussing opposing interpretations of how the two sections interact).} Though this lack of clarity is harmless in most cases, it becomes problematic when a posthumously conceived child applies for benefits.\footnote{See Gillett-Netting, 371 F.3d at 595–96 (“[T]he Social Security Act . . . [does not make] clear the rights of children conceived posthumously.”).} Unlike other children, posthumously conceived children often fit one definition but not the other.\footnote{See Capato I, 631 F.3d at 630 (holding that a posthumously conceived child clearly satisfied § 416(e), but not § 416(h)).}

Section 416(e) defines “child” as “the child or legally adopted child of an individual.”\footnote{42 U.S.C. § 416(e)(1). This broad definition also includes the stepchildren, grandchildren, and step-grandchildren who meet certain conditions listed in subsections (e)(2) and (e)(3). Id. § 416(e)(2)–(3).} Because paternity tends not to be disputed, posthumously conceived children generally fit into this broad definition.\footnote{See Capato I, 631 F.3d at 627 (holding that the biological offspring of a decedent and his widow clearly fit § 416(e)’s definition); Gillett-Netting, 371 F.3d at 596 (same).}

Alternatively, § 416(h) uses narrower categories to define who may qualify as a child.\footnote{42 U.S.C. §§ 416(e), 416(h); Capato I, 631 F.3d at 630 (holding that a posthumously conceived child clearly satisfied § 416(e), but not § 416(h)).} Subsection 2(A) indicates that the Act shall apply state intestacy laws to determine whether an applicant is a “child” of the deceased parent.\footnote{42 U.S.C. § 416(h) (2006). If the applicant would be able to inherit property from the deceased parent in the state of the parent’s domicile at death, then the applicant qualifies as a child for purposes of the subchapter.} Subsections 416(h)(2)(B) through 416(h)(3)(B), which were added in 1965, provide other ways in which the applicant may be considered a child despite an inability to inherit from the deceased parent under

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\item \footnote{42 U.S.C. § 402.}
\item \footnote{42 U.S.C. § 402(d) (2006). The child must be unmarried, below specific age limits or under disability beginning before age twenty-two, and dependent on the insured at the time of the insured’s death. Id.}
\item \footnote{Capato II, 132 S. Ct. at 2029 (discussing opposing interpretations of how the two sections interact).}
\item \footnote{See Gillett-Netting, 371 F.3d at 595–96 (“[T]he Social Security Act . . . [does not make] clear the rights of children conceived posthumously.”).}
\item \footnote{See 42 U.S.C. §§ 416(e), 416(h); Capato I, 631 F.3d at 630 (holding that a posthumously conceived child clearly satisfied § 416(e), but not § 416(h)).}
\item \footnote{42 U.S.C. § 416(e)(1). This broad definition also includes the stepchildren, grandchildren, and step-grandchildren who meet certain conditions listed in subsections (e)(2) and (e)(3). Id. § 416(e)(2)–(3).}
\item \footnote{See Capato I, 631 F.3d at 627 (holding that the biological offspring of a decedent and his widow clearly fit § 416(e)’s definition); Gillett-Netting, 371 F.3d at 596 (same).}
\item \footnote{42 U.S.C. § 416(h) (2006).}
\item \footnote{Id. § 416(h)(2)(A).}
\item \footnote{Id.}
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state intestacy law. For posthumously conceived children, however, none of the additional criteria in subsection (h) apply. Thus, whether these applicants are “children” under § 416(h) turns on whether posthumously conceived children may inherit under the state’s intestacy law. As a result of states’ inadequate responses to posthumous conception, it is extremely difficult for most posthumously conceived children to argue, for Social Security purposes, that they are entitled to inherit. Therefore, the typical posthumously conceived child will not successfully meet the definition of “child” in § 416(h).

Because posthumously conceived children fit into the definition of “child” in § 416(e), and not in § 416(h), the relationship between the two sections is central to analyzing whether an applicant is a “child” or not. Until the U.S. Supreme Court’s 2012 decision in *Capato II*, which held that courts must defer to the SSA’s interpretation of the issue, circuit courts struggled to resolve the ambiguity regarding how these provisions interact. Is it sufficient that the applicant is the “child” of the wage earner, satisfying subsection (e), or does the failure to inherit under state law under subsection (h) bar the applicant from receiving benefits?

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62 See id. § 416(h)(2)(B)–(3)(B). According to these subsections, an applicant is a child if: (1) the applicant’s parents participated in a marriage ceremony that would have been valid but for a legal impediment; (2) the insured acknowledged parentage in writing; (3) a court decreed the insured to be the applicant’s parent before the insured’s death; (4) a court ordered the insured to support the child because the insured is the applicant’s parent; or (5) the Commissioner of Social Security finds satisfactory evidence of parentage, and the deceased parent had lived with or supported the applicant while alive. *Id.*

63 *Schafer*, 641 F.3d at 53. Marriage ends at death, eliminating the first possibility, and the other four require the deceased to have performed some action after the child’s birth. See *id.*

64 See, e.g., *Beeler*, 651 F.3d at 965 (holding that a child did not satisfy § 416(h) because she could not inherit under Iowa intestacy law).

65 See supra notes 37–44 and accompanying text (discussing state law responses to the possibility of posthumous conception).

66 See *Beeler*, 651 F.3d at 965.

67 See *Schafer*, 641 F.3d at 52 (“This case turns on the relationship between the brief definition of ‘child’ in § 416(e)(1) . . . and § 416(h)’s more specific provisions.”).

68 *Capato II*, 132 S. Ct. at 2026.

69 Compare *Schafer*, 641 F.3d at 51 (holding that an applicant must fit into a § 416(h) category to receive benefits), with *Gillett-Netting*, 371 F.3d at 597 (holding that an applicant must only satisfy § 416(e) to receive benefits).

70 See *Schafer*, 641 F.3d at 52; *Gillett-Netting*, 371 F.3d at 597.
C. The Social Security Administration and Chevron Deference

Congress created the SSA, headed by the Commissioner of Social Security (“the Commissioner”), to administer and interpret the Act.\(^71\) Among its various duties, the SSA is responsible for handling all claims for survivor benefits.\(^72\) In addition to reviewing applications for these benefits, the SSA has implemented a procedure for applicants who wish to challenge an initial denial of benefits.\(^73\) The four-step appeals procedure begins with an opportunity to have another SSA agent reconsider the application.\(^74\) Then, an applicant may request a hearing before an administrative law judge (“ALJ”).\(^75\) If the ALJ denies benefits, the applicant may appeal to the Social Security Appeals Council.\(^76\) Upon exhausting these options, the applicant may bring suit in federal district court.\(^77\)

To aid in its determinations of eligibility for benefits, the SSA has promulgated regulations that interpret the Act’s provisions—including §§ 416(e) and 416(h)—according to an official rulemaking process.\(^78\) Therefore, a major issue in cases attempting to interpret the interplay between § 416(e) and § 416(h) is whether the SSA’s interpretation, as expressed in its regulations, is entitled to deference under the Supreme Court’s 1984 decision, *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*\(^79\)

In *Chevron*, the Supreme Court created a two-step inquiry for courts to determine when they must defer to an agency’s official interpretation of a statute.\(^80\) If the inquiry leads the court to find an

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\(^74\) *Id.* at 2.

\(^75\) *Id.*

\(^76\) *Id.* at 3.

\(^77\) *Id.*


\(^80\) *Id.* at 842–43. In *Chevron*, Congress had endowed the Environmental Protection Agency (EPA) with the power to promulgate regulations implementing the Clean Air Act. *Id.* at 846. Pursuant to that power, the EPA issued a regulation in which it specifically defined a key term for the purposes of the Clean Air Act’s amendments. *Id.* at 840–41. In response to a challenge to the EPA regulation, the Supreme Court upheld the agency’s definition. *Id.* at 842. Because Congress had not commanded a specific definition to be
agency’s interpretation is entitled to *Chevron* deference, then the court will uphold the interpretation and will not substitute its own judgment for that of the agency.\(^{81}\) In posthumously conceived children cases prior to *Capato II*, circuit courts struggled with both *Chevron* steps when deciding whether to defer to the SSA’s interpretation of the Act.\(^{82}\)

Step one of the *Chevron* deference test asks whether Congress has spoken directly to the issue in question.\(^{83}\) If it has, the analysis is complete;\(^{84}\) Congress’s unambiguously expressed intent must control, and an agency has no power to contradict that intent.\(^{85}\) At step one in posthumously conceived children cases, circuit courts differed on whether Congress specifically addressed the issue of how § 416(e) and § 416(h) relate.\(^{86}\) Additionally, the circuit courts that have held that Congress has spoken to the issue disagreed further as to what Congress said—whether Congress clearly intended satisfaction of § 416(e) to be sufficient or whether Congress clearly intended that applicants must satisfy § 416(h).\(^{87}\)

Step two of the *Chevron* test asks whether the agency’s interpretation of the issue on which Congress has been silent or ambiguous is based on a permissible construction of the statute.\(^{88}\) Because agencies are experts on issues that can be highly complex or technical and about which courts have little expertise, a court may not substitute its own judgment for any reasonable interpretation by the agency.\(^{89}\) For an agency’s construction of the statute to be reasonable, it must be consis-

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81 Id. at 843.
82 See *Beeler*, 651 F.3d at 962 (resolving the issue at step two); *Schafer*, 641 F.3d at 60 (resolving the issue at step one); *Capato I*, 631 F.3d at 631 n.5 (resolving the issue at step one); *Gillett-Netting*, 371 F.3d at 597 (implicitly resolving the issue at step one).
83 *Chevron*, 467 U.S. at 842.
84 Id. at 842–43.
85 Id. Some ambiguities may only become apparent in the context of the overall statutory scheme or when the court attempts to read the statute as a coherent, harmonious whole. *See* *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000). Therefore, to determine whether Congress has specifically addressed a certain question, the court should look at the statutory context, not just a single provision in isolation. *Id.*
86 See, e.g., *Beeler*, 651 F.3d at 962 (assuming that Congress’s intent was ambiguous); *Schafer*, 641 F.3d at 60 (concluding that Congress’s intent was unambiguously expressed); *Capato I*, 631 F.3d at 631 n.5 (same); *Gillett-Netting*, 371 F.3d at 597 (same).
87 See *Schafer*, 641 F.3d at 60 (holding that Congress intended all applicants to satisfy § 416(h)); *Capato I*, 631 F.3d at 631 (holding that Congress intended satisfaction of § 416(e) to be sufficient); *Gillett-Netting*, 371 F.3d at 597 (holding that Congress intended satisfaction of § 416(e) to be sufficient).
88 *Chevron*, 467 U.S. at 843.
89 See id.
tent with the statute’s plain language and meaning, and must not be contrary to Congress’s intent or purpose. Additionally, the statute’s legislative history can provide the court with guidance as to whether an agency’s interpretation is reasonable. Assuming there is ambiguity in § 416(e) and § 416(h), circuit courts prior to *Capato II* struggled to determine whether the SSA’s interpretations of the word “child” in its regulations were reasonable given the statute’s plain language, underlying purpose, and legislative history.

