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**The Evolution of the  
American Family**

## 2 The Evolution of the American Family

This article examines the evolution of the American family, exploring how and why the family structure has changed over time, and what these trends suggest about the future of the American family.

By Courtney G. Joslin

## 6 The Federalization of Family Law

Since the 1930s, Congress has enacted numerous federal statutes to address serious problems regarding family law matters that states have been either unwilling or unable to resolve, especially when the welfare of children is involved.

By Linda D. Elrod

## 10 Interstate Recognition of LGBT Families

Legal protections provided to same-sex couples and their families are not always portable. States must give full recognition to adoptions and other types of judgments, but marriages and civil unions might not be recognized by other states.

By Shannon Price Minter

## 11 Advancing the Freedom to Marry in America

As the nation celebrates the fortieth anniversary of Stonewall, leading advocates examine how the freedom to marry movement began; what work and events have shaped its progress, especially in the last year; and action steps for future progress.

By Mary L. Bonauto and Evan Wolfson

## 15 Miscegenation: An American Leviathan

Interracial marriage has increased since the 1967 *Loving v. Virginia* decision, but not enough to change the way Americans think about race. Straddling the boundary of formal legality and informal criminality, interracial sex and partnership persists as an American leviathan.

By Kevin Noble Maillard

## 16 Forming Families by Law: Adoption in America Today

Although there is a long history in this country of some children being raised by adults other than their biological parents, legal recognition of these families was not generally available until states began enacting formal adoption laws in the mid-nineteenth century.

By Joan Heifetz Hollinger and Naomi Cahn

## 20 Family Integrity and Children's Rights: A UN Convention Perspective

As the Obama administration has indicated it will review the U.S. position on the UN Convention on the Rights of the Child (CRC), this article examines the CRC's conception of family, finding significant protections in place for parents and families.

By Jonathan Todres

## 21 Assisted Reproduction: Preserving Families and Protecting the Rights of Individuals

Family-building with assisted reproduction is a relatively new phenomenon that has not only enriched the lives of those who use it, but has broadened the concept of what a family is. Along with it, though, have arisen unique problems having to do with the rights of the individual involved.

By Bruce L. Wilder

## 26 Human Rights Heroes Evan Wolfson and Mary Bonauto

Thanks to the work of Evan Wolfson and Mary Bonauto over the past twenty years, the nation and its legal landscape have changed and we can all look forward to a day of equal protection and the freedom to marry.

By Kristen Galles



Image by Jeff Sheng



Image by Mainframe Photographics, Inc.



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# The Federalization of Family Law

By Linda D. Elrod

**H**istorically, family law has been a matter of state law. State legislatures define what constitutes a family and enact the laws that regulate marriage, parentage, adoption, child welfare, divorce, family support obligations, and property rights. State courts generally decide family law cases. But since the 1930s, Congress has enacted numerous federal statutes to address serious problems regarding family law matters that states have been either unwilling or unable to resolve, especially when the welfare of children is involved. Today, congressional legislation, decisions of the U.S. Supreme Court, and the participation of the United States in more international treaties have “federalized” more and more areas of family law traditionally left to the states.

A multitude of federal laws now regulate and impact families; some specifically confer jurisdiction on federal courts. As a result, federal courts now hear a growing number of family law cases, especially those that involve complex interjurisdictional or full faith and credit issues. The Supreme Court has contributed to this federalization by “constitutionalizing” family law. It has repeatedly used the U.S. Constitution, in particular the Fourteenth Amendment, to extend constitutional privacy protections to increasing numbers of persons and to invalidate state laws in areas of law previously thought to be the exclusive province of state legislatures.

Internationalization of the law likewise contributes to federalization. As people and goods move freely across country borders, so do their family law issues and problems. The U.S. State Department now actively participates in the drafting of international treaties, working with the



In recognition of Child Abuse Prevention Month, a worker for Texas Court Appointed Special Advocates arranges cutouts of children for a Stand Up for Abused and Neglected Children rally.

Associated Press, AP

Hague Conference on Private International Law and the United Nations (UN) to address family law issues on a global scale. The United States has ratified and implemented many international law conventions. The Supreme Court has noted the judicial opinions of the European Court of Human Rights in cases involving privacy rights of same-sex partners and the juvenile death penalty.

## Congressional Action since the 1930s

For almost two hundred years, the fifty states regulated family law because the federal government did not. The Tenth Amendment left states with “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it.” Beginning with the New Deal legislation of the 1930s, Congress has used its powers under the Commerce Clause, the Full Faith and Credit Clause, and the spending power to set policy. A brief look at the areas of child support and child protection illustrate how Congress has set the national social welfare agenda by passing laws, allocating money for programs, and requiring states to comply with federal regulations to receive funding.