The SSA’s regulations echo the statute’s basic provisions and elaborate on its terms. In 20 C.F.R. § 404.350, the SSA describes who is entitled to child survivor benefits. According to that regulation, an applicant is entitled to benefits if the applicant is the child of a deceased person as described in the subsequent regulations. The subsection entitled “Your relationship to the insured” further explains that the term “child” includes the insured’s “natural child.” The next subsection answers the question “Who is the insured’s natural child?” by listing the same conditions found in § 416(h) of the Act. The text of this subsection does not explicitly clarify whether the child must fulfill one of these conditions or whether these conditions simply present additional ways to be considered a natural child where the applicant’s status is in dispute. The SSA, however, has consistently maintained that its regulations require the applicant to satisfy one of the conditions whether or not parentage is in dispute.

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91 See Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258 (1995) (concluding that the insertion of certain language to the statute long after the National Bank Act was initially passed made the Comptroller’s interpretation reasonable). Legislative history may indicate that an agency’s construction of a statute is contrary to the will of Congress. See id. It is also particularly helpful when Congress has made changes to the statute over time. See id. The addition or deletion of language often reveals Congress’s intent in relation to a certain term or provision. See id.
92 See Beeler, 651 F.3d at 956 (holding that SSA regulations are reasonable); Schafer, 641 F.3d at 61 (stating, in dicta, that SSA regulations are reasonable).
94 Id. § 404.350.
95 Id.
96 Id. § 404.354. The insured’s legally adopted child, grandchild, and stepchild also qualify. Id.
97 Id. § 404.355.
98 See id.
99 *Capato II*, 132 S. Ct. at 2033 (noting that the SSA’s interpretation has been “adhered to without deviation for many decades”); SSAR 05-1(9), 70 Fed. Reg. 55,656, 55,657 (Sept. 22, 2005).
II. THE GILLET-NETTING DECISION AND ITS AFTERMATH

Prior to the U.S. Supreme Court’s 2012 decision, Astrue v. Capato (Capato II), which held that the SSA’s interpretation of the Act’s provisions was reasonable, only four federal appellate cases had addressed the interplay of § 416(e) and § 416(h). The first of these cases, Gillett-Netting v. Barnhardt, arose in 2004 in the U.S. Court of Appeals for the Ninth Circuit. Section A of this Part details the groundbreaking case that first addressed the issue of posthumously conceived children and the two definitions of “child” in the Act. Section B explains the SSA’s official response to that decision.

A. The Ninth Circuit’s Interpretation: Gillett-Netting v. Barnhardt

When it decided Gillett-Netting in 2004, the Ninth Circuit became the first federal circuit to interpret § 416 in a posthumously conceived child case. The Ninth Circuit held that satisfying § 416(e) is sufficient for an applicant to qualify as a “child” under the Act, and implied that the identical structure of the regulations and provisions in the Act made a Chevron deference inquiry unnecessary.

In 1994, Arizona residents Robert Netting and Rhonda Gillett-Netting were struggling to conceive a child when Netting was diagnosed with cancer. When advised that chemotherapy could leave him sterile, Netting deposited semen in a sperm bank where it was frozen and stored for his wife’s use. Netting indicated that he wanted his wife to bear his children with the frozen semen even if he did not survive his fight with cancer. He died two months later, and within a year, Gillett-Netting became pregnant through in vitro fertilization. As a result, she gave birth to twins Juliet and Piers.

Gillett-Netting applied for Social Security survivor benefits on behalf of the twins, but the SSA denied her claim. She subsequently

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101 371 F.3d 593, 596 n.3 (9th Cir. 2004).
102 See infra notes 104–127 and accompanying text.
103 See infra notes 128–135 and accompanying text.
104 371 F.3d at 596 n.3.
105 See id. at 596 & 597 n.4.
106 Id. at 594.
107 Id.
108 Id. at 595.
109 Id. at 594–95.
110 Gillett-Netting, 371 F.3d at 595.
111 Id.
requested a hearing before an ALJ, who determined that the twins were not entitled to benefits because they were conceived after the deceased wage earner was already dead and thus were never dependent on him.\textsuperscript{112}

When the Social Security Appeals Council refused to review the decision, Gillett-Netting filed suit in the U.S. District Court for the District of Arizona, claiming that the denial of benefits was not supported by substantial evidence and not in accordance with the law.\textsuperscript{113} The district court determined that Arizona’s intestacy laws did not permit the twins to inherit from their father and that therefore they did not fit into any category of “children” in § 416(h).\textsuperscript{114} It thus held that the twins were not Netting’s “children” under the Act.\textsuperscript{115}

On appeal, the Ninth Circuit reversed, holding that the twins were Netting’s children for purposes of the Act.\textsuperscript{116} The court reasoned that Congress added § 416(h) to the Act to offer alternative ways for children whose parents were unmarried or whose parentage was in dispute to receive benefits.\textsuperscript{117} It found nothing in the Act suggesting that an applicant must use § 416(h) to establish parentage when it is not in dispute.\textsuperscript{118} Therefore, where parentage is unquestioned, the court held that the applicant is a “natural child” under § 416(e) and that § 416(h) is irrelevant.\textsuperscript{119}

The Ninth Circuit did not engage in an explicit \textit{Chevron} inquiry to determine whether the interpretation in the SSA regulations was entitled to deference.\textsuperscript{120} Rather, it determined that the regulations failed to suggest that the applicant must consult § 416(h)’s analogue in the regulations—“Who is the insured’s natural child?”—when parentage is not in dispute.\textsuperscript{121} The court implied that the term “natural child” in § 404.354 of the regulations, just as in § 416(e), necessarily includes all biological children.\textsuperscript{122} Because biological children fit the commonly

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\item \textsuperscript{112} Id.
\item \textsuperscript{113} \textsuperscript{Id.;} Gillett-Netting v. Barnhart, 231 F. Supp. 2d 961, 964 (D. Ariz. 2002) \textit{rev’d and remanded}, 371 F.3d 593 (9th Cir. 2004).
\item \textsuperscript{114} Gillett-Netting, 231 F. Supp. 2d at 966.
\item \textsuperscript{115} Id. Gillett-Netting also contended that denying the twins benefits violated equal protection, but the district court dismissed that claim. Id. at 963. The Supreme Court quickly dismissed the same equal protection claim in \textit{Capato II}, 132 S. Ct. at 2033.
\item \textsuperscript{116} Gillett-Netting, 371 F.3d at 594.
\item \textsuperscript{117} Id. at 596.
\item \textsuperscript{118} Id. at 597.
\item \textsuperscript{119} \textit{See id}.
\item \textsuperscript{120} \textit{See id.} at 597 n.4.
\item \textsuperscript{121} Id.
\item \textsuperscript{122} \textit{See Gillett-Netting}, 371 F.3d at 597 n.4.
\end{itemize}
\end{footnotesize}
accepted definition of the term, they need not establish further that they are “natural children” under § 404.355’s more specific definition unless their parents were never married.\textsuperscript{123} Therefore, the court implicitly concluded that no deference inquiry was necessary because the same construction applied to both the Act and the regulations.\textsuperscript{124}

The SSA claimed that, despite the absence of an explicit directive, the regulations did require the applicant to pass through the more specific definition of “child.”\textsuperscript{125} The Ninth Circuit held, however, that the SSA’s stance on how to read the regulations was prompted by the litigation and not promulgated formally in a regulation.\textsuperscript{126} Thus, this aspect of the SSA’s interpretation was irrelevant to the court in \textit{Gillett-Netting}.\textsuperscript{127}

\textbf{B. The SSA’s Response to \textit{Gillett-Netting}}

Following the \textit{Gillett-Netting} decision, the SSA issued an acquiescence ruling indicating that it would follow the Ninth Circuit’s interpretation only in states within the circuit.\textsuperscript{128} The SSA would consider any posthumously conceived child within the circuit a “child” if parentage was not in dispute regardless of state intestacy laws.\textsuperscript{129} The SSA, however, still maintained that its position on the relationship between § 416(e) and § 416(h) was correct.\textsuperscript{130} Therefore, it would continue to advocate that interpretation in all other jurisdictions.\textsuperscript{131}

By releasing this ruling, the SSA precluded future courts from concluding, as the Ninth Circuit did, that the interpretation of the regulations it advocated for in \textit{Gillett-Netting} was prompted by litigation.\textsuperscript{132} As \textit{Gillett-Netting} highlighted, the SSA’s position that applicants must

\begin{itemize}
  \item \textsuperscript{123} See id.
  \item \textsuperscript{124} See id.
  \item \textsuperscript{125} See id.
  \item \textsuperscript{126} See id.
  \item \textsuperscript{127} See id.; see also Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 213 (1988) (holding that deference to an “agency’s convenient litigating position” is inappropriate).
  \item \textsuperscript{128} SSAR 05-1(9), 70 Fed. Reg. 55,656, 55,657 (Sept. 22, 2005). The SSA issues an acquiescence ruling whenever a decision of a U.S. Court of Appeals conflicts with the SSA’s interpretation of the Act. Id. at 55,656. These rulings state why the SSA’s interpretation differs from the court’s and how the SSA plans to apply the holding of the case forward. Id.
  \item \textsuperscript{129} Id. at 55,657.
  \item \textsuperscript{130} Id.
  \item \textsuperscript{131} Id.
  \item \textsuperscript{132} Compare \textit{Gillett-Netting}, 371 F.3d at 597 n.4. (noting that the SSA’s interpretation of the regulations was prompted by litigation and thus was irrelevant), \textit{with} Beeler v. Astrue, 651 F.3d 954, 960 (8th Cir. 2011) (noting that the SSA’s reading of the regulations was found in the acquiescence ruling and was relevant to the deference inquiry).
\end{itemize}
consult the more specific section of the regulations in all cases was not clear from the regulations alone. The acquiescence ruling, however, codified the SSA’s reading of the regulations, and thus its interpretation could be eligible for deference in future cases. Therefore, the SSA’s official interpretation for the purposes of a deference inquiry in all cases following this ruling was that a posthumously conceived applicant must fit into one of the enumerated categories under § 416(h) of the Act or § 404.355 of the regulations.

III. A Circuit Split Emerges and the Supreme Court Responds

A. The 2011 Posthumously Conceived Children Cases

For nearly seven years following Gillett-Netting v. Barnhardt, no federal court of appeals discussed the interplay of § 416(e) and § 416(h), and in 2011, three different circuits faced posthumously conceived plaintiffs seeking Social Security survivor benefits. All three cases involved the same basic facts: a husband froze sperm in anticipation of chemotherapy treatments and his wife used the sperm to conceive a child after his death. The only issue in each case was whether the applicants qualified as “children” without being able to inherit under state law.

1. Agreement with the Ninth Circuit

In January 2011, the U.S. Court of Appeals for the Third Circuit endorsed Gillett-Netting’s interpretation of the Act and denied deference to the SSA’s interpretation in Capato ex rel B.N.C. v. Commissioner of Social Security (Capato I). Like the court in Gillett-Netting, the Capato I

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133 See Gillett-Netting, 371 F.3d at 597 n.4.
134 SSAR 05-1(9), 70 Fed. Reg. 55,656, 55,656 (Sept. 22, 2005); see, e.g., Beeler, 651 F.3d at 960 (noting that the Commissioner’s asserted position in the case is restated in the acquiescence ruling).
135 See Capato II, 132 S. Ct. at 2028–29 (stating that the SSA’s position was that satisfaction of 20 C.F.R. § 404.355 is necessary); Beeler, 651 F.3d at 960 (same); Schafer v. Astrue, 641 F.3d 49, 52–53 (4th Cir. 2011); 70 Fed. Reg. at 55,657 (same).
137 Beeler, 651 F.3d at 956–57; Schafer, 641 F.3d at 51; Capato I, 631 F.3d at 627–28.
138 Beeler, 651 F.3d at 959; Schafer, 641 F.3d at 53; Capato I, 631 F.3d at 628.
court held that it was not compelled to consult § 416(h) when the Act’s general provision, § 402, explicitly refers to § 416(e) alone. Basic principles of statutory interpretation dictate that absent contrary indications, words in a statute are assumed to carry their ordinary, plain meaning. According to the court, the common meaning of the word “child” under § 416(e) undeniably encompasses undisputed biological offspring. Therefore, the court emphatically concluded that the children of a deceased wage earner and his widow are “children” under the Act.

The Third Circuit held that the SSA’s interpretation of the Act was not entitled to deference because it was contrary to Congress’s unambiguously expressed intent. The court did not explicitly frame the issue as a Chevron question, but implicitly conducted a Chevron analysis and dealt with the SSA’s interpretation at step one. The court had to acknowledge that the acquiescence ruling reflected the SSA’s interpretation, but it also stated that the Act did not compel or even suggest that this interpretation was valid. In a footnote, the court clarified that it had discerned Congress’s unambiguously expressed intent in the text of the statute and thus did not need to determine whether the SSA’s interpretation was reasonable.

At the end of its opinion, the Third Circuit carefully limited its holding to the factual situation before it. The Commissioner had argued that it was problematic to assume that the term “child” automati-

627. His wife conceived twins with his frozen sperm in January 2003 through in vitro fertilization, and subsequently applied for benefits on their behalf. Id. at 628. When the SSA denied her claim, she requested a hearing before an ALJ. Id. In his decision, the ALJ lamented that although allowing benefits to the twins would be consistent with the purposes of the Act, he felt constrained by a law that lagged behind rapidly advancing medical technology. Id. Because the twins could not inherit under Florida intestacy law, the ALJ held that they were not Mr. Capato’s “children” under the Act. Id. Ms. Capato sued the Commissioner of Social Security in the U.S. District Court for the District of New Jersey, which affirmed the ALJ’s ruling. Id.

140 Capato I, 631 F.3d at 631 (“[W]hy should we, much less why must we, refer to § 416(h) when § 416(e) is so clear, and when we have before us the undisputed biological children of a deceased wage earner and his widow.”).

141 See id.

142 Id.

143 Id. at 632 (“[A]re the undisputed biological children of a deceased wage earner and his widow ‘children’ within the meaning of the Act? The answer is a resounding ‘Yes.’”).

144 Id. at 631 & n.5.

145 See id. at 631 (using statutory interpretation to determine Congress’s intent); see also supra notes 80–92 and accompanying text (describing the two-step Chevron deference test).

146 Capato I, 631 F.3d at 631.

147 Id. at 631 n.5.

148 Id. at 632.
cally includes every biological offspring. The court conceded that this argument could be persuasive in many other situations, given the ability to determine paternity scientifically in combination with the variety of modern family structures that arise through surrogacy and donated gametes. The opinion warned that advancements in reproductive technology have outpaced developments in the law and that posthumous conception was an entirely new world, giving rise to a host of complex legal and moral questions that Congress had not envisioned when it passed the Act.

2. Disagreement with the Ninth Circuit

Later in 2011, the U.S. Courts of Appeals for the Fourth and Eighth Circuits created a circuit split by holding, contrary to the Capato I court, that applicants were required to satisfy § 416(h). Although the circuits came to the same conclusion as one another, each court resolved the issue at a different Chevron step.

In April 2011, in Schafer v. Astrue, the U.S. Court of Appeals for the Fourth Circuit held that Congress unambiguously intended applicants to satisfy § 416(h) to receive benefits; thus, Chevron step one resolved the question. The court examined the Act as a whole and highlighted how the other circuits’ opinions were inconsistent with the structure of

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149 Id.
150 Id. Although traditionally exactly two people could participate in the creation of a child, now up to five distinct people can take part in the process of “having” a child: a sperm donor and an egg donor can provide the genetic material, a surrogate can give birth to the child, and two genetically unrelated people can orchestrate the conception and birth with the intention of raising the resulting child. John Lawrence Hill, What Does It Mean to Be a “Parent”? The Claims of Biology as the Basis for Parental Rights, 66 N.Y.U. L. Rev. 353, 355 (1991). Consequently, a child with a certain biological makeup could be the result of any of sixteen different combinations (in addition to traditional conception and birth) of those possible participants. Id. Therefore, biological paternity will not accurately indicate who the functional “parent” of the child is in many cases. Id.

151 Capato I, 631 F.3d at 627, 632.
152 See Beeler, 651 F.3d at 956; Schafer, 641 F.3d at 60; see also Capato I, 631 F.3d at 631 (holding that applicants must satisfy § 416(e)).
153 Beeler, 651 F.3d at 956 (holding that the issue is resolved at Chevron step two); Schafer, 641 F.3d at 60 (holding that the issue is resolved at Chevron step one).
154 Schafer, 641 F.3d at 60. The deceased in this case, Don Schafer, died in March 1993 as a resident of Virginia. Id. at 51. In 1999, his wife conceived a child through in vitro fertilization using his frozen sperm, and gave birth nearly seven years after his death. Id. Mrs. Schafer applied for benefits on behalf of the child, and the SSA denied her claim. Id. An ALJ subsequently awarded the child benefits, but the SSA Appeals Council reversed, holding that he was not a child under the Act because he could not inherit from his father under Virginia law. Id. Mrs. Schafer sought review in the U.S. District Court for the Western District of North Carolina, which affirmed the decision of the Appeals Council. Id.
the Act. First, it stated that the term “child” cannot automatically encompass the deceased’s “natural children” simply because they are his biological offspring. It pointed to the Third Circuit’s acknowledgement of the various family structures that arise from reproductive technology, surrogacy, and donors. Biological paternity in many cases does not indicate that the child has a relationship with or expectation of support from that parent. The court also reasoned that if Congress intended a biological relationship to be sufficient, it would not have included any of the requirements in addition to biological parentage in § 416(h)(2)(B) and § 416(h)(3)(C)(ii). The court refused to believe that Congress would leave such a critical term as “child” for the SSA to interpret without further direction.

The Fourth Circuit additionally criticized the other circuits for asserting that § 416(e) only applies to children of married parents. This assertion cannot be true if the word “child” in § 416(e) includes all natural children as those opinions also claim. The undisputed children of an unmarried couple are clearly the couple’s natural children. Therefore, § 416(e) would apply to them if being a natural child were sufficient. The pure language of § 416(h) supports this reasoning. Section 416(h) explains how to determine whether an applicant is a child “for purposes of this subchapter,” and makes no reference to any limitations on the marital status of the applicant’s parents. Thus, the Schafer court held that the statute’s plain meaning required the SSA to interpret the Act as it did.