**Child support establishment and enforcement.** Title IV-A of the Social Security Act of 1935 included a provi-

sion for Aid to Families with Dependent Children (AFDC). AFDC was a partnership between the federal government and the states to provide a minimum support payment for children in single parent homes, if the states adopted plans approved by the then-U.S. Secretary of Health, Education and Welfare. AFDC quickly became welfare for single mothers with children whose fathers were absent from the home; in the majority of cases, there were no paternity or support orders. Rising numbers of children born out of wedlock and in poverty led to increasingly larger demands for welfare funds.

In an attempt to shift costs to parents, Congress enacted Title IV-D of the Social Security Act in 1974 and established the Office of Child Support Enforcement. Because of state reliance on federal monies to operate the AFDC system, this office could dictate standards for establishing and enforcing child support, including a requirement that each state set up its own “IV-D” agency. Ten years later, a unanimous Congress passed the Child Support Enforcement Amendments of 1984 that changed the federal government’s role from merely enforcing child support to encouraging states to establish *adequate* support orders. The 1984 amendments mandated that

states offer child support services to all child support obligees, enact wage-withholding provisions to ensure payment of child support, and develop expedited procedures for establishing and enforcing child support orders. The legislation created a national panel to develop models for objective support guidelines that reflected the costs of rearing a child so that states could adopt advisory child support guidelines.

Within four years, Congress passed the Family Support Act of 1988 that required states to make the “advisory” guidelines presumptive and to develop expedited procedures for establishing paternity throughout a child’s minority. The act also created the U.S. Commission on Interstate Child Support. That commission recommended criminal sanctions for nonpayment of support. The Child Support Recovery Act of 1992 made it a federal crime to willfully fail to pay child support to a child in another state. Federal courts upheld that act against challenges, finding it to be a valid exercise of congressional power under the Commerce Clause in “pursuit of the general welfare.” To prevent modification of one state’s support order by another state, Congress enacted the Full Faith and Credit for Child Support Orders Act of 1994, which required states to enforce, and not modify, child support orders from other states.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) marked a new era in federal government involvement. It ended the AFDC program guarantee of cash subsistence benefits in favor of block grants to states, called Temporary Assistance to Needy Families. The PRWORA required that states enact tougher enforcement laws, create new registries for support orders and new hires, and streamline procedures for paternity establishment. Most significantly, Congress mandated that states enact the Uniform Interstate Family Support Act, which provided states with enforcement tools for out-of-state

enforcement orders. Until the PRWORA, states had been free to choose whether to enact a uniform law. Federal courts again rebuffed challenges to the federal mandates on the basis that Congress may condition federal funds upon a state’s enactment of laws or regulations as long as the condition is in pursuit of the public welfare—and collecting child support is for the general welfare.

In another move to protect children, Congress mandated that every custody order include a qualified medical child support order to ensure that children are covered under a parent’s health insurance policy. Individual states, however, still control the amount and duration of child support, with some states ending support at age eighteen and others allowing postmajority support. Some have suggested that a national child support guideline should provide all children with parents of comparable income the same level and duration of support.

**Child welfare.** The New Deal legislation also provided the roots for the federalization of child welfare. The 1935 Social Security Act that created AFDC also provided money to enable the federal Children’s Bureau to cooperate with state public welfare agencies in establishing, extending, and strengthening protections of and care for homeless, dependent, and neglected children. In the 1960s, Congress created the AFDC Foster Care Program to help states with the cost of placing children from poor families in government-supported foster care.

The Child Abuse Prevention and Treatment Act, enacted in 1974, authorized the use of federal funds to improve state responses to child neglect. CAPTA required states to have legal definitions of abuse and neglect covering children through their eighteenth birthday, to expand the types of mandatory reporters of child abuse, to provide a twenty-four-hour hotline to report child abuse and neglect, and to appoint guardians *ad litem* in abuse and

neglect cases. A National Center on Child Abuse and Neglect was set up to fund research and to shape nationwide child protective services. When it appeared that too many Native American children were being placed in foster care or adoptive placements outside the tribe, Congress enacted the Indian Child Welfare Act of 1978 (ICWA). ICWA requires notice to tribes, allows tribal intervention, and requires a higher standard for removal of Indian children to non-Indian placements.

Congress has enacted a host of other pieces of child welfare legislation, including:

- The Child Abuse Prevention and Treatment and Adoption Reform Opportunities Act of 1978,
- The Adoption Assistance and Child Welfare Act of 1980,
- The Abandoned Infants Assistance Act of 1988,
- The Victims of Child Abuse Act of 1990,
- The Family Preservation and Support Initiative,
- The Multiethnic Placement Act and the Interethnic Adoption Provision of the Small Business Job Protection Act of 1996,
- The Crimes Against Children and Sexually Violent Offender Registration Act and Megan’s Law,
- The Adoption and Safe Families Act of 1997,
- The 1999 Foster Care Independence Act,
- The PROTECT Act,
- The Child and Family Services Improvement Act of 2006,
- The Safe and Timely Interstate Placement of Foster Children Act of 2006, and
- The Adam Walsh Child Protection and Safety Act of 2006.

**Child abduction.** Relying on its powers under the Full Faith and Credit Clause of the Constitution, Congress enacted the Parental Kidnapping Prevention Act of 1980

(PKPA) to deter parental child abduction and to prevent interjurisdictional conflicts over the proper location for child custody decisions. Because two states could exercise child custody jurisdiction simultaneously under the then-applicable uniform law (the Uniform Child Custody Jurisdiction Act), the PKPA prioritized a “home state” basis (often called the six-month rule) for jurisdiction. Only if there is no home state could a court use another basis for jurisdiction. The PKPA also detailed the concept of continuing exclusive jurisdiction in which the decree state retains jurisdiction so long as one contestant remains there and the child maintains contacts. State courts need only give full faith and credit to custody orders made in accordance with the PKPA. Although the Supreme Court later held that the PKPA did not create a private right of action in federal courts, it led to the drafting of the Uniform Child Custody Jurisdiction and Enforcement Act, which uses the same jurisdictional language as the PKPA and will soon be the law in all fifty states.

Congress also addressed international abductions by enacting a federal criminal law for international parental kidnapping. In implementing the Hague Convention on the Civil Aspects of International Child Abduction, the International Child Abduction Remedies Act confers concurrent jurisdiction on federal and state courts for return of a child.

Congress has affected child welfare in numerous other ways: the child labor regulations of the Fair Labor Standards Act of 1938; the many laws on public schools and education, including the Education for All Handicapped Children Act of 1975; the English Language Acquisition Act; the Individuals with Disabilities Education Act; and the No Child Left Behind Act of 2001.

**Miscellaneous.** In addition to matters affecting a child’s welfare, Congress has legislated in the areas of abortion, childbirth, family planning, and domestic violence. The Violence

Against Women Act of 1994 made it a federal crime to cross a state line with intent to injure or harass an intimate partner and required interstate enforcement of protection orders. Reauthorizations in 2000 and 2005 continued funding and expanded coverage to assist more women.

By adding Title VII to the Civil Rights Act of 1964 to prohibit discrimination on the basis of sex, Congress ended a century of protective labor legislation that had kept married women from the workplace. The

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## **A multitude of federal laws now regulate and impact families.**

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Equal Pay Act of 1963, the Fair Credit Reporting Act, the Equal Credit Opportunity Act, and the Pregnancy Discrimination Act of 1978 also helped end discriminatory practices. Federal laws help spouses who are divorcing by allowing continued health care coverage under the Consolidated Omnibus Budget Reconciliation Act and by providing a framework for the division of pensions (qualified domestic relations orders) under the Retirement Equity Act of 1984, amending the Employment Retirement Income Security Act. Federal laws in the tax, immigration, bankruptcy, and military areas all affect families.

Probably the most controversial and direct foray into family law came in 1996, when Congress passed the Defense of Marriage Act (DOMA). Enacted in response to a Hawaii Supreme Court decision that placed Hawaii on the verge of permitting same-sex marriages, DOMA provides that federal law will only recognize a marriage between a man and a woman. DOMA expresses congressional intent to limit the applicability of the Full Faith and Credit Clause by providing that no state shall be required to recognize a same-sex marriage

from another state. There are currently a number of cases challenging the federal benefits provision of DOMA filed by married couples and by government agencies in states that now allow same-sex marriage.

### **The Constitutionalization of Family Law**

Because family law has mainly been state law, state trial judges generally have broad discretion to interpret their own state statutes. There is no statutory bar to federal courts hearing these cases if they involve citizens of different states where the amount in controversy exceeds \$75,000. A nineteenth century judicially created “domestic relations exception,” however, allows federal courts to avoid judicial involvement in substantive domestic relations matters, such as divorce and its incidents. As late as 1992, the Supreme Court observed that the whole subject of the domestic relations belongs to the laws of the states.