Finally, the Fourth Circuit relied heavily on the Act’s legislative history to determine that Congress’s intent was unambiguous. As the court accurately pointed out, reliance on intestacy statutes has always

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155 Id. at 54–55.
156 Id.
157 Id. at 54; see supra note 150 and accompanying text.
158 Capato I, 631 F.3d at 632.
160 Schafer, 641 F.3d at 54.
161 Id. at 55.
162 Id.
163 Id.
164 Id.; see 42 U.S.C. § 416(e).
166 Schafer, 641 F.3d at 55–56; see 42 U.S.C. § 416(h).
167 Schafer, 641 F.3d at 56.
168 Id. at 57–58.
been part of the Act, and the 1965 amendments clarify that Congress consistently understood that applicants must satisfy § 416(h).\textsuperscript{169} Because extramarital children were not covered by all states’ intestacy laws, Congress decided to add the other § 416(h) criteria as an alternative way to receive benefits.\textsuperscript{170} The \textit{Schafer} court wrote that if Congress did not consider intestacy laws the only avenue for eligibility, it would not have needed to create exceptions for extramarital children to get around it.\textsuperscript{171} Congress could have simply clarified that “child” in § 416(e) includes all biological children of a decedent.\textsuperscript{172} The Fourth Circuit therefore held that Congress’s unambiguous intent was for all applicants to satisfy § 416(h) to be eligible for benefits.\textsuperscript{173} Thus, the court did not need to address \textit{Chevron} step two.\textsuperscript{174}

In contrast, the U.S. Court of Appeals for the Eighth Circuit, when considering the same question, did reach the second step of \textit{Chevron}.\textsuperscript{175} In August 2011, the Eighth Circuit decided \textit{Beeler v. Astrue}, holding that the SSA’s interpretation of the Act was reasonable and entitled to deference.\textsuperscript{176} In the opinion, however, the court improperly conducted the \textit{Chevron} inquiry in reverse.\textsuperscript{177} Rather than determining whether or not Congress clearly intended a specific interpretation, the court jumped to the easier question of whether the SSA’s interpretation was a permissible reading of the statute.\textsuperscript{178} Although the court assumed ambiguity and moved directly to step two, the court’s reasoning closely followed that of the Fourth Circuit and seemed to support the same con-


\textsuperscript{171} \textit{Schafer}, 641 F.3d at 58.

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{Id.} at 60.

\textsuperscript{174} \textit{See id.} The court did, however, explain in dicta that even if the interpretation of the Act advocated by the SSA was not the only reasonable one, it fell within the range of permissible interpretations and would thus be entitled to \textit{Chevron} deference. \textit{Id.} at 60–63.

\textsuperscript{175} \textit{See Beeler}, 651 F.3d at 956.

\textsuperscript{176} \textit{Id.} The father in this case, Bruce Beeler, was an Iowa resident who died in May 2001. \textit{Id.} at 957. His wife, Patti Beeler, conceived a child in July of the following year through intrauterine insemination and gave birth in April 2003. \textit{Id.} The SSA denied the child’s application for survivor benefits. \textit{Id.} An ALJ and the SSA Appeals Council agreed that she was not a child within the meaning of the Act. \textit{Id.} Mrs. Beeler then sued the Commissioner of Social Security, and the U.S. District Court for the Northern District of Iowa reversed the decision to deny benefits. \textit{Id.; see Beeler v. Astrue}, No. C09-0019, 2009 U.S. Dist. LEXIS 130944, at *1–2 (N.D. Iowa Nov. 12, 2009).

\textsuperscript{177} \textit{See Beeler}, 651 F.3d at 959–60 (beginning its analysis with a discussion of the regulations’ reasonableness).

\textsuperscript{178} \textit{See id.}
clusion: that Congress’s unambiguous intent was for courts to interpret the statute as the SSA had. In fact, instead of explaining why the statute was ambiguous, the Eighth Circuit quoted the Fourth Circuit, stating that the text of the statute “could hardly be more clear.” The court used similarly strong language in its discussion of the Act’s legislative history.

B. *The Supreme Court’s Response: Astrue v. Capato*

In response to the circuit split arising from these three 2011 cases, the U.S. Supreme Court granted certiorari to resolve the issue of Social Security survivor benefits for posthumously conceived children. In the 2012 decision, *Astrue v. Capato (Capato II)*, the Supreme Court held that the SSA’s interpretation, even if not the only reasonable one, was a permissible construction of the Act, and therefore was entitled to deference. Although most of the opinion advanced arguments supporting the conclusion that the Act must be read as the SSA reads it, implying that Congress’s intent was unambiguous, the Court did not commit to that holding. Instead, Justice Ruth Bader Ginsburg, writing for a unanimous court, resolved the issue in the same backwards manner employed by the Eighth Circuit in *Beeler*. Rather than first deciding whether Congress’s intent was unambiguous under *Chevron* step one, the Court held that, of the two interpretations advanced by the parties, the SSA’s was better, and, because it was at least reasonable, it was entitled to deference pursuant to *Chevron* step two.

In reaching its holding, the *Capato II* Court made many of the same points as the Fourth Circuit, pointing to flaws in the Third Circuit’s conclusion that applicants must pass through § 416(h) only if they are children of unmarried parents or children whose biological parentage is in dispute. The Court stated that nothing in § 416(e) indicates that Congress meant it to apply to children of married parents but not to those of unmarried parents. Unlike in § 416(e), Congress

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179 See id. at 963–64.
180 Id. at 963 (quoting Schafer, 641 F.3d at 54) (internal quotation marks omitted).
181 See id. at 964.
183 Id. at 2026.
184 See id. at 2030–33.
185 See id. at 2033–34; supra notes 175–181 and accompanying text (discussing Beeler).
187 Id. at 2029–30; *Capato I*, 631 F.3d at 631.
188 *Capato II*, 132 S. Ct. at 2029.
explicitly distinguished between legitimate and extramarital children elsewhere in the Act as well as in contemporaneous statutes. The Court also noted that marriage does not imply that the paternity of a wife’s children is certain, nor does the absence of marriage indicate that paternity is necessarily uncertain. The Court went on to criticize the assertion that biological paternity is a prerequisite to using only § 416(e) to determine whether an applicant is a “child” under the Act. In 1939, when Congress first enacted this portion of the Act, scientific proof of biological paternity did not exist. Thus, Congress could not have meant to use biology to distinguish between those children who must pass through § 416(h) and those who need only satisfy § 416(e).

After listing its criticisms of the Third Circuit’s interpretation, the Capato II Court explained why the SSA’s interpretation was persuasive. Most importantly to the Court, § 416(h) explains how child status is to be determined “for purposes of this subchapter.” The subchapter referred to is subchapter II of the Act, which spans § 401 through § 434. Because this explicit cross-reference to the entire subchapter, including § 416(e), makes the connection between § 416(e) and § 416(h) clear, Congress had no need to refer to § 416(h) redundantly in § 416(e).

Additionally, the Court looked elsewhere in the Act to find that reliance on state law was “anything but anomalous.” “Wife,” “widow,” “husband,” and “widower” are all defined by reference to state law. In fact, the original version of the Act contained a single provision mandating the use of state law to define who qualified as a “wife,” “widow,” “husband,” “widower,” “parent,” and “child.” Using state law ensured

189 Id. at 2029–30; see 42 U.S.C. § 402(d)(3)(A) (2006) (referring to the “legitimate . . . child” of an individual); Servicemen’s Dependents Allowance Act of 1942, ch. 443, § 120, 56 Stat. 385 (defining “child” to include “legitimate child,” “child legally adopted,” and, under certain conditions, “stepchild” and “illegitimate child” (internal quotation marks omitted)).
190 Capato II, 132 S. Ct. at 2030.
191 Id.
192 Id.
193 Id.
194 Id. at 2030–33.
195 Id. at 2030–31.
197 Capato II, 132 S. Ct. at 2031; see 42 U.S.C. § 416(h).
198 Capato II, 132 S. Ct. at 2031.
199 Id.; see 42 U.S.C. §§ 416(b), (c), (f), (g), (h)(1)(A).
200 Capato II, 132 S. Ct. at 2031; see 42 U.S.C. § 409(m) (1940).
that the Act would cover all applicants within Congress’s contemplation while avoiding congressional interference with family relations, an area traditionally within the realm of state law.\footnote{\textit{Capato II}, 132 S. Ct. at 2031.}

Finally, the Court held that requiring applicants to satisfy § 416(h) was consistent with Congress’s perception of the Act’s core purpose—to help dependent members of a wage earner’s family when they lose the wage earner’s income.\footnote{\textit{Id.} at 2032.} According to the Court, if a state allows a certain child to take in intestacy, it is more likely that the child will be dependent during the parent’s life and at the parent’s death.\footnote{\textit{Id.} at 2032.} Although some states provide for posthumously conceived children in their intestacy statutes despite the lack of actual dependence on the parent during the parent’s lifetime, the Court held that Congress has the right to generalize and use state intestacy law as a workable substitute for case-by-case determinations of actual dependency.\footnote{\textit{Id.} at 2033.}

Based on these observations, the Court held that the SSA’s longstanding interpretation was reasonable and entitled to deference.\footnote{\textit{Id.}} This assertion, along with the Fourth Circuit’s discussion in \textit{Schafer} of the Act’s legislative history and the 1965 amendments, persuasively support the conclusion that the Act requires all applicants to pass through § 416(h) to receive child survivor benefits.\footnote{See \textit{id.}; \textit{Schafer}, 641 F.3d at 57–58.} This conclusion, however, eliminates benefits for posthumously conceived children whose biological fathers died while domiciled in states that do not include such children in their intestacy statutes.\footnote{\textit{Capato II}, 132 S. Ct. at 2034 ("[T]he law Congress enacted calls for resolution of [this case] by reference to state intestacy law. We cannot replace that reference by creating a uniform federal rule the statute’s text scarcely supports.").} Although this result may seem unfair, the Act as it currently is written compels this conclusion.\footnote{See \textit{id.}}
IV. RESOLVING THE ISSUE: THE NEED FOR A CONGRESSIONAL RESPONSE TO PROTECT THE RIGHTS OF POSTHUMOUSLY CONCEIVED CHILDREN

The courts that have addressed posthumously conceived children in the context of Social Security benefits have all tried to conclusively resolve the problem such children create through statutory interpretation. Yet, the wide spectrum of justifications courts have used to reach such varied conclusions highlights a large underlying problem: Congress did not contemplate these children when it passed the Act. The Act was never meant to deal with posthumously conceived children, and it thus must be updated in light of the advances in medical technologies that facilitate their birth.

A. Reasons Congress Must Update the Act

There are three fundamental reasons why updating the Act to include posthumously conceived children regardless of state intestacy law is both logical and necessary. First, the original justifications for relying on state laws are no longer relevant, and a uniform method of determining which children are eligible would be more efficient and just. Second, intestacy laws in particular should not determine benefits because they are inherently poor indicators of a state’s policy on posthumously conceived children. Third, explicitly adding benefits for posthumously conceived children would be consistent with the underlying purposes and legislative history of the Act.


210 See Capato II, 132 S. Ct. at 2026 (“The technology that made the twins’ conception and birth possible, it is safe to say, was not contemplated by Congress when the relevant provisions of the Social Security Act . . . originated (1939) or were amended to read as they now do (1965).”); Beeler, 651 F.3d at 966 (“It is unlikely that Members of Congress contemplated this precise question when enacting the relevant provisions of the Act in the 1930s and 1960s.”); Capato I, 631 F.3d at 627 (“It goes without saying that these technologies were not within the imagination, much less the contemplation, of Congress when the relevant sections of the Act came to be . . . .”).

211 See Beeler, 651 F.3d at 966; Capato I, 631 F.3d at 627; Gillett-Netting, 371 F.3d at 595; infra notes 212–354 and accompanying text.

212 See infra notes 216–307 and accompanying text.

213 See infra notes 216–252 and accompanying text.

214 See infra notes 253–273 and accompanying text.

215 See infra notes 274–301 and accompanying text.
1. Congress’s Original Reasons for Deferring to the States Are No Longer Relevant

Both administrative efficiency and federalism originally led Congress to defer to state laws to define the term “child.” Today, however, these justifications have lost much of their persuasive force.

Deferring to the states was efficient when the Act was created, but changes in the structure of the Social Security system over time have created the need for a uniform standard. When the Act was written in 1935, Congress envisioned the states as the entities primarily responsible for implementing the Act and distributing funds. Prior to the Act, about forty-five states had aid for dependent children, but in most of these states the programs were inoperative. The Act was therefore “designed to aid the states” in their efforts to care for dependent members of their populations by granting money to each state to boost its federally approved program. Congress thus assumed that the states would continue to take the lead in caring for their own citizens by distributing federal money within the Social Security system. Additionally, the only practical method of administering the Act at the time was through the states. The SSA’s predecessor, the Social Security Board,

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\[\text{\footnotesize \textsuperscript{216} See infra notes 218–227, 234–238 and accompanying text.}
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\[\text{\footnotesize \textsuperscript{217} See infra notes 228–233, 239–252 and accompanying text.}
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\[\text{\footnotesize \textsuperscript{218} See infra notes 219–227 and accompanying text.}
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\[\text{\footnotesize \textsuperscript{221} Id.}
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\[\text{\footnotesize \textsuperscript{222} See id.; Solomon, supra note 219, at 5.}
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\[\text{\footnotesize \textsuperscript{223} See Solomon, supra note 219, at 12; Franklin D. Roosevelt, Presidential Message Transmitting to the Congress a Report of the Social Security Board Recommending Certain Improvements in the Law (Jan. 16, 1939), in Statutory History of the United States: Income Security, supra note 220, at 221 (noting that much of the Act’s success in its early years was “due to the fact that all of [its] programs . . . [were] administered by the states themselves, but coordinated and partially financed by the Federal Government,” and}
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originally consisted of only three members with no facilities or budget and was primarily responsible for determining and reporting on the best methods for providing social insurance. Consequently, the states had to administer the Act because the federal government lacked the capacity. Because states assumed such a central role, it made sense to allow them to determine eligibility for benefits according to their own laws. Without a compelling reason to infringe on the states’ individual policies in the field of domestic relations, Congress chose to defer to the states to determine eligibility using standards with which they were already familiar.

Today, however, the administration of the Act is quite different and Congress’s original considerations no longer apply. The SSA has grown into a large organization with plenty of resources and staff to handle Social Security claims at the federal level. Although states are still involved, the SSA has a large infrastructure and a uniform process for determining eligibility. As a result, a single entity, rather than fifty independent ones, now primarily administers the Act. It is thus highly inefficient to force the SSA to deal with the laws of fifty different states to determine eligibility for benefits. In light of this change, uniformity and efficiency are compelling reasons to create a single standard for eligibility.

Another reason Congress originally deferred to the states was its respect for principles of federalism, but this concern is now outweighed

that this structure “enabled [the federal government] to put these programs into operation quickly”); SSA History, SSA.gov, http://www.ssa.gov/history/orghist.html (last visited Feb. 9, 2013).

224 See SOLOMON, supra note 219, at 12; SSA History, supra note 223. Even as regional offices began to surface, many decades passed before the system was well organized and had uniform procedures and training for its offices. SSA History, supra note 223.

225 See SOLOMON, supra note 219, at 12; SSA History, supra note 223.


227 See id.

228 See SSA, supra note 72, at 1.

229 Id. In 2011, for example, the SSA reviewed 4.8 million applications for retirement, survivor, and Medicare benefits and decided over 795,000 hearing requests. Id.

230 See id. (discussing the SSA’s capacity to perform various functions and process millions of applications); SSA, PUB. NO. 05-10084, SURVIVORS BENEFITS 7 (2012), available at http://www.ssa.gov/pubs/10084.pdf (explaining the uniform process for applying for benefits with the SSA); SSA, supra note 73, at 1–9 (explaining the uniform process for appealing a denial of benefits through the SSA).

231 See SSA, supra note 72, at 1.

232 See id.; SSA supra note 230, at 7; SSA, supra note 73, at 1–9.

233 See SSA, supra note 72, at 1; SSA, supra note 230, at 7; SSA, supra note 73, at 1–9.
by more important considerations. Family relationships and intestacy are historically state issues, so Congress, without a reason to usurp state policies in that area, left them intact for purposes of the Act. Also, at the time the Act was written, states’ intestacy statutes were comprehensive. State legislatures had thought through the policy concerns implicated by allowing certain people to inherit and excluding others, taking all potential types of heirs that existed at the time into account. Thus, Congress could comfortably fall back on these presumably informed decisions.

When posthumous conception became a reality, however, most states did not rush to amend their intestacy laws to account for the existence of a new type of child. In many cases, the exclusion of posthumously conceived children from inheritance laws is not because of a deliberate policy decision, but instead because of inaction by legislatures that are too busy with other issues or unaware of the implications of ignoring this problem. It is not fair to deny benefits to some children merely because they are from a state that has not yet updated its statutes. Therefore, Congress should step in and create uniformity, rather than wait for each state to address the issue of posthumous conception individually.

By passing the 1965 amendments, Congress has already shown a willingness to ignore federalism in favor of including all children who


235 See Capato II, 132 S. Ct. at 2031; Schafer, 641 F.3d at 62.

236 See Nolan, supra note 11, at 1076 (noting that the state intestacy law that has been in place since before this technology existed is inadequate for addressing the needs of posthumously conceived children).

237 See Marissa J. Holob, Note, Respecting Commitment: A Proposal to Prevent Legal Barriers from Obstructing the Effectuation of Intestate Goals, 85 CORNELL L. REV. 1492, 1502 (2000) (noting that intestacy laws’ presumptions of who should take property were acceptable a hundred years ago before the emergence of nontraditional families).

238 See id.

239 See supra notes 37–44 and accompanying text (explaining that only thirteen states have changed their laws).

240 See Nolan, supra note 11, at 1101–04 (exploring practical reasons for legislative delay in updating intestacy statutes).

241 See Banks, supra note 9, at 331 (noting that states’ failure to keep up with rapidly advancing assisted reproduction technology has “increase[d] the presence of distributional inequity where claimants of equal relational status to a worker are treated differently based solely upon their deceased parent’s domicile at death”).

242 See id.; Nolan, supra note 11, at 1101–04.
deserve benefits.\textsuperscript{243} Although the Fourth Circuit’s analysis in \textit{Schafer v. Astrue} of the Act’s history yields strong evidence that Congress intended all children to satisfy the definition of “child” in § 416(h), this history also exhibits why it would be appropriate for Congress to resolve the issue of posthumously conceived children.\textsuperscript{244} In 1965, Congress saw that intestacy statutes were not adequately keeping up with changing family structures.\textsuperscript{245} Extramarital children deserved benefits, but their treatment varied enormously from state to state.\textsuperscript{246} Because relying on inconsistent state laws to determine eligibility for this group of children was incompatible with the Act’s purposes, Congress added additional uniform standards through which an applicant could qualify.\textsuperscript{247} The current status of posthumously conceived children across the states is similar, and therefore, Congress should again take action at the federal level by adding additional avenues through which these children can qualify for benefits.\textsuperscript{248}

Moreover, as a general matter, Congress, not the states, should determine who is eligible for benefits because Social Security is a \textit{federal} program.\textsuperscript{249} Although family relationships and intestacy are traditionally state issues, state laws should not be a factor in the distribution of federal benefits when citizens of every state are contributing uniformly to the program.\textsuperscript{250} Even the Advisory Committee whose recommendations led to the 1965 amendments noted that inconsistent treatment of children across states is not appropriate for a federal program.\textsuperscript{251}


\textsuperscript{244} See \textit{Schafer}, 641 F.3d at 57–58.

\textsuperscript{245} S. Rep. No. 89-404, at 109 (explaining that “[t]he States differ[ed] considerably in the requirements that must be met in order for a child born out of wedlock to have inheritance rights”).

\textsuperscript{246} \textit{Id.} at 109–10.

\textsuperscript{247} \textit{Id.} at 110 (“[I]n a national program . . . , whether a child gets benefits should not depend on whether he can inherit his father’s intestate personal property under the laws of the state in which his father happens to live.”); see 42 U.S.C. § 416(h)(2)(B)–(3)(B) (2006).