That said, beginning with the Warren Court in the mid 1960s, Supreme Court decisions have affected nearly every area of family law, transforming what had been seen as ordinary state-regulated family issues—regulation of marriage, criminal laws on contraception, etc.—into constitutional issues of equality, privacy, and federalism. Over 100 Supreme Court cases have dealt with such issues as establishing and terminating parental status; child abuse and neglect; marriage; jurisdiction for divorce, alimony, division of property, child custody, and child support; family property rights such as homestead, pensions, and insurance proceeds; family living arrangements; child custody and visitation; and child rearing. The Supreme Court has set the framework for examining domicile, jurisdiction, and full faith and credit issues for recognizing sister state divorce decrees.

For example, in a series of cases, the Supreme Court established that the Due Process Clause of the Fourteenth Amendment protects a “private realm” of family life—the freedom of personal choice in matters of marriage

and procreation. The Court also has held that citizens have a fundamental right to marry that is rooted in liberty and privacy, and have a right to marital and individual privacy in contraception and procreation.

As early as the 1920s, the Supreme Court recognized the rights of parents to raise and educate their children as part of the liberty protected by substantive due process. Parental rights, however, are not absolute, as the state as *parens patriae* can act to protect children from harm. The state can terminate parental rights. To terminate parental rights, however, requires clear and convincing evidence, and parents must be provided with counsel if they cannot afford it.

The Supreme Court has also recognized and protected family relationships that were not dependent on marriage. Unwed fathers who establish a relationship with their child or who follow state-prescribed procedures for establishing parentage are entitled to protection of their parental rights, except in some limited instances. A grandmother living with two grandsons who were cousins was protected as a “family” from removal from public housing under a city zoning ordinance.

Children are “persons” under the Fourteenth Amendment entitled to equal protection in education, in laws that establish ages of majority for child support, and in custody disputes involving interracial parents. Children, including those born out of wedlock, are persons within the Bill of Rights entitled to benefits that are for children generally, such as child support, the right to sue for wrongful death, and depending on circumstances inheritance through intestate succession. Children have procreative rights as well as First Amendment rights (although these rights are somewhat more limited than those held by adults).

Children have both procedural and substantive due process rights when subjected to state action or school disciplinary proceedings. In delinquency proceedings, children

have the right to counsel and to confront witnesses. In addition, the Supreme Court has prohibited states from using the death penalty for crimes committed while a minor.

The Supreme Court has stricken regulations that discriminated on the basis of gender in child support, alimony, and in education, and has removed restrictions on marital testimonial privilege. The Supreme Court has also interpreted federal pension statutes and other laws.

This ongoing constitutionalization of family law is likely to continue because the Supreme Court appears willing to recognize new rights protected by substantive due process. In addition, the protection is not limited to traditional families. As families become even more diverse and problems more complex, the Supreme Court is likely to be the final voice.

### **The World’s Children**

Child welfare issues have united the countries of the world. Family law has become internationalized through U.S. participation in international organizations such as the UN and the Hague Conference on Private International Law. Although the Hague Conference started working on problems facing international families at the end of the nineteenth century, the United States did not join until 1964. The problem of parental abduction of children across international borders brought the United States into the active drafting process for the Hague Convention on the Civil Aspects of International Child Abduction (1980). Over eighty countries, including the United States, have ratified or acceded to the abduction convention.

The increasing number of babies crossing international borders for adoptions in other countries, many in the United States, has raised concerns about “baby selling.” The United States participated in the drafting and ratified the Hague Convention on Inter-country Cooperation with Respect to International Adoption. Three other conventions await ratification:

the Hague conventions on the protection of children (1996), that on the protection of adults (1999), and that on the international recovery of child support (2007).

The United States signed, but has not ratified, the UN Convention on the Rights of the Child, although 192 other nations have. This convention recognizes the rights of a child for continuity of relationships, for a voice in judicial or administrative custody decisions if the child is mature enough, and for protection in the formation and preservation of their identity, including nationality, name, and family relations. The language of the UN convention recognizes that the child may have separate legal interests from his parents, such that the child might intervene as a party or have appointed counsel to advocate the child’s position in a divorce case. The United States also has not ratified the Convention on Elimination of All Forms of Discrimination Against Women, although many states have used some of its provisions.

In finding that the Eighth Amendment prohibited sentencing juveniles to death for crimes committed as juveniles, the Supreme Court looked at the UN Convention on the Rights of the Child as evidence of an international consensus against the juvenile death penalty. Increasing “globalization” will make international treaties and laws of even more importance.

Increasingly, family law issues transcend state boundaries. When issues involve protecting children, as in sheltering them from abuse and abduction and in ensuring that they receive adequate child support and health care, a national solution may be necessary. The village is now national, and rapidly becoming international.

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