\textsuperscript{248} See S. Rep. No. 89-404, at 110; \textit{supra} notes 37–44 and accompanying text (explaining the varied treatment of posthumously conceived children across the states).

\textsuperscript{249} See \textit{Banks}, \textit{supra} note 9, at 350–31 (noting that a national program should not depend on the state in which an applicant’s father happened to have lived).

\textsuperscript{250} \textit{Id.} at 267 (asserting that Congress should amend the Act to expressly address posthumously conceived children because “[n]o local governing body or other branch of government should speak on behalf of Congress in matters so deeply immersed within its constitutionally derived authority”).

easiest and fairest solution is for Congress to dictate uniformly how posthumously conceived children should be treated for Social Security purposes.252

2. Intestacy Law Is Not Appropriate for Determining a State’s Policy on Posthumously Conceived Children

A more specific problem with the current system is that intestacy statutes are not well suited to addressing the needs of posthumously conceived children.253 Usually, intestate succession clearly demonstrates a state’s policy on who should be considered the “child” of a deceased parent.254 The main purpose of an intestacy scheme is to distribute property according to the plan that the average person would have chosen himself or herself, as well as to promote society’s view of the family. 255 If a state believes a certain type of child, such as an extra-marital or adopted child, deserves rights as the “child” of a decedent, then the state will grant them an intestate share.256 Therefore, Congress’s choice to single out intestacy as the benchmark for eligibility is logical for other children.257 For posthumously conceived children, however, competing considerations make this area of law an inherently poor indicator of the state’s view on the child’s rights.258 The inclusion of posthumously conceived children in intestacy statutes is contrary to another central policy guiding the construction of these laws: certainty and finality in the distribution of estates.259 It is in the public interest to

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252 See Banks, supra note 9, at 267, 330–31; Reports & Studies: 1965 Advisory Council—Part III, supra note 251.
253 See infra notes 254–273 and accompanying text.
254 See Susan N. Gary, Adapting Intestacy Laws to Changing Families, 18 LAW & INEQ. 1, 12–13 (2000) (discussing how intestacy statutes promote states’ conceptions of who should be considered a member of a decedent’s family).
255 Holob, supra note 237, at 1500–01 (discussing major policy goals of intestacy laws). Other main goals include fairly distributing property among family members and promoting societal interests. Id. at 1500.
256 See Gary, supra note 254, at 12.
257 See id.
259 In re Kolacy, 753 A.2d at 1262 (“Estates cannot be held open for years simply to allow for the possibility that after born children may come into existence. People alive at the time of a decedent’s death who are entitled to receive property from the decedent’s estate are entitled to receive it reasonably promptly.”); Browne C. Lewis, Dead Men Reproducing: Responding to the Existence of Afterdeath Children, 16 GEO. MASON L. REV. 403, 430 (2009)
deal with estates quickly and efficiently by determining who is entitled to exactly what portion of the decedent’s property and physically distributing that property as soon as possible.\textsuperscript{260} Heirs who do not yet exist will affect the proportional amounts that other existing heirs will receive.\textsuperscript{261} Thus, the inclusion of posthumously conceived children in intestacy statutes would force existing heirs to wait until the birth of any such children before the size of the existing heirs’ shares can be determined with finality.\textsuperscript{262}

As a result of these underlying considerations, state legislatures have valid policy reasons to construct a default estate distribution plan that excludes or severely limits the inclusion of posthumously conceived children.\textsuperscript{263} Legislatures may believe that such children have rights and deserve support from their deceased fathers, but nevertheless exclude them from intestacy laws for the sake of efficiency or practicality.\textsuperscript{264} Because these concerns do not exist with perpetually available Social Security aid, state legislatures may decide that these children should be entitled to such benefits, but may exclude them from taking intestate shares.\textsuperscript{265} Thus, intestacy laws should not be relied upon to determine the state’s view on whether posthumously conceived children should be considered the “children” of a decedent for the purposes of Social Security benefits.\textsuperscript{266}

\begin{footnotes}
\item[260] \textit{In re Kolacy}, 753 A.2d at 1262; Lewis, \textit{supra} note 259, at 430.
\item[261] \textit{Woodward}, 760 N.E.2d at 266 ("Any inheritance rights of posthumously conceived children will reduce the intestate share available to children born prior to the decedent’s death.").
\item[262] Lewis, \textit{supra} note 259, at 430 (noting that the other heirs should not have to wait indefinitely to receive their inheritance); Wood, \textit{supra} note 10, at 903–04 (discussing the implications for decedent’s other children if posthumously conceived children are included in intestate statutes).
\item[263] See \textit{Woodward}, 760 N.E.2d at 266; \textit{In re Kolacy}, 753 A.2d at 1262; Lewis, \textit{supra} note 259, at 430; Wood, \textit{supra} note 10, at 903–04.
\item[264] See \textit{Woodward}, 760 N.E.2d at 266; \textit{In re Kolacy}, 753 A.2d at 1262; Lewis, \textit{supra} note 259, at 430; Wood, \textit{supra} note 10, at 903–04.
\item[265] See \textit{SSA}, \textit{supra} note 230, at 7 (encouraging applicants to apply promptly, but providing no time limit for when an applicant must apply for benefits after the death of a wage earner); \textit{cf. In re Martin B.}, 841 N.Y.S.2d 207, 209–10 (Sur. Ct. 2007) (interpreting the term “issue” in a trust instrument to include posthumously conceived children, despite the fact that the New York legislature had excluded posthumously conceived children from intestate succession, because “the concerns related to winding up a decedent’s estate differ from those” in a context where the disposition is not yet effective).
\item[266] See \textit{Woodward}, 760 N.E.2d at 266; \textit{In re Kolacy}, 753 A.2d at 1262; Lewis, \textit{supra} note 259, at 430; Wood, \textit{supra} note 10, at 903–04.
\end{footnotes}
Further evidence that applying intestacy statutes is inappropriate for determining Social Security benefits lies in state judicial decisions. No state court has ever addressed the inheritance rights of posthumously conceived children in an actual intestacy proceeding. Instead, state courts have almost exclusively considered the issue for the purpose of determining Social Security eligibility. The lack of case law reflects the infrequency with which posthumously conceived children have sought intestate shares from a decedent’s estate. These children simply never use intestacy statutes for their intended purpose. In Social Security cases, courts are therefore forced to apply the statutes to a purely theoretical situation in which a posthumously conceived child wants to inherit from his or her father’s estate. Rather than pretending that posthumously conceived children use intestacy laws to inherit property, Congress should acknowledge that courts are only applying intestacy law to posthumously conceived children to determine whether the children are entitled to Social Security benefits, and should create an appropriate standard for that determination that balances the interests it implicates.

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268 See Wood, supra note 10, at 882–89 (surveying case law addressing the inheritance rights of posthumously conceived children).

269 See, e.g., Finley, 270 S.W.3d at 850 (addressing inheritance law for a posthumously conceived child in a Social Security case); Woodward, 760 N.E.2d at 260 (same); Khabbaz, 930 A.2d at 1182 (same); In re Kolacy, 753 A.2d at 1259 (same); In re Martin B., 841 N.Y.S. 2d at 209–10 (determining the inheritance rights of a posthumously conceived child under a trust instrument based on whether the trustor intended the term “issue” to include posthumously conceived children); see also Wood, supra note 10, at 882–83 (discussing the lack of case law on the inheritance rights of posthumously conceived children and noting that the issue “finally came to light when surviving parents began petitioning for survivors benefits under the Social Security Act”).

270 See Wood, supra note 10, at 882–83; see also Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 290 (Ct. App. 1993) (holding that a deceased man’s frozen sperm was property, but declining to address the inheritance rights of a potential posthumously conceived child because it was so “unlikely that the estate would be subject to claims” by such a child).

271 See Finley, 270 S.W.3d at 850; Woodward, 760 N.E.2d at 260; Khabbaz, 930 A.2d at 1182; In re Kolacy, 753 A.2d at 1259; Wood, supra note 10, at 882-89.

272 See, e.g., Finley, 270 S.W.3d at 850; Woodward, 760 N.E.2d at 260; Khabbaz, 930 A.2d at 1182; In re Kolacy, 753 A.2d at 1259.

273 See Finley, 270 S.W.3d at 850; Woodward, 760 N.E.2d at 260; Khabbaz, 930 A.2d at 1182; In re Kolacy, 753 A.2d at 1259; Wood, supra note 10, at 882–89.
3. Adding a Provision for Posthumously Conceived Children Is Consistent with the Act’s Purpose and History

Explicitly adding benefits for posthumously conceived children would be consistent with the underlying purpose and legislative history of the Act.274 The same considerations that led Congress to pass the Act in 1935 favor the inclusion of posthumously conceived children today.275 Congress passed the Act as a humanitarian endeavor to help people in need.276 According to the 1935 House Ways and Means Committee Report endorsing the Act, its purpose was to relieve distress and to reduce dependency and destitution in the future.277 With these goals in mind, the Report stressed that “the core of any social plan must be the child.”278 The House committee saw that the best way to create stability was to give children the means to develop into competent members of society capable of supporting themselves.279 Therefore, because the goal was to create future generations of independent adults, no logical distinction can be made between ordinary children who need aid and posthumously conceived children who need aid.280

The reasons that led Congress to add survivor benefits in 1939 further support the inclusion of posthumously conceived children.281 In 1938, President Franklin D. Roosevelt, the Act’s creator, noted that the expansion of Social Security benefits was necessary because the program “must include all who need protection.”282 Consequently, he created the Advisory Council on Social Security to investigate deficiencies in the Act and recommend changes; these recommendations were sub-

275 See Adams, 521 F.2d at 659; H.R. Rep. No. 615.
276 See Adams, 521 F.2d at 659 (“The Social Security Act is remedial and its humanitarian aims necessitate that it be construed broadly and applied liberally.” (citations omitted)).
278 Id.
279 See id.
280 See Banks, supra note 9, at 358 (arguing that Congress’s goals of keeping families together and giving children the chance to grow up in health and security to create independent adults support the notion that posthumously conceived children, like other children who have lost a wage-earning parent, should receive benefits).
281 See infra notes 282–287 and accompanying text.
sequently adopted by Congress.\textsuperscript{283} The Council determined that survivor benefits for children were necessary because “many deserving cases [we]re not able to obtain any aid.”\textsuperscript{284} The 1939 amendments were driven by a desire to comprehensively cover all children who needed and deserved protection by providing benefits to children who were deprived of support from a deceased parent.\textsuperscript{285} Because posthumously conceived children are deprived of their deceased fathers’ support and are conceived as they are due to tragic circumstances, they need and deserve protection as much as any parentless child.\textsuperscript{286} Extending survivor benefits to them is entirely consistent with the 1939 expansion to cover all deserving children.\textsuperscript{287}

The U.S. Supreme Court and the U.S. Court of Appeals for the Fourth Circuit have both construed the purpose of survivor benefits for children more narrowly: to replace the unexpected loss of a wage-earning parent’s support.\textsuperscript{288} Therefore, as the Fourth Circuit has noted, posthumously conceived children, who have never actually been supported by their fathers, are different from the Act’s intended beneficiaries.\textsuperscript{289} But every state’s intestacy statutes provide for posthumous children conceived before but born after the death of their fathers.\textsuperscript{290} By relying on state intestacy laws, Congress showed a willingness to provide survivor benefits for these children who were never actually supported by their deceased parents.\textsuperscript{291}

One might also argue that the purpose of survivor benefits was to provide support for those children who were already born or conceived

\begin{itemize}
\item \textsuperscript{283} Solomon, supra note 219, at 12–13. The Advisory Council was a group of people appointed to represent the public and advise the government on Social Security issues. \textit{Id}. This Council and subsequent periodically appointed Councils were extremely influential in the major amendments throughout the Act’s history, especially the 1939 amendments. \textit{Id.}; \textit{Historical Background and Development of Social Security}, SSA.Gov, http://www.ssa.gov/history/briefhistory3.html (last visited Feb. 9, 2013).
\item \textsuperscript{284} Reports \& Studies: 1938 Advisory Council, supra note 274.
\item \textsuperscript{286} See Banks, supra note 9, at 379 (asserting that “[t]he congressional purpose of this social legislation mandates that minimal accommodations be expressly provided” for posthumously conceived children).
\item \textsuperscript{287} See id.; Reports \& Studies: 1938 Advisory Council, supra note 274.
\item \textsuperscript{288} \textit{Capato II}, 132 S. Ct. at 2032; \textit{Schafer}, 641 F.3d at 58.
\item \textsuperscript{289} \textit{Schafer}, 641 F.3d at 58–59.
\item \textsuperscript{290} Wood, supra note 10, at 897 (noting that the Uniform Probate Code and all states permit such posthumous children to inherit).
\item \textsuperscript{291} See 42 U.S.C. § 416(h) (2006) (relying on state intestacy law to determine whether some applicants are “children” under the Act); Wood, supra note 10, at 897.
\end{itemize}
when a parent died unexpectedly, and that a living parent chooses to have a posthumously conceived child already knowing that the other parent is deceased. But the legislative history discussed above weighs against such a narrow view that focuses on the mindset of the child’s living parent rather than the needs of the child. Posthumously conceived children do not choose the circumstances of their births. Whether or not a mother knows before she conceives that her husband will die before her child is born, the situation from the child’s point of view is the same. The posthumously conceived child is, practically speaking, in a situation identical to that of the posthumous child: fatherless and incapable of receiving support from that father in his lifetime. The only difference is the timing of conception. In fact, the Fourth Circuit in Schafer even acknowledged that some posthumously conceived children are “similarly situated enough to more traditionally conceived children” that they deserve to inherit from their fathers. The purposes given for protecting children under the Act—to reduce future dependency and create security—favor inclusion of both types of children. Posthumously conceived children deserve the same chance to become productive members of society as traditional posthumous children, and if supporting one group is good for future economic stability, then supporting the other is too. Given the Act’s underlying purposes, the law should not draw a line between these two groups.

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292 See Capato II, 132 S. Ct. at 2032; Schafer, 641 F.3d at 58.
293 See Adams, 521 F.2d at 659; H.R. Rep. No. 615 (1935); Banks, supra note 9, at 358, 379.
294 See Nolan, supra note 11, at 1105 (“Imposing disabilities on a posthumously conceived child who is not responsible for his or her own birth is both ineffectual and unjust.” (citation omitted)); supra notes 276–287 and accompanying text.
295 See Woodward, 760 N.E.2d at 266 (“Posthumously conceived children may not come into the world the way the majority of children do. But they are children nonetheless.”); Nolan, supra note 11, at 1067–68 (noting that posthumously conceived children are just posthumous children born within an extended time interval).
296 See Nolan, supra note 11, at 1067–68.
297 See id.
298 Schafer, 641 F.3d at 59.
299 See Adams, 521 F.2d at 659; H.R. Rep. No. 615 (1935); Banks, supra note 9, at 358, 379.
300 See Banks, supra note 9, at 302 (arguing that both groups deserve support from a predeceased parent, and that society should not punish posthumously conceived children because of how their parents chose to procreate).
301 See H.R. Rep. No. 615; Banks, supra note 9, at 376–77 (arguing that including posthumously conceived children furthers Congress’s interest in preventing future state wards, and that it may be better to help them with Social Security funds, to which the child’s working parent contributed, than the general treasury); Nolan, supra note 11, at 1067–68.
4. Congress Must Update the Act

It is unfair to deny benefits to a class of children based on provisions of the Act that were written when posthumous conception was mere science fiction. When a child has no father—for the sole reason that cancer took his life before he could start a family with his wife—it is difficult to say that the child does not deserve the same protection given to a child conceived immediately before his father’s death. It is even more difficult to say that such a child should not receive benefits because his father died a resident of Virginia, when the same child would receive benefits had his father lived in Massachusetts. Courts should not be asked to deny benefits to posthumously conceived children when Congress did not consider whether to include them or not. The standards currently governing eligibility unfairly exclude many posthumously conceived children from benefits for reasons that can no longer be justified. Therefore, the best solution is for Congress to amend the Act to explicitly provide benefits to posthumously conceived children.

B. A Proposed Solution

Congress should insert a section into the Act that explicitly grants benefits to posthumously conceived children. It would be unfair, however, to allow all such children to qualify automatically. To balance the rights of the deceased father, the grieving mother, and the fatherless child, Congress must place restraints on the timing of conception and require the written consent of the deceased biological father.

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302 See Capato I, 631 F.3d at 627.
303 See Nolan, supra note 11, at 1067–68.
304 See Banks, supra note 9, at 331.
305 See Capato II, 132 S. Ct. at 2034 (stating that, despite the tragic circumstances giving rise to the case, the Court had to interpret the law Congress enacted and could not “creat[e] a uniform federal rule the statute’s text scarcely supports”); Woodward, 760 N.E.2d at 272 (noting that issues surrounding posthumously conceived children should be addressed by the legislature); Nolan, supra note 11, at 1088 (noting that legislatures can weigh policies whereas judiciaries can only decide the cases before them).
306 See supra notes 216–301 and accompanying text.
307 See Banks, supra note 9, at 259.
308 See supra notes 216–301 and accompanying text.
309 See Wood, supra note 10, at 902–03 (discussing other interests involved in allowing posthumously conceived children to inherit).
310 See Woodward, 760 N.E.2d at 265, 269 (discussing the need to protect the best interests of children and the reproductive freedom of the father in limiting inheritance rights through timing and consent requirements); Wood, supra note 10, at 902–03 (discussing the need to protect the mother and father’s interests in limiting posthumously conceived
Scholars have suggested such limitations with respect to amending state intestacy laws to cover posthumous conception, but these limits apply just as well in the context of a uniform federal standard.\footnote{See Wood, \textit{supra} note 10, at 902–03; Nelson, \textit{supra} note 47, at 775.}

First, Congress should limit eligibility for benefits based on how much time has passed between the wage earner’s death and the child’s conception.\footnote{See Woodward, 760 N.E.2d at 266–68; Wood, \textit{supra} note 10, at 905–06; Nelson, \textit{supra} note 47, at 775.} The mother cannot be pressured into having a child too soon, while she is still mourning the death of her husband.\footnote{See Woodward, 760 N.E.2d at 268; Wood, \textit{supra} note 10, at 905–06; Nelson, \textit{supra} note 47, at 775.} Conceiving through artificial reproduction can also be difficult, and women may need some time to become pregnant.\footnote{See Woodward, 760 N.E.2d at 268; Nelson, \textit{supra} note 47, at 775.} After too much time has passed, however, the decision to have a child seems more like a unilateral choice by the mother to become a single parent.\footnote{See Knaplund, \textit{supra} note 49, at 627–28 (noting that a woman has a choice to become a single parent using the sperm of a random donor, of a man she knows, or of her deceased husband).} She looks no different from a woman who uses a sperm donor to become pregnant on her own.\footnote{See id. at 656–67 (arguing that women have financial incentives to choose deceased husbands’ sperm to reproduce).} Therefore, she should not get extra support from the government simply because she happens to have the sperm of her deceased husband.\footnote{See \textit{id.} at 656–67 (arguing that women have financial incentives to choose deceased husbands’ sperm to reproduce).} The contention that a child is losing the support of a parent that would otherwise have been there becomes less understandable as the gap in time between the father’s death and the child’s conception increases.\footnote{See \textit{Capato II}, 132 S. Ct. at 2026 (holding that the SSA’s interpretation was reasonable); \textit{Beeler}, 651 F.3d at 966 (holding that the SSA’s interpretation was reasonable); \textit{Schafer}, 641 F.3d at 60 (holding that Congress’s unambiguously expressed intent was to require satisfaction of § 416(h)); \textit{Capato I}, 631 F.3d at 631 (holding that Congress’s unambiguously expressed intent was for satisfaction of § 416(e) to be sufficient); \textit{Gillett-Netting}, 371 F.3d at 597 (holding that Congress’s unambiguously expressed intent was for satisfaction of § 416(e) to be sufficient).}

This tension may help explain the radically different outcomes in the cases discussed above.\footnote{See \textit{id.}} The statute as it currently is written can only be read in one of two extreme ways: (1) either all children con-
ceived after their fathers’ deaths are entitled to benefits, or (2) no children conceived after their fathers’ deaths are entitled to benefits unless state intestacy law provides for them. The Third and Ninth Circuits dealt with children conceived shortly after their fathers’ deaths. Faced with the type of child who deserved protection, these courts were uncomfortable denying benefits to the entire class of posthumously conceived children. Alternatively, the Fourth Circuit heard a case in which the child was born seven years after his father had died. The court likely concluded that such a child should not be entitled to benefits simply because the sperm came from the mother’s long-dead husband rather than an anonymous donor. Therefore, the court chose the interpretation excluding the entire class of children who could not inherit under state law. Even the Eighth Circuit and U.S. Supreme Court cases, which applied backward Chevron inquiries, may be attributable to the fact that the children in question were born so closely to their fathers’ deaths. These courts, facing the persuasive logic of the Fourth Circuit and plaintiffs who seemed to deserve protection, perhaps wanted to soften the harshness of the Fourth Circuit’s conclusion. Thus, instead of foreclosing the possibility of benefits based on the statute itself, the courts did not determine whether this was Congress’s unambiguously expressed intent, but simply that the SSA’s construction was permissible. The SSA can easily change its policy without congressional action.

320 See Schafer, 641 F.3d at 60 (interpreting the Act as denying benefits to all posthumously conceived children who cannot inherit under state law); Capato I, 631 F.3d at 631 (interpreting the Act as granting benefits to all posthumously conceived children).
321 See Capato I, 631 F.3d at 627–28 (addressing a child conceived within nine months of the father’s death); Gillett-Netting, 371 F.3d at 594–95 (addressing a child conceived within ten months of the father’s death).
322 See Capato I, 631 F.3d at 631; Gillett-Netting, 371 F.3d at 597.
323 See Schafer, 641 F.3d at 51.
324 See id. at 59 (expressing concern that “survivorship benefits would serve a purpose more akin to subsidizing the continuance of reproductive plans than to insuring against unexpected losses”).
325 Id. at 60.
326 See Capato II, 132 S. Ct. at 2026; Beeler, 651 F.3d at 957. In Capato II, the Supreme Court specifically criticized the lack of any time limitation in the Third Circuit’s interpretation of the Act, noting that the states that provide for posthumously conceived children in their intestacy statutes generally include time limits and that the Act itself has duration-of-relationship limitations in several other sections. Capato II, 132 S. Ct. at 2031–32.
327 See Capato II, 132 S. Ct. at 2026; Beeler, 651 F.3d at 966.
328 See Capato II, 132 S. Ct. at 2026; Beeler, 651 F.3d at 966.
As courts can only interpret the Act as written, Congress must decide what the appropriate time limit on conception should be.\textsuperscript{330} Adopting a bright-line rule for when conception must occur requires a judgment of when a woman has had enough time to grieve and to conceive, issues that vary immensely from person to person based on physical, social, cultural, and other factors.\textsuperscript{331} Although ideally each case would be evaluated based on each woman’s specific situation, the SSA deals with so many claims each year that a bright-line rule is the only practical way to handle this issue.\textsuperscript{332} Congress is also in a better position than the SSA to weigh the concerns involved and make a broad policy decision, rather than leaving each case to the discretion of the SSA’s staff.\textsuperscript{333}

The chosen time limit must be at least a few years, to allow for grieving and potential issues with conception, but somewhere less than the seven years confronting the U.S. Court of Appeals for the Fourth Circuit in the 2011 case, \textit{Schafer v. Astrue}.\textsuperscript{334} When suggesting appropriate time limits with regard to state intestacy statutes, scholars have considered other factors, such as the finality of estate distribution and protection of the rights of other surviving heirs.\textsuperscript{335} Thus, scholars have endorsed limits of two or three years by which time the child must be in utero.\textsuperscript{336} Because Social Security is not affected by these administrative concerns, however, a federal standard can be more accommodating to the different obstacles a woman may face before she can conceive.\textsuperscript{337}

\textsuperscript{330} See Woodward, 760 N.E.2d at 272 (noting that courts “can only address the specific circumstances of each controversy that presents itself,” whereas questions on posthumously conceived children “cry out for lengthy, careful examination” by the legislature); Nolan, supra note 11, at 1089 (“The judiciary’s major function is to interpret and construe statutes . . . not to make new policy.”).

\textsuperscript{331} See Wood, supra note 10, at 906 (discussing potential time limits that respect the woman’s need to grieve before deciding to conceive).

\textsuperscript{332} See SSA, supra note 72, at 1 (indicating that the SSA reviewed 4.8 million applications in 2011).

\textsuperscript{333} See Nolan, supra note 11, at 1089–90 (arguing that the legislature is the most appropriate body to make public policy decisions).

\textsuperscript{334} See Schafer, 641 F.3d at 51; Wood, supra note 10, at 903–04.

\textsuperscript{335} See Wood, supra note 10, at 903–04; Nelson, supra note 47, at 775.

\textsuperscript{336} See Knaplund, supra note 49, at 652–53 (agreeing with California’s limit of two years and Louisiana’s limit of three years from the decedent’s death in the context of fatherhood actions); Wood, supra note 10, at 906 (suggesting a time limit two or three years after the decedent’s death).

\textsuperscript{337} Cf. \textit{In re Martin B.}, 841 N.Y.S.2d at 209–10 (noting that administrative concerns, like certainty and finality of estate distribution, that may leave posthumously conceived children out of intestacy statutes, do not affect trust instruments that have not yet been affected).
Therefore, four years may be more appropriate for Social Security benefits, as it seems to strike a better balance between the relevant concerns for the majority of cases.\footnote{See Woodward, 760 N.E.2d at 268; Knaplund, supra note 49, at 656–67; Wood, supra note 10, at 905–06; Nelson, supra note 47, at 775.} Four years gives most women enough time to grieve a husband’s death, to deal with any other crises like the unexpected loss of a job or sudden illness, and to conceive successfully.\footnote{See Woodward, 760 N.E.2d at 268; Wood, supra note 10, at 905–06; Nelson, supra note 47, at 775.} At the same time, it does not reach unreasonably far past the death of the father, so it limits abuse of the system by would-be single mothers choosing their husbands’ sperm over a stranger’s solely for the financial benefit.\footnote{See Knaplund, supra note 49, at 631.}

In addition to timing, the second limitation on posthumously conceived children’s eligibility must be written consent from the father to have and support children conceived by the mother with his sperm.\footnote{See Woodward, 760 N.E.2d at 269 (acknowledging the need for “affirmative consent”).} Complex biological relationships can arise in the modern world of assisted reproduction, and mere biological paternity does not necessarily indicate that a man plans to have a parent-child relationship with and financially support the resulting child.\footnote{Capato I, 631 F.3d at 632 (discussing the complexities that arise from the possibility of assisted reproduction); Hill, supra note 150, at 355 (explaining the various potential family structures that can arise through assisted reproduction); Wood, supra note 10, at 903 (noting that men who preserve sperm during life may not contemplate the possibility that their wives will conceive after their deaths).} Survivor benefits function as a replacement for the lost financial support of a deceased parent.\footnote{Knaplund, supra note 49, at 631.} This backdrop assumes that were the father alive, he would have chosen to have and support children.\footnote{See Woodward, 760 N.E.2d at 269.} Therefore, a consent requirement is essential.\footnote{See id.}

Demanding consent protects the father’s right to be financially responsible only for children he agreed to have and support.\footnote{Id.; Lewis, supra note 259, at 441 (contending that a writing requirement protects a deceased father’s rights by not making him responsible for children he did not agree to conceive).} The Massachusetts Supreme Judicial Court in the 2002 case, \textit{Woodward v. Commissioner of Social Security}, stressed that fathers, despite being deceased, should have a right to control if and by whom their sperm is used.\footnote{Woodward, 760 N.E.2d at 269.} The court held that affirmative consent was essential to pro-
tecting that right. Additionally, the father’s consent is relevant with respect to Social Security benefits when the father already has other existing children. The benefits paid on behalf of any deceased person are limited to between 150% and 180% of the deceased’s benefit account. Although the addition of one child might not bring the family past that limit, it can if there are enough other beneficiaries. Therefore, consent protects the father’s right to support only the children for whom he planned to be responsible and protects his other children’s rights to receive the full benefits to which they are entitled.

In addition, consent functions as a second check to insulate the system from abuse. By only giving benefits to children whose fathers provided consent, the requirement further limits single mothers from unilaterally choosing to conceive using their long-dead husbands’ sperm—rather than that of a random donor—for the financial benefit.

Conclusion

The Social Security Act is not well equipped to deal with the needs of posthumously conceived children. As a result, legislative inaction has left an entire class of children, already born into tragic situations, without the support they deserve. Reproductive technology has drastically changed the modern world and the law has not adjusted accordingly. The fairest and most efficient solution is for Congress to amend the Act to provide for posthumously conceived children to receive Social Security benefits in a uniform manner.

Alycia Kennedy

348 Id.
349 See SSA, supra note 72, at 8–9 (discussing the amount of benefits for each survivor and maximum benefits for each family).
350 Id. at 9.
351 See id. at 8–9.
352 Wood, supra note 10, at 904 (arguing that consent “protect[s] the deceased parent’s interest in knowing and voluntary support”).
353 See Knaplund, supra note 49, at 656–67; Wood, supra note 10, at 903–04 (arguing that consent acts as a check on a spouse’s unilateral decision to conceive).
354 See Knaplund, supra note 49, at 656–67; Wood, supra note 10, at 903 (noting that by solely requiring biological paternity, the estate is “at the mercy of the unilateral choices of [the father’s] surviving partner”